



REPUBLIC OF KENYA



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Masinde & another v Machasio; Eshikoni Auctioneers (Auctioneer) (Environment & Land Case 30 of 2012) [2022] KEELC 15068 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15068 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 30 OF 2012
EC CHERONO, J
NOVEMBER 24, 2022

BETWEEN

TIMOTHY NYONGESA MASINDE 1ST PLAINTIFF

ASTON WAMALWA MASINDE 2ND PLAINTIFF

AND

HUMPHREY WACHIYE MACHASIO DEFENDANT

AND

ESHIKONI AUCTIONEERS AUCTIONEER

RULING

1. The application before me is the notice of motion dated October 13, 2022 seeking the following orders;
 1. (Spent).
 2. That there be interim stay of execution of the decree and judgment of this court made on October 3, 2017 pending the hearing and determination of this application.
 3. That there be a temporary stay of execution of the decree and judgment of this court made on October 3, 2017 pending payment of the decretal sum in full in line with the notification of sale by Eshikoni Auctioneers dated August 22, 2022.
 4. That the warrants of attachment and sale of land parcel No E Bukusu/N Sang'alo/2084 in execution of a decree for money be set aside.
 5. That the applicant be allowed to deposit Kshs 2,500,000/= as down payment of the decretal sum upon granting of prayer 3 above.



6. That the applicant be allowed to subsequently pay on monthly basis of Kshs 2,500,000/= until the decretal sum is fully paid.
 7. Costs of the application be provided for.
2. The supported by the affidavit of the applicant sworn on even date and the following grounds;
- a. That I have filed this application and is pending inter partes hearing hence the need for the subjected matter be protected by this court's order
 - b. That this Eshikoni Auctioneers have been instructed by the respondents and have advertised the applicant's land comprised in parcel No E Bukusu/N Sang'alo/2084 ready for sell on the August 17, 2022.
 - c. That the applicant is ready to settle the amount as proposed in the orders above once the same are granted.
 - d. That it is just and equitable that the orders herein be granted.
3. In the supporting affidavit sworn on August 13, 2022, the applicant reiterated the averments contained in the grounds apparent on the face of the said application and stated that the plaintiff/respondent sued him before this honourable court and judgment was entered in his favour. He was dissatisfied and preferred an appeal to the Court of Appeal in Eldoret *vide* CA No 3 of 2018. The Court of Appeal also upheld the findings of this honourable court and dismissed his appeal. He stated that following the dismissal of his appeal, the plaintiff/respondent has instructed Eshikhoni Auctioneers to execute the judgment. He stated that the said auctioneers have since advertised land comprised in parcel No E Bukusu/N Sang'alo/2084 to be sold by public auction on August 17, 2022. He said that he is committed to pay the decretal sum as follows;
- a. Upon allowing the application in terms of prayer 3, he be allowed to deposit Kshs 2,500,000/=.
 - b. Subsequently he be allowed to deposit on monthly basis Kshs 2,500,000/= until the decretal amount together with the interest is settled in full.
4. The applicant further stated that the land advertised for auction is his only source of livelihood for his family and selling the same would be prejudicial to him and his family.
5. The application is opposed with two replying affidavits sworn by Irene Naliaka Nyongesa and Aston Wamalwa Masinde. According to the plaintiffs/respondents, the applicant's application is frivolous vexatious and an abuse of the court process and that the same must fail. The respondents further contend that the orders being sought by the applicant has been overtaken by events as execution has taken place. The respondents also stated that his court is functus officio having determined a similar application previously and that the applicant has approached this Honourable court with unclean hands and is therefore not entitled to the orders sought.

Applicant's Submissions

6. The defendant/applicant through the firm of JS Khakula & Co Advocates submitted that the he has met the two requirements for grant of stay pending appeal under order 42 rule 6(2) [Civil procedure Rules](#). On substantial loss, the applicant submitted that he has been ordered to Kshs 6,673,255/= plus interest to the respondents which by no means a small amount and that he will suffer substantial loss if he were to pay the decretal amount and the interest thereof as ordered by this honourable court.



7. The applicant further submitted that the application herein is made in good faith to protect his interest as he would otherwise be in serious jeopardy if the respondents were to proceed with execution. He also submitted that he will suffer substantial as the respondents if paid the decretal sum are unlikely to pay back the substantial sums that have been awarded.
8. As regards security, the applicant submitted that it is ready and willing to furnish such reasonable security as the court may order for the due performance of the judgment/decre. He further submitted that this discretion should be exercised in a manner that will not be burdensome to the applicant, thus defying the main purpose of granting the stay. He cited the following cases;
 1. *Reliance Bank Ltd v Norlake Investment Ltd* [2002] 1 EA 227
 2. *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* [2018] eKLR
 3. *E Muiru Kamau & another v National Bank of Kenya Ltd* [2009] eKLR
 4. *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR
 5. *Erine Campbell & Co Ltd v Githunguri Dairy Plant Co Ltd & anor* [2009] eKLR.

