



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCA NO. 005 OF 2020.

MOFFAT NYAGA KAGAU (suing as administrator of the estate of

EUSTACE KAGAU KANGERWE.....1ST OBJECTOR/APPELLANT

MARGARET MBOGO (suing as administrator of the estate of

GERSHON JOHN MBOGO2ND OBJECTOR/APPELLANT

WALTER NYAMU KARIUKI (suing as administrator of the estate of

JOSEPH KARIUKI NYAMU.....3RD OBJECTOR/APPELLANT

TERESIA GATURI NJOKA (suing as administrator of the estate of

JOSPHAT NJOKA MBIRIAL.....4TH OBJECTOR/APPELLANT

VERSUS

PATRICK ODUNDO OWITI

t/a COUSINS MOTOR WORKS.....1ST RESPONDENT

NEW EMBU UHURU GARAGE LTD.....2ND RESPONDENT

RULING

1. This ruling in respect to the application dated 20th January 2020 wherein the applicants/objectors seek orders as follows: -

1. Spent

2. Spent

3. Spent

4. That this honourable court be pleased to order a stay of execution of the decree dated 22nd January, 2019 and in particular to restrain any further execution by the plaintiff/Decree Holder and M/S Anfield Auctioneers, their servants, agents and/or employees with regard to L.R. No. 348 Embu township pending the hearing of the appeal.

5. That this honourable court be pleased to issue an order restraining the plaintiff/Decree Holder, its servants and/or employees from effecting any transfer of L.R. No. 269 Embu Township L.R. No. 270 Embu township, L.R. 347 Embu Township and L.R. 348 Embu Township to any party whatsoever pending the hearing and determination of the appeal.

6. That the costs of this application be provided for.

2. The application is supported by the affidavit the 2nd Objector, Margaret Mbogo, the Administratrix of the Estate of one Gershom John

Mbogo (deceased) and is premised on the grounds that: -

a) That the Objectors/Appellants came across an advertisement in the Star Newspaper dated 20th December, 2019 in which the interested party, M/S Anfield Auctioneers had advertised the sale of L.R No. 269 Embu Township L.R. No. 270 Embu township, L.R. 347 Embu Township and L.R. 348 Embu Township by public auction on 20th January 2020.

b) That the aforesaid properties proclaimed and advertised for sale are not the properties of the defendant/Judgment Debtor. The defendant/ Judgment Debtor is only a tenant in the aforesaid properties.

c) That as per the official search conducted at the lands registry in Embu;

· L.R. Number 269 Embu Township measuring approximately 0.025 hectares is registered in the names of Eustace Kagau, Muchiri Murangi, Peter Nyaga and Joseph Kariuki Nyamu, Gerishon Mbogo, Josphat Njoka, Kimata Kirari and Muriithi Waguna.

· L.R. number 270 Embu township measuring 0.025 hectares is registered in the names of Eustace Kagau, Muchiri Murangi, Peter Nyaga, Joseph Kariuki Nyamu, Gerishon Mbogo, Josphat Njoka, Kimata Karari and Muriithi Warura and David Karemere.

· L.R. Number 347 Embu Township measuring 0.1033 hectares is registered in the names of Eustace Kagau, Muchiri Murangi, Peter Nyaga, Joseph Kariuki Nyamu, Gerishon Mbogo, Josphat Njoka, Kimata Karari and Muriithi Wagura and David Karemere.

