



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. 7 OF 2021**

**MARTIN CHEGE KAHARI.....APPELLANT**

**-VERSUS-**

**LETSHEGO KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**ELIUD C.WAMBU T/A CHADOR AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

*(Being and appeal from a Ruling by the Chief Magistrate Court in Thika Hon. J.M Nangea dated 8<sup>th</sup> December 2020 in MCL&E Case No. 74 of 2020).*

**RULING**

Through a Notice of Motion dated 19<sup>th</sup> January 2021, expressed to be bought under **Order 42 Rule 6** of the Civil Procedure Rules and **Section 3A** of the **Civil Procedure Act**, the Applicant sought the following orders;

- 1. That there be a stay of the ruling and consequential orders of the ruling of the application dated 23<sup>rd</sup> September 2020, delivered on the 8<sup>th</sup> December 2020, pending this appeal.*
- 2. That the now proposed auction scheduled for the 30<sup>th</sup> January 2021, be stayed pending this appeal.*
- 3. That the costs of this application be provided for.*

The application is grounded in the affidavit sworn by **Martin Kahari Chege, through the Law Firm of Maina Muiruri & Co. Advocates**. He averred that the Court in **Thika MCL&E Case No. 74 of 2020**, had dismissed his injunctive application dated **23<sup>rd</sup> September 2020**, yet the auctioneer and bank had not advertised the proposed auction of **Title No. Gatuanya/ Ngoliba/Block 1/1889**. He further averred that being dissatisfied with the said Court's ruling, he has filed this Appeal and it has come to his attention that the Respondents have advertised the charged property being **Title No. Gatuanya/ Ngoliba/Block 1/1889**, for auction scheduled on **30<sup>th</sup> January 2021**, despite the Respondents not having met the legal and statutory threshold for the exercise of the **Chargee's power** of sale.

He further deponed that he is continuing to repay the loan and he is willing to abide by any condition that the Court may impose. He further proposed to pay the **Decretal sum** in instalments.

The Application is opposed, and the Respondents filed their grounds of opposition dated **25<sup>th</sup> January 2021**, and averred that the application filed by the Appellant does not meet the threshold for grant of Stay of Execution pending Appeal under established principles.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also filed a Replying Affidavit dated **26<sup>th</sup> January 2020**, sworn by **Winnierohi Wafula**, a legal officer of the 1<sup>st</sup> Respondent. She deponed that the appellant approached the 1<sup>st</sup> Respondent seeking a financial facility of **Kshs.1,500,000/=** and the same was secured by a legal charge over the property known as **Gatuanya/ Ngoliba/Block 1/1889**, in the name of **James Kahari Kiragu**, the guarantor, deed of guarantee and indemnity signed by the guarantor being the owner of the property charged to be paid in **36** equal monthly installments of **Kshs.59,416.67/=** She further deponed that the appellant failed to make regular payments and fell due as at **13<sup>th</sup> August 2019**, and he was issued with a **90 day** Statutory Notice.

She averred that further on **26<sup>th</sup> August 2019**, the 1<sup>st</sup> Respondent issued a **40 days** Notice requiring the appellant to rectify his default of **Kshs.1,319,326/=**. The auctioneers further issued a **45 days Redemption Notice** to both the Plaintiff and guarantor, being the owner of the subject property. Further that the 1<sup>st</sup> Respondent proceeded to advertise the property for sale on **14<sup>th</sup> September 2020**, when the Plaintiff ran to Court to stop the sale and the Court issued a temporary injunction and upon full hearing of the appellant's application dated **23<sup>rd</sup> September 2020**, the Court dismissed the matter, causing the appellant to file this application for stay. It was her contention that the ruling

dated **8<sup>th</sup> December 2020**, dismissing the Appellant's application is a negative order and does not require performance by any of the parties save for payment of costs.

The Application was canvassed by way of written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their submissions on **12<sup>th</sup> February 2021**, through the Law Firm of **Mulongo & Co. Advocates**, while the Appellant/ Applicant filed his on **5<sup>th</sup> February 2021**, through the Law firm of **Maina Muiruri & Co. Advocates**. The main issues for determination are:-

**1. Whether the Appellant/Applicant is entitled to stay of Execution.**

**2. Whether the Applicant is entitled to stay of the impending auction which was scheduled on 30<sup>th</sup> January 2021.**

**1. Whether the Appellant/Applicant is entitled to stay of Execution**

The Applicant has sought for stay of execution of a ruling delivered by **Hon. J. M. Nangea (Chief Magistrate)** on **8<sup>th</sup> December 2020**. It is not in doubt that the said ruling merely dismissed the Appellant/ Applicant's application with costs being in the cause.

