



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 1 OF 2011

EUNICE ATIENO PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED DEFENDANT

RULING

Order 42 Rule 6 (1) of the Civil Procedure Rules provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.”

Rule 6 (2) of the same Order 42 sets out the factors to be taken into consideration by the Court in dealing with an application for stay of execution so that, no stay will be made unless:-

- (a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and
- (b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

This present application dated 25th October 2011 is essentially made under Rule 6 of Order 42. However, the sub-rule of Rule 6 under which the application is made is not specified. But since the application seeks a temporary injunction order against the respondent, it may safely be said that the applicant intended to invoke sub-rule (6) of Rule 6 of Order 42 which provides that:-

“Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

Indeed, prayer (2) of this application is for an injunction to issue against the respondent restraining it

whether by itself, its servants and/or agents from advertising, selling whether by public auction or private treaty the suit property pending the hearing and determination of an intended appeal.

The intended appeal stems from the ruling of this Court made on 6th October 2011 in which the applicant's earlier application for a temporary injunction dated 5th January 2011 was dismissed. In effect the present application is tantamount to being an appeal against the ruling of this Court made on 6th October 2011. Obviously, this Court cannot sit on appeal against its own ruling which was made after consideration of the principles enunciated in **GIELLA VS. CASSMAN BROWN [1973] EA 358** for grant of interim injunctions. The same principles would apply in this application.

On the outset there is nothing to suggest that the circumstances have since changed such that it would be fair and just to allow and reconsider a fresh application for a temporary injunction.

Therefore, in dealing with this application, the Court would not be exercising its appellate jurisdiction as provided by Sub-rule 6 of Rule 6 of Order 42 CPR. To that extent, the application is incompetent, defective and a misconception.

However, in as much as S. 3A of the Civil Procedure Act is invoked, the application may be considered on the strength of the provision and perhaps a temporary injunction be granted pending appeal.

The entire Order 42 Rule (6) of the Civil Procedure Rules deals with stay of execution or proceedings pending appeal. However, the order made by this Court on 6th October 2011 is not capable of being stayed. It was an order dismissing on merits the applicant's application for a temporary injunction against the respondent. In such circumstances, there would be nothing to stay.

As for the present application, being guided by the principles applicable for the grant of stay pending appeal (See Order 42 Rule 6 (2) CPR) and holding in the case of **MADHUPAPER INTERNATIONAL LIMITED VS. KERR [1985] KLR 840**, to the extent that "*the Court of Appeal jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid*", this Court would consider the relevant grounds for the application serially. These are grounds (2), (3) and (4).

With regard to ground two (2), paragraph 7 of the applicant's supporting affidavit indicates that the applicant will suffer substantial loss as the sale of the suit property shall result in her eviction from the house.

The sale of property charged to a bank would not in the opinion of this Court result to substantial loss. When the charge instrument was executed by the debtor he in fact offered the property as a commodity for sale. Such property would in the circumstances be capable of compensation if the owner is deprived of its possession. Such deprivation would not translate to substantial loss.

Therefore, ground two of this application has no merit. By the same token, ground four is also unmerited because if the intended appeal succeeds after the property has already been sold, the applicant would be compensated for the loss by the respondent which is a reputable financial institution. It has not been suggested herein that the respondent would be incapable of making good the loss that may otherwise be suffered. To that extent, the intended appeal shall not be rendered nugatory. With the failure of ground two (2) and four (4), we are left with only ground three (3) which is a contention that the intended appeal is arguable and not frivolous.

With tremendous respect to the applicant, ground three is devoid of merit on the basis of the ruling of this Court made on 6th October 2011 in which it was found that a prima-facie case with probability of success was not established to warrant the grant of an interlocutory injunction pending the hearing and final determination of this case.

It would follow that, if a prima facie case was not established, the intended appeal is frivolous and would not entitle the applicant a temporary injunction pending the hearing and determination of the appeal.

In the end result, this application is dismissed with costs to the respondent.

J. R. KARANJA
JUDGE

[Read and signed this 4th day of November 2011]

[In the presence of Mr. Baraza for the plaintiff/applicant and in the absence of Counsel for the defendant/respondent]