Oagare v Bank of Africa Kenya Limited & another (Civil Appeal E101 of 2023) [2024] KEHC 2813 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E101 OF 2023

TA ODERA, J

MARCH 13, 2024

BETWEEN

JEREMIAH KENEDY OTUNDO OAGARE ..... APPELLANT

AND

BANK OF AFRICA KENYA LIMITED ..... 1ST RESPONDENT

KEYSIAN AUCTIONEER ..... 2ND RESPONDENT

RULING

1. Before this court is the Notice of Motion application dated 2nd October 2023 by which the Applicant/ Appellant seeks the following orders;

   a. Spent

   b. Spent

   c. That, this court be pleased to stay the execution of the orders by the lower court on 30th June, 2023 and 2nd August, 2023 pending the hearing.

   d. That Costs of this Application be provided for.

2. The Application was premised upon Article 50 (1) of *the constitution* of Kenya 2010, Order 42 Rule 6 of the civil procedure rules 2010, Section 1A, 1B and 3A and 63 (e) of the *Civil Procedure Act* Cap 21 Laws of Kenya and all enabling provisions of the law and was supported by the Affidavit of even date Sworn by the Applicant/Appellant on 2nd October 2024 both sworn by the Applicant.

3. The Applicant averred that he had obtained orders from the trial court restraining the Defendant, their agents/servants from auctioning land parcels Nyaribari Chache/B/B/Boburia 7726 and 8066 pending the hearing and determination of the suit he had filed against the Respondents. The case at hand was determined in favor of the Defendants allowing the Respondents to auction the said properties.

He claimed that the ruling and Judgment of the subordinate court entered on 30th June, 2023 and 2nd August, 2023 were delivered in the absence of his advocate and hence he had no opportunity to pray for stay of execution. He deponed that he was aggrieved by the Ruling and Judgment of the subordinate court rendered on 30th June, 2023 and 2nd August, 2023 respectively and has preferred an Appeal against the said decision which Appeal he contended has a high probability of success. He contended too that no prejudice will be visited upon the Respondents if the orders sought were granted and that it was in the interest of Justice if stay of execution pending Appeal was granted by this court. He contended further that if the order sought were not granted his Appeal will be rendered a nugatory.

4. The Respondent opposed the Application through a Replying Affidavit sworn by Ephraim Gitobu, a senior recoveries officer at the 1st Respondent on 29th December 2023. In his Affidavit Mr. Gitobu averred that the Application was bad in law and an abuse of the court process, an afterthought, misleading, mala fides and was intended to prejudice the 1st Respondent from exercising its right to recover the long-overdue debt owed to it by the Applicant/Appellant herein and generally to enjoy the fruits of the Judgement.

5. Mr. Gitobu deponed that the Application does not meet the threshold for grant of orders of stay under order 42 Rule 6 (2). He underscored that that the Application had been filed 60 days after the Judgment had been delivered on notice served to all parties and thus the same was filed with unreasonable delay. He underscored further that the Applicant has not demonstrated sufficiently that he will suffer substantial loss if the order were not granted. It was his contention that the Applicant had not demonstrated that 1st Respondent which is a reputable banking institution would be unable to pay decretal sum if the Appeal was to be determined after the execution of the Judgment of the subordinate court. He contended too that in any event it was the 1st Respondent that would suffer immensely if the prayers sought were granted because the Applicant has been indebted to the Respondent since 2019 and its efforts to recover have always been scuttled by the injunctive orders against the sale of the suit properties. It was his contention that the Applicant in his Application had not demonstrated expressly or otherwise his willingness to deposit security for the due performance of the decree as may ultimately be binding on him when the appeal is eventually heard and determined, save to state at paragraph 11 of his supporting Affidavit that his Appeal would be rendered a nugatory if the orders are not granted.

6. On a without prejudice basis Mr. Gitobu averred that the Applicant was at 4th October, 2017, when the appellant instituted the suit, Kisii CMCC No 590 of 2017, he was indebted to the 1st Respondent to the tune of Kshs. 12,053,500.19/= which amount has since grown to Kshs. 23,661,543.00 as at the time of the delivery of the Judgment on 2nd August, 2023. He thus prayed that should the court be inclined to granting the prayers sought, then the same should be on condition that the said sums as at the date of the Judgment be deposited in a joint interest-earning account in the name of the advocates on record within the timelines the Honourable court will be will be gracious to issue; failure to which the Application stands dismissed.

