



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCA NO. E005 OF 2020

MARGARET JOSEPHINE AKOTH OLOO.....1ST APPELLANT

MOSES CLIPCLAP MUKHAYA2ND APPELLANT

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....1ST RESPONDENT

PHILMARK SYSTEM SERVICES LIMITED.....2ND RESPONDENT

RULING

1. Through the application dated 18th March 2020, the Appellants/Applicants seeks the following orders: -

1. Spent

2. Spent

3. That the honourable court be pleased to issue an order restraining the 1st respondent either by itself, employees, servants, agents, instructed auctioneers or whosoever acting on its behalf from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by public auction or private treaty, taking possession or exercising any power of a charges or lease, let, charge or otherwise howsoever interfere with the applicants' ownership and title to all those parcels of land known as L.R No. NAIROBI/BLOCK 72/934 in the name of MARGARET JOSEPHINE AKOTH OJOO on the one hand and title number KJD/OLCHORO ONYORE/16396 and L.R. CLIPCAP MUKHAYA on the other hand pending the hearing and determination of this appeal.

4. That the honourable court be pleased to award the costs of this application to the applicants.

2. The application is supported by the 1st applicant's affidavit and is premised on the grounds that: -

1. That the 1st respondent has, through Legacy Auctioneers, scheduled a sale by public auction of the subject properties for 26th March 2020 allegedly in exercise of its statutory power of sale as a chargee.

2. That the said purported statutory power of sale does not exist for being founded on invalid charge instruments which are forgeries.

3. That the requisite mandatory statutory notices under the Land Act as well as the Auctioneers Act have not been properly or at all issued.

4. That the alleged debt owing from the 2nd respondent for which he purported statutory power of sale is sought to be exercised is in any event not covered by the term of facilities alleged to have been granted to the 2nd respondent an alleged to be secured by the appellants.

5. That the alleged debt owing to the 1st respondent from the 2nd respondent has in any case been paid to the full extent.

6. *That the appellants are not privy to the extra facilities granted to the 2nd respondent for which they are now called upon to pay.*
7. *That the 1st respondent to sell the subject properties without first carrying out a proper valuation as required by law.*
8. *That the 1st respondent clandestinely transacted with the 2nd respondent without any reference to the appellants with regards to the debt now alleged to be owing.*
9. *That all these matters were raised by the appellants before the Chief Magistrate's Court as evident from the application dated 3rd January 2020 and the annexures therein but the same were not properly considered hence this appeal.*
10. *That the appellants moved the Chief Magistrate's Court at Milimani in Civil Suit No. 6 of 2020; Margaret Josephine Akoth Ojoo & Another V African Banking Corporation Limited & 2 Others filed on 3rd January 2020 together with an application of the same date presented under certificate of urgency.*
11. *That the appellants stand to suffer irreparably unless the Honourable court grants the orders sought.*
12. *That the appellants' appeal herein also stands to be rendered a pure academic exercise unless the orders sought herein are granted.*
13. *That no amount of damages will be adequate to compensate the appellants if the orders sought are not granted and the appeal herein is ultimately successful.*

3. The 1st respondent opposed the application through the replying affidavit of one **Kajuju Marete** who avers that there is nothing new in the present application as the applicants only seem to be regurgitating the issues that they argued before the lower court. He further states that the application has been filed out of time.

4. Parties canvassed the application by way of written submissions which I have carefully considered.

5. The main issue for determination is whether the applicants have made out a case for granting of orders of injunction pending appeal.

6. Courts have held that in considering an application such as this, the test applicable is the same as that for stay of execution pending appeal as stated under Order 42 Rule 6(6) of the Civil Procedure Rules which stipulate as follows:

“(6) Notwithstanding anything contained in sub rule (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.”

7. In the celebrated case of **Madhupaper International Ltd v Kerr** [1985] eKLR, the Court of Appeal held as follows: -

“The test we have to apply to this particular application to this court is whether or not the company has made out its claim for an injunction to preserve its property until the appeal is heard” or is it an application which ought to fail because the appeal is frivolous or it would be worse for the company if this court's discretion is not exercised in favour of the company the receivers re-enter and the powers of the directors are stifled which may or may not affect any litigation thereafter in which the company is involved through curiously enough none of the advocates mentioned this one way or the other.”

8. In the present case, as opposed to the above cited case, the applicants challenge, through the appeal, the decision by the trial court not to grant them orders of injunction pending the hearing and determination of the suit. It is to be noted that the decision on whether or not to grant orders of injunction vested on the trial courts discretion based on the facts that were presented before it. For this reason, this court will not deliberate on the merits of the decision of the trial court as that is an issue to be canvassed in the pending appeal. Of concern before this court is whether a case has been made for the granting of orders of injunction pending appeal.

9. Under Order 42 Rule 6 of Civil Procedure Rule, an applicant for orders of stay of execution must establish that: -

- a) He will suffer substantive loss if the order of stay is not granted.
- b) That he has filed the application for stay of execution timeously.
- c) That he is willing to provide security.

Substantive loss.

10. The applicants' case was that they will suffer irreparable loss of the suit property which has been scheduled for sale by public auction unless the orders sought are granted. It was the applicants' position that the pending appeal will be rendered nugatory unless the orders sought are granted. In **Madhupaper International Ltd Case** (supra) the Court of Appeal held that where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant an applicant an injunction pending appeal so as to prevent the appeal from being rendered nugatory. A similar position was taken in **Erinford Properties Ltd v Cheshire County Council** [1974] 2 ALL ER 448. The applicant

for injunction pending appeal must also demonstrate that his case fits the criteria set in *Giella v Cassman Brown Co. Ltd* 1973 E.A. 358, **wherein it was held:** -

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

11. In the present case, I find that the applicants have demonstrated they will lose the suit property if the intended sale by public auction is allowed to proceed. I am therefore satisfied that the condition for substantive loss has been met.

Delay

12. I note that while the impugned ruling was delivered on 7th February 2020, the instant application was filed on 18th March 2020, less than 2 months after the said ruling. I find that in the circumstances of this case, the application was filed timeously.

Security.

13. The applicant did not offer any security as a condition for the orders of injunction pending appeal sought. Needless to say, the respondents claim is that there was default in the repayment of the loan facility that precipitated the 1st respondents exercise of the statutory power of sale.

14. Going by the 1st Respondent’s Courtesy Notice dated 31st August 2020, the outstanding loan balance stands at Kshs 23,399,296.03. It was the 1st respondent’s case that the said balance continues to accrue interest at the contractual rates.

15. I note that besides their claim that they were not privy to the alleged extra loan facilities, were not served with statutory notices, that the loan had been paid fully and that valuation had not been carried out the applicants did not demonstrate the loan had actually been repaid in full. That they were willing to settle the outstanding sum due.

16. For the above reasons, I find that in order to give the applicants and opportunity to ventilate their appeal, it will in the interest of justice that that the orders for injunction be granted but on condition that the applicants deposits, as security, the outstanding loan due in an interest earning account in a financial institution of repute to be held in the joint names of counsel for both parties, within 60 days from the date of this ruling failure of which the orders of injunction shall be deemed as vacated.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th day of October 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Malanga for the 2nd respondent and for Chimei for the Appellants

Mr. Mugisha for the 1st respondent

Court Assistant: Silvia