REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 95 OF 2019

PAMELA ADHIAMBO GOGO

t/a ALPHA JOLI HARDWARE.....APPLICANT/APPELLANT

VERSUS

KENYA WOMEN MICROFINANCE LTD.....RESPONDENT

(Being an appeal from the ruling and order by Hon. M. Obiero, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 101 of 2019 delivered on 02/08/2019)

RULING

1. This ruling is in respect of a Notice of Motion application evenly dated and filed on 28/08/2019. The Appellant/Applicant sought the following orders: -

> **(1) THAT this application be certified urgent and the same be placed before the Judge and be heard ex-parte on priority basis in the first instance.**
>
> **(2) THAT an order be made for stay of executing the orders of the Hon. Magistrate M. Obiero for sale of property known as KAMAGAMBO/KABUORO / 8658 by 1/9/2019 pending the hearing of the main suit and the Appeal.**
>
> **(3) THAT cost of this Application be provided for.**

2. The application (hereinafter referred to as '**the stay application'**) was premised on the grounds appearing on its body and is supported by the Affidavit of the Applicant herein sworn on 28/08/2019.

3. The Respondent strenuously opposed the stay application through a Replying Affidavit sworn by its Regional Manager one Charles Odingo on 02/09/2019 and filed in Court on 03/09/2019.

4. The stay application was heard by way of oral submissions where Learned Counsel **Mr. Roche Odhiambo** appeared for the Applicant and Learned Counsel **Mr. Singei** appeared for the Respondent.

5. The brief background to the stay application is that the Applicant filed *Migori Chief Magistrate's Court Civil Case No. 101 of 2019* (hereinafter referred to as '**the suit'**) against the Respondent. The suit related to some financial transactions between the parties which had culminated in the threat of the sale of the Applicant's parcel of land known as *Kamagambo/Kabuoro/8658* (hereinafter referred to as '**the land'**). The land was used as a collateral over the monetary advancements by the Respondent to the Applicant. The land was encumbered by way of a legal charge.

6. The Applicant had filed the suit together with an interlocutory application by way of a Notice of Motion dated 14/05/2019. I will henceforth refer to the Notice of Motion as **'the injunction application'**).

7. The Plaint in the suit sought the following prayers: -

> **(i) An order that the Plaintiff be provided with Loan Account statements by the defendants regarding the transaction between the parties herein a stated herein above.**

(ii) An order of the taking/reconciliation of accounts to ascertain the position of the loan facilities to the Plaintiff by the defendant

(iii) An order of temporary injunction restraining the defendants their agents and or employees from selling the collaterals i.e. KAMAGAMBO / KABUORO / 8658 and properties attached on 27/3/2019 pending the hearing and determination of this suit.

(iv) Cost of this suit.

(v) Any other or further relief this Hon. Court may deem fit to grant.

8. On the other hand, the injunction application sought the following orders: -

1. That this Application be certified as urgent and be heard ex-parte in the first ionstance.

2. That an order be made restraining the KENYA WOMEN MICROFINANCE BANK by themselves, agents, or any other person and in particular auctioneers from selling or in any other way disposing of properties known as KAMAGAMBO / KABUORO / 8658 and other properties attached by the respondents/defendants on 27/3/2019 pending the hearing of this application the suit inter partes.

3. That there be an order for taking / reconciliation of accounts in respect of my personal A/C/ No. [...] and a loan A/C statement and other statements be rendered to me by the Defendants / Respondents covering the whole duration from the month of May 2014 todate.

4. That after the taking / reconciliation of Accounts and provision of Loan Account Statement from May 2014 todate further directions be given by this Hon. Court resulting from the taking / reconciliation of Accounts.

5. That cost be provided for.

9. The injunction application was opposed. It was heard by way of written submissions. The injunction application was set for highlighting of submissions where **Mr. Roche Odhiambo** appeared for the Applicant and **Mr. Abisai** appeared for the Respondent. The Applicant's Counsel informed the court of a pending application which sought to restrain Mr. Abisai from representing the Respondent. The court overruled the Applicant's Counsel resulting with Mr. Odhiambo protesting and refusing to take part in the highlighting of the submissions. The court decided the injunction application on the basis of the written submissions then on record.

10. The ruling on the injunction application was rendered on 02/08/2019. The injunction application was dismissed and costs ordered to be in cause. The Applicant was however given 30 days within which to deposit one-half of the outstanding loan amount which the court stated to be Kshs. 1,500,000/=. In default the sale of the land was to follow.

11. That was the ruling that elicited an appeal. The Applicant filed a Memorandum of Appeal evenly dated on 28/08/2019. She raised 15 grounds of appeal. She also filed the stay application. The status quo in this matter was maintained by an order of ***Karanja, J*** made on 04/09/2019.

12. The foregone is the background to the stay application.

13. As said, the stay application was argued *inter partes*. The Applicant's Counsel submitted that the appeal was intended to challenge the impugned ruling which ordered the Applicant to pay the sum of Kshs. 1, 500,000/= which the court strangely described as '*one-half of the outstanding loan'*. Counsel argued that the impugned ruling did not take into account cardinal issues raised by the Applicant and that the court erred in dismissing the injunction application. To the Applicant, there was no basis of the alleged sum ordered to be paid since the outstanding balance was yet to be established.

14. The Applicant's Counsel further submitted that if execution of the impugned ruling was to continue then immense and substantial loss shall occasion to the Applicant. Counsel pointed out that the Applicant and the Respondent had been involved in many financial dealings and for a long time and that it was imperative that the parties do reconcile their transactions. To that end the Applicant submitted that it was imperative that she be supplied with a Loan Account Statement which she had all along requested in vain. The Applicant took issue with the statement produced by the Respondent. She deponed that being a former Bank employee she was well aware of how Loan Account Statement was and its contents. She vehemently protested that the statement which was produced fell far short of the contents of a Loan Account Statement. She raised a red flag.

15. The Applicant contended that she had made several payments which were not captured in the disputed statement. The Applicant posited that she was ready out to take further steps towards settlement of the matter upon undertaking the reconciliation exercise. To her, the Respondent is not keen to render the statement but intent on executing in a case where the Respondent fell short of coming out clean.

16. Counsel submitted that any execution which takes place before settlement of the issues raised shall be premature and the Applicant shall loose the land which comprises of her sole homestead. That amounts to substantial loss. Counsel referred to several decisions in buttressing his submissions.

17. **Mr. Singei** for the Respondent opened his submissions by declining the jurisdiction of this Court. He submitted that this Court is not properly seized of the jurisdiction as the stay application was, in the first instance, supposed to be filed before the lower court courtesy of

Order 42 Rule 6(2) of the **Civil Procedure Rules**.

18. Counsel further submitted that if the Court finds that it has the jurisdiction over the stay application then it ought to note that the Applicant has so far failed to comply with the impugned ruling requiring the deposit of Kshs. 1,500,000/=. The maxim '*he who wants equity must do equity'* was cited. Counsel submitted that the Respondent had legitimate expectation that the law will be complied with.

19. On the issue of substantial loss, Counsel submitted that the land is quantifiable such that if the Applicant finally succeeds the Respondent will not find any difficulty in making good the value. Counsel also submitted that the statements produced by the Respondent were not challenged by the Applicant who remain indebted to the Respondent. Counsel further submitted that the Applicant had not requested for any statements from the Respondent and that there was no basis to infer refusal by the Respondent to avail the statements.

20. It was finally submitted that the stay application amounted to seeking an injunction through the back door. The Respondent also referred to several decisions in support of its submissions.

21. In a rejoinder, the Applicant submitted that the Court is properly seized of the jurisdiction and that she had legitimate expectation that she will be given a hearing as enshrined in the **Constitution**. She decried the need for the reconciliation exercise.

22. I have carefully perused and considered the stay application alongside the parties' submissions, the lower court record, the impugned ruling and the several decisions referred to by the parties. I fully understand the nature and gravity of the stay application and I will address the issues and the law hereinbelow.

23. I will start with the issue of jurisdiction. The source of a Court's jurisdiction was aptly discussed by the **Supreme Court of Kenya** in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

> ***A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings … where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.***

24. On the need for a Court to, at the earliest possible opportunity, ascertain that it is seized of jurisdiction before it deals with a matter further, the Court of Appeal in **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction: -

> ***So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.***

25. I recall to have previously dealt with the jurisdictional aspect of the High Court in respect to Order **42 Rule 6(1)** of the **Civil Procedure Rules**. As I still hold that position, I will reiterate what I stated in a ruling in **Migori High Court Civil Appeal No. 27 of 2017 South Nyanza Sugar Company Limited vs. Joshua Ondara Ondigi (2017) eKLR.** I rendered myself thus: -

> *12. ….. **Order 42 Rule 6(1)** of the Civil Procedure Rules is tailored as follows: -*
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> ***'6(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 y 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 od stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have order set aside.***
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> *13. The above provision provides two important aspects of stay of execution applications. The first one relates to the original and special jurisdiction of the High Court to entertain an application for stay of execution when a like application was initially heard in the lower court but disallowed. In such a case the High Court, although sitting as an appellate Court, is vested with such a special and original jurisdiction in law to consider a like application regardless of the fact that the earlier one was disallowed by the court appealed from. Therefore, the* [filing of the] *application before the High Count will neither be caught up by the doctrine of res judicata nor be regarded as an abuse of the process of the Court.*
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> *14. The second aspect relates to what happens when the court appealed from allows the application for stay but the Applicant or Respondent is aggrieved by that order. In such a case, an Applicant is still at liberty to file a fresh application before the High Court or the Court appealed to or may apply to vary or set-aside that order. An aggrieved Respondent may also apply to the Court appealed to for setting aside such an order.*
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> *15. It is however important to take note of the conduct of an Applicant who is granted a conditional stay in the court appealed from*

and fails to comply with those orders and instead rushes to the Court appealed to and files a fresh application. The Court appealed to cannot just close its legal eyes to what happened before the court appealed from. What happened before the court appealed from forms part of the record of the Court and the Court appealed to must consider that background in light of the fresh application. In such a scenario, the Court of Appeal has pronounced itself that such a party is in clear abuse of the process of the Court. The Court in the case of ***Patriotic Guards Ltd v James Kipchirchir Sambu (2017) eKLR*** *held as follows: -*

> ***'As we have already shown in this ruling the applicant applied for, and was granted by the trial court a stay of execution pending appeal. A condition was given in that the entire judgment sum be deposited in an interest earning account in the name of the advocates of the parties. That condition has not been met by the applicant and no explanation has been offered why the applicant has not complied with the condition. The applicant chose to apply for a stay of execution of the judgment of the trial court and received favourable orders by that court but instead of complying with orders given chose to file an application for stay of execution to this Court. Although we recognize that we have our jurisdiction on such an application, is original we cannot be blind to the fact that an applicant who is armed with orders of a lower court but who chooses to file a similar application for stay of execution may very well be abusing the process of the court…...'***

16. The Court of Appeal in dealing with that aspect further in the case of ***Hunker Trading Company Limited v. Elf Oil Kenya Limited (2010) eKLR*** *stated as follows: -*

'As stated above, no notice of appeal has been lodged in this Court against the order of stay of execution on terms given by (Koome, J) which order although granted on different grounds to those applicable to an application for stay of execution in this Court and the order has since lapsed, this is a factor which this Court cannot fail to take into account because the non-compliance with the order has a bearing on the provisions of Section 3A of the Appellate Jurisdiction Act. Moreover, the disobedience of the order in our view has an impact on the management of the Court resources.

Sections 3A and 3B of the Appellate Jurisdiction Act and also in the context of the High Court section 1A and 1B of the Civil Procedure Act, have in the recent past generated what appears to have the markings of enlightened jurisprudence touching on the management of civil cases and appeals and therefore as the sections have been extensively reproduced in many recent decisions we need not reproduce them here except the material part in the Act because the two sets of sections are in pari materia. Section 1A (3) of the Civil Procedure Act reads: -

> *'A party to civil proceedings, or an advocate for such party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the direction and, orders of the Court.'*

As the applicant has admitted having failed to comply with the order of stay by (Koome, J) we find that it is in breach of section 1A (3) of the Civil Procedure Act and also section 3A (3) of the Appellate Jurisdiction Act.

