



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL SUIT NO. 24 OF 2018**

**DAVID ISOE AYUBU.....PLAINTIFF**

**VERSUS**

**I & M BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOSEPH GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS....2<sup>ND</sup> DEFENDANT**

**AND**

**KIPSOSION RERIMOI KIPKORIR.....INTERESTED PARTY**

**RULING**

1. The applicant took out a motion on notice dated 9<sup>th</sup> December, 2020, brought under sections 1A, 1B, 3A and 63E of the Civil Procedure Act, and Orders 42 rule 6 and 51 rule 1 the Civil Procedure Rules, 2010, seeking an injunction restraining the respondents by themselves their agents or legal representatives from transferring the property known as **Title Number Ngong/Ngong/9895**, situated at Ongata Rongai in Kajiado County to the Interested Party, pending the hearing and determination of his intended appeal to the Court of Appeal.

2. The motion is based on the grounds on its face and on the applicant's affidavit sworn on 9<sup>th</sup> December, 2020. The grounds in support of the motion are, that; the property may be transferred to the interested party any time now; that he is appealing against the judgment of this court delivered on 2<sup>nd</sup> December, 2020 dismissing his suit against the respondents and interested party; that failing to grant stay orders will render his intended appeal to Court of Appeal nugatory and that he will suffer irreparable loss and damage. He stated that no prejudice will be occasioned to the respondents and the interested party as the interested party is already in possession of the suit property and he is collecting rent from his (applicant's) tenants.

3. In his affidavit, the applicant reiterated the facts and grounds on the face of the motion. He deposed that he applied for a certified copy of the proceedings and judgment in order to pursue an appeal to the Court of Appeal; that the application was made timeously and that the intended appeal has high chances of success.

4. According to the applicant, the court made a finding that his property was not advertised for sale in a newspaper as required by law, though it further made a finding that he was aware of the sale. The applicant stated that he understood that advertisement in a newspaper is a legal requirement and is meant for the general public and not for him as a registered owner of the property.

5. He deposed that he should be granted an opportunity to exhaust his right of appeal guaranteed under the Constitution before the interested party unfairly runs away with his only property.

6. The respondents filed a replying affidavit by Andrew Muchina sworn on 14<sup>th</sup> December, 2020 and filed on 16<sup>th</sup> December, 2020 opposing the application. He deposed that the application is not merited as the applicant has not satisfied the conditions for granting such orders. According to the deponent, the applicant has not demonstrated that he has an arguable appeal as he has not exhibited a draft Memorandum of Appeal. As a result, he has not shown that refusal to grant an injunction will render the appeal nugatory.

7. He further deposed that the intended appeal is frivolous and will inflict greater hardship on the 1<sup>st</sup> respondent than it would avoid. According to the deponent, if the property is transferred, the applicant will not suffer any irreparable loss that the 1<sup>st</sup> respondent cannot compensate by damages in the event the intended appeal succeeded. He also asserted that the applicant has already demonstrated his inability to pay leading to sale of the property by auction. He maintained that if an injunction is granted, the 1<sup>st</sup> respondent will suffer irreparable loss as it will not be able to recover the entire debt which is dependent on the property being transferred to the Interested Party. Imposing an injunction will therefore cause greater hardship on the 1<sup>st</sup> respondent than it would avoid. He further deposed that, the 1<sup>st</sup> respondent continues to suffer other losses in terms of litigation costs, including the costs it will incur in the intended appeal in the Court of Appeal.

