



East Africa Vantor Co Ltd v Agricultural Finance Corporation & another (Environment & Land Case 4A of 2020) [2023] KEELC 17284 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 4A OF 2020**

YM ANGIMA, J

MAY 4, 2023

BETWEEN

EAST AFRICA VENTOR CO LTD PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION 1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES 2ND DEFENDANT

RULING

A. Introduction

1. By a plaint dated October 30, 2016 the Plaintiff sought an injunction to restrain the 1st Defendant from exercising its statutory power of sale over the two suit properties the subject of the suit. By a judgment dated June 09, 2022 the court dismissed the Plaintiff's suit. However, the 1st Plaintiff was directed to undertake a valuation of the suit properties and to issue a fresh notification of sale if it intended to realize the securities.

B. The Plaintiff's Instant Application

2. The Plaintiff was apparently aggrieved by the said judgment and vide a notice of motion dated June 28, 2022 brought under Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules, 2010* (the Rules), it sought a stay of execution of the decree dated June 09, 2021 pending the hearing and determination of the application. It is, however, obvious that the Plaintiff intended to seek a stay of execution of the decree pending the hearing and determination of an intended appeal to the Court of Appeal. This is clear from a reading of the application as a whole.
3. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Geoffrey Wahome on June 28, 2022. It was contended that the intended appeal to the Court of Appeal might be rendered nugatory should the decree the



executed in the meantime. The Plaintiff further contended that the application had been filed without unreasonable delay and that it was willing to abide by any terms and conditions which the court may impose. The court was consequently urged to allow the application.

C. The Defendants' Response

4. Although the Defendants were represented by an advocate throughout the proceedings there is no indication on record of any response having been filed on their behalf.

D. Directions on Submissions

5. When the application came up for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on September 19, 2022 but the Defendants' submissions were not on record by the time of preparation of the ruling.

E. The Issues for Determination

6. The court has perused the Plaintiff's notice of motion dated June 28, 2022 together with the supporting affidavit. It is evident that the sole question for determination is whether or not the Plaintiff has made out a case for the grant of a stay of execution pending appeal.

F. Analysis and Determination

7. The court has considered the material and submissions on record in this matter. It is evident from the record that by the decree dated June 09, 2022 the Plaintiff's suit was dismissed meaning that the prayers sought in the plaint dated October 30, 2016 were simply refused. The question which then arises is whether a dismissal order is capable of being stayed in the manner contemplated under Order 42 rule 6(2) of the Rules. In *Western College of Arts & Applied Sciences vs Orange & Others* [1976] KLR 63 the Court of Appeal considered this issue as follows:

"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for stay, to enforce or restrain by injunction."

8. That decision was applied by the Court of Appeal in the subsequent decisions of *Marangu Rucha & Another vs Attorney General & 10 Others* [2014] eKLR and *Peter Kamondia Njuguna vs Paul Ng'ang'a Gachie* [2015] eKLR where it was affirmed that a dismissal order or an order refusing the relief sought is not capable of being stayed. It is pertinent to note that the Plaintiff did not seek an interim injunction pending the hearing and determination of the intended appeal.
9. It is also noteworthy that the jurisdiction of this court to entertain an application for stay stems from Order 42 rule 6(4) of the Rules which requires an applicant to comply with the rules regarding the lodging of an appeal to the appellate court. In the instant case, the Plaintiff was required to lodge a notice of appeal within 14 days from the date of delivery of the impugned judgment.



10. There is no dispute that the judgment was delivered on June 09, 2022. The last date for filing the notice of appeal was therefore on or about June 23, 2022. However, the notice on record is dated June 30, 2022, court stamped on July 15, 2022 and paid for on September 26, 2022. There is no indication that the Plaintiff sought and obtained leave of court to lodge the notice of appeal out of time.
11. Additionally, it is doubtful if the Plaintiff's new firm of advocates M/S Maina & Maina Advocates are properly on record since there is no indication on record of compliance with the provisions of Order 9 rule 9 of the Rules on change of advocates after judgment. When this issue was brought to the attention of the court during the pendency of the application, the said firm was granted 21 days to regularize their appearance in the matter. However, by the time of preparation of the ruling no steps had been taken to comply with the order.

G. Conclusion and Disposal Order

12. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for stay of execution pending appeal. Accordingly, the court makes the following orders for disposal thereof:

- a. The Plaintiff's notice of motion dated June 28, 2022 is hereby dismissed.
- b. There shall be no order as to costs since the application was not opposed by the Defendants.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 4TH DAY OF MAY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms Ivy Mouti for the Plaintiff

Mr Mutuma holding brief for Mr Mabonga for the Defendants

C/A - Carol

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Y M ANGIMA

JUDGE

