



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ENVIRONMENT AND LAND CASE APPEAL No. 34 OF 2019

GRANDPARK INVESTMENT LIMITED.....APPELLANT

VERSUS

GEORGE NG'ANG'A MANG'ARA.....RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. E.K. Usui,

Chief Magistrate) delivered on 5th December 2019 in CM Miscellaneous Application No. 15 of 2019

George Ng'ang'a Mang'ara v Grandpark Investment Limited)

RULING

1. Being aggrieved by the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. E.K. Usui, Chief Magistrate) delivered on 5th December 2019 in **Nakuru CM Miscellaneous Application No. 15 of 2019 George Ng'ang'a Mang'ara v Grandpark Investment Limited**, the appellant filed this appeal seeking setting aside of the said order. Simultaneously with the Memorandum of Appeal, the appellant filed Notice of Motion dated 16th December 2019 in which it seeks stay of execution of the said order together with proclamation arising therefrom pending hearing and determination of the appeal. Although prayers 2 and 3 of the application refer to an order issued on 17th May 2019 by Hon. B. Mararo, counsel for the applicant clarified that the said reference is an error. There was absolutely no dispute between the parties that the order referred to is that made by Hon. E.K. Usui, Chief Magistrate, on 5th December 2019.

2. The application is supported by an affidavit sworn by Simon Wahome Gitonga who describes himself as a director of the applicant. He deposed that the order made by Hon. E.K. Usui, Chief Magistrate, on 5th December 2019 in **Nakuru CM Miscellaneous Application No. 15 of 2019 George Ng'ang'a Mang'ara v Grandpark Investment Limited** was to the effect that the applicant herein did not demonstrate the matter before the subordinate court was not listed in the cause list of 17th May 2019 and consequently the learned magistrate found no good reasons to set aside the orders of 17th May 2019. He added that the orders of 17th May 2019 were to the effect that the respondent herein was granted leave to enter upon and repossess plot No. 221 Industrial Area Naivasha being the suit premises and further that the respondent appoints an auctioneer accompanied by the O.C.S Naivasha to assist in compliance with the order.

3. The deponent further deposed that proceedings in **Nakuru CM Miscellaneous Application No. 15 of 2019** arose from a determination in **Business Premises Rent Tribunal Case No. 15B of 2017** wherein the applicant's suit was dismissed and the respondent herein given the liberty to institute eviction proceedings. He added that part of the orders the applicant had sought in the application that was dismissed by the subordinate court was for release of the applicant's goods that had been seized by an auctioneer. That the applicant will suffer substantial loss if the goods are sold since it uses the goods to operate its bar and restaurant and further that the applicant is willing to pay rent and to give such security as the court will deem fit to order. The deponent did not however annex any single annexure to shed light on any of the matters deposed to.

4. The respondent opposed the application through his replying affidavit sworn on 27th February 2020. He deposed that Simon Wahome Gitonga the deponent of the supporting affidavit is not a director of the applicant. He annexed a copy of a certificate of search issued by the Registrar of Companies and dated 18th October 2019. He further deposed that the application is overtaken by events since the applicants goods were sold at a public auction held on 31st January 2020. He annexed a copy of a newspaper advertisement published on 24th January 2020 by Tango Auctioneers & General Merchants.

5. Counsel for the applicant conceded that indeed the auction sale had taken place but added that the applicant's property was sold for an unspecified sum of rent and that therefore the applicant will suffer substantial loss if the orders sought are not granted. Counsel further argued that the application has been filed without any unreasonable delay and that the applicant will abide by any order on security made by

the court.

6. On his part, the respondent argued that the deponent of the supporting affidavit is not a director of the applicant and that he has not exhibited any authority to swear the affidavit. He urged the court to dismiss the application.

7. I have considered the application, the affidavits and the submissions. The application seeks stay of execution pending appeal and is brought *inter alia* under **Order 42 rule 6 (2)** of the **Civil Procedure Rules, 2010** which provides:

6.(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 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

8. Consequently, an applicant