



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. E082 OF 2021

EZEKIEL KIPROTICH MANO.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(Being an appeal from the Ruling of the Honourable R. Odenyo, Senior Principal Magistrate Court

dated 13th July, 2021 in the Chief Magistrate's Court at Eldoret, Civil Case No. 814 of 2019)

Coram - Hon. R. Nyakundi, Judge

M/s J.C. Chumba & Company Advocates for the Appellant

G & A L.L.P. Advocates for the Respondent

RULING

PROCEDURAL LITIGATION HISTORY: -

The procedural appeal concerns the refusal by the trial magistrate to grant an injunction to the intended appellant in the context of a commercial claim based on a charger/ chargee - agreement and a guarantorship on the whole of that sale property known as **Uasin Gishu/Kimumu/138**. The trial magistrate summary of the background of facts proclaimed himself that the applicant/ intended appellant did not qualify for the relief of the injunction. The Applicant being aggrieved with those findings has preferred an appeal to this court. At present in order to forestall any further action, a notice of motion expressed under Section 3 & 3A Order 40, 42 and Order 51 Rule 1 seeks a substantive relief of stay of execution of that ruling pending the hearing and determination of the intended appeal.

In support of the application is an affidavit sworn by the applicant in addition to the grounds of the motion dated 22nd July, 2021 which comprise of the following: -

- a. That the Appellant/ Applicant filed the suit in the Chief Magistrates Court on the 24th day of September, 2019.**
- b. Accompanying the suit was Appellant's application for temporary injunction dated the 18th day of September, 2019.**
- c. The Application was heard and determined and the honorable Senior Principal Magistrate R. Odenyo delivered his Ruling dismissing the Appellant's Application on the 13th day of July 2021.**
- d. Being dissatisfied with the findings and the ruling of the court, the Appellant lodged this appeal.**
- e. The Appellant has an arguable appeal with high prospect of success.**
- f. The Appellant is the registered proprietor of the Land Parcel Uasin Gishu/Kimumu/138 measuring 5 acres, having acquired it from the Kimumu Settlements Scheme and having been in possession for over 40 years.**
- g. The Bank charged the said Appellant's property illegally and by fraudulent means, as the Appellant never executed any Charge or Guaranty instrument and hence no relationship was ever established between the Bank and the Appellant.**

h. Despite immediate protests by Appellant with the assistance of the then District Officer who clearly informed the Bank that the Appellant had not consented and ordered revocation of transaction in relation to the Appellant's Title Deed and immediate production of the Respondent Customer on the Bank to transact by himself alone, the Bank went ahead and charged the Appellant's property based on a disputed Power of Attorney to charge.

i. The intervention by the District Officer with the assistance of the C.I.D. was done before the property was charged.

j. The Ruling of the Honourable Senior Principle Magistrate did not consider the Appellant's rights and interests over his property but went ahead to suggest to the Respondent that it should dispose of the property immediately.

k. The Ruling of the Honourable Senior Principle Magistrate is extremely prejudicial to the Appellant.

l. The Appellant stand to suffer irreparable damages unless the order of temporary injunction to restrain the Respondent from disposing of the Appellant's property known as Uasin Gishu/Kimumu/138 measuring 5 acres are issued.

m. The Respondent will not suffer any prejudice since the Appellant does not have any power in the current circumstances to temper with the current status of the property.

n. That it is in the interest of justice that the temporary injunction be issued to preserve the Appellant property until this appeal is determined.

o. That this Appeal and the entire suit in the Chief Magistrate Court Eldoret, would be rendered nugatory unless the orders sought are issued.

p. That granting the orders sought herein will occasion the swift delivery of justice upon the parties.

q. That granting the orders sought herein will not cause adverse effects upon any of the parties to this suit.

r. That this application is brought in good faith

The Respondent bank vehemently countered the averment by the Applicant/ intended appellant in a replying affidavit filed in court on 4th August 2021 by the remedial manager Michael Mwita who invited the court to appreciate the chargor/ chargee loan agreement which resulted in the applicant's property being offered as security for the loan. For instance the deponent averred that the loan amount as applied for was advanced to the debtor on the strength of the security identified as **Uasin Gishu/Kimumu/138**. This was to provide the necessary safeguards in the event of default of the terms and repayment modules agreed with the borrower. It was the Respondent's contention that the statutory power of sale had arisen against the security in order to liquidate the loan amount.

As the undisputed facts demonstrate one Lazarus Kiplimo Kemboi approached the Respondent Bank for credit facilities in the form of an overdraft payable within the terms stipulated in the letter of offer dated 8th April, 1993. The effect of the letter of offer was the incorporation of security Title Deed No. Uasin Gishu/Kimumu/138 which was to stand in the event of the default by the borrower. Apparently that is how the Applicant/ intended Appellant found himself in the mix of this commercial transaction between the borrower and the Respondent Bank. The remedial instrument for the overdraft facilities was his parcel of land offered as collateral Security to the Bank to secure the monies applied for and advanced to the borrower.

That being the case alongside other matters the proceeding in the primary court constitute the validity and or otherwise the exercise of the statutory power of sale as provided for under Sections 90, 91 and 92 of the Land Act 2012. The Judicial pronouncement by the trial magistrate was that the interlocutory remedy of injunction to stop the Respondent Bank from exercising the statutory power of sale was not available to the Applicant/ intended Appellant. That dismissal order of the ruling on 22nd day of July, 2021 became the trigger of the intended appeal simultaneously with a notice of motion for stay of execution.

In canvassing the issues touching on the notice of motion I take note of the affidavits, the written submissions by the respective counsels to concretize in brief the position of the law in such matters. That effort though not wholly reproduced in this interlocutory ruling is indeed appreciated. What is questionable is whether the Applicant/ intended Appellant qualifies to be granted the remedy of stay of execution pending the hearing and the determination of the appeal

DETERMINATION: -

The approach to the determination of the notice of motion on the issue of stay of execution is to be found in the language of Order 42 Rule 6 of the Civil Procedure Rules. As a general principle the court is mandated to do whatever it thinks judiciously appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the rights of the parties to a litigation, desirous of pursuing the right of appeal. There is no limitation on what the court can do. However, the drafters of Order 42 Rule (6) of the Civil Procedure Rules thought it fit to provide threshold conditions to guide the court in exercise of its discretion to do justice to the parties. As derived from the letter and spirit of the rule the following conditions must be met by the Applicant for him or her to succeed in the grant of this equitable remedy on stay of execution:-

a. An application for a stay ought to be filed without undue delay.

b. The Applicant must demonstrate evidentially an element of substantial loss.

c. Sufficient good cause for the remedy of stay of execution against a valid judgment or ruling.

d. That if the relief on stay of execution is declined the appeal may be rendered nugatory.

e. That the intended appeal has high chances of success.

Notwithstanding this condition precedents the formula which will provide effective interim relief in the particular circumstances of each case is in the realm of the courts judicial discretion. Not only can the courts enlarge old remedies, it can also invent new ones to secure and vindicate the breached rights of the parties. Anything less would mean that the court itself instead of being the protector of rights, defender and guarantor may be guilty of serious betrayal of the Constitution. From the above paraphrased Order 42 Rules 6 of the Civil Procedure Rules it is clear beyond peradventure that an appeal shall lie from the decision of the Lower Court through the High Court as of right unless limited by statute in which leave must be sought before an appeal is filed. There is no doubt the constitution and the statute on Civil Law confers a specific right of appeal to parties aggrieved by the decision of the Lower Court to this court as part of its jurisdiction mandate. To my mind an appeal on interlocutory ruling/ order before the conclusion of a substantive claim is unique as it does not delve into the merits of the dispute. It is my considered opinion that the Provisions of Order 42 Rule (6) on stay of execution should be given a harmonious reading in such a manner so that an appeal from an interlocutory decision of a lower court should be dealt with swiftly in a sense not to render the main suit nugatory. It is rare unless on jurisdictional issues and on point of law that interlocutory reliefs may be capable of settling the claim as between the disputants with finality.

That now takes me to the competence of the grounds advanced in the notice motion as infused with the provision of Order 42 Rule (6) of the Civil Procedure Rules. To start with it's my impression the notice of motion was brought by the applicant without undue delay. It is also borne in mind that the entire scheme of Order 42 Rule (6) of the Civil Procedure Rules on stay of execution conditional or unconditional is granted entirely at the discretion of the court. With all discretionary powers an appeal court is always loath to interfere with the way a lower court exercises its discretion but would be compelled to interfere if the discretion was wrongly exercised, or was tainted with some irregularity, in breach of the law or the court finds that it is in the interest of justice to interfere (See University of Lagos -Vs- Aigoro (1985)1NWLR and Nzeribe -Vs- Dave Engineering Company (1994) 8NWLR 124). There is no dispute though not sitting on appeal the Applicant is inviting this court to scrutinize the impugned ruling and its standing on account of competing interest of the parties to the litigation. A panoramic view of the grievances in the memorandum of appeal dated 22nd July, 2021 by the Applicant/ intended Appellant hinges on the exercise of discretion by the trial magistrate in making definitive findings at an interlocutory stage which is a preserve of the issues in the main suit. The court therefore has to have a legal eye-view to consider the prospect of the intended appeal succeeding in the context of an application for stay of execution. It cannot be overemphasized that any claimant or litigant in approaching any judicial or quasi-judicial forum has a legitimate expectation of being accorded a fair hearing as stipulated under Article 50 (1) of the Constitution which provides that: -

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body”

In the earlier proceedings that was the forum of conveniens providing wide judicial discretion whether or not the Applicant had a suited claim against the Respondent Bank. It has to be acknowledged where the discretionary power allows the court to dismiss an interlocutory claim it is much better to indicate whether there are any pending jurisdictional issues in the main suit. This is to give a quick insight to the parties as to whether the interlocutory application compromised or collapsed the suit in general. In its broader setting due process is a legal requirement that the trial court must respect in the context of a suit in law and the elements of interim conservatory or injunctive orders. In a way regardless of the outcome of the intended appeal there is a catch-all guarantee that an interlocutory decision does not affect the determination of the entire suit on the merits. There is a clear division in the adjudication of disputes that interim orders on stay, conservatory and injunctions are measures to preserve the subject matter of the suit to give way for arguments and evidence to adjudicate the issues in the main suit by the court with a view to render final judgment. In the case at bar based on procedural law there are limitation founded on the impugned ruling for the Applicant to pursue his legitimate aims as pleaded in the plaint? Without undermining the potentiality and critical recourse on appeal to an extent, that is the impression one gets from the memorandum of appeal. Typically therefore there is a possibility that interlocutory applications unless properly thought through can limit access to justice by denying a litigant a recourse to an independent tribunal on the merits. As a central pillar of this application I am of the view that the intended appeal consists of expressions indicative of issues with high prospects of success.

The other identifiable condition to be satisfied by the Applicant is on proof that he would suffer substantial loss which could not be compensated in damages. As noted in (Kenya Shell Limited Vs. Kibiru (1986) eKLR 410). **Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore without the evidence it is difficult to see why the Respondents should kept out of their money. What sort of laws would this be? In an application of this nature the Applicant should show the damage it will suffer if the order of stay is not granted see also (James Wangalwa & Another -Vs- Agnes Naliaka CA No. 42 of 2011)**

Essentially the intended appeal is not practically about money decree, but at the very onset the effect of the trial magistrate dismissing the interim measure of temporary injunction gives way for the Respondent Bank to exercise the statutory power of sale. A perusal of the order does manifest that implication. It is clear from the reading of the impugned ruling that there is nothing specific in the averment contained in paragraph 11, 12, 15 and 17 of the Plaint. The plaint involved determination of issues of prescription in a claim of restitution of rights in property to the Applicant and a further issue on award of damages. As the matters stand it looks very unlikely that the Respondent bank would be estopped from proceeding in exercising the statutory power of sale under the Land Act 2012. Thus if it is the Respondent's view that the ruling disposed of the case with finality without evidence being led on the issues on the pleadings per se, that to me amounts to serious substantial laws to the Applicant. It is a rule of fair trial rights that no order shall be made for the court to determine the case and pronounce judgment which appears to make the trial an academic exercise or an abortive trial.

“The right to equality of arms or the right to truly adversarial proceedings in civil and criminal matters forms an intrinsic part of the right to a fair hearing and means that there must at all time be a fair balance between the prosecution, plaintiff

**and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-à-vis his or her opponent.”
(see Eur. Court HR, Case of Brandstetter -Vs- Austria, Judgment of 28th August 1991, Series A, No. 211 P. Para. 68”.**

In the instant case there are special circumstances which turn on the right to a fair trial which when viewed from the record exhibit proof of substantial loss that may be otherwise result if the court does not pronounce itself on the fate of the suit filed by the Applicant. The usual cause I take in this matter is to stay any eventuality of the ruling by the trial court pending an appeal so as not to cause irreparable injury to the Applicant. He may be ruined without knowing whether his suit is bad in law in the event the Respondent Bank initiates the statutory power of sale. In relation to security for due performance of the decree I hold the view that it is dependent upon the outcome of the appeal and subsequent declaration in respect to the pending suit.

DECISION:-

For the reasons above this court accepts submissions of counsel for the Applicant intended Appellant and consequently grants the notice of motion dated 22nd July, 2021.

DATED, SIGNED AND DESPACHED VIA THE EMAILS AT ELDORET THIS 1ST DAY OF DECEMBER, 2021.

R. NYAKUNDI

JUDGE