



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL CASE NO. 125 OF 2019**

**JANE TUITOEK KOECH.....APPLICANT**

**=VS=**

**SIMON KIPKOECH KWAMBAI & 3 OTHERS..... RESPONDENT**

**RULING**

1. The Applicant filed a Motion Application dated the 26<sup>th</sup> day of August, 2019 seeking for orders that this honorable court be pleased to hear the applicant's application filed herein during the High Court Vacation Rules.
2. The application is based on grounds that the high court is on vacation and the matter is urgent, the applicant shall suffer substantial loss if the application is not heard immediately and lastly, that the application has been brought promptly, in good faith and it is in the best interest of justice to all parties.
3. The application is based on the grounds that the applicant and the 1<sup>st</sup> respondent are husband and wife. That they purchased the suit land Tembeleo/Elgeyo Border Block 1 (KAPKEI) 44 measuring 4.13 Ha.
4. That she came to learn that the suit property herein was charged without being informed by the 1<sup>st</sup> respondent.
5. That she had no knowledge of the agreement between the her and the 1<sup>st</sup> respondent with regards to charging the property to the 3<sup>rd</sup> defendant for a loan facility of Kshs. 2,000,000.
6. The applicant is unable to comprehend why the suit property was charged and subsequently advertised for sale and sold to Ben Kiptum Ego and Evelyne Cheron.
7. She filed an application for injunction dated 20.6.2019 vide Eldoret CMCC E&L NO. 40 of 2019 which application was dismissed and stay orders earlier granted vacated.
8. Further, that she has filed an appeal against the said ruling which appeal raises serious issues of law and fact, with high chances of success.
9. Lastly, that the application has been brought without undue delay and that the applicant is willing to put up such security as the honorable court may order pending the hearing and determination of the Appeal.
10. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not file any response to the application. The 3<sup>rd</sup> and 4<sup>th</sup> respondent filed their grounds of opposition dated 26<sup>th</sup> June 2019 as follows: -
11. That the ruling and order of the trial court of 9<sup>th</sup> August,2019 dismissing the appellant's application dated 20<sup>th</sup> June, 2019 is negative in nature and that no stay order can issue against such negative order.
12. Secondly, that the present application does not meet the criteria set down under *Order 42 rule 6* of the *Civil Procedure Rules* and that the appellant have not demonstrated that she shall suffer substantial loss if stay is not granted.
13. The subject property is real property capable of being valued and any loss suffered by the applicant can easily be compensated.
14. Lastly, that the appellant has not demonstrated that she has an arguable appeal and neither has she offered any security for costs.
15. The 3<sup>rd</sup> and 4<sup>th</sup> respondents also filed a replying affidavit dated 16<sup>th</sup> January, 2020 and the grounds that the court dismissed the

appellants application dated 20<sup>th</sup> June, 2019 after the court found out that it lacked merit.

16. The appellant and the 1<sup>st</sup> respondent are husband and wife while the 2<sup>nd</sup> respondent is their daughter. The 3<sup>rd</sup> respondent bank advanced loan facilities to the 2<sup>nd</sup> respondent who secured a charge over the 1<sup>st</sup> respondent's property.
17. Before executing the charge, spousal consent was obtained. Her averments of fraud have never been reported to the police neither has she made a report of loss of title.
18. The instant application is a deliberate move by both the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents to frustrate the 3<sup>rd</sup> respondent's effort to recover its monies.
19. The suit property was sold through a public auction conducted on 3<sup>rd</sup> April, 2019 where one Ben Ego was declared the purchaser having been the highest bidder.
20. The issues being ventilated in the instant application and the appeal have already been determined by courts of competent jurisdiction and all subsequent suits are aimed at denying the respondents from enjoying the fruits of the judgment.
21. Lastly, that the property has already been sold to a third party who has not been enjoined to these proceedings and will be affected by any orders granted by the court in favor of the appellant.
22. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file any submissions. The 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that there is nothing arising out of the trial court's ruling to refrain or enforce by way of an injunction. The court never ordered either of the party to desist from doing anything in its ruling and thus did not make any enforceable order which is capable of being stayed.
23. The property was sold to a new purchaser in the exercise of its power of sale by the 3<sup>rd</sup> respondent and therefore there is no cause of action against the 3<sup>rd</sup> respondent as it was discharged at the fall of the hammer.
24. Lastly, that the instant application and the appeal is a clear case of abuse of the process of the court and largely res judicata and urged the court to decline the application by the appellant to re-litigate issues the court has already pronounced itself on.

#### **ISSUES FOR DETERMINATION**

a) Whether the Applicant has met the pre-requisites of Order 42 Rules 6.

25. Order 42 Rule 6 (1) & (2) provides as follows:-

*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 by 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 make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*2. No order of stay shall be made under sub rule (1) unless-*

*a. The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and*

*b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant*

26. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.
27. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal.
28. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal (Madan, Miller and Porter JJA)* whole considering an application of this nature had this to say:-

*i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

*iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may*

become available to the applicant at the end of the proceedings.

*iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

29. It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely;

**(a) Substantial loss may result to the applicant unless the order is made;**

**(b) The application has been made without undue delay;**

**(c) Such security as to costs has been given by the applicant.**

30. The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.

31. What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto** where it was held *inter alia* that:-

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by*

*itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni,.....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”*

32. In **Elena D.Korir vs Kenyatta University**, Justice **Nzioki wa Makau** had this to say:-

*“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.*

*In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd (2013) as follows:-*

*“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.*

33. The parcel of land in issue passed to a third party who is not a party in this application. If the intended appeal succeeds the process can be reversed. The purchaser would be affected adversely if the orders were to be granted; without him being accorded a hearing which is against the rule of natural justice.

A parcel of land carries a value, which loss can be adequately redressed by way of damages.

I therefore find the application unmerited and is dismissed. Cost be in the cause.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 14<sup>th</sup> day of September, 2020.**

In the presence of:-

Mr. Kagunza and Mukabane for the applicant absent

Khadambi for the 3<sup>rd</sup> respondent

Ms Gladys - Court assistant