



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. NO. 10 OF 2019

KAPSOEN ESTATES LTD.....1ST APPLICANT

AUGUSTINE K. ARAP CHERUIYOT.....2ND APPLICANT

VERSUS

DAVID KURGAT.....RESPONDENT

RULING

1. This ruling is in respect a Preliminary Objection dated **29/7/2019** and filed in court on **30/7/2019**. The Preliminary Objection is brought by the plaintiffs and raised the following grounds:

- (a) That this court has no jurisdiction to entertain this application on the ground that the respondent is seeking to execute a money decree issued in Kitale CMCC No. 463 of 2016 being a claim for a refund of a purchase price on account of a failed sale agreement.
- (b) That this application is an abuse of the due process in that the original appeal file No. 58 of 2018 exists and yet the applicant is making a multiplicity of miscellaneous while he disobeys valid court orders with impunity.
- (c) That the applicant has failed to meet the overriding objectives of the Act as he has not deposited any bit of the decretal sum as ordered in Kitale CMCC No. 463 of 2016 and yet he continues to seek orders for stay from his court.
- (d) That the orders of Hon. Justice Chemitei forwarding the application for stay to this court is not an excuse for another separate miscellaneous application to be filed.

2. The background to the Preliminary Objection is that the applicants herein filed a Notice of Motion dated **22/6/2019** pursuant to **Article 159 (2) of the Constitution of Kenya, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 rule 1 of the Civil Procedure Rules** and seeking the following orders:-

- (1) ...spent
- (2) That The court be pleased to grant an order of interim stay of execution of the judgment dated **18/10/2017** to the extent that no further proclamation and/or attachment further proclamation sale of the items listed in the auctioneers proclamation notice or any other property belonging to the applicants pending the hearing of this application *inter partes*.
- (3) That the court be pleased to grant an order of stay of execution of the judgment dated **18/10/2017** to the extent that no further proclamation and/or attachment further proclamation sale of the items listed in the auctioneers proclamation notice or any other property belonging to the applicants pending the hearing and determination of the notice of motion dated **26/11/2018**.
- (4) Costs of this application be provided for.

3. The grounds relied upon are that an application dated **26/11/2018** seeking stay of execution of the judgment in this suit was heard and determined and it was ordered by the High Court that the matter be referred to this court but the interim orders were not extended and the respondent has issued proclamation notices dated **19/6/2019**, and the applicants, who had preferred an appeal against the Magistrate's Court Judgment being **Kitale High Court Civil Appeal No. 34 of 2017** are exposed to irreparable loss unless interim orders are granted.

4. The application is supported by the supporting affidavit of the 2nd applicant sworn on **22/6/2019** amplifying the above grounds.
5. On **19/9/2019** the applicants filed replying affidavit sworn by their advocate on record on **16/9/2019** in reaction to the notice of preliminary objection.

The Respondent's Submissions on Preliminary Objection

6. In support of the Preliminary Objection the respondent filed submissions on **11/10/2019**.

Determination

7. I have considered the application, the preliminary objection, the affidavit filed in response to the preliminary objection and the respondent's submissions.

8. The main issue that arises in the instant application is whether the stay of execution orders sought should issue pending the hearing of the notice of motion dated **26/11/2018**.

9. For clarity it is necessary to set out what the notice of motion dated **26/11/2018** seeks. It seeks the following:-

(a) ...spent

(b) That there be a temporary stay of execution of the court's order of 5/11/2008 from the applicant's application dated 16/10/2018 pending the hearing and determination of tis application interpartes.

(c) That here be stay of execution of the court's court of 5/11/2018 pending the hearing and determination of the applicant's appeal Kitale Civil Appeal No. 34 of 2017.

(d) That this court be pleased to set aside orders issued by the trial court in Kitale CMCC No. 463 of 2016 on 5/11/2018 with regards to the application dated 16/10/2018 pending the hearing and determination of this application.

(e) That this court be pleased to make its own findings and make appropriate orders.

(f) That this court in exercise order (e) above be pleased to grant an order directing the applicants to deposit his original title deed as a security deposit pending the hearing and determination of Kitale Civil No. 314 of 2017.

(g) That this court be pleased to have custody of the above mentioned title and the commitment pending hearing and determination of the appeal therein.

(h) That this court be pleased to grant stay of execution pending the hearing of this application.

10. The background to that application is that another application dated **16/10/2018** had been filed seeking inter alia review of the ruling of the Magistrate's Court in **Kitale CMCC No. 463 of 2018**. In that application the applicant had sought that as an alternative to paying the decretal sum of **Kshs.10,000,000/=** he be allowed to deposit a title deed as security pending the hearing and determination of the applicant's appeal in **Kitale Civil Appeal No. 34 of 2017**. This application was made on the ground that the applicant was not able to pay the decretal amount and that the title offered as security was worth **Kshs.15,000,000/=** which was over and above the decretal sum. This application was declined hence the application dated **26/11/2018** in the High Court.

11. In a ruling on the application dated **26/11/2018** the High Court observed that it would not go into the merits of the application on the ground that it is this court which is with the jurisdiction and that that application can be canvassed in this court. It therefore ordered that that application be transferred to this court for determination. That ruling is dated **3/4/2019**.

12. The instant application dated **22/6/2019** arises out of apprehension in the part of the applicants that execution of the lower court decree would be levied against the applicants before the application dated **26/11/2018** is heard. As evidence of the risk of execution two documents are appended in the instant application: the Proclamation Notice issued by Lifewood Traders Auctioneers dated **19/6/2019** and the Invoice of the same date.

13. I have considered the preliminary objection I disagree with the respondent's assertion that this court has no jurisdiction to entertain the instant application sought. The instant application only seeks to have stay of execution pending the hearing and determination of an earlier application that was transferred to this court by the High Court and which is yet to be heard on the merits. For clarity the preliminary objection raised regarding jurisdiction is not in respect of the earlier application.

14. I find that the application dated **26/11/2018** having been transferred to this court it is upon this court to hear and determine whether the same has merit. It is clear that the High Court never extended the interim orders in respect of that application. That application would be rendered nugatory if stay orders were not issued pending its hearing and determination. The assertion in limb No. (d) of the preliminary objection that the transfer of the application to this court is not an excuse for filing of another miscellaneous application such as the instant application is misguided for indeed there is no other manner in which the applicants could have sought to secure their position pending the hearing of the earlier application save lodging the instant application.

15. For the foregoing reasons I find all the four limbs of the preliminary objection are not merited and I hereby strike it out with costs to the applicants.

Dated, signed and delivered at Kitale on this 21st day of January, 2020.

MWANGI NJOROGE

JUDGE

21/1/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio holding brief for Akenga for Applicant

N/A for the Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

21/1/2020