We do not think that the fact that the orders has since lapsed has in any way eroded the relevance of the disobedience of the order to the operation of the overriding objective. The thrust of the applicant's application to this Court under Section 3A is substantially to seek similar orders to those he was granted in the superior court and failed to obey. Under section 1A (3) the applicant has a duty to obey all court processes and orders.

In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another r case has been baptized the (double "O" principle") and in this case, we have chosen to call it ("the O2 or the oxygen principle") because it is intended to re-energise the processes of the court's and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this court's resources (time) and also an abuse of its process. The fact that the notice of appeal under rule 5(2)(b) and is directed at the judgment of (Lesiit,J), would still not take the matter outside the provisions of Section 3A which is a provision of an Act of Parliament.

As the applicant did not appeal against the order of stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of Rule 5 (2) (b) and Section 3A and is therefore incompetent. The order of stay of execution on terms was subsequent to the decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to tis Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources.

The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O2" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court."

17. *Although the foregone decisions of the Court of Appeal dealt with stay of execution applications under the Court of Appeal Rules, the legal arguments and findings therein encapsulate the applicable principle in law on stay of execution applications made before the court appealed from and the court appealed to hence to that extent the decisions are binding on this Court.*

26. This Court therefore has the jurisdiction to entertain the stay application regardless of the fact that no such application was filed before the lower court.

27. I will now deal with the question as to whether the stay application is merited. I have already reiterated the provisions of Order **42 Rule**

6(1) of the **Civil Procedure Rules**. Indeed, there are three conditions to be satisfied for the grant of a stay of execution order in an appeal to the High Court. The conditions are that the Applicant must demonstrate that she will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree.

28. The Applicant has decried that unless the stay order is granted she will suffer substantial loss. The Applicant does not deny that she has been in financial dealings with the Respondent. She also does not deny that she received some financial advancements from the Respondent. Further, the Applicant admitted indebtness to the Respondent. The only point of departure was the extent of such indebtness.

29. From the documents exchanged between the parties which formed part of the injunction application the Applicant was intent on amicably attending to the matter long before she filed the suit. Even on filing the suit, the pleadings sought for among other documents the Loan Account Statement so as to enable the Applicant carry out a reconciliation exercise to determine her indebtness to the Respondent. The position was the same in the injunction application.

30. The Applicant was a Banker. She took issue with the statement which was availed by the Respondent. She categorically denied that the statement was a Loan Account Statement for various reasons. She raised various issues which she could not get answers in the statement which was supplied but the answers lie only in a Loan Account Statement. Unlike the submission by **Mr. Singei** that the Applicant had not requested for the Loan Account Statement from the Respondent there is ample evidence to the contrary. The Applicant has therefore not been supplied with the Loan Account Statement and as such several questions remain unanswered. Her indebtness to the Respondent has equally not been ascertained.

31. The essence of supplying a Loan Account Statement was dealt with by the Court of Appeal in **Nairobi Civil Appeal No. 282 of 2004 Margaret Njeri Muiruri v. Bank of Baroda (Kenya) Limited (2014) eKLR**. The Court discussed the issue as follows: -