The guiding provisions of the Law with regards to Stay of Execution are to be found in **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** which provides that an applicant must demonstrate the following:-

**a. Substantial loss may result to the applicant unless the**

**order was made;**

**b. The application was made without unreasonable**

**delay; and**

**c. Such security as the Court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.**

From the above provisions of law, it is evident that for the Court to exercise its discretion, the Appellant/Applicant should meet the conditions as set out in the said **Order 42 Rule 6 of the Civil Procedure Rules, 2010**.

However, it is not in doubt that the order issued by the trial Court, was a **negative order**, as the Court only dismissed the said application for grant of temporary injunction and did not order any party to do anything or refrain from doing anything. The Court notes that the orders issued vide the Ruling delivered on the **8<sup>th</sup> December 2020**, were to the following effect:-

**15. Due to the foregoing reasons/observations, I find that the Plaintiff has not made out a prima facie case with a probability of success. He will not also suffer irreparable loss as he knew all along that the suit property and other collateral could be sold off to recover any loan arrears.**

**16. The application does not meet the threshold for grant of temporary injunction and is hereby dismissed. Costs of the application shall be in the cause.**

These orders, were in the Court's humble opinion and in agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's submission, **Negative orders**. The issue of negative orders was dealt with in the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR**, where it held that an order for stay cannot be granted where a negative order had been issued. Under Section 2 of the Civil Procedure Act, the definition of a **Decree holder** alludes to an order that was capable of being executed.

Also, In the case of **Western College of Arts and Applied Sciences vs. Oronga (1976) KLR 63** at p. 66 Law V P said:-

***“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 the instant case, the High Court has not ordered any of the parties to do anything or 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 to restrain by injunction.”***

**2. Whether the Applicant is entitled to stay of the impending auction which was scheduled on 30<sup>th</sup> January 2021 pending this Appeal?**

From the annexures **MKG 2**, it is evident that there was a schedule auction for **30<sup>th</sup> January 2021**. However, on **26<sup>th</sup> January 2021**, the Parties herein entered a **consent** whereby the said proposed auction that was scheduled for **30<sup>th</sup> January 2021**, was stayed pending the interparties hearing of the instant Application.

It is evident that the Appeal herein emanates from a Ruling of an Interlocutory Application which Ruling was delivered on **8<sup>th</sup> December**

2020, and it dismissed the Applicant's application of injunction.

After the said Ruling, the 2<sup>nd</sup> Respondent herein advertised the suit property for sale by public auction. The said auction was scheduled for **30<sup>th</sup> January 2021**.

In the instant Appeal, the Appellant is seeking for setting aside of the Ruling delivered on **8<sup>th</sup> December 2020**, and that the prayers sought vide the application dated **23<sup>rd</sup> September 2020**, be allowed.

The prayers sought in the Application dated **23<sup>rd</sup> September, 2020** are injunctive orders. If Appeal herein is successful, then the said orders may be allowed. However, if the suit property would have been sold, then the Appeal would have been rendered nugatory and just a mere academic exercise.

The purpose of Stay pending Appeal is to maintain status quo. The said stay pending Appeal can be allowed if the Appeal has a high chance of success and that if the stay is not granted, the said Appeal may be rendered nugatory. See the case of **Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, where the Court held that:-

***“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.***

In the instant case, if the proposed auction is allowed to proceed, then the instant Appeal will be a mere academic exercise as the said Appeal will have been rendered nugatory.

For the above reasons, the Court finds that the applicant is entitled to Stay of the proposed public Auction but on condition that he deposits **Kshs.300,000/=** in his Account held with the 1st Respondent herein within the next **7 days** from the date hereof. In default, the **Stay orders** herein will lapse automatically.

Further the Appeal herein to be prosecuted expeditiously. For the above reasons, the Appellant is directed to file the **Record of Appeal** within a period of **30 days**, from the date hereof.

It is so ordered

**DATED, SIGNED AND DELIVERED AT THIKA THIS 13TH DAY OF MAY 2021.**

**L. GACHERU**

**JUDGE**

**13/5/2021**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**No appearance for the Appellant**

**No appearance for the 1<sup>st</sup> Respondent**

**No appearance for the 2<sup>nd</sup> Respondent**

**L. GACHERU**

**JUDGE**

**13/5/2021**