



**Hemkur Holdings v Sheth & 2 others (Civil Suit E656 of 2021)  
[2023] KEHC 23222 (KLR) (Commercial and Tax) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23222 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E656 OF 2021  
FG MUGAMBI, J  
OCTOBER 6, 2023**

**BETWEEN**

**HEMKUR HOLDINGS ..... APPLICANT**

**AND**

**VIPUL JASVANTRAI SHETH ..... 1<sup>ST</sup> RESPONDENT**

**DALALI TRADERS ..... 2<sup>ND</sup> RESPONDENT**

**DIAMOND TRUST BANK LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. Before the court is the application dated 25<sup>th</sup> November 2022. It is brought under Order 22 rule 6 and Order 51 of the [Civil Procedure Rules 2010](#).
2. The application seeks the following orders:
  - i. Spent
  - ii. That the 1<sup>st</sup> respondent be compelled to forthwith vacate the applicant's premises in accordance with the ruling issued by this Honourable Court on 26<sup>th</sup> August 2022.
  - iii. That the OCPD Parklands Police station provides assistance to M/S Baseline Auctioneers to evict the 1<sup>st</sup> respondent herein from the suit premises.
  - iv. Costs of this application
3. The application is supported by the grounds on the face of it, the affidavit sworn by Kurit Gudka and written submissions dated 31<sup>st</sup> March 2021. Briefly the dispute is founded on a loan facility that was



advanced by the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent, secured by a charge on the property known as Masionette No. 2 erected on L.R No 1870/11/314 situated in Westlands (the suit property). Following default in paying up the facility, the suit property was sold by public auction where the applicant was confirmed to be a bonafide purchaser by this Court.

4. The 1<sup>st</sup> respondent was given 7 days to hand over vacant possession of the suit property but has refused to do so. It was the applicant's case that the auctioneers instructed by the applicant to assist in executing the ruling had been denied entry to the said premises, necessitating the application now before the Court.
5. The 1<sup>st</sup> respondent opposed the application by grounds of opposition dated 12<sup>th</sup> February 2023 on the following grounds:
  - i. That the applicant does not hold a decree and this Honourable Court has not issued any decree capable of being executed within the meaning of Order 22, rule 6 of the *Civil Procedure Rules, 2010*, which the application is anchored on.
  - ii. That the applicant had preferred an appeal, being Nairobi CACA No. E343 of 2022 Vipul Jasvantrai Sheth v Diamond Trust Bank Limited & Others against the ruling of Hon. Justice Mabeya.
  - iii. That status quo orders were issued by Hon. Justice Mabeya and the plaintiff's suit is ripe for hearing on its merits.
  - iv. That the application at an interlocutory stage of the proceedings is dash harum-scarum and takes the nature of an application for execution before judgment.
  - v. That the application is misconceived and serves no purpose towards the just determination of the litigation but rather serves to delay and obscure the real dispute and the plaintiff's claim.

### **Analysis**

6. I have carefully considered the pleadings, evidence and submissions filed by rival parties. The main issue for determination is whether the applicant had made out a case for orders of eviction of the 1<sup>st</sup> respondent from the suit property and police intervention in the eviction process.
7. The first ground goes to the substance of the application on account of erroneous citing of the law under which the application is brought. The 1<sup>st</sup> respondent has confirmed that this was an inadvertent error. Order 22 rule 6, which the applicant cites in this application, provides for the procedure for the application for execution. Order 22 rule 6(3) requires that a certified copy of the decree should accompany the application. The decree has not been provided because the application before the Court is not an application for execution of a decree.
8. I am persuaded by the decision of this Court in *Dominion Farm Limited V African Nature Stream & Another*, Kisumu HCCC No. 21 of 2006 where it was held that:

“Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice.”



9. On this basis I would find that the wrong citing of the law is not fatally defective. That said, it is Order 22 rule 29 that provides for eviction in the case of a decree for immovable property. It reads as follows:

“Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.”

10. A cursory look at the record confirms that the 1<sup>st</sup> respondent had filed an injunction seeking to stop the applicant and the 3<sup>rd</sup> respondent from interfering with the suit property. The court in a ruling dated 26<sup>th</sup> August 2022 dismissed the application stating that it could not restrain a sale that had already taken place. The 1<sup>st</sup> respondent was therefore ordered to vacate the premises within 7 days.

11. In response to the argument by the applicant that the Court had issued status quo orders, I have perused the record and I note that on 26<sup>th</sup> August 2022 the Court dismissed the application for stay of execution but issued status quo for 7 days from 26<sup>th</sup> August 2022.

12. The 1<sup>st</sup> respondent argues further that he had preferred an appeal against the impugned ruling. Order 42 Rule 6 of the [Civil Procedure Rules](#) is instructive that an appeal does not operate as an automatic stay of execution. It provides as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.”

13. I have already said that the application for stay of execution was dismissed by this Honourable Court. There is no order from the Court of Appeal staying the execution of the orders of 26<sup>th</sup> August 2022. Under the circumstances, nothing stops the applicant from taking possession of the suit property. The applicant has prayed for security to be provided during the eviction exercise. The role of the police service shall be confined to maintaining law and order to enable the court bailiffs to perform their duties.

### **Determination**

14. In conclusion I find that the application dated November 25, 2022 is meritorious and I allow it on the following terms:

- i. That the 1<sup>st</sup> respondent is hereby ordered to vacate the applicant’s premises within 3 days from the date of this ruling.
- ii. That the Officer Commanding Parklands Police Station does provide security to M/S Baseline Auctioneers for the eviction of the 1<sup>st</sup> respondent from Masionette No. 2 on L.R. No 1870/II/314 IR86119 Westlands.
- iii. That the 1<sup>st</sup> respondent shall bear the costs of this application and the costs of the eviction.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER 2023**



**F. MUGAMBI**  
**JUDGE**

