



**Kapila v Brunlehner; Brunlehner (Objector) (Commercial Case E454 of 2019)
[2024] KEHC 8563 (KLR) (Commercial & Admiralty) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE E454 OF 2019**

MN MWANGI, J

JULY 11, 2024

BETWEEN

SHEETAL KAPILA PLAINTIFF

AND

NARRIMAN KHAN BRUNLEHNER DEFENDANT

AND

JOSEF BRUNLEHNER OBJECTOR

RULING

1. The objector/applicant filed a Notice of Motion application dated 12th October, 2023 pursuant to the provisions of Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law, seeking an order for review of part of this Court's ruling delivered on 7th July, 2023 declining to issue an order for stay of execution of the Deputy Registrar's ruling dated 20th February, 2023, and praying for issuance of an order for stay of execution of the Deputy Registrar's ruling dated 20th February, 2023 pending hearing and determination of the objector's appeal.
2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Josef Brunlehner, the objector herein. He averred that he filed an application dated 17th March, 2023 seeking an order for extension of time to file and serve a Memorandum of Appeal against the Deputy Registrar's ruling of 20th February, 2023, and for stay of execution of the same ruling. That in a ruling delivered on 7th July, 2023, this Court allowed the application for extension of time but dismissed the application for stay of execution on the ground that the Deputy Registrar's ruling was a negative order, thus incapable of execution.



3. He further averred that he has filed and served a Memorandum of Appeal, but the plaintiff through a letter dated 10th July, 2023 to the Deputy Registrar, has initiated execution proceedings to settle terms for the sale of the disputed properties. He deposed that the said proceedings have progressed significantly, with parties appearing before the Deputy Registrar multiple times, with the objective of selling the properties via public auction. Mr. Brunlehner contended that he is aggrieved by the said execution proceedings and asserted that if an order for stay of execution is not issued, the properties in question will be sold before the appeal is resolved thus rendering the appeal meaningless, and causing him substantial loss.
4. He contended that the plaintiff on the other hand will not suffer any harm or prejudice if the orders sought are granted since he is in possession of all that property known as Kwale/Galu Kinondo/613 measuring approximately 7.9 acres.
5. The defendant filed a replying affidavit in support of the instant application sworn on 30th January 2024 by Narriman Khan Brunlehner, the defendant herein. She stated that she supports the instant application and confirmed that she has no objection to the prayers being sought in the application herein.
6. The application was opposed by the plaintiff vide replying affidavits sworn on 24th October, 2023 & 9th April, 2024 by Sheetal Kapila, the plaintiff herein. He averred that the defendant is the sole registered owner of the parcels of land under a prohibitory order issued on 20th June, 2022. He further averred that the objector's claim is that he holds a 50% share in the suit parcels of land, but he admitted in a previous case (Mombasa ELC 354 of 2016) that he could not be registered as the owner of the said parcels of land since he was a foreigner. Mr. S. Kapila contended that the said statement makes the objector's claim for ownership of the said parcels of land illegal pursuant to the provisions of Article 65 of *the Constitution* of Kenya, 2010.
7. It was stated by Mr. S. Kapila that the execution proceedings before the Deputy Registrar are valid since there is no stay of execution against the judgment of 26th January, 2021, which was delivered in his favour. He contended that in view of this Court's ruling delivered on 7th July, 2023, the present application is akin to asking this Court to sit on appeal of its own decision. He stated that the objector has not shown any substantial connection to the properties to justify a stay of execution, and that the application herein does not meet the necessary criteria for such an order.
8. In a rejoinder, the objector filed a further affidavit contending that if this application is not allowed, the Deputy Registrar will finalize the terms of the sale, thereby allowing the plaintiff to begin the process of selling the disputed parcels of land, which are the focus of the objection proceedings and form the basis of his appeal.
9. The instant application was canvassed by way of written submissions which were highlighted on 11th June, 2024. The objector's submissions were filed on 22nd January, 2024 by the law firm of A.G.N Kamau Advocates, whereas the plaintiff's submissions were filed by the law firm of Wandabwa Advocates on 10th June, 2024. No submissions were filed for the defendant.
10. Mr. A.G.N. Kamau, learned Counsel for the objector cited the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rules 1 & 2 of the Civil Procedure Rules, 2010 and submitted that the order intended to be stayed is no longer a negative order since the plaintiff has commenced execution proceedings, thus converting it into a positive order capable of being stayed. He urged this Court to review its ruling of 7th July, 2023 declining to grant the objector an order for stay of execution of the Deputy Registrar's ruling delivered on 20th February, 2023. He stated that the fact that the said ruling



has since been converted into a positive order capable of being executed is sufficient reason for the objector to be granted an order for review of this Court's ruling delivered on 7th July, 2023.