> ***31. Which leads us to the third issue raised in the appeal; whether the bank supplied statements of accounts to the appellant. Such statements would have been crucial to answer the following questions which loudly cried out for answers: what is the amount of money that was advanced to the borrower or drawn by the borrower from the Bank on the loan and current accounts respectively? When were such advances or drawings done? What interest rate was applied by the Bank and for what periods? What is the amount outstanding on the loan and current account and how was it made up? The statements would have shown a distinction between the loan account and the overdraft account; what charges were being levied on each of the accounts, any commissions charged, and the interest component of the outstanding balance.***
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> ***32. The "statements" produced before the High Court which counsel for the Bank described as 'reconstructed' did not supply the answers to those questions. Indeed they raised more questions than they answered. They were not only "indecipherable " but also wanting. The appellant in her testimony stated that she could not understand how the amount being demanded could have risen to Kshs. 200 million and characterized the bank's demand as robbery.***
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> ***33. The Bank's witness, however, who would have shed light on the matter compounded the situation when he stated:***
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> > ***'The current account the central agencies overdrew the following it is running account the amount drawn up to 1990. The amounts are too many I cannot now tell. I need time to add. The total amount repaid, it is only interest that we were recovering. Looking at page 4, there are credits in respect of interest payment. When at end of month we debit account if it is not paid it accrues more interest. If payment is made we credit account. There were payments made but I cannot now say I don't have total.'(emphasis added)***
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> ***34. The learned trial judge was herself disturbed when she observed that:***
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> > ***'The plaintiff in her evidence stated that the rate of interest charged by the defendant to be "robbery" and the court is of view that indeed considering the amount of the facility, of Kshs. 6 million and the amount now being claimed by the defendant being close to Kshs. 200 million that the rate of interest not only is it exorbitant but is … morally wrong."***
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> ***This state of affairs was unacceptable. By the time the suit was filed in the High Court in the year 2000, the computer age was with us. Surely, the bank was under some obligation to provide accounts that were clear, and that were a true representation of all charges, commissions and rates that were loaded onto those accounts, as well as showing the number of times the appellant was making repayments to offset the debt. This was clearly not the case here. The appellant was not even sure at what point the interest was increased. One way of shedding light on the matter would have been to provide these accounts. The appellant's claims, on their own, provided a basis for which the court ought to have ordered the respondent to provide a statement accounts and we hold that the trial court was in error in rejecting the prayer for accounts.***

32. The Court of Appeal in the said matter decreed the Bank *'to supply the client with detailed statements in relation to both the loan and current accounts from the inception of both accounts showing all debits and credits and interest rates charged at different times so as to arrive at the balance claimed by the Bank to be outstanding on each account'.*

33. My Lordships in the aforesaid matter went further to decree that '*in default of compliance by the Bank, the appellant and the estate of the deceased shall stand discharged from all claims by the Bank.'*

34. The foregone analysis defines the importance of a Loan Account Statement.

35. Having established that the Loan Account Statement requested by the Applicant is yet to be supplied one hand and in view of the demand and possible realization of the land as the security on the other hand by the Respondent, I am satisfied that the Applicant has proved the first

condition.

36. As to whether there is delay in filing the stay application, I must find in the negative. The impugned ruling was rendered on 02/08/2019 and the stay application was filed on 28/08/2019. I have as well seen various correspondences between the Applicant's Counsel and the court on the supply of the proceedings and the ruling.

37. As to the security, the land is still legally encumbered in favour of the Respondent.

38. As I come to the end of this ruling, I must state, and without prejudice to the parties' rights, that this is a matter which the parties may easily sort out if they so wish to. An exchange of the documents followed by a meeting(s) is more likely to resolve all the issues. That is a calling under **Article 159(2)(c)** of the **Constitution**. I am not sure if the parties shall benefit from the expediency of amicably settlement if they opt to litigate before Courts. I therefore urge the Counsels and the parties herein to consider the foregone.

39. This Court finds that the Applicant has satisfied the conditions for grant of the orders sought and in the end makes the following final orders: -

> **(a) There shall be a stay of execution of the ruling and orders of the Hon. Obiero, PM made on 02/08/2019. For avoidance of doubt, the Applicant shall not pay the decreed sum of Kshs. 1,500,000/- neither shall the Respondent exercise its right to realize the parcel of land known as Kamagambo/Kabuoro/8658 pending the determination of this appeal.**
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> **(b) The Appellant shall file and serve the Record of Appeal together with her written submissions within 30 days. Once served, the Respondent shall file and serve its written submissions within 14 days of service.**
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> **(c) The appeal is hereby fixed for highlighting of the written submissions on …../03/2020.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of February 2020.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Roche Odhiambo Counsel instructed by the firm of Messrs. Odhiambo & Co. Associates Advocates for the Applicant.

Mr. Singei Counsel instructed by the firm of Messrs. Abisai & Company Advocates for the Respondent**.**

Evelyne Nyauke – Court Assistant.