



**Tanui v Boss & another (Environment and Land Appeal E011 of 2023)
[2023] KEELC 20328 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E011 OF 2023
JM ONYANGO, J
OCTOBER 3, 2023**

BETWEEN

DAVID K. TANUI APPELLANT

AND

ALBERT KIPCHIRCHIR BOSS 1ST RESPONDENT

CONSOLIDATED BANK LTD 2ND RESPONDENT

RULING

1. David K. Tanui, the appellant herein filed a notice of motion dated June 21, 2023 seeking an order of stay of execution with respect to the ruling delivered by Hon D. Mikoyan in Eldoret CMELC Case No E173 of 2022.
2. There are four grounds upon which the application is based. The first one is that the learned magistrate misdirected himself and overlooked the fact that there are two defendants in the suit who faced different prayers and therefore he should have struck out the suit relating to the 2nd respondent only. Secondly, the subject property Baringo/Sabatia/103/155 was to be sold by public auction on June 23, 2023. Thirdly, that the appeal has high chances of success and if the application is not granted, the appeal shall be rendered nugatory and lastly that the applicant is likely to suffer substantial loss if the application is not granted.
3. The application is supported by the applicant's affidavit sworn on the June 21, 2023 in which he deposes that his suit was struck out on June 21, 2023 and his application for execution in the Chief Magistrate's Court disallowed.
4. It is his further deposition that the amount claimed is not Kshs 20,000,000 but Kshs 14, 000,000/ together with interest and penalties being the balance owed to him by the 2nd(sic) respondent. Further that the suit property belongs to a third party who was his guarantor and the same is charged to the 2nd



- defendant. He is therefore apprehensive that if the property is sold by the 2nd defendant, the guarantor will not take it kindly since it is likely to be sold at a throw away price.
5. He adds that the 2nd defendant is claiming the sum of Kshs 634,400 as its cost and if he executes for the same, the applicant will suffer substantial loss. He opines that his appeal has high chances of success and if execution is not stayed, the appeal shall be rendered nugatory.
 6. The application is resisted by the 2nd respondent through the replying affidavit of its Credit Manager, Nickson Mwilu Mutisya. In the said affidavit Mr Mutisya avers that the Chief Magistrate dismissed the applicant's case on April 26, 2023 on the grounds that the court lacked jurisdiction. He states that the application is an afterthought as it has been filed more than two months after the ruling was delivered. He adds that he is aware that the applicant had filed a similar application for stay in the Chief Magistrate's Court but the court declined to entertain it.
 7. It is his further deposition that the applicant has not come to court with clean hands as he is guilty of non-disclosure, having failed to disclose the fact that the suit property has been the subject of litigation *vide* Eldoret HCCC No 73 of 2018 James Kipruto Kiplagat & Another v Consolidated Bank of Kenya Limited where the judge dismissed the plaintiff's suit and allowed the bank to exercise its statutory power of sale arising from an undisputed charge registered against the property.
 8. He criticizes the applicant for having failed to demonstrate that he shall suffer substantial loss and for failing to furnish security for costs.
 9. He adds that the outstanding amount owed by the borrower to the 2nd defendant stood at Kshs 31,484,588 as at 2017 which amount continues to accrue interest and that the application is therefore made in bad faith and the 2nd respondent should not be stopped from enjoying its statutory rights as this would amount to re-writing the contract between the borrower and the 2nd respondent.
 10. In response to the replying affidavit, the applicant filed a further affidavit claiming the replying affidavit was sworn by a person who has no authority.
 11. He maintains that the amount in dispute is Kshs 14,000,000/= and not 22,500,000/=. He adds that the 2nd respondent is aware of the transaction between the applicant and the 1st respondent involving the sale of parcel No Sergoit/ Kawaptai/8/345 in order to pay off the loan owed to the 2nd respondent.
 12. The applicant explains that the delay in filing the application was occasioned by the fact that his application in the lower court was declined on June 6, 2023. It is his plea that land being an emotive matter, the sale should not be allowed to proceed as damages would not be an adequate remedy.
 13. The application was prosecuted through written submissions. In his submissions dated July 20, 2023, filed by his counsel, the applicant submits that he has demonstrated that if the application is not granted and the suit property is sold by public auction the applicant shall suffer substantial loss. He relies on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR for the proposition that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. He argues that if the application is not allowed, then the appeal shall be rendered nugatory.



14. Regarding the delay, he contends that a period of two months is not inordinate. He places reliance on the case of Reliance Bank Limited v Norlake Investments Ltd (2000) eKLR where the Court of Appeal held that

“to refuse to grant an order of stay to the applicant would cause the applicant such hardship as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants’ appeal to be heard and determined”

Analysis and Determination

15. From a careful consideration of the application, replying affidavit and submissions filed by the parties, the singular issue for determination is whether the application for stay of execution should be granted.
16. It is common ground that the applicant’s suit in the lower court was struck out as the court stated that it lacked jurisdiction. It is also common ground that the subject matter herein was litigated in Eldoret HCCC No 73 of 2018, whereby the High Court gave the bank the go ahead to exercise its statutory power of sale.
17. What the applicant is seeking to prevent in the present application is exactly what the High Court and allowed albeit on different grounds. It is telling that the applicant failed to disclose this fact as the same was disclosed by the 2nd respondent. The applicant is therefore guilty of material non-disclosure of this fact which he knows does not favour his case. Having failed to disclose such a material fact, he has not come to court with clean hands and he should not expect equity to look at him favourably.
18. The second issue that the applicant cannot escape is that he is seeking to stay a dismissal which is a negative order. It is trite that a negative order cannot be stayed as it is not capable of being executed. See Western College of Arts and Applied Sciences v E.P Oranga & 3 others (1976) eKLR and Catherine Njeri Maranga v Serah Chege & another (2017) eKLR.
19. Lastly, assuming that the applicant had surmounted the above-mentioned hurdles, he has not satisfied the three conditions for stay of execution provided under order 42 rule 6 of the Civil Procedure Rules as the suit property is not registered in his name so he cannot suffer irreparable loss. Secondly, he filed this application after a delay of two months and even though he has explained the delay, the explanation is not satisfactory. Lastly he has not offered any security for costs.
20. The inevitable conclusion is that the application lacks merit and it is dismissed with costs to the 2nd respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET, THIS 3RD DAY OF OCTOBER 2023

.....
J.M ONYANGO

JUDGE

In the virtual presence of :

Miss Chepkwony for Mr. Nyamweya for the Applicant

Miss Rop for Mr. Langat for the Respondent

Court Assistant: A. Oniala