11. It was stated by Counsel that the plaintiff wrote to the Deputy Registrar vide a letter dated 10th July, 2023 seeking a date for settlement of terms of sale and the matter was scheduled for hearing on 5th September, 2023. That subsequently, the objector realized that the process leading to execution was imminent, thus he filed the instant application on 15th October, 2023. He submitted that there has been no inordinate delay in the filing of the application herein. To buttress these submissions, Mr. A.G.N. Kamau relied on the case of *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR.
12. He also relied on the case of *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu Nyeri Civil Appeal No. E030 of 2021* and contended that the order sought to be stayed is anticipated to be in fruition thus leading to the execution and disposal of the disputed parcels of land which are the subject matter of the appeal before this Court. He stated that having found in its ruling of 7th July, 2023 that the appeal before this Court is merited, an order for stay of execution of the Deputy Registrar's ruling delivered on 20th February, 2023 should issue.
13. He argued that if the instant application is not allowed, the objector will suffer substantial loss because his interest in the disputed plots will be sold or alienated by public auction, which will significantly diminish their value, and consequently deprive him of his constitutional right to property as enshrined in *the Constitution* of Kenya, 2010.
14. Mr. Wandabwa, learned Counsel for the plaintiff cited the provisions of Section 80 of the *Civil Procedure Act*, Order 45 Rule 1(b) of the Civil Procedure Rules, 2010 and the case of *Mwihoko Housing Company Limited v Equity Building Society* [2007] 2 KLR 171 and submitted that the instant application is akin to asking this Court to sit on appeal of its ruling delivered on 7th July, 2023 disguised as an application for review. Further, that there is no mistake, error or omission apparent on the face of the record to warrant this Court to review its ruling of 7th July, 2023. He relied on the case of *Akithii Ranching (Director Agricultural) Co. Ltd v District Land Adjudication & Settlement Officer-Tigania District & 2 others* [2014] eKLR and stated that once this Court declined to grant the objector an order for stay of execution, it became functus officio.
15. Counsel cited the case of *Macharia T/a Macharia & Co. Advocates v East African Standard* [2002] eKLR and the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and contended that the objector has not demonstrated that his appeal will be rendered nugatory in the event that the instant application is not allowed. He stated that in any event, the order issued by the Deputy Registrar in her ruling delivered on 20th February, 2023 is a negative order incapable of being executed hence there is nothing for this Court to stay. To this end, Mr. Wandabwa relied on the case of *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR.

ANALYSIS AND DETERMINATION.

16. I have considered the instant application, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavits filed by the plaintiff and the defendant, and the written submissions by Counsel for the parties. The issue that arises for determination is whether this Court should partly review its ruling delivered on 7th July, 2023 and issue an order for stay of execution of the Deputy Registrar's ruling delivered on 20th February 2023.

Whether this Court should partly review its ruling delivered on 7th July, 2023 and issue an order for stay of execution of the Deputy Registrar's ruling delivered on 20th February, 2023.



17. This Court’s jurisdiction to review its own decisions has to be exercised within the parameters of Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules, 2010 which provide as hereunder-

- “ 80. Any person who considers himself aggrieved-
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

- (1) Any person considering himself aggrieved-
- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

18. The Court in the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR in determining an application for review held as follows-

“...section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:

- a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- b. On account of some mistake or error apparent on the face of the record, or



- c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”
19. The objector’s case is that the negative order issued by the Deputy Registrar in a ruling delivered on 20th February, 2023 has been converted into a positive order capable of being executed in view of the execution proceedings that are currently ongoing before the Deputy Registrar. It is not disputed that the plaintiff initiated execution proceedings before the Deputy Registrar vide a letter dated 10th July, 2023 with the aim of settling terms for the sale of the disputed parcels of land and thereafter, the sale of the said parcels of land by way of a public auction.
20. This Court in its ruling delivered on 7th July, 2023 at paragraphs 39 and 40 stated as follows-
- “In her ruling dated 20th February, 2023, the Deputy Registrar dismissed the objector’s application dated 28th June, 2022 with costs to the 1st respondent. I have perused the application that was considered and determined by the Deputy Registrar and my finding is that the order made by the Deputy Registrar was a negative order...
- This Court’s finding is that an order for stay of execution cannot issue in the present application since the order issued by the Deputy Registrar on 20th February 2023 was a negative order incapable of execution.”
21. It is evident from the record that the Deputy Registrar’s ruling delivered on 20th February, 2023 which the objector seeks to stay has not been altered, varied and/or set aside. It is also evident that the ruling delivered on 20th February, 2023 was in respect to objection proceedings, and not execution proceedings pursuant to the judgment delivered by the Court (differently constituted), on 26th January, 2021 in favour of the plaintiff as against the defendant.
22. From the foregoing, the execution proceedings currently before the Deputy Registrar have nothing to do with the Deputy Registrar’s ruling delivered on 20th February, 2023. I am therefore not persuaded that there is a mistake or error apparent on the face of the record and/or any other sufficient reason to warrant this Court to exercise its discretion to review, vary, and/or set aside its ruling delivered on 7th July, 2023 declining to grant the objector an order for stay of execution of the Deputy Registrar’s ruling delivered on 20th February, 2023.
23. As to whether an order for stay of execution of the Deputy Registrar’s ruling delivered on 20th February, 2023 pending the hearing and determination of the appeal can issue, this Court in its ruling delivered on 7th July, 2023 considered the said issue and found that an order for stay of execution could not issue since the order issued by the Deputy Registrar on 20th February, 2023 was a negative order incapable of execution. If at all the objector was dissatisfied by the said finding, the only recourse available to it was to appeal against this Court’s ruling at the Court of Appeal.
24. The upshot is that the instant application is devoid of merit. It is dismissed with costs to the plaintiff. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:



Mr. Mwaura h/b for Mr. Kamau for the objector/applicant

Mr. Karani for the plaintiff/respondent

Mr. N'tongaiti h/b for Mr. Machio for the defendant/2nd respondent

Ms B. Wokabi – Court Assistant.

