

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 43 OF 2017

LANDMARK PORT CONVEYORS LIMITED.....PLAINTIFF

VERSUS

BUZEKI ENTRPRISES LIMITED.....DEFENDANT

&

NIC BANK (K) PLC.....OBJECTOR

RULING

This matter has a long history and the record shows that there are several rulings that have been delivered relating to the issues in dispute herein. Several facts are not in dispute in this matter. There is a judgment in favour of the plaintiff against the defendant herein. Parties have attempted to settle the matter without success. Execution proceedings are in place but for reasons that appear on the record, the decree has not been satisfied. There is an application for stay of execution filed by the objector herein which is yet to be determined by the Court of Appeal. There is also an application by the auctioneer to obtain police assistance in the execution of the decree. It is also not in dispute that the objector has lodged an appeal to the Court of Appeal following the decision of the high court dismissing the objection proceedings.

On 17th December, 2019 this court observed that there is an application by the objector for stay of execution, but that having filed a Notice of Appeal in the Court of Appeal, it was not for this court to consider whether or not the intended appeal is arguable. Consequently, this court gave an order for stay of execution for 30 days to allow the objector file an application for stay of execution in a Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules within the same period. The court further ordered that any further stay orders shall be in the province of the Court of Appeal. It is not in dispute that indeed the objector filed an application before the Court of Appeal for stay of execution. However, the objector has returned to this court and filed an application dated 12th February, 2020 seeking an order that there be a stay of execution of the decree pending the hearing of the application before the Court of Appeal, being No. 1 of 2020. That application is opposed by the plaintiff and replying affidavits have been filed to that effect. The auctioneer has also objected to that application.

The court also allowed the defendant to file an affidavit in reply to the auctioneer's application. The question that arises is whether or not this court has jurisdiction to entertain this matter, having ceded any deferred the proceedings to the Court of Appeal. The objector and the plaintiff have filed submissions and cited some authorities which I have considered. The Notice of Appeal filed by the objector has been accepted by the Court of Appeal and that in itself confirms there is a pending appeal before that court. Further there is an application No. 1 of 2020 before the Court of Appeal under rule 5 (2) (b) of the Court of Appeals Rules.

Section 34 of the Civil Procedure Act provide as follows,

“34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.”

My understanding of the above provision is that a party need not file a separate suit to address the matters contained in this section. On the contrary all such matters shall be addressed by the same court under the same suit.

I have considered the authorities cited by counsel in this matter and observed that some are by the High Court with concurrent jurisdiction. Such cases may only be of persuasive value. These include **James Juma Muchemi & Partners Limited vs. Barclays Bank of Kenya Limited (2011) e KLR, Aviation & Allied Workers Union vs. Kenya Airways Limited & 3 Others (2013) e KLR.** In those cases the court held that the High Court retains jurisdiction notwithstanding the fact that a notice of appeal has been filed in the court of appeal. In **Adiel Muriithi Philip vs. Thomas Maingi (2017) e KLR** the Court of Appeal held that the high court had jurisdiction to deal with the matter concerning execution of the decree notwithstanding the fact that the notice of appeal had been filed in the Court of Appeal.

In the instant case, the objector has not only filed a Notice of Appeal but also an application for stay of execution in the Court of Appeal. Further to the foregoing, this court has already determined the objector's application for stay of execution dated 2nd December, 2019 and made appropriate orders therein. In that regard therefore, the application for stay of execution by the objector has been determined. The present application by the same party which is dated 12th February, 2020 is therefore not new neither is it a review of the orders made in the earlier application.

In my view, this court is now divested of any jurisdiction to address any matter that has moved from the High court to the Court of Appeal. To do so would be assuming a jurisdiction that is not grounded on any law or procedure. I am not persuaded that I have any right whatsoever to delve into any application relating to proceedings in the High court as I consider this court *functus Officio* in respect to any matter relating to the dispute.

In view of the foregoing, I decline to make any order as sought by the objector in the application dated and filed on 12th February, 2010. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 7th Day of May, 2020.

A. MBOGHOLI MSAGHA

JUDGE