



REPUBLIC OF KENYA



KENYA LAW
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**Karanja v Molyn Credit Limited & another (Civil Appeal E071 of 2020)
[2021] KEHC 274 (KLR) (Civ) (17 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL APPEAL E071 OF 2020
F TUIYOTT, J
NOVEMBER 17, 2021**

BETWEEN

FLORENCE NJERI KARANJA APPLICANT

AND

MOLYN CREDIT LIMITED 1ST RESPONDENT

PETER NGOTHO 2ND RESPONDENT

RULING

1. I am afraid that Florence Njeri Karanja (the Applicant) has not done enough to deserve the orders sought in the Notice of Motion dated 8th December 2020 which is for the following orders: -
 1.
 2. THAT pending the hearing and determination of the instant Application and Appeal, a Stay of Execution be issued against the 2nd Respondent from proceeding with execution of this Honourable Court's judgment on its Counter-claim delivered on 6th November 2020 and or a status quo on the land parcel known as Title No. Githunguri/Nyaga T.437 be maintained.
2. Emerging from the Application and the replying affidavit is that Judgment in Milimani CMCC No. 10931 of 2018 Florence Njeri Karanja vs Molyn Credit Limited & Another dismissed her suit and allowed the counterclaim of Peter Ngotho. From her affidavit in support of the Application, the Applicant reveals that she made a claim against Molyn Credit Limited (the 1st Respondent) seeking orders to restrain it from exercising its power of sale over the suit property which she had charged in favour of the credit company for a loan facility of Kshs.600,000/= on 14th February 2013. She says that she has paid a sum of Kshs.1,367,237/= which amounts to full repayment of the loan facility.



3. It is common ground that the property was sold to the 2nd Respondent when the 1st Respondent exercised its statutory power of sale. The Applicant, however, contends that the exercise of that power was not only premature but also irregular.
4. She asserts that she stands to suffer irreparable loss if the 2nd Respondent is allowed to enter into possession of the suit property and or to dispose or deal with the suit property in any other way in realization of the outcome of the counterclaim. She states that she lives on the suit property and has developed it overtime.
5. The Application is opposed. The lender filed grounds of opposition dated 6th April 2021 arguing that this appeal is not an arguable one and that no substantial loss will result to the applicant if stay of execution and/or a temporary injunction is not granted.
6. For the 2nd Respondent, he contends through a replying affidavit sworn on 15th March 2021, that he is an innocent purchaser for value without notice and that it will cause him further hardship to keep him out of land he purchased in 2014, 7 years ago now.
7. The Application is anchored under two provisions of the *Civil Procedure Rules*. Order 40 Rule 1 for injunction and Order 42 Rule 6 for stay.
8. Order 40 Rule 1 reads: -

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

9. It is common ground that the first hurdle to be surmounted by the Applicant is to demonstrate a prima facie case with probability of success. On this the Court is unable to assess the merit of the Applicant’s case as the pleadings, proceedings and judgment of the lower Court have not been placed before me. Although the applicant states that she requested for these though a letter, no effort has been made to attach even handwritten copy of the proceedings or even the pleadings before the lower Court. The plea for injunction must therefore fail.
10. Turning to the application for stay, Order 42 Rule 6 reads: -

“Stay in case of appeal

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 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 order set aside.

2. No order for stay of execution shall be made under subrule (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.
 3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
11. No doubt, this application having been filed just 31 days or so after the Judgment was delivered, was filed without delay. But that is not enough. The Applicant must show that he/she will suffer substantial loss if stay is not granted.
 12. Here, the applicant put out her land out as collateral for money borrowed. It was always within the contemplation of the parties to the credit contract that the charged property would be sold in the event of default. The charged property therefore took a merchantable character, available for sale in the event of default. Even if the exercise of the power of sale was eventually found to be faulty, still the applicant will not be without a remedy because, by virtue of section 99(4) of the *Land Act*, damages are a possible pursuit.
 13. There is then an agreement made by the Applicant that the lis pendens rule should operate in her favour to preserve the suit property in the life of the Appeal. This type of argument has been made and tested previously. The consistent answer by the Courts has been that the rule cannot operate in respect to the exercise of a charge Statutory Power of Sale (See for example *Approtech Services Limited v Savings & Loans Ltd* [2001] LLR 1498 and *Al-Jalal Enterprises Ltd v Gulf African Bank Ltd* [2014] eKLR).



14. I must, eventually, find the entire application of 8th December 2020 to be without merit. It is hereby dismissed with costs.

DATED AND SIGNED THIS 11TH DAY OF NOVEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

