



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC NO 135 OF 2018

BETWEEN

ASSET CARGO LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

MUGANDA WASULWA T/A

KEYSIAN AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to a Notice of Motion dated 16th July 2020 brought under Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The application is supported by affidavit of Crispus Waithaka Gachini and seeks the following orders:-

a) Spent.

b) *That there be stay of the ruling delivered on 7th July 2020 and an order of interim injunction do issue against the Defendant/Respondent, their agents, servants, nominees and or employees from attaching, removing, repossessing and or in any manner interfering with the plaintiff's property being the family house on Plot No L.R MN/SEC 1/16043 pending hearing and determination of this application interparties.*

c) *That there be stay of ruling delivered on 7th July 2020 and an order of interim injunction do issue against the defendant/respondent, their agents, servants, nominees and or employees from attaching, removing, repossessing and or in any manner interfering with the plaintiff's property being the family house on Plot No L.R MN/SEC 1/16043 pending hearing and determination of the appeal filed herein.*

d) *That the costs of this application be borne by the respondent.*

2. The applicant being aggrieved by the ruling of this court that was delivered on 7th July 2020 seeks to appeal to the Court of Appeal and has attached a notice of appeal dated 15th July 2020. The applicant also states that the appeal has merits as it raises triable issues. That failure to grant the prayers sought, the applicant will suffer substantial and irreparable loss if the suit premise is sold off and that the applicant will be prejudiced if the application is not allowed as the suit premises is the matrimonial home for its directors, and that the appeal will be rendered nugatory.

3. The application is opposed by the 1st defendant/respondent vide a replying affidavit dated 15th September 2020 sworn by Christine Wahome which states that the application is incompetent, mala fides, does not disclose material facts, devoid of merit, frivolous, vexatious and an abuse of court process. The 1st respondent reiterated the contents of the replying affidavit sworn on 7th September 2018 and reiterates that the applicant is in default of a charge and as the chargor the bank was rightly exercising its power of sale. That the application is meant to frustrate the 1st respondent's right of statutory power of sale. That the applicant had not come to court with clean hands by failing to make payment which has been detrimental to the bank and the application should be dismissed with costs.

4. The application was canvassed by way of written submissions which the applicant filed on 27th October 2020 while the 1st respondent filed on 2nd February 2021. I have considered the application, the replying affidavit and submissions filed herein. The issue to determine is whether the applicant has met the threshold for court to issue stay orders of its own ruling issued on 20th July 2020 pending hearing and determination of the intended appeal.

5. Order 42 Rule 6 lays out the law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub Rule 2 outlines mandatory conditions that have to be met for court to grant stay pending appeal.

6. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the appellant. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisite provided under Order 42 Rule 6. Firstly the application must be brought without undue delay; secondly the court will satisfy itself that substantial loss may result to the applicant unless stay of execution is granted; and thirdly 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.

7. From the record, the ruling appealed against was made on 7th July 2020 and the application herein was filed on 17th July 2020. This was after only ten days. The application was therefore made timeously.

8. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicant, I wish to refer to the case of **Kenya Shell Limited V Benjamin Karuga Kigibu & Ruth Wairimu (1982-1988) KAR 108** where the Court of Appeal stated:

“It is usually a good rule to see if Order 41, Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

9. In the case of **Absalom Dora V Turbo Transporters (2013) eKLR** it was stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

10. In the present case, the applicant has stated that it will suffer substantial loss and the appeal rendered nugatory unless stay of execution is granted because the respondent is likely to sell the suit premises which is the only matrimonial home for the directors of the applicant’s company.

11. In this case it is not in dispute that the applicant company was offered a mortgage facility by the 1st respondent. It is not also in dispute that the applicant defaulted in their loan obligations, prompting the 1st respondent to seek to exercise its right of sale over the charged property. In my view to allow the application would no doubt cause the 1st respondent greater hardship as the debt continues to escalate. The applicant had offered the suit premises as security and therefore had been converted to a commercial commodity. If the applicant were to succeed in the intended appeal, I do not think that the appeal would be rendered nugatory if the prayers sought are not granted because an award of damages will be an adequate remedy. The applicant has not suggested in any event, that the 1st respondent is incapable of paying such damages. Having charged the suit premises, the applicant converted it into a commercial commodity with monetary value that can easily be ascertained and the loss can always be made good by an appropriate award of monetary compensation. The 1st respondent is a reputable financial institution with the financial ability to compensate the applicant with monetary value of any loss that it may incur if the intended appeal is successful.

12. In the result, this court finds no merit in the Notice of Motion dated 16th July 2020. The same has failed to meet the threshold laid down in Order 42 Rule 6 (2) of the Civil Procedure Rules and is hereby dismissed with costs to the 1st respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of March, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE