



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

APPEAL CASE NO. A93 OF 2021

JAMES KAMAU NDUNGU.....APPELLANT

=VERSUS=

PETER MUTITU BARUH.....RESPONDENT

RULING

1. The memorandum of appeal filed in this appeal was triggered by a judgment rendered by Hon C. K Kisiangani on 14/10/2021 in **Ruiru SPMC E & L Case No. 17 of 2020**. The dispute in the said suit was about delivery of vacant possession of Land Parcel Number **Ruiru/Ruiru East Block 2/8061**, together with the developments thereon. The respondent sued the appellant in the said suit, contending that he purchased the suit property in a public auction and he was subsequently registered as the proprietor but the appellant had refused to vacate the property. The chargee that sold the suit property in exercise of the chargee's statutory power of sale was **M/s Springboard Capital Limited**.

2. Upon conclusion of trial, Hon C. K Kisiangani rendered a judgment in which she made a finding that the respondent's title was issued legally after the fall of the hammer in an auction and that there was no fraud on part of the respondent. Consequently the learned magistrate issued an order directing the appellant to vacate the suit property within 60 days and to bear costs of the suit.

3. Aggrieved, the appellant filed a memorandum of appeal dated 2/11/2021.

Subsequently, the appellant brought a notice of motion dated 22/11/2021, seeking an order of stay of execution, pending the hearing and determination of the appeal. The appellant also sought an order that this appeal be heard together with **Thika CMC E & L Case No. 667 of 2017**. The said application is the subject of this ruling. The application was canvassed through written submissions dated 10/1/2022 - filed through the firm of *Macharia Nderitu & Co Advocates*.

4. The appellant contends that the estate of his late wife had challenged the chargee's exercise of the statutory power of sale in **Thika CMC E & L Case No. 677 of 2017** and that **Ruiru SPMC E & L Case No. 17 of 2020** proceeded while the case at the Thika Chief Magistrate Court was pending. Counsel adds that the title held by the respondent is invalid because it was processed and issued while **Thika CMC E & L No 677/2017** was pending. He adds that the estate of his late wife stands to lose the suit property which is the only source of income for him and his family.

5. The respondent opposed the application through a replying affidavit dated 8/12/2021, grounds of opposition dated 8/12/2021, and written submissions dated 8/1/2022 – filed through the firm of *Bench & Co Advocates*. His case is that he purchased the suit property in a public auction. He adds that the Magistrate Court discharged the initial injunction, thereby paving way for him to be registered as proprietor of the suit property. He contends that what remained was for the applicant to give possession of the suit property and that the applicant having failed to do so, he was constrained to initiate proceedings to eject the applicant out of the suit property.

6. It is the respondent's case that the issues which the appellant is raising in the present application were raised in the trial court and were considered by the trial court. He contends that the application has been overtaken by events and that he would be prejudiced if the order of stay is granted.

7. I have considered the application together with the response thereto. I have

also considered the relevant legal framework and jurisprudence. Two questions fall for determination in this application. The first question is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant orders of stay of execution pending appeal. The second question is whether this appeal should be heard together with **Thika CMC E & L Case No. 677 of 2017**. I will make brief sequential pronouncements on the two questions in the above order.

8. Exercise of jurisdiction to grant an order of stay of execution pending appeal is guided by the framework in **Order 42 rule 6(2)** of the Civil Procedure Rules which provides as follows:

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.”

9. The Court of Appeal in the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & CockarAg. JA)* emphasized the above guidelines in the following words:

“...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

10. In the present application, the appellant is aggrieved by the findings of the trial court and has challenged those findings. He says that if the award of the trial court is enforced, he would stand to suffer substantial loss. Secondly, the impugned judgment was rendered on 14/10/2021. The memorandum of appeal in this appeal was filed on 3/11/2021. The application under consideration was subsequently filed on 21/11/2021 – this was within the period of 60 days within which the appellant was required to vacate the suit property.

11. The respondent deposed in paragraph 18 of his replying affidavit that the appellant’s agents have been illegally occupying the suit property and collecting rental income from the rental apartments on the suit property for the last four years despite the fact that he (the respondent) is the registered proprietor of the suit property. Further, it does emerge from the appellant’s affidavit that he resides in Texas, United States of America. He does not reside in the suit property.

12. Given the above circumstances of this appeal, the court takes the view that only a conditional order of stay of execution of the judgment of the trial court was suitable. The condition is that the rental income accruing from the suit property should be preserved for a period of six months during which time the appellant is expected to prepare the record of appeal, process and prosecute this appeal.

13. On whether this appeal should be heard together with **Thika CMC E & L Case No 677 of 2017**, the view of the court is that the plea for an order consolidating this appeal with the suit pending trial in the Chief Magistrate Court is premature because the record of appeal has not been filed and the appeal has not been admitted. I will decline to grant that plea at this stage on the above grounds.

Disposal Orders

14. In the end, the notice of motion dated 22/11/2021 is disposed through the following disposal orders.

a) All the rental income collected from the suit property shall be deposited in an interest earning account to be opened in the joint names of the two law firms representing the parties in this appeal.

b) The appellant shall file and serve a record of appeal within 30 days. In default, this appeal shall stand dismissed.

c) Subject to the appellant’s compliance with (a) and (b) above, there shall be a stay of execution of the decree in Ruiru SPMC E & L Case No 17 of 2020 for a period of six months only.

d) The plea for consolidation at this stage is rejected.

e) Costs shall be in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF MARCH 2022

B M EBOSO

JUDGE

In the presence of: -

Mr Njanja for the Appellant

Mr Benchi for the Respondent

Court Assistant: Lucy Muthoni