· L.R. Number 348 Embu Township measuring 0.136 hectares is registered in the names of Eustace Kagau, Muchiri Murangi, Peter Nyaga, Joseph Kariuki Nyamu, Josephat Njoka Gerishon Mbogo, Kimata Kirari and Muriithi Wagura and David Karemere.

d) That the proprietors of the properties are all deceased and therefore their share in the suit properties formed part of their respective estates.

e) That the defendant/Judgment /Debtor does not have any legal or equitable interest in the properties proclaimed and advertised for sale.

f) That the objectors'/appellants' application objecting to the sale of the properties is at risk of being rendered an academic exercise.

g) That the plaintiff/Decree Holder is a non-existent entity and that if the sale is allowed to proceed then the Objectors/Appellants would have no recourse in case the appeal is won as from the records at the registrar of companies the business name Cousins Motor Works is owned by one, Morris Osewe and not Patrick Odundo as indicated in the court papers.

h) That the decree being executed against the suit properties is as a result of a default judgment which judgment the defendant/Judgment Debtor has applied to set aside vide in an application dated 21st November, 2019. The said application is scheduled for mention on 21st January 2020 before the very same Honourable I. Orenge (SRM) for the purposes of taking a ruling date. The said application will also be an academic exercise in view of impending sale and refusal to grant interim orders of stay.

3. The Decree Holder/Respondent, **Patrick Odundo Owiti**, filed a replying affidavit in opposition to the application wherein he avers that he had for a long time, dealt with the Judgment Debtor and supplied it with spare parts but that during the period between 2017 and 2018 the Judgment Debtor refused to pay for the spare parts that had been supplied to it thus precipitating the filing of the suit before the Lower Court wherein default judgment was entered against the Judgment Debtor for Kshs 7,267,400.

4. He avers that he proceeded to execute the judgment by first conducting due diligence when he established that the Judgment Debtor owns properties known as Embu Township 347, 348 270 and 269 (hereinafter "**the suit properties**").

5. He states that he obtained orders to advertise and sell the suit properties but that through an application dated 21st November 2019, the Judgment Debtor unsuccessfully sought orders to stay the execution. He further states that following the dismissal of the application dated 21st November 2019, the Judgment Debtor, through persons purporting to be legal representatives of its previous shareholders, filed another application dated 15th January 2020 purporting to be objectors but that the trial court declined to grant the orders sought after which the suit properties were sold by public auction on 20th January 2020.

6. He avers that the objector's application dated 15th January 2020 was fatally defective and that allowing the instant application will be tantamount to allowing the appeal.

7. He further states that since the suit properties have already been sold to a third party/purchaser, entertaining the instant application without the participation of the purchaser will be tantamount to condemning the purchaser unheard.

8. The respondent contends that the objectors have colluded with the Judgment Debtor to frustrate the execution process and have not come

to this court with clean hands for the reasons that: -

- a) *The 1st objector has not revealed to this honourable court that the Letters of Administration Intestate dated 17th December 2014 annexed as annexure R.G.2A were revoked on 5th May 2017 and that he has appealed against the said decision.*
- b) *The 2nd objector has not demonstrated to this honourable court that he has legal or equitable interest in the sold properties. The name of Gershom John Mbogo the estate in which the 2nd objector purports to represent does not appear anywhere in the certificate of leases.*
- c) *The 4th objector has not revealed to this honourable court that the letters of Administration dated 2nd March 2011 annexed as annexure R.G. 28 were suspended until the issue of validity of WILL is determined. The court declined to confirm the said Letters of Administration and suspended the same until the issue of validity of will is determined.*
- d) *The objectors have not disclosed to this court that EUSTACE KAGAU KANGERWE JOSEPH KARIUKI NYAMU & JOSPHAT NJOKA MBIRIAI were previous directors of the Judgment- Debtor and that they were holding the suit properties as trustees of the Judgment Debtor as evidenced by copies of certificate of lease annexed as R.G.5A. R.G.6A & 6B. R.G.7A & 7B and R.G.8A & 8B on the affidavit in support of the objectors' application.*

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

10. The main issues for determination are as follows:

- a) *Whether the objectors have made out a case for granting of orders of stay of execution pending appeal.*
- b) *Whether the prayer for stay of transfer of the suit property is available to the objectors herein.*

11. Before I consider the above issues, I find it necessary to comment on the 1st respondent's arguments on the procedure adopted by the objectors in filing the objection before the lower court. The 1st respondent submitted that the said objection proceedings did not comply with the provisions of Order 22 Rules 51,52 and 54 of the Civil Procedure Rules. My finding is that the issue of whether or not the objectors complied with the provisions of the Civil Procedure Rules in lodging their objection is an issue that can only be canvassed in the appeal and not in this application for stay of execution.

Stay of execution pending appeal

12. Order 42 Rule 6 of the Civil Procedure Rules (CPR) stipulates as follows on stay of execution pending appeal.

[Order 42, rule 6.] Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 to 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 for stay of execution 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 that 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(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.

13. In the present case, it was not disputed that the execution of the decree has already taken place and the suit properties sold at an auction as shown in the copies of Certificates of Sale attached as respondent's annexures "P.O.O. 10(a)- (d)" to the replying affidavit. My finding is that the respondent established, to the satisfaction of this court that the suit properties were sold to one **Mr. Ahamed Ali Gedi** on 20th January 2020. I therefore find that in the circumstances of this case, the prayer for stay of execution pending appeal has therefore been overtaken by events.

Stay of transfer

14. The applicants also sought orders to restrain the decree holder from effecting the transfer of the suit properties to the purchaser pending the hearing and determination of the appeal. It is however instructive to note that the said purchaser is not a party to these proceedings. It was not disputed that the suit properties were sold in execution of a lawful court decree and that the said sale has not been set aside. The question which then arises is whether the applicants have made out a case for the granting of an order to restrain the decree holder from transferring the purchased properties to the purchaser.

15. The objectors/applicants argued that the suit properties belong to persons who are deceased and not the judgment debtor, in which case, the estates of the deceased owners would suffer loss and the pending appeal rendered nugatory if the orders sought are not granted. It did not escape the attention of this court that the sale of the suit properties took place on 20th January 2020 which was the same day that the instant application was filed. Under the above circumstances, the applicants could not have been expected to know the details of the auction so as to be able to include the purchaser in the application.

16. When the application came up for mention for directions on 28th January 2020, the 1st respondent's counsel informed this court that the sale had already taken place whereupon the court made an order for the maintenance of the status quo pending the hearing and determination of the application. It is therefore not in doubt that the suit properties have not been transferred to the purchaser.

17. My findings on the issue of stay of execution notwithstanding, this court is of the view that it cannot ignore the pertinent questions revolving around the ownership of the suit properties in question which forms the backbone of the objection proceedings that are the subject of the appeal. I am of the humble view that these are questions that can only be answered in the appeal. For the above reasons I find that the justice of this case will require that the court stops the process of transfer of the suit properties to the purchaser, albeit temporarily, pending the hearing and determination of the appeal.

18. It did not also escape the attention of the court that the 1st respondent already has a decree in his favour and that he should not be stopped from enjoying the fruits of his decree without the provision of any security for the due performance of the decree. The 1st respondent also contended that the judgment debtor colluded with the objectors to delay the 1st respondent's realization of the fruits of the decree. This court of the humble view that in the circumstances of this case, the orders to stay the transfer of the suit properties will be on condition that the applicants deposit part of the decretal sum as security pending the appeal.

19. For the above reasons, I will allow the application dated 20th January 2020, albeit partly, as follows: -

a. That the plaintiff/Decree Holder, its servants and/or employees are hereby restrained from effecting any transfer of L.R No. 269 Embu Township L.R. No. 270 Embu township, L.R. 347 Embu Township and L.R. 348 Embu Township to any party whatsoever pending the hearing and determination of the appeal.

b. That the applicants shall within 30 days from the date of this ruling, deposit the sum of Kshs. 4 million in an interest earning account to be held by counsel for the objectors and judgment debtor in a financial institution of repute as security for the due performance of the decree.

c. That in the event of failure to comply with orders in no. (b) hereinabove, the orders granted in no. (a) above will stand vacated and the 1st respondent shall be at liberty to conclude the transfer of the suit properties.

d. That the costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered via Skype at Nairobi this 1st 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. Otieno for the Appellant/Applicant

Mr. Mwangombe for the Decree Holder/Respondent

Court Assistant: Silvia