



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 4 OF 2020

ROY ANTONY MUGO KAUGI.....APPELLANT/APPLICANT

VERSUS

JACOB MUCHANGI.....RESPONDENT

RULING

1. Before this court is an application dated 31.03.2021 brought under certificate of urgency and wherein the appellant/ applicant seeks the following orders; -

1)spent

2) *This honourable court be pleased to review and/ or set aside the ruling of Hon. Nyakweba Senior Principal Magistrate delivered on 23.03.2021 in the Chief Magistrate Court Civil Case No. 67 of 2018*

3) *This honourable court be pleased to stay execution of the lower court's decree pending the hearing and determination of the appeal herein*

4) *This Honourable Court be pleased to set aside the sale of parcel of land number Gaturi/Githimu/3110 conducted on 30.10.2020.*

5) *This Honourable Court to order that a prohibitory order do issue against the parcel of land No. Gaturi/Githimu/3110 pending the hearing and determination of the appeal herein.*

6) *Costs of the application.*

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant.

3. In a nutshell, the applicant's case is that he was dissatisfied with the judgment delivered by Hon. T. Kwambai SRM in Embu CMCC No. 67 of 2018 on 17.04.2019 in favour of the respondent and after which he filed the instant appeal. However, the respondent is in the process of executing the said judgment and decree to the detriment of the applicant. Further that the applicant filed an application dated 7.12.2020 seeking setting aside the said sale amongst other prayers and which was dismissed by Hon. H. Nyakweba SRM on 23.03.2021. Further that the respondent is not a man of means and will not be able to refund the decretal amount or compensate the appellant for his parcel of land No. Gaturi/Githimu/3110 in the event the appeal succeeds and which appeal raises arguable points of law with chances of success.

4. Further that the appeal stands to be rendered nugatory in the event it succeeds if the orders sought are not granted. That the respondent has irregularly and unprocedurally sold the applicant's land parcel by public auction and further gotten orders that the Executive Officer do sign the transfer documents and the production of the original title be dispensed with. That when his application for stay came up for hearing on 4.11.2020, he discovered of the said sale and he proceeded to file another application for stay of execution and setting aside of the auction sale and which application was dismissed by the Chief Magistrate's Court on 23.03.2021 to his detriment. He deposed that the said sale was irregular, illegal and unprocedural as it did not comply with the law. As such the said ruling ought to be reviewed.

5. The application is opposed by way of a replying affidavit sworn by the respondent and wherein he deposed that this court is bereft of jurisdiction to review the orders of Hon. Nyakweba as there is no appeal lodged against the said orders. Further that the orders of stay are overtaken by events as the decree of the lower court has already been executed and the suit land sold in an auction to a person not a party to the proceedings herein and who will be prejudiced by the substantive orders sought in the application thus violating her constitutional rights to own property and right to be accorded a fair hearing. Further that the only court which can set aside the auction sale is the trial court and this court can only exercise jurisdiction over the same on appeal and thus this court is bereft of jurisdiction to grant prayers 2, 4 and 5.

Further that the applicant's remedy is against the bailiff who conducted the sale and not the respondent and that the respondent is a man of means and can be able to refund the decretal sum in the unlikely even the appeal succeeds.

6. The application was canvassed by way of written submissions. The applicant reiterated that the auction was not properly conducted and further that the process of execution was not followed. Further that prohibition would take care of all the parties' interests pending the hearing of the appeal as the land has not been transferred to the 3rd party (auction buyer). Further that the appeal has overwhelming chances of success.

7. The respondent on his part submitted that the decree of the lower court has already been executed and the entire decretal sum recovered and paid to the judgement creditor. Further that this court is bereft of jurisdiction to set aside the sale of the suit land and which application the applicant had already filed in the lower court. That this court can only exercise jurisdiction over an appeal challenging the orders of the trial court. Further that adverse orders cannot be made without having enjoined the auction purchaser and who is not a party in this court and the lower court.

8. I have considered the application herein, the response thereto and the rival submissions filed by the parties.

9. However, I note that the respondent raised an issue as to this court being bereft of jurisdiction to grant prayers 2,4 and 5. It is now trite that an issue of jurisdiction once raised ought to be determined *in limine* as a court downs its tools the moment it finds that it has no jurisdiction. {See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)**}

10. However, since the issue of jurisdiction does not affect the whole application but some of the prayers, I will consider each of the prayers and make a finding.

11. The applicant sought for review and/or setting aside of the ruling of Hon. Nyakweba Senior Principal Magistrate delivered on 23.03.2021 in the Chief Magistrate Court Civil Case No. 67 of 2018 (prayer 2), setting aside the sale of parcel of land number Gatari/Githimu/3110 conducted on 30.10.2020 (prayer 4) and further for a prohibitory order to issue against the parcel of land No. Gatari/Githimu/3110 pending the hearing and determination of the appeal herein (prayer 5). The respondent in opposing the same deposed that the trial court had determined on the issue and as such this court does not have original jurisdiction over the same issue unless on appeal against the said orders of the trial court.