8. The interested party also filed a replying affidavit sworn on 23<sup>rd</sup> April, 2021 and filed on 28<sup>th</sup> April, 2021. He deposed that the applicant's application is fashioned to deny him the fruits of the judgment of this court delivered on 2<sup>nd</sup> December, 2020 dismissing the suit. It is his case that jurisdiction to determine whether an intended appeal has chances of success lies with the Court of Appeal and not this court. Doing so, this court would be conducting a mini-appeal.
9. The interested party further deposed that the orders sought will prejudice him as he wants a conclusion to the matter so he can transfer the property into his name. He maintained that the application lacks merit, is incompetent, frivolous, bad in law and should be dismissed with costs.
10. This application was disposed of by way of written submissions. The applicant filed his submissions dated 22<sup>nd</sup> February, 2021 on 23<sup>rd</sup> February, 2021. He submitted that he had met the conditions for granting injunction pending appeal. He argued that the subject matter being land, there was no need for security and relied on *Iye Mohamed Bakari v Maweni Estates' Limited & 2 others* [2006] eKLR.
11. According to the applicant, it is in the interest of justice that he be granted orders to stay transfer of the property into the interested party's name to avoid rendering the appeal nugatory. He further argued that the intended appeal is arguable and has high chances of success. He relied on *Civil Joseph Gitahi Gachau & Another v Pioneer Holding (A) Limited & 2 others* (Civil application No. 124 of 2018).
12. He submitted that the court's jurisdiction is to determine whether or not the appeal will be rendered nugatory in the event stay was not granted and not whether the intended appeal has merit or not. He relied on *Kenya Power & Lighting Company Limited v Esther Wanjiru Wakobi* [2014] eKLR, on the principles to be considered in an application of this nature. It is also his case that the application was filed expeditiously and prima facie, the appeal at the Court of Appeal is arguable.
13. The applicant again relied on *Center Star Limited & Another v Halima Mahmood Ali & 2 others* (Civil Application Number 95 of 2018 -COA) and *Eunice Muthoni Nderitu (Suing as the Administrator of the Estate of Moses Wangui Deceased) v David Nderi Kamau /a Lukaka Service* [2020] eKLR where the court allowed applications for stay/ injunction pending appeal.
14. He prayed that the application be allowed.
15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their written submissions dated 15<sup>th</sup> March, 2021 on 17<sup>th</sup> March, 2021. They submitted that the applicant had not met the threshold for granting injunction pending an intended appeal. They relied on *Erinford Properties Limited v Cheshire County Council* [1974] 2 ALL ER 448, which has also been reiterated in several cases including *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR.
16. The respondents argued that the power to grant an injunction pending appeal is discretionary and should be exercised by following the laid down principles; that is, the discretion will be exercised against an applicant whose appeal is frivolous; the discretion should be refused where it would inflict greater hardship against the respondent than it would avoid; the applicant must show that to refuse the injunction would render an appeal nugatory and the court should be guided by the principles in *Giella v Cassman Brown & Company* [1973] E.A., 358.
17. According to the respondents, the intended appeal is frivolous and urged the court not to grant the injunction. In their view, the applicant had not demonstrated that he had an arguable appeal as he had not exhibited a draft memorandum of appeal to show arguable points in the intended appeal. They cited *Venture Capital & Credit Ltd v Consolidated Bank of Kenya Ltd* [2004] 1 E.A., 357.
18. They contended that the intended appeal has no merit and that filing of the notice of appeal is not enough to establish sufficient cause under Order 42 Rule 6 of the Civil Procedure Rules. They also argued that the applicant had not demonstrated efforts he had made in following up on typed proceedings since their letter dated 2<sup>nd</sup> December, 2020 requesting for proceedings. They contended that the applicant had merely stated that the appeal had high chances of success but failed to set out any arguable points he intends to rely on in the appeal. They relied on *Vivian Muia v Mzoori Limited* [2017] eKLR and *Abercombie & Kent Limited v John Wanjau Maina* [2020] eKLR.
19. The respondents maintained that granting an injunction would inflict greater hardship on the 1<sup>st</sup> respondent bank than it would avoid. In their view, if the property was transferred, the applicant would not suffer an irreparable loss that cannot be compensated by damages by the 1<sup>st</sup> respondent in the event the intended appeal succeeded and that the applicant had demonstrated his inability to pay hence the sale of the property by public auction. "If the injunction was granted, the bank would suffer irreparable loss as it will be unable to recover the entire debt which is dependent on the property being transferred to the interested party." They argued. In the circumstances, they asserted, granting an injunction would cause greater hardship on the 1<sup>st</sup> respondent bank than it would avoid. They relied on *Madhupaper International Limited v Kerr* [1985] eKLR and *Equip Agencies Limited v I & M Bank Limited* [2017] eKLR.
20. They maintained that the intended appeal will not be rendered nugatory since he can be compensated by damages which would be an adequate remedy. They relied on *Julius Musili Kyunga v Kenya Commercial Bank Ltd & 2 others* [2016] eKLR; *Tahir Sheikh Said Investment Limited v Bank of Africa Limited* and *Abdulmajid Mohamed Adam (Interested Party)* [2021] eKLR.
21. They contended that once a property had been given as security, failure to repay the loan, would result into selling the security to recover the outstanding loan. They relied on *John Mathara Mwangi v Consolidated Bank of Kenya Limited* [2016] eKLR. They urged that the application be dismissed with costs.
22. The interested party filed his written submissions dated 19<sup>th</sup> April, 2021 filed on 28<sup>th</sup> April, 2021. He submitted that the court considered all material facts before it before dismissing the suit. He argued that at all stages of legal proceedings, courts must do justice and that on 2<sup>nd</sup> December, 2020 the court dispensed justice by delivering a judgment whose fruits he is yet to enjoy.