Background

7. The facts of this case are that the Applicant herein in the year 2014 approached the 1st Respondent for a loan facility to run a business by the name Manga Cash and Carry Ltd. He used his two parcels of land Nyaribari Chache/B/B/Boburia 7726 and 8066 both registered under his name as security for the loan. On 6th May, 2014, the 1st Defendant at the Plaintiff's behest advanced loan facilities totaling to Kshs 9,480,169.94 to the Plaintiff vide a letter of offer dated the same day. Unfortunately the Applicant defaulted in paying the loan prompting the 1st Respondent to issue demand letters asking him to regularize his account but the same did not yield any positive response from the 1st Respondent.

8. The 1st Respondent issued a 90 days' statutory notice and upon failure of the plaintiff to regularize his account, the 1st Respondent proceeded to issue a 40 days' notice to sell the properties used as security. Upon expiry of more than a year without the Applicant settling the arrears, the 1st Respondent proceeded to procure the services of the 2nd Respondent to help him in the recovery process by selling off the two parcels of land that the Applicant had used as security. The 2nd Respondent through the instructions of the 1st Respondents proceeded to issue a 21 days redemption notice and advertised the properties for sale wherein the sale was to take place on 14th December, 2017. Together with the Redemption notice, the respondents attached the valuation report of the two properties dated 12th September, 2017 prepared by Acumen Valuers Ltd which had the properties valued at Kshs. 9,000,000 as the market value and 6,750,000 as forced sale value.

9. The Applicant being unhappy with the valuation of the properties at 6,750,000, filed the suit at the chief Magistrate Court at Kisii vide a plaint dated 11th December, 2017 seeking a declaration that a revaluation of the properties be done according to the prevailing market value before the auction process which he was not opposed could proceed. He contended that the property was valued at 12,000,000 in 2013 and thus it could not be of a value lower than that figure 4 years later. In response the 1st Respondent filed a statement of defense denying the Applicants claim and stating that he had contacted accredited valuers and followed all requisite statutory laws in its bid to exercise its statutory power of sale. The 1st respondent equally urged the court to dismiss the suit with costs and the 1st Respondent be allowed to recover its facility.

10. Together with the said Plaint the Applicant filed a notice of motion Application dated 11th December, 2017 seeking restraining orders against the respondents barring them from proceeding with the auction until the case was heard and determined which Application were allowed on 14th December, 2017 pending Interpartes hearing of the Application was on scheduled 14th January, 2018. On 14th January, 2018, the trial court proceeded to allow the Application after the advocate for the 1st Respondent failed to attend court despite the hearing date being taken by the consent of the parties. However, the said order allowing the Application set aside by consent adopted by the trial court on 8th January, 2021 wherein the parties agreed that a revaluation of land parcel Nyaribari Chache B/B/Boburia 7726 was going to be conducted by a valuer on the Banks panel chosen by the Applicant and that the cost of the revaluation was to be borne by the Applicant. The parties also consented that the interim orders issued on 14th December, 2017, were going to be extended until the filing of valuation report in court.

11. On 6th November, 2018, the parties recorded another consent that the plaintiff be allowed contract a valuer of his own choice and file the report within few days and that in case the parties failed to agree the matter be set down for hearing.

12. After several adjournment by the Applicant from 2018 to the disgust of the trial court, the Applicant learned counsel showed up on 29th March, 2023 on which date the matter was scheduled for hearing seeking yet another adjournment claiming that he intended to seek leave to amend the plaint vide an Application. The trial court which had heard enough of excuses from the learned counsel for marked and even marked the adjournment given to the Respondent on 15th February, 2023 denied the Application for adjournment and order the matter to proceed to full hearing.

13. Even after all the parties had closed their cases, the learned counsel for the Applicant insisted that he wanted to amend his Plaint so as to reflect the averments the Applicant had made during the hearing of his case which were quite different from his averments in the Plaint where he had indicated that he was only opposed to the valuation report. The learned trial Magistrate declined the prayer and reminded

the learned counsel that he had already made a ruling on the same before allowing the matter to proceed to full hearing.

14. On 2nd of May, 2023, the Applicant's filed a notice motion Application seeking to set aside the proceeding of the court on 29th March, 2023 and be granted leave to amend the plaint so that he could contest the sum the 1st Respondent claimed he owed it.

15. The learned trial Magistrate in her Ruling dismissing the Application in her ruling dated 30th June, 2023 found that the Applicant was in the Application asking the court to sit on an appeal of its own decision since the Applicant in his Application wanted the court to set aside its decision denying him an adjournment on the date in question. The learned trial Magistrate went ahead to advice the Applicant to Appeal the decision if he was not satisfied with her decision denying him an adjournment. On whether the trial court could allow the Applicant to amend his pleading, the learned trial Magistrate held that the Applicant having failed to attach his a draft amended plaint to his Application for amendment of the plaint, the application was thus fatally defective and should be struck out. Further too trial learned trial Magistrate observed that even if she found merit in the Application, the Respondents will greatly be prejudiced since they had been litigating over the matter for more than 6 years. The learned Magistrate equally took note that both parties had closed their cases safe for final submissions which the court had directed them to file. It was equally her finding that the Applicant intended to introduce completely a new cause of action at the end of the proceedings of his original cause of action a move noted would amount to asking the defendants to unfairly respond to a totally new cause of action after closing the original case the Applicant had filed against them.