12. In relation to prayer 2 (review or setting aside of the trial court's ruling delivered on 23.03.2021, I have looked at the application and more so the provisions of the law upon which the same is premised. There is no provision which provides for review which has been cited. Under Section 80 of the Civil Procedure Act and Order 45 which are the legal provisions providing for review, such an application can only be made to the court which made the decree or order which is subject of the review. As such, this court does not have jurisdiction to review the said ruling. The applicant ought to have moved this court by way of an appeal against the orders of the learned magistrate. This court cannot exercise supervisory jurisdiction over the trial court in the manner the applicant has moved it. The said prayer is struck out for want of jurisdiction.

13. In relation to prayer 3, the applicant seeks for the orders of stay of execution of the decree of the trial court pending hearing and determination of the appeal herein. A similar prayer was sought in the application dated 7.12.2020 and which was determined in the ruling of 23.03.2021. However, in **Moses Meibako Ngatuny & 2 others v Peipei Ole Mosoiko [2021] eKLR**, M.C Oundo J in determining the issue as to whether an application for stay of execution pending appeal was *res judicata* for the reasons that a similar application had been determined by the trial (lower) court held that High Court has jurisdiction to entertain such an application. This is notwithstanding the same has been dismissed by the lower court. I am persuaded by the said decision and I find that the prayer for stay is not *res judicata*. So does the applicant deserve the orders of stay?

14. Stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules 2010. Under Rule 6(2), an applicant is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See **Antoine Ndiaye vs. African Virtual University [2015] eKLR**)

15. In **Butt vs. Rent Restriction Tribunal [1979] eKLR**, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

16. I note that the application was filed on 7.04.2021 and which was about two weeks from the delivery of the ruling by the trial court. Despite the judgment subject of the appeal having been delivered on 17.04.2019, such date should not be the basis of computing the time within which the instant application ought to have been brought as the applicant was pursuing his application in the lower court. In my view the application cannot be said to have been made with unreasonable delay. Delay of two weeks is not unreasonable.

17. As to what substantial loss constitutes, it was observed in **James Wangalwa & Another vs. 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.

18. In the instant case, the applicant deposed that the respondent is in the process of executing the said judgment and decree and if the orders of stay are not granted, the appeal shall be rendered nugatory in case it succeeds. The applicant further deposed that the respondent has irregularly and unprocedurally sold the suit land by public auction. The respondent in opposition to the application deposed that the suit land has already been disposed off, to a third party. I have perused the record of the trial court and I note that indeed the trial court made orders authorizing the Executive Officer to sign the transfer documents. As such and as the respondent did put it, the decree has been executed.

19. The purpose of an application for stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his right of appeal are safeguarded. Therefore, it should be clearly demonstrated that there is indeed reason to preserve the subject matter upon which failure the appeal will be rendered nugatory.

20. As such, that being the case, there is no execution to stay. Despite the applicant submitting that the suit land has not been transferred to a third party, he did not attach any evidence in that respect. 'In my view, the prayer for stay of execution has been brought too late in the day. There is nothing to be salvaged by an order of stay of execution.

21. That being the case, considering the issue as to whether security for due performance of the decree has been given can only be said to be an academic exercise since the issue of substantial loss has not been substantiated.

22. As such prayer 3 fails.

23. In relation to prayer 4, I have indeed perused the trial court's record and I note that the applicant herein filed an application dated 7.12.2020 in the trial court and wherein he sought for orders of stay of execution of the judgment of the trial court and further for the orders of setting aside the sale of the suit land. The said application was determined by the trial court in a ruling delivered on 23.03.2021. There is no appeal pending before this court against the said orders. It is my considered view that this court cannot hear and determine the said issue. The said issue having been determined by the trial court and a decision in that respect having been made, this court cannot exercise its original jurisdiction (as the applicant has invited it to do), yet this court has not been properly moved by way of appeal in respect to the impugned orders. It is my view that the said issue is *res judicata*.

24. As regards prayer 5, it is clear from the reading of the pleadings before me that the said prayer is premised on the grounds that the auction sale was illegal and unlawfully done. However, as I have said above, the applicant made an application seeking setting aside the said sale and which application/issue was determined by the trial court. The trial court analyzed the law and gave the said sale a clean bill of health. The applicant has not appealed against the said ruling but the appeal relates to the judgment of the trial court.

25. The term prohibitory order is commonly used in execution proceedings relating to immovable property. For instance, under Order 22 Rule 48 (1) of the Civil Procedure Rules, 2010 and which is one of the provisions under which the application herein was brought provides that: -

“Where the property to be attached in immovable, the attachment shall be made by an order prohibiting the judgement – debtor from transferring or charging the property in any way, and all persons from taking any benefit from the purported transfer or change, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”

26. The purpose of such prohibitory or inhibition order is obviously to preserve the property pending completion of the process of execution. Such orders prevent any further dealings with the subject property so that a decree for its attachment or delivery, as the case may be, is not rendered nugatory. (See Samuel Njeru Daniel –vs- James Njeru Nthiga & 2 others [2017] eKLR).

27. The decree having been fully executed, there is nothing to preserve. Prayer 5 therefore fails.

28. In conclusion, the application lacks merit and the same is hereby dismissed.

29. It is so ordered.

Delivered, dated and signed at Embu this 22nd day of September, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent