



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 620 of 2007

SHEILA AKINYI MARCO.....1ST PLAINTIFF

CHRISTINE WAIRIMU MBURU.....2ND PLAINTIFF

PAULINE NGANGA.....3RD PLAINTIFF

VERSUS

SASANET LIMITED1ST DEFENDANT

SASANET INVESTMENT

COOPERATIVE SOCIETY LIMITED.....2ND DEFENDANT

MICHAEL CHEGE NJOROGE.....3RD DEFENDANT

SAMMY GITAU NJOROGE.....4TH DEFENDANT

AND

JOHN WACHIRA MUGO.....1ST OBJECTOR

MOSES WANGAI NJOROGE.....2ND OBJECTOR

ELIZABETH SAVETH WANGAI.....3RD OBJECTOR

FLORENCE SOILA NGOSSOR.....4TH OBJECTOR

R U L I N G

There are two applications before this court: The first application is the objector's notice of motion made under the provisions of **Order XLI Rules 4 and 5 of the Civil Procedure Rules** seeking to stay the order issued by Khaminwa J on 27th October 2009 allowing the

plaintiffs to proceed with the sale of the properties known as Nairobi/Block 93/1074- Apartment 6 & 7 (*hereinafter referred to as the suit properties*) pending the hearing of an intended appeal to be filed by the objectors against the said decision to the Court of Appeal. The application was filed on 8th January 2010. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Moses Wangai Njoroge. Counsel for the objectors appeared before Muga Apondi J on 11th January 2010, a day before the suit properties were scheduled to be sold, and obtained orders suspending the intended sale of the suit properties for a period of fourteen (14) days pending hearing interparties of this application. The court further directed that the objectors pay the auctioneers' charges together with cost of advertisement before 12th January 2010.

The application is opposed. Allen Waiyaki Gichuhi, the advocate for the plaintiffs swore a replying affidavit in opposition to the application. The second application was filed by the plaintiffs on 12th January 2010. It is a notice of motion brought under the provisions of **Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Rules** seeking to set aside interim orders that were issued by the court on 11th January 2010. Mr. Thuita, counsel for the objectors and Mr. Gichuhi, counsel for the plaintiffs agreed to have the two applications argued at the same time, and thereafter for this court to deliver a single ruling in respect of the two applications.

I have considered the submissions made by counsel for the parties to this application. I have also read the pleadings relied on by the said parties in support of their respective opposing positions. This case has a chequered history. The plaintiffs and the objectors were victims of the now infamous pyramid scheme scam orchestrated by the defendants. The plaintiffs and the objectors filed suit against the defendants. Pending the hearing and determination of the said suits, the plaintiffs and the objectors were successful in identifying certain properties owned by 3rd defendant. The plaintiffs and the objectors have been engaged in a legal tussle with a view to establishing who between them is entitled to attach the said properties in execution of decrees which have been issued in their respective favours. In an earlier application by the objectors seeking this court's declaration that they were entitled to attach the 3rd defendant's properties, this court on 19th June 2009 set aside the prohibitory order issued in favour of the objectors on the grounds, inter alia, that the judgment and the decree that the objectors had obtained against the 3rd defendant was issued without jurisdiction. The objectors were aggrieved by the decision of this court and have duly filed notice of their intention to appeal against the said decision. The said appeal is yet to be heard and determined. There is no evidence on record to suggest that the objectors have taken any step to file the substantive appeal.

On 27th October 2009, the plaintiffs' application seeking to sell the suit properties in satisfaction of the preliminary decree issued in their favour by the court was allowed by Khaminwa J. At page 5 of her ruling, the learned judge had this to say:

“In the circumstances, I allow the application and grant orders as prayed namely; the immoveable properties in the name of 3^d judgment-debtor, Michael Chege Njoroge being flats 6 and 7 in LR Nairobi/Block 93/1074, which were attached pursuant to the order of 26/11/2007 and the preliminary decree of 16/7/2008 be sold by public auction to satisfy the preliminary decree herein...”

It was pursuant to the said order of the court, that the plaintiffs sought to sell the suit properties by public auction. The plaintiffs instructed Mssrs Garam Investment, an auctioneering firm, to sell the attached properties. As stated earlier in this ruling, although the notice of sale of the suit property was published on 28th December 2008, the objectors waited until 8th January 2010 when they filed the present application seeking to stay the sale of the suit properties pending hearing of the appeal that the objectors intend to file in the Court of Appeal against the said decision of Khaminwa J.

The principles to be considered by this court in determining whether or not to grant stay of execution pending the hearing and determination of an intended appeal are well settled. The applicant must establish that he would suffer substantial loss if stay is not granted. The applicant must present to court the application seeking to stay execution without undue delay. Finally, the applicant must be prepared to provide security for the due performance of the decree or order (*see Order XLI Rule 4 (2) of the Civil Procedure Rules*). This court is further aware that in considering applications such as the present one, it should be mindful to allow an applicant exercise his undoubted

right of appeal so that the intended appeal may not be rendered nugatory. In the present application, it is apparent that the prohibitory order which the objectors appear to rely on to support their claim, that, they too are entitled to the suit properties, was set aside by this court. The objectors cannot rely on a decision of this court that has already been vacated. It was further evident that the objectors are guilty of laches. The objectors took no action in this matter from the time Khaminwa J. rendered her ruling on 27th October 2009. It was apparent that the objectors moved the court in the present application when they realized that the plaintiffs had already advertised the suit properties for sale. The objectors therefore are guilty of inordinate delay in presenting their application.

Other than claiming that they would suffer substantial loss, the objectors did not present any evidence to this court to support their assertion that they would suffer such loss if the plaintiffs are allowed to proceed with the sale of the suit properties. As to security, the objectors made no offer in regard to security for the due performance of the decree or order. The objectors have not even paid the auctioneers costs, including the cost of advertisement, that they were ordered to pay when they obtained the interim orders pending hearing and determination of this application. The advocate of the objectors told the court that the objectors were not in a position to pay the auctioneer's cost within the period specified by the court, as in their opinion, the time given was too short. It is evident that the objectors cannot pay security in the circumstances for the due performance of the order or decree as exhibited by their non-payment of the auctioneer's costs as earlier ordered by the court.

For the above reasons, the objectors' application lacks merit. It cannot be allowed. It is hereby dismissed with costs. The interim orders issued in their favour by this court on 11th January 2010 is hereby set aside. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF JANUARY 2010

L. KIMARU

JUDGE