16. The learned trial Magistrate finally delivered her Judgment on 2nd August, 2023 where she held as follows;

I find that the only issues I have determine are

1. Whether or not the suit land/properties have been undervalued
2. If so whether the plaintiff is entitled to the relieves sought

Issue 1

> The plaintiff argues that the suit lands/suit properties had been undervalued before they were advertised for sale. According to the plaintiff the properties were valued at Kshs. 12 Million for years ago in 2013. According to the Defendant the pre-sale valuation report put the market value of the properties at Kshs. 8 million while the forced sale value at Kshs.6,750,000/=
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> I have considered the issue and evidence adduced and exhibits produced the parties. the valuation report by Acumen Valuers Lts dated 13th September, 2017 gave the market value at Kshs. 9,000,000/= while the force value was at Kshs. 6,750,000/=
>
> On the other hand the plaintiff valuer (Add Property Consultants) in the valuation report dated 25th May, 2022 gave the value market value of the suit properties at Kshs. 11 Million and forced sale at Kshs. 8,250,000/= .However the plaintiff did not produce the report valuing the properties at Kshs 12 Million in 2013 as exhibit and for this reason I find that that the plaintiff failed to prove that in 2017, the Defendants valuer (Acumen Valuers Ltd) undervalued the suit properties.

Issue 2

Having found that the plaintiff failed to prove issue 1, I find he is not entitled to the reliefs sought. Having stated that the above I find that the plaintiff failed to prove his case against the defendants on a balance of probability and dismiss it with costs to the defendants

17. Being aggrieved by the decision of the trial court the Appellant filed the Memorandum of Appeal dated 3rd January, 2024 challenging the entire judgment delivered on 2nd August, 2023. The Appellant set out the following as the grounds of Appeal;

    a. That learned trial magistrate erred in law and by finding that the Appellant did not prove his case despite have been furnished with enough evidence

    b. That learned trial magistrate erred in law and by endorsing an inaccurate valuation of the suit property.

    c. That learned trial magistrate erred in law and by not giving a notice of the date she was going to deliver her Judgment.

    d. That learned trial magistrate erred in law and by not giving a notice for its ruling which was core on the outcome of the case.

    e. That learned trial magistrate erred in law and by not taking into consideration the documentary evidence filed.

    f. That learned trial magistrate erred in law and by not recording the true position of the case and the real issues under dispute.

    g. That learned trial magistrate erred in law and by failing to accord the plaintiff time to heard on the issues of illegalities

    h. That learned trial magistrate's Judgement is not as per the evidence produced hence unjustified

18. Based on the above grounds of appeal the Applicant urged the court to dismiss the Judgement and ruling of the lower court and allow the Appellants Appeal.

19. On 2nd October, 2020 the Applicant filed this instant Application seeking to stay execution of the Judgment of the chief Magistrate court at Kisii in Kisii CMCC No. 590 of 2017 delivered on 2nd August, 2023 as the Ruling of the Court delivered on 30th June, 2023 for reason stated here in above. As I have indicate the Application is opposed by a replying affidavit filed by the 1st Respondent.

20. During the Interpartes hearing of the Application this Court directed that this Application be canvassed by way of written submission. The respondent filed the written submissions dated 19th January 2023 whilst the Applicant relied upon his grounds on the face of the Application and his supporting Affidavit.

Issues for Determination

21. I have carefully considered this application, the Affidavits on record as well as the written submissions filed by both parties. The issue for determination by this court is whether this court can stay the execution of the Judgment and ruling of the trial Magistrate court delivered on 2nd August, 2023 and 20th June, 2023 respectively by Hon S.N. Abuya (CM) in Kisii CMCC No. 590 OF 2017 pending the hearing and determination of the Appeal lodged by the Applicant.

Analysis And Determination

22. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (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.
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> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

23. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:

1. Substantial loss may result to him unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

24. Before establishing whether the Applicant has satisfied the above principles it is important to at this earliest opportunity state that this court cannot grant stay against the Ruling of the trial Court delivered on 30th June, 2023 because the trial court did not order any of the parties to do anything or to refrain from doing anything or to pay any sum. It therefore follows that this Court has no mandate to grant a Stay Order in the manner prayed for by the Applicant with respect the said ruling.

Substantial Loss

25. As to what substantial loss is, it was observed in the case James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, that:

> "No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has

been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

26. In this instant Application, I note that the applicant has merely stated that if stay is not granted, the respondent may execute the judgment issued in his favor thus rendering the appeal nugatory. On the other hand the 1st Respondent in its submissions argued that the Applicant has been indebted to it for a period of 12 years and has for a period of 6 years been protected by the interim orders of the court. It contended that the Applicant has not been showing any interest in paying even a dime of the same. The 1st Respondent submitted further that it stood to suffer more loss than the Applicant. it submitted too though the Applicant had acknowledged in his plaint that he was not opposed to the recovery process safe for the valuation of the suit properties he used as security. Further the 1st Respondent submitted that the Applicant was given sufficient time to present to the trial court his own valuation done by his own valuer but he failed to do so. The Respondent equally submitted that Plaintiff has not demonstrated his ability to pay the outstanding debt should he loose the Appeal. It was the 1st Respondent argument too that it is a reputable banking institution and thus would be able to pay the decretal sum should the Appeal be allowed by this court.

27. This submissions of the 1st Respondent hereinabove have not been challenged by the Applicant. He has not demonstrated in all pleadings and arguments both in this court that he is not indebted to the 1st Respondent. He equally has not demonstrated his willingness to pay any part of the debt owed to the Respondent despite the fact that the loan is ballooning yearly. If this court were allow this trend to continue, it shall expose the 1st Respondent to endless litigation trying to follow up on the debt should the Applicant lose the Appeal. Thus on a balance of probabilities it is outright that the 1st Respondent would suffer greatly if this Application for stay is allowed.

28. Equally upon reading and considering the judgment of the trial court, I agree with the 1st Respondent that the decree includes an outstanding sum of money owed to it. Given the fact that the 1st Respondent has deposed that he is capable of refunding the decretal sum in case the applicant wins in his intended appeal, I am not satisfied that if the order sought is denied the appeal would be rendered nugatory. I am guided by the decision of the court in the case Ann Wanjiru Waigwa & another v. Joseph Kiragu Kibarua-Nyeri High Court Civil Appeal No.92 of 2009 where it was held that:-

> "...I need to state that as a general proposition that an appeal out of money decree would rarely be rendered nugatory....had he in the replying affidavit deponed that he was a man of means and would be in a position to refund the decretal sum in the event of the appeal succeeding, I would have perhaps looked at the application rather differently."

29. In the case of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410 the court held that.

> ".....In considering an application for stay, the Court doing so must address its
> 2. collective mind to the question of whether to refuse it would render the appeal nugatory.
>
> 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a

judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

Unreasonable Delay

30. The instant application was filed on 2nd October, 2023, exactly 2 months from the time the Judgment appealed from was delivered. A two months delay is unreasonable delay. Even though the Applicant claims that the delay was occasioned the absence of his advocate in court when the trial court was delivering its Judgement wherein he could have made an oral application for stay of execution, he failed to explain why he did not file this Application together with his Memorandum of Appeal which he filed on 1st September, 2023, a month after the Judgment was delivered. I agree with the 1st Respondent in its submission that that this Application is an afterthought and the delay in filing is prove of the same.

Security for Due Performance

31. The Court of Appeal in the case Nduhiu Gitahi and Another v Anna Wambui Warugongo [1988] 2 KAR 621, citing among others the decision of Sir John Donaldson M. R. in Rosengrens v Safe Deposit Centers Limited [1984] 3 ALLER 198 stated as follows regarding this condition of providing security:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates.... (Emphasis added)

32. In this instant Application, I note that the applicant has not offered or expressed willingness to furnish security for due performance for purpose of meeting his obligations if he ultimately fails in his appeal. As I have observed hereinabove he has not demonstrated any form of willingness to pay the outstanding debt which is ballooning yearly. I thus do not find any reason to stay the execution of the Judgment without his willingness to deposit the security.

Conclusion.

33. Accordingly, for the reasons set out above, I decline the request for stay of execution of the Judgement and ruling of the learned trial Magistrate delivered on 2nd August, 2023 and 30th June, 2023 respectively. I thus proceed to dismiss the Applications with costs to the 1st Respondent.

34. It is so ordered.

T.A ODERA

JUDGE

13.3. 24

Delivered Virtually via team's platform in the presence of;

Masolo for appellant applicant

N/A No Appearance for the respondent

Court Assistant: Oigo

Masolo: We seek a mention date for full compliance. The respondent has not complied.

Order: 1. Appeal be heard by way of written submissions

2. Each party has 21 days to comply.

3. Mention on 2.7.24 for compliance.

T.A ODERA

JUDGE

13.3.24