



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

HCCC NO. 300 OF 2012

AFRITRACK INVESTMENTS (E.A.) LTD.....PLAINTIFF

-VERSUS-

JANE WAMUYU MWAI.....DEFENDANT

CONSOLIDATED WITH NO. 235 OF 2014

WAINAINA & KARIMI ADVOCATES.....PLAINTIFF

-VERSUS-

AFRITRACK INVESTMENTS (E.A.) LTD.....DEFENDANT

RULING

Introduction

1. This ruling is in respect to two applications namely:

a) The application dated 18th October 2019 wherein the plaintiff in HCCC 300/2012 seeks an order for stay of proceedings pending the hearing and determination of an appeal.

b) Application dated 16th December 2019 wherein the plaintiff in HCCC 235/2014 seeks orders for inhibition to restrain any dealings in the suit property.

2. Parties canvassed both the applications concurrently by way of written submissions

3. Through an earlier application dated 19th February 2019, the applicant (Afritrack Investment E.A. Ltd) sought orders to transfer the consolidated suit (HCCC 300 of 2012 and 235 of 2014) to the Environment and Land Court (ELC) for hearing and determination.

4. In a ruling delivered on 18th July 2018, this court declined to grant the orders to transfer the suit to Environment and Land Court. Aggrieved by the said ruling, the applicant filed an appeal vide Civil Appeal No. 453 of 2019. Application dated 18th October 2019

5. After filing the appeal, the applicant (Afritrack) filed this application seeking orders of stay of proceedings pending the hearing and determination of the appeal.

6. The application is supported by the affidavit of the applicant's advocate Mr. Stephen Oyugi Okero and is premised in the on the ground that the appeal will be rendered nugatory if the proceedings herein are allowed to continue as the crux of the applicant's case is that this court lacks the jurisdiction to hear and determine the suit. It is the applicant's case that should the appeal be successful, it will substantively and materially affect not only the hearing of the suit but also the forum. The applicant maintained that it will be in the interest of justice and the preservation of the integrity of the judicial process that the proceedings be stayed pending the appeal. Respondent's case.

7. The respondent (Jane Wamuyu Mwai) opposed the application through her replying affidavit dated 5th December 2019 wherein she states that the instant application, having been filed barely a few days to the date slated for the hearing of the suit, being 18th November 2019, was intended to delay and frustrate the speedy conclusion of the main suit.

8. She avers that the applicant is not entitled to the orders sought having failed to comply with the court orders of 28th October 2015. She accuses the applicant of causing numerous adjournments of the suit as it continues to enjoy the suit property that it has not paid for despite court orders to that effect. It is the respondent's case that the appeal is not arguable as the case before this court is purely commercial in nature.

9. I have carefully considered the application dated 18th October 2019, the respondent's response and the parties' submissions together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case for stay of proceedings pending the hearing and determination of the appeal.

10. Courts have taken the position that they will not stand in the way of a party pursuing his right to an appeal without just and sufficient cause. The appellant's right to appeal must however be balanced with the respondent's right to enjoy the fruits of his judgment and the overriding objective to ensure just and expeditious resolution of the disputes as envisaged under Article 159 of the Constitution. In *Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Ltd* [2015] eKLR the court observed: "What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of total sum of the circumstances of each case, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.

The court went further and stated that:

The Constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of law is informed by the principle of justice in Article 159 of the Constitution which expresses the now common principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order."

11. From the above cited case it is clear that the decision on whether or not to grant an order for stay of proceedings pending appeal is a discretionary one. Such discretion must however be exercised judiciously and only in the most deserving cases in order to facilitate just, expeditious, proportionate and affordable resolutions of disputes.

12. In the present case, the respondent argued that the applicant does not deserve the orders sought as it is guilty of laches and for occasioning numerous adjournments of the case when it was previously listed for hearing. The respondent listed the instances of adjournments as follows:

- i. 25th January 2018- hearing adjourned at Afritrack's insistence as their witnesses was out of the country.
- ii. 17th September 2018- hearing adjourned because Afritrack's witness was unavailable.
- iii. 14th January 2019- adjournment of hearing sought because Afritrack's witness was in the UK; and
- iv. 21st February 2019- hearing adjourned at Afritrack's changed its advocate on 19th February 2019 and filed an application to transfer the sought too the under resourced Environment and Land Court.

13. Considering the numerous instances of adjournments highlighted hereinabove, I find that the respondent's claim that the applicant is responsible for delaying the prosecution of the case is not far-fetched. I say so because even though the suits herein were filed in 2012 and 2014 respectively, it was not until 19th February 2019 that the applicant filed the earlier application to transfer the suits to the Environment and Land Court and even after the said application was rejected through the ruling delivered in 18th July 2019, it was not until 4 months later on 7th November 2019 that the applicant filed the instant application to stay the proceedings pending an appeal.

14. My further finding is that the delay exhibited by the applicant clearly negates the overriding objective envisaged under Section 1A of the Civil Procedure Act that requires the court to ensure just, expeditious proportionate and affordable resolution of civil disputes. I also note that it was not disputed that the applicant has been responsible for the numerous adjournments that have been made in the suit.

15. For the above reasons, this court is reluctant to grant the orders sought in the application dated 18th October 2019 more so considering the fact that the applicant has not complied with this court's orders issued on 28th October 2015 requiring it to deposit, in court, the sum of Kshs. 17,000,000/= together with interest.