23. The interested party further submitted that the court having delivered its judgment, it cannot be called upon to determine whether or not an intended appeal from its decision had high chances of success, as doing so, would be tantamount sitting on a mini-appeal. He contended that the issue of success of an intended appeal should be raised in the appeal itself. According to him, the correctness of a judgment can only be impugned in obvious cases such as lack of jurisdiction. He relied on ***Capital Realty Limited v Housing Finance & another*** [2020] eKLR and He urged the court to dismiss the application with costs.
24. I have considered this application, replying affidavits and submissions made on behalf of the parties. I have also considered the decisions relied on. What is before court is an application for injunction pending appeal (stay of execution pending an intended appeal) to the Court of Appeal. This court delivered its judgment on 2<sup>nd</sup> December 2020 dismissing the applicant's suit that had challenged sale of his property parcel No. **Ngong/Ngong/9895** by public auction.
25. The applicant had charged that property to secure a loan advanced to him by the 1<sup>st</sup> respondent. He defaulted in loan repayment leading to sale of the property in exercise of statutory power of sale. The applicant moved to court to challenge the sale and after a hearing, the suit was dismissed. That is the judgment the applicant intends to appeal against and has applied for an injunction to stop transfer of the property into the interested party's name pending the hearing and determination of that intended appeal. He has argued that he has an arguable appeal with high chances of success and that if the application is not granted, his appeal will be rendered nugatory.
26. The respondents and interested party have argued that the application is not merited; that the applicant has not demonstrated that he will suffer irreparable loss that cannot be compensated by way of damages and that an injunction will cause them more harm than it will avoid.
27. The principles upon which an application for stay/injunction pending appeal should be granted are clear. Order 42 rule 6 provides that:
- 1. 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 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 of stay 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 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. (emphasis).***
28. One of the requirements is that an application should be filed without delay. The judgment to be appealed against was delivered on 2<sup>nd</sup> December 2020 while the application was filed on 9<sup>th</sup> December 2020, one week later. There is not in contention, therefore, that the application was filed without delay.
29. The most important requirement is that an applicant must show to the satisfaction of the court, that he will suffer substantial loss if stay/injunction is denied. In ***Butt v Rent Restriction Tribunal*** (Civil App No. NAI 6 of 1979), the Court of Appeal held that *the power of the court to grant or refuse to grant an application for stay of execution is discretionary. The discretion should be exercised in such a way as not to prevent an appeal. The court added that in exercising the discretion whether to grant or refuse an application for stay, the court should consider the special circumstances of the case and its unique requirements.*
30. It is clear from the reading of Order 42 rule 6 as well as the above decision, that in an application for stay/injunction, the court exercises judicial discretion and like any other discretion, the discretion should be exercised judicially. That is; whether to grant stay or not, the Court has to consider the unique circumstances of each case.
31. The guiding principle under Order 42 rule 6 is that an applicant has to show that he will suffer substantial loss should stay be denied. *The applicant must establish factors which show that should stay not be granted and execution proceeds, it will create a state of affairs that will irreparably affect him as the successful party in the intended appeal. (See. ***James Wangalwa & another v Agnes Naliaka Cheseto*** [2012] eKLR)*
32. In ***Equity Bank Ltd v Taiga Adams Company Ltd*** [2006] eKLR, the Court stated that *the only way of showing or establishing substantial loss, is by showing that if the decretal sum is paid (execution proceeds), the respondent would not be in a position to reimburse should the appeal succeed because he has no means of doing so. In other words, in the present application, the applicant is required to show that if an injunction is not granted and the property is transferred into the interested party's name, he would suffer irreparable loss that cannot be remedied by damages.*
33. In the case ***Machira T/A Machira & Co Advocates v East African Standard (No 2)*** [2002] eKLR, the court stated that to demonstrate that he will likely suffer substantial loss, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words, and merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory.
34. I have carefully read the application, the supporting affidavit as well as the grounds on the face of the motion. The applicant's case is that he intends to appeal against this court's decision; that he has an arguable appeal with high chances of success and that if stay/injunction

is not granted, his intended appeal will be rendered nugatory.

35. The property was knocked down in the public auction in favour of the interested party as the highest bidder. He paid the deposit and entered into an agreement with the 1<sup>st</sup> interested party to pay the balance which he eventually did. The applicant obtained an injunction to stop transfer of the property into the name of the interested party's name and challenged the sale but the suit was dismissed.

36. The applicant did not state what substantial loss he would suffer and how if an injunction was not granted. He submitted at length on the merit of the intended appeal and that it would be rendered nugatory but did not show the substantial loss he would suffer. He stated that he would lose his only property but he did not allege that the 1<sup>st</sup> respondent would not be in a position to compensate him by way of damages if his appeal succeeded.

37. The respondents argued that the applicant would be compensated by damages if his appeal succeeded. They maintained that he had not demonstrated what substantial loss he would suffer if stay was not granted. The applicant did not answer the depositions and submissions. He did not even allege that the 1<sup>st</sup> respondent was not in a position to compensate him by way of damages were his appeal to eventually succeed. In other words, the applicant merely alleged that the appeal would be rendered nugatory without substantiating how. That is not the meaning of substantial loss as contemplated by Order 42 rule 6 and decided cases. The applicant was required to do much more than merely assert that the intended appeal would be rendered nugatory.

38. As this court stated in *Kenya National Highways Authority v Ahmednasir Maalim Abdullahi* [2020] eKLR:

*It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court's discretion in his favour.*

39. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Others* [1986] eKLR, **Platt, Ag. JA**, stated:

*If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.*

40. It is clear to this court that the applicant failed to demonstrate that he would suffer substantial loss if stay/injunction was not granted in his favour.

41. The applicant also argued that he has an arguable appeal with high chances of success. The respondents argued that the applicant did not attach a memorandum of appeal to show that there were arguable grounds on appeal. An application for stay of execution will not fail because a party has not attached a draft memorandum of appeal as long as he has deposed sufficiently in his affidavit the grounds he intends to pursue on appeal. (See *Dr. Fred Okengo Matiangi Cabinet Secretary, Ministry of Interior and National Government & 6 others v Miguna Miguna; Kenya National Commission on Human Rights (Interested Party)* [2021] eKLR.

42. The applicant intends to appeal against a decision of this court. This court is therefore ill prepared to determine whether or not his intended appeal is arguable or has high chances of success because it cannot do a merit review of its own decision. This court's mandate under Order 42 rule 6 is to determine whether an applicant has demonstrated that he will suffer substantial loss and not whether the appeal has high chances of success.

43. When the court is called upon to consider an application for stay pending appeal, it has to balance interests of both the applicant and those of a successful respondent who has a judgment in his favour. A decree holder requires protection just like the applicant who wishes to exercise his right of appeal against that decree. The applicant has a duty to satisfy the court that without stay/injunction, he would suffer substantial loss. It is not a question of apprehension. It must be about real substantial loss.

44. Having given due consideration to the application, the depositions in the supporting affidavit and the responses, and on the strength of the decisions referred to above, I am not satisfied that the applicant has met the threshold for grant of stay/injunction pending an intended appeal. Consequently, the application dated 9<sup>th</sup> December 2020, is declined and dismissed with costs.

**Dated, Signed and Delivered at Kajiado this 9<sup>th</sup> day of July, 2021.**

**E C MWITA**

**JUDGE**