



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 34 OF 2018

ARKAY INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....1ST DEFENDANT

DALALI TRADERS AUCTIONEERS.....2ND DEFENDANT

RULING

The applicant filed a notice of motion application dated 16th December 2020 seeking the following reliefs;

1. Spent
2. Spent
3. That an order of stay be issued stopping the 1st defendant/respondent from proceeding with the intended sale by a public auction scheduled on 24th December 2020 of the plaintiff/applicant's property known as Eldoret Municipality Block 10/38 pending the lodging, hearing and determination of the applicant's intended appeal.

The application is supported by the affidavit of Radia Sanjay Shantilal, a director of the plaintiff/applicant. The applicant filed an application on 8th August 2019 to set aside a consent order dated 12th September 2018. The plaintiff/Applicant further sought an order barring the sale of its property known as Eldoret Municipality Block 10/38 pending the hearing and determination of the application. The application was dismissed causing the applicant to file the present application. The auction was halted on 24th December 2020 and the only prayer that remains is stay of the intended sale of the property pending the appeal.

APPLICANT'S CASE

The applicant filed submissions on 8th April 2021

The applicant submits that under *order 42 Rule 6(2)* the applicant is required to demonstrate the following;

- a. Substantial loss may result unless the order is made
- b. The application has been made without unreasonable delay;
- c. Such security as the court orders for the due performance of the decree has been given by the applicant.

The applicant delves into the issues raised by the respondent in the replying affidavit. The applicant responded to the respondents' replying affidavit paragraphs 5 & 7 and submitted that the fact that the court dismissed the application dated 8th August, 2019 does not bar this court from granting a stay of execution.

The applicant avers that the purpose of stay of execution is to preserve the substratum of the case and cites the case of **Consolidated Marine vs Nampijja & Another, Civil App. No. 93 of 1989 (Nairobi)**. The applicant cites the case of **Mukuma vs Abuoga (1988) KLR 645** on what amounts to substantial loss.

The applicant submits that the suit property is the substratum of the suit and if it is sold and the appeal is successful the entire object of the appeal will be rendered nugatory.

The applicant cites the case of *JMM v PM (2018)* where the court quoted the case of Appeal decision in ***Shell Ltd v Kibiru & Another (1986) KLR 410*** and submits that if the appeal is successful and the court of appeal refers the matter back to this court and by that time the suit property has been sold then the entire object of the appeal will be rendered nugatory.

The respondent argued that it can compensate the applicant in the event it is successful in its application, however in this instance, we are not dealing with a money decree whereby the applicant can easily be compensated. In this case if the land is sold and the appeal is successful the applicant will never get its land back.

The applicant submits that it has demonstrated that it will suffer substantial loss if the stay is not granted and the appeal will be rendered nugatory if the same is successful and the property has been sold.

The impugned decision was delivered on 2nd December 2020 and the application was filed on 18th December 2020. This is a period of 16 days between delivery of ruling and filing of the application. The application was made without unreasonable delay. The applicant relies on the case of *Lamsons Industries* in support of this submission.

The applicant is willing to abide by any conditions the court may set. It has met the conditions for grant of stay under *order 42 rule 6(2)* of the *Civil Procedure Rules*. It prays that the court allow the application dated 16th December 2020.

RESPONDENT'S CASE

The respondent filed a replying affidavit, dated 19th January 2021 and submissions in opposition of the application.

The respondent submits that the appeal lacks merit as the applicant did not lead any evidence to demonstrate that the consent entered into was as a result of fraud and misrepresentation. The appeal is intended to prevent the defendant from recovering the sums advanced to the plaintiff which have been pending for a period of over five years. In the ruling, the court considered if the plaintiff had led evidence to demonstrate fraud and duly arrived at the determination that the plaintiff had failed to demonstrate his case.

The defendant avers that the plaintiff cannot seek to obtain a stay of the statutory power of sale having consented to the sale in the consent dated 12th September 2018. The loan facility has principal and interest in arrears of kshs. 109,821,081.64 as at 30th July 2018 which continues to accrue interest.

The applicant has not made a single payment to settle the arrears and should the stay be granted the outstanding sum will exceed the value of the suit property known as Eldoret Municipality Block 10/38 hence the 1st defendant will suffer substantial loss as it won't be able to recover the outstanding amounts.

The respondent submits that there is no positive order capable of being stayed by this honourable court as this honourable court in its ruling dated 2nd December 2020 issued a negative order dismissing the plaintiff's application and it is trite law that a negative order which doesn't impose obligations on a party to undertake an action cannot be stayed. They rely on the case of ***Catherine Njeri Maranga vs Serah Chege & Another (2017) eKLR*** and the case of ***Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) (2015)*** in support of this submission. The application, is averred, is unmerited as there is no positive order capable of being stayed.

The respondents further notes that the application seeks a stay barring the defendants from proceeding with the intended sale by a public auction scheduled on 24th December 2020 and submit that the aforementioned order is ineffectual and automatically expired when the scheduled auction of the 24th December 2020 was cancelled. The order cannot be deemed to extend until the hearing and determination of the intended appeal noting that parties are bound by their pleadings.

The respondent cites the case of ***Mukuma v Abuoga (1988) KLR 645*** and the case of ***Baiba Dhidha Mjidho v Van Leer East Africa Ltd (Greif (K) Ltd.) (A Business of Greif Bros Co-Op [2006] eKLR*** on the issue of substantial loss.

The applicant will not suffer substantial loss as the respondent is a tier 1 bank with 130 branches across East Africa and assets worth billions of shillings as evidenced by the unaudited group and bank results for the period ended 30th September 2020 produced as annexure SK-1, and will be in a position to refund the plaintiff the entire value of the suit property plus interest should the appeal succeed. The respondent also cites the case of ***Shalimar Flowers Self-Help Group vs Kenya Commercial Bank Limited (2016) eKLR***.

The respondent reiterates that it will suffer irreparable loss as the plaintiff's term loan facility has principal and interest in arrears of kshs. 109,821,181.56/- and the entire outstanding amount was kshs. 420,593,081.64 as at 30th July 2018 which amount continues to accrue interest at 23% per annum hence it is clear that if stay of execution is granted the amount owing will exceed the value of the suit property hence will render the 1st defendant incapable of recovering the sums advanced to the plaintiff.

The defendants do not contest the issue that the application was made without undue delay.

The plaintiff has not offered any form of security in the application for the stay of execution which is fatal to the said application.

The respondents submit that the circumstances under which a chargor will be restrained from exercising its statutory power of sale are set out

in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125*. They further rely on the case of *Mombasa HCCC 36 of 2010 – Global Bapipo Holdings Limited vs Diamond Trust Bank Kenya Limited & Another*.

The respondent submits that the plaintiff has failed to offer to deposit the arrears claimed and they pray that the entire arrears, if the application is allowed, be deposited in a joint interest earning account in the name of the parties advocates within a period of 30 days.

ISSUES FOR DETERMINATION

- a. Whether the applicant has satisfied the threshold for granting orders for stay.
- b. Whether the court can stay a negative order as sought by the plaintiff.

Order 42 Rule 6(2) of the *Civil Procedure Rules* provides;

(2) No order for stay of execution shall be made under sub rule (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

It was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, as follows:

“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.”

The applicant claims that it will suffer substantial loss; however the same must be weighed against the respondent’s right to enjoy the fruits of the judgment. The amount sought in the statutory sale is colossal. The applicant has not made any deposits towards settling the outstanding arrears. The respondent has proven that it can compensate the applicant if the appeal succeeds by virtue of annexure SK1.

Given the amount outstanding in arrears the respondent may not be able to recover the arrears and interest if stay is granted. The applicant has not proven that it will suffer substantial loss that cannot be compensated by way of damages.

The applicant has not provided any security and its ability to pay the security, given the amount involved in the suit is in doubt. Willingness on their part to pay the outstanding arrears is also not demonstrated in the application.

The respondent contends that the order of stay cannot be granted as there is no positive order capable of being stayed. In *Mugenyi & Co Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984)* it was stated that;

‘...an order for stay of execution must be intended to serve a purpose....’

The Application for stay seeks to specifically stay a scheduled auction of the 24th December 2020 which was cancelled and has been surpassed by time. In the premises the sought for order won’t serve any purpose.

Given the foregoing considerations, the application lacks merit and is hereby dismissed with costs to the Respondents.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE, 2021

In the presence of:-

Mr. Njoroge holding brief for Mr. Kamau Chege for the Applicant/Plaintiff

Mr. Kisinga for defendant/Respondent

Ms Gladys - Court assistant