16. Be that as it may and my above findings notwithstanding this court will in the wider interest of justice allow the application dated 18th October 2019 but on condition that the applicant complies with this court's said order of 28th October 2015 and deposits, in court, the balance of the purchase price being Kshs. 17,000,000 together with interest pending the hearing and determination of the appeal and the suit.

17. In conclusion, I make the following orders in respect to the application filed on 7th November 2019.

a)The application dated on 18th October 2019 is hereby allowed in the following terms.

- i. The applicant, Afritrack Investment (EA) Ltd shall deposit, in court, the sum of Kshs 17 million together with interest

within 30 days from the date of this ruling.

ii. In the event of failure to comply with order in (a) (i) hereinabove, the stay of proceedings order shall be immediately vacated and the respondent will be at liberty to fix the main suit herein for hearing.

b) The costs of this application shall abide the outcome of the main suit.
Application dated 16th December 2019.

18. Through this application, the plaintiff in HCCC No. 235 of 2014 (Wainaina & Karimi Advocates) seeks an order of inhibition to inhibit the registration of any dealings in the property known as LR No. 14902/18 (hereinafter "the suit property") situate in Nairobi until the hearing and determination of the suit herein.

19. The application is supported by the affidavit of the plaintiff's Managing Partner, Mr. Paul Wainaina Kimani, and is premised in the main grounds that: -

a) The plaintiff is a firm of advocates who shall suffer irreparable loss if the suit property is not preserved. The plaintiff seeks an order to inhibit any further dealings in accordance with Section 68 of the Land Registration Act pending the determination of the suit herein.

b) On 28th October 2015, Honourable Justice Farah Amin delivered a ruling directing the defendant purchaser to pay into court the sum of Kshs 17,000,000.00 together with interest at the rate of 18% per annum from 18th November, 2011, failing which a charge shall be lodged against the property, on terms to be decided after hearing submissions from the parties.

c) The defendant purchaser failed to make payment as directed by the court's ruling, and is currently in possession of the suit property together with the relevant title documents.

d) A recent official search over the suit property reveals that it is not charged hence there is an imminent risk that the defendant purchaser, Afritrack Investment will interfere with the subject property to the detriment of the applicant herein.

20. The application is supported by defendant in 300/2012, Jane Wamuyu Mwai, through the grounds in support of application wherein she sets out the following grounds: -

1. Afritrack has failed, refused and or neglected to comply with the court order dated 28th October, 2015 requiring it to deposit the sum of Kshs 17,000,000/= with interest in court.

2. Afritrack is enjoying the suit property, LR 14902/18, despite having failed to pay the aforesaid sum of money which was the balance of the purchase price.

3. Afritrack Investments E.A. Limited may take action by way of disposing off, selling, transferring, charging or otherwise alienating the suit property.

4. Jane Wamuyu Mwai stands to suffer irreparable loss unless orders are issued to preserve the suit property.

21. The defendant (Afritrack Investments) opposed the application through the grounds of opposition dated 15th January 2020 wherein it states that the application is defective, res judicata and bad in law as the court lacks the jurisdiction to entertain it.

22. At the hearing of the application, Mr. Kabugu, learned counsel for the applicant submitted that the application is merited as it seeks to protect the suit property which the respondent has not fully paid for yet it still holds the title documents. He submitted that Section 68 of the Land Registration Act entitles this court to grant orders of inhibition as the test applicable is similar to the test for issuance of orders of injunction.

23. In rejoinder, Mr. Manyara for the respondent submitted that the application is res judicata as the instant application seeks the very same prayers sought in an earlier application filed on 4th June 2014 wherein both Justices Amin and Gikonyo made substantive orders with respect to the prayers sought herein. Counsel further submitted that this court lacks the jurisdiction to entertain the suit as it falls under the purview of the Environment and Land Court.

24. Mr. Kabugu for the applicant submitted that the application seeks to enforce the previous orders of Amin J. which the respondent has not been complied with and that Section 2 of the Land Registration Act grants exclusive original jurisdiction to this court to grant order of injunction.

25. I have considered the rival submissions made by counsel in respect to the application for orders of inhibition. I note that it is not disputed that on 28th October 2015, Amin J. made the following substantive orders:

1. The defendant purchaser shall pay into court the sum of Kshs 17,000,000/- together with interest at a rate of 18% per annum together from 18th November 2011 until payment within 28 days (That is in variation of the Order of Honourable Gikonyo J.)
2. In the event that payment is not made a charge shall be lodged against the property, on terms to be decided after hearing submissions from the parties.

26. It is not in dispute that the said orders of 28th October 2015 have not been complied with to date.

27. My finding is that the issue of preservation of the suit property pending the hearing of the suit is an issue that had already been settled in the Ruling by Amin J. that I have already highlighted in this ruling. I find that the proper approach by the applicant should have been to pursue the enforcement of the said orders.

28. In sum, I find that the application dated 16th December 2019 is res judicata and I therefore dismiss it with no orders as costs.

Dated, signed and delivered via Skype at Nairobi this 5th day of June 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. Kabugu for the plaintiff in 235/2014

No appearance for the defendant

Court

Assistant:

Silvia