



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO. 49 OF 2019

COOPERATIVE BANK OF KENYA.....APPELLANT/APPLICANT

VERSUS

TARAMUSI FRANCIS ONGOKI.....RESPONDENT

RULING

The appellant filed an appeal against the decision of the trial court in Eldoret CMCC no. 364 of 2017. The application herein seeks the following orders;

- a) Interim stay of execution pending the hearing of this application.
- b) This court set aside the orders of the trial court declining to grant orders of stay of execution pending the appeal.
- c) The court order stay of execution pending the hearing of the appeal.
- d) The court grant stay of further execution in Eldoret CMCC 364 of 2017 on condition that the entire decretal amount be deposited in a joint interest earning account in the name of both counsel.
- e) The respondent be ordered to meet the auctioneer's costs.
- f) Costs of this application be provided for.

APPLICANT'S CASE

The applicant submitted that the application herein is properly before the court. The respondent obtained judgment on 15/3/2019 and 30 days' stay was granted, the appellant filed the appeal and application for stay on 12/4/2019. Having put the process of execution on course rendered the application dated 12/4/2019 of no consequence having been overtaken by events and there was nothing to be canvassed during the inter parties hearing. The respondent responded to the application without disclosing that execution had been levied.

The applicant filed another application dated 24/4/2019 for stay in fear of the expiry of the stay granted until 20/4/2019. The trial court declined to grant orders on the ground that it amounted to an appeal to the application of 12/4/2019.

The application dated 12/4/2019 was overtaken by events and dispensed with on 30/4/2019.

The application dated 24/4/2019 was not heard on merit as it was rejected by the trial court. The order rejecting the same ought to be set aside as this court is clothed with jurisdiction to set it aside or order it be reheard.

The applicant relied on Order 42, Rule 6(1) and (2) of the Civil Procedure Rules and cited the case of Eldoret High Court Civil Appeal No. 83 of 2008, Kenya Fluorspar Company Limited v Moses Segite to buttress this point. It further relied on the case of Patrick Kalava Kulamba vs Philip Kamusu & Roda Ndanu Philip (Suing as the legal rep of the estate of Jackline Ndinda Philip (2016) eKLR.

The applicant submitted that it satisfies all the pre-requisites of Order 42 Rule 6. The decretal sum is kshs. 2,299,500/- plus costs of kshs. 217,956/- with interest. The respondent is a man of straw and will not be in a position to refund the decretal amount in the event that the appeal succeeds. In his replying affidavit he has stated that he is a man of means and annexed the title deeds of seven properties whose value have not been disclosed. In the circumstances the court cannot discern what amount is readily available. He has further disclosed that he has kshs. 3,000,000/- held by the bank but accounts held by the bank are subject to privilege and the bank cannot disclose the information on the account unless by order. The applicant has not been given any express authority to comment on the account.

Execution was levied on 20th April 2019 which was a Saturday; 21st April was a Sunday and 22nd April was Easter Monday. On 23rd April 2019 counsel for the applicant filed an application for stay and the same was rejected leading to the current application being filed hence the same was filed timeously.

The applicant is willing to have the entire decretal amount deposited in a joint interest earning account.

The execution was irregular as it was levied on a Saturday, which was a legal holiday. As per order 50 Rule 9(2) it is specifically excluded as a non-service day for notices where a proclamation notice is a notice under the rule. The respondent ought to bear the costs for the auctioneer owing to the illegal execution.

RESPONDENT'S CASE

The respondent filed submissions on 13th May 2019. The submissions on record are undated and unsigned.

The respondent submitted that there is no information before the court to make a finding that the trial magistrate did not exercise her discretion properly. The respondent cited the case of *Patrick Kalava Kulamba & Another v Philip Kamusu & Roda Ndanu Philip* (Suing as the legal rep of the estate of *Jackline Ndinda Philip (2016) eKLR*) to put forward the point that the application should not invoke the original jurisdiction of this court and therefore it is improperly before the court.

Prayer 6 is properly before the court and the respondent submitted that the fixed deposit account of kshs. 3,000,000/- that the respondent holds with the bank is beyond the decretal sum and there are ownership documents of various properties annexed as well. He further submitted that no substantial loss shall be occasioned if the applicant paid out the amount due to the respondent.

The respondent submitted that order 50 Rule 9 does not apply to execution proceedings which fall under order 22. That order does not exclude Saturdays and the particular Saturday was not a legal holiday.

He submitted that the applicant be made to pay half payment of the decretal sum and the other half be deposited in a joint interest earning account in the name of both counsels.

ISSUES FOR DETERMINATION

- a) Whether the prerequisites of Order 42 Rule 6 have been met.
- b) Who should meet the auctioneers' costs

WHETHER THE PREREQUISITES OF ORDER 42 RULE 6 HAVE BEEN MET

Order 42 rule 6(2) of the Civil Procedure Rules 2010 states;

(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.

Substantial loss

The burden of proof on whether the respondent will be able to reimburse the decretal sum falls on him upon any concerns raised by the Applicant that he is unable to do the same.

The court is guided by the finding in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* where the court held;

Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

The respondent has contended that he will be able to pay the decretal amount as per paragraph 9 of his replying affidavit. He has annexed a deposit form. He has also annexed pictures of various properties of his own. However, there are no valuation reports to ascertain the value of the properties attached. Further, the deposit form only shows that he deposited money but there is no bank statement to prove that the money is actually in the account.

In *Edward Kamau & another; v Hannah Mukui Gichuki & another [2015] eKLR* the court held;

I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not

possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.

The respondent should have filed an affidavit of means, availed current Bank statement and valuation reports for the properties. Having not done so, I find that he has failed to prove that he is in a position to reimburse the decretal amount if the appeal succeeds and in that regard the applicant may suffer substantial loss.

Whether the application was made without unreasonable delay

Given the chronology of events from the execution being levied on a Saturday to the application in the lower court being filed and rejected three days after the execution was levied, I opine that the application was made timeously. The execution was levied on 20th April 2019 and the application filed on 25th April 2019. It follows that the application was filed timeously.

Deposit of security

The applicant is willing to deposit the security in court. I find that given the failure of the respondent to prove that he will be able to reimburse the decretal amount in the event that the appeal succeeds and that the application was filed in time, it would be the best remedy for the situation. The applicant should deposit the decretal sum in a joint interest earning account in the names of both counsels.

To direct the application be heard afresh in the lower court is an option as per Order 42 rule 6 but in the interests of expediting justice, the order for the deposit of the decretal sum in a joint interest earning account is a better option.

WHO SHOULD MEET THE AUCTIONEERS' COSTS

Order 50 Rule 9 states;

(1) This rule applies to pleadings, notices, summonses (other than summonses on plaintiffs), orders, rules and other proceedings.

(2) Service shall normally be effected on a weekday other than Saturday and before the hour of five in the afternoon.

(3) For the purpose of computing any period of time subsequent to service outside the times specified in sub rule (2)—

(a) service effected after five in the afternoon on a weekday other than Friday or Saturday is deemed to have been effected on the following day;

(b) service effected after five in the afternoon on Friday is deemed to have been effected on the following Monday.

The respondent submitted that the rules to be applied are those of order 22. A perusal of order 22 indicates that there are no provisions as to service of a notice. Order 50 rule 9 deals with services other than summons on plaintiffs. A proclamation notice is by its very definition a notice. The respondent has not cited the provision in law that provides that notices can be served on Saturdays.

Order 50 Rule 1 provides;

Where by these Rules or by any judgment or order given or made, time for doing any act or taking any proceedings is limited by months, and where the word "month" occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months unless otherwise expressed.

It therefore follows that the execution proceedings as relied upon by the respondents are governed by *Order 50 rule 9*. The execution was irregular and I therefore order that the costs be met by the respondent. However, cost of the application will be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of July, 2019.

In the presence of;

Ms Koech for the Appellant/ Applicant

Mr. Choge holding brief for C.D Nyamweya for the Respondent

Ms Sarah - Court assistant