



**Murithi v Times U Sacco Ltd & another (Environment and Land Appeal
E043 of 2023) [2024] KEELC 1265 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E043 OF 2023**

CK NZILI, J

MARCH 6, 2024

BETWEEN

REBECCA NJERI MURITHI APPLICANT

AND

TIMES U SACCO LTD 1ST RESPONDENT

TOP SCOUT (K) LTD 2ND RESPONDENT

RULING

1. The court is asked to stay the execution of a judgment delivered at the lower court pending the hearing and determination of this appeal. Further, the court is asked to issue a temporary order of injunction barring and restraining the respondents, its agents, servants, or employees from advertising, putting up for sale, selling L.R No. Abothuguchi/Katheri/3204 by way of a public auction or in any other manner pending hearing and determination of this appeal.
2. The applicant relies on the grounds set on the face of the application and on a supporting affidavit sworn by Rebecca Njeri Murithi on 23.11.2023. Briefly, the applicant says her claim at the lower court was dismissed, leading to the appeal before the court. It is averred that she is apprehensive that the 1st respondent shall execute by disposing of the suit premises through a public auction, rendering her hard-earned work on her land to go all down the drain. The applicant avers that her appeal raises triable issues and has a high chance of success. That if, the execution proceeds, her appeal shall be rendered nugatory. She annexed a copy of the charge as an annexure marked ENN 1.
3. The respondent opposed the notice of motion through a replying affidavit sworn by Catherine Ndumba Nkanata on 6.12.2023. As the credit manager of the 1st respondent avers that the application was an afterthought geared towards procrastinating repayment of a loan facility that the applicant took out with her husband Joseph Edward Mwirigi. The deponent further avers that this court cannot stay a negative order; the applicant has not demonstrated the loss she will suffer as the land is yet



to be advertised for public auction, and that nothing was stopping them from advertising the land for auction the land that was willingly charged with them. Further, the deponent says there was no demonstration of how the appeal has a high probability of success. The 1st respondent further avers that since the filing of the lower court suit in 2016, the applicant has not serviced the loan facility now standing at Kshs.2,702,759/=, as per the loan statement attached as annexure CNN "2". In the event the court grants the orders sought, the 1st respondent averred the outstanding sum should be deposited in a joint interest-earning account for both advocates for the parties.

4. Lastly, the respondents aver that justice should cut both ways to protect their interest as a money lending institution from vexatious litigants using the courts of law to run away from reservicing loans advanced to them in this instance, since 2016.
5. With leave, parties filed written submissions to the application. The applicant relied on written submissions dated 11.12.2023. It was submitted that in 2015, the applicant and her husband took out a loan of Kshs.3,500,000/= from the 1st respondent which was dispatched in bits to enable them to finish Kilimani Equator Academy, erected on the suit land. The applicant submitted that the loan was repaid to the tune of Kshs.1,500,000/=, but the 1st respondent began advertising to auction the security, leading to two cases at Githongo Law Courts, which were later consolidated.
6. The applicant submitted that the suit land was her matrimonial property and that it should not be auctioned, for she was willing to service the loan. It was submitted that the application was filed on time and that she was willing to pay Kshs.1,200,000/= as security for costs in an advocate's interest-earning account.
7. The respondents relied on written submissions dated 14.12.2023. It is submitted that the applicant has no basis to assert that she will suffer substantial loss or damage if the stay is not granted, more so when she has enjoyed an interim order since 2016 without servicing the loan. Reliance was placed on [*Kenya Shell Ltd vs Kibiru*](#) (1986) KLR 410.
8. The respondents submitted that the law permits them to use due process in the recovery of a debt owed to them, which process was yet to commence against the suit property; otherwise, the applicant has not shown what financial loss she stands to suffer in the absence of the advertisement.
9. Additionally, the respondents submitted the success or otherwise of an appeal may not be determined by the court in the absence of a copy of the lower court judgment. Reliance was placed on [*Kenya Commercial Bank vs Benjob Amalgamated Ltd & another*](#) C.A No. Nai 50 of 2001.
10. The respondents submitted that the court of law will not interfere with the parties' contractual arrangement. In this instance, the applicant has admitted she owes the 1st respondent a loan but which she wants the court to stop its recovery without probable cause eight years down the line. Therefore, the respondents submitted that the probability of the appeal succeeding in view of the admission of the loan was nil.
11. Further the respondents submitted that the burden was on the applicant to demonstrate why they should be denied the enjoyment of the fruits of their judgment. Reliance was placed on [*Kenya Shell Ltd vs Benjamin Karuga Kibiru & another*](#) (supra). Moreso, the respondents submitted that the applicant was granted a chance to avail security for costs pending the hearing on this motion but scuttled the chance. Since he who comes to equity must come with clean hands, the respondents urged the court to find the applicant a dishonest person.
12. A party seeking a stay of execution must surmount three hurdles: apply within a reasonable time, demonstrate substantial loss and offer security for the due realization of the decree should the appeal



- not succeed. In addition, a party must also show that it is in the interest of justice to grant the orders sought, guided by the overriding objectives of this court under Section 1A, 1B, 3A & 3 of the [Civil Procedure Act](#) as read together with Article 159 of [the Constitution](#).
13. In this appeal, the decree sought to be appealed against was a result of a dismissal of the appellant's suit at the lower court. The appellant had sought a permanent injunction stopping the respondents from offering for sale, disposing of or in any way interfering with the ownership, use, or possession of L.R No. Abothuguchi/Katheri/3204. The respondents had threatened to sell the security to realize its outstanding loan.
 14. The trial court, in dismissing the suit ordered that the respondents undertake a fresh valuation in accordance with the law before realizing the security. Costs and interests were granted to the respondents. In essence, therefore, there is no positive order in favor of the respondents. The refusal of the suit means the status of the land as charged remains. The respondents may do what is required of them to realize the outstanding loan if the appellant does not regularize her account with them. That was the situation before the appellant filed her suit at the lower court. See [Catherine Njeri Maranga vs Serah Chege & another](#) (2017) eKLR.
 15. In [Electro Watts Ltd vs Alios Finance \(K\) Ltd](#) (2018) eKLR, the court said a statutory power of sale was not an order emanating from the court that could be executed but a right that would crystallize if the appellant defaulted in repaying the loan. In the suit before the trial court, the applicant has not prayed for anything else apart from a permanent injunction. There was no prayer for the property to be declared matrimonial property. All that the appellant was raised was that the statutory power of sale was being pre-maturely exercised. Further, in the affidavit in support of the application herein, the applicant has not placed before the court material to show the extent, nature and particulars of loss likely to occur to her should the statutory sale arise before this appeal is heard and determined. The particulars and the quantum of investments that the appellant has put on the suit property against the outstanding loan have not been stated.
 16. In [James Wangalwa vs Agnes Cheseto Naliaka](#) (2012) eKLR, the court said substantial loss must be proved with cogent and tangible evidence since execution per se does not amount to substantial loss being a lawful process. Substantial loss, is what is to be prevented from happening. The applicant has not shown the situation likely to occur if the negative order is not stayed. In [Kaushik Panchatia and 2 others vs. Prima Bank \(K\) Ltd](#) (2020) eKLR, the court observed that a negative order was incapable of being stayed because there was nothing to stay. Further, in [Western College of Arts and Applied Sciences vs Orange & others](#) (1976) KLR 63, the court said that since no order had been made for a party to do anything or to pay any sum, there was nothing to stay to enforce or restrain by way of an injunction.
 17. In this application, there is no evidence that costs in the lower court have been assessed and are being executed against the appellant. The appellant has failed to prove any substantial loss and how the appeal will be rendered nugatory if a negative order is not stayed save for the payment of costs, which the appellant has not offered to deposit in her affidavit. Written submissions are not evidence. A party must plead facts through an affidavit and not through written submissions. Submissions, however powerful or convincing, cannot replace an affidavit.
 18. On a temporary injunction pending an appeal, Order 42 Rule (6) of the [Civil Procedure Rules](#) provides that an appellate court may, for sufficient reason, grant such an order on such terms as are just. In [Jenniffer Akinyi Osodo vs Boniface Okumu Osodo & 3 others](#) (2021) eKLR, the court cited with approval [Stanley Kangethe Kinyanjui vs Tony Keter & others](#) (2013) eKLR, on the principles to apply on both a stay of execution and a temporary injunction pending an appeal. The court said a party must



demonstrate that he has an arguable appeal, namely one which is not frivolous or idle, and demonstrate that the appeal will be rendered nugatory.

19. On the nugatory aspect, the court said there was need to preserve the suit property to avoid any adverse dealing with it, causing the substratum of the appeal to dissipate. The applicant had pleaded that the suit property was both ancestral and matrimonial in nature.
20. In this appeal, the appellant has not raised issues touching on the property as matrimonial or ancestral. The affidavit in support is scanty on the details. The appeal has merely raised general matters. The trial court had the discretion to grant or refuse an order of permanent injunction. How the trial court refused, misdirected itself, misapplied the law, or misused its discretion has not been demonstrated or raised in the memorandum of appeal or the supporting affidavit. See *National Bank of Kenya Limited vs Juja Coffee Exporters Ltd* (2021) eKLR. The appellant has made admission to the outstanding debt. Sufficient cause or reason why the debt should be stayed from being realized in the absence of a repayment proposal has not been demonstrated. Sympathy and compassion, though commendable, must be on a sound legal basis. See *National Bank of Kenya Limited vs Juja Coffee Exporters Limited* (supra).
21. The upshot is that I find the application lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6th DAY OF MARCH, 2024

HON. CK NZILI

JUDGE

In presence of

C.A Kananu

Mrs. Bundi for the Applicant

Mr. Mutuma for the Respondent