Respondents Submissions

9. The respondents through the firm of M/ Omundi Bwonchiri & Co Advocates submitted that the orders sought in the application herein has been overtaken by events as execution has taken place and the applicant has not denied by way of a supplementary affidavit.
10. Further, the respondents submitted that this honourable court is functus officio in that, on February 2, 2022, the plaintiffs applied to execute the decree by way of Sale of the subject suit property when an order for stay of execution was granted to the defendant, on condition that the full decretal sum was to be settled and in default the suit property LR No E Bukusu/N Sang'lo/2084 to be sold by way of public auction in realization of the full decretal sum. They submitted that after the applicant defaulted as directed by the court, the suit property was advertised and sold by way of public auction
11. It is the respondents' further submission that the applicant is not honest in that on May 12, 2018, a joint Account was opened at Sidian Bank Limited A/C No xxxxxxxxxxxxxxx between advocates for both the plaintiff/respondent and the defendants/applicants where the defendant undertook to deposit the entire decretal sum pending the hearing of appeal at the Court of Appeal *vide* Civil Appeal No 3 of 2018 but the defendant failed and the said account was later closed. The respondents also submitted that *vide* a consent entered on February 2, 2022 in which the defendant/applicant was granted 3 months to liquidate the decree but failed to do so and waited until the subject property was advertised to seek stay orders. They contend that the applicant is guilty of non-disclosure of material facts to the extent that he has previously been granted chances to liquidate the decretal sum but failed. They argued that the order being sought is an equitable remedy and that the applicant is not deserving the remedy. They cited the following cases;
 1. *Erick V Makhoa & 4 others v Lawrence Sagin & 2 others* Civil Application No 20 of 1994 (12/94 UR).
 2. *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR.
 3. *Mohammed Shally Sese (Shah Sese) v Fulson Company Limited & another* [2006] eKLR.
 4. *John Njue Nyaga v Nicholas Njiru Nyaga & another* [2013] eKLR.



Legal Analysis and Decision

12. I have considered the notice of motion application dated October 13, 2022, the supporting affidavit and the annexures thereto, the replying affidavit, the submissions by advocates and the applicable law. The applicant in the said application is seeking stay of execution of the judgment and decree of this honourable court issued on October 3, 2017. Order 42 rule 6(2) *CPR* sets out grounds under which a court may grant stay of execution of a decree or order pending appeal or other court action.
13. The applicant in this case is not seeking stay pending appeal. Though he has brought himself within the ambits of order 42 rule 6 *CPR*, the applicant seeks to pay the decretal sum by instalments of Kshs 2,500,000/= as down payment and the same amount on the subsequent months till payment in full. An application to pay a decretal sum adjudged by a court by monthly instalment is a discretionary power. Before allowing such application, the court must be satisfied that the applicant is deserving of the orders. In deciding whether or not such application is deserving, the court must be satisfied that sufficient cause has been shown. The court must also be satisfied that applicant has demonstrated good faith. The guiding principles for payment of decretal sum by instalments has been discussed in the case of *Rajabali Alidina v Remtulla Alidina & another* (1961) EA 565 where the conditions to be considered were stated as follows;
 - a. The circumstances under which the debt was contracted;
 - b. The conduct of the debtor;
 - c. His financial position;
 - d. His *bona fides* in offering to pay a fair proportion of the debt at once
14. The respondent in his replying affidavit in opposition to the application deposed that the orders sought by the applicant have been overtaken by events as execution has taken place. The respondent further deposed that this honourable court is *functus officio* having determined a similar application by the applicant. Those averments given under oath have not been controverted by way of a further or supplementary affidavit.
15. It is my view that the applicant is not deserving of the orders sought. First the defendant denied the plaintiff/applicant's claim and the matter went for full trial. By a consent recorded before the Deputy Registrar on February 2, 2022, the parties agreed in the following terms;
 1. The judgment debtor to pay the full sum of the decree to the plaintiff/judgment creditor within 3 months of today. In default the property No East Bukusu/North Sang'alo/2084 be sold by way of public auction in realization of the said decretal sum.
 2. Matter be mentioned on May 4, 2022.
16. The applicant has not denied the averments by the respondent under oath that a similar application has been made and that this court is *functus officio*. I agree with counsel for the respondent Mr Bwonchiri that the application by the applicant dated October 13, 2022 is frivolous, vexatious and an abuse of the due process of this honourable court.
17. The upshot of my analysis is that the notice of motion dated October 13, 2022 is devoid of merit and the same is hereby dismissed with costs.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 24TH NOVEMBER, 2022.



HON E C CHERONO

ELC JUDGE

In the presence of;

1 Mr bw'onchiri for plaintiffs.

2 Mr Shikhu H/B for kakhula for defendants

3, Wilkister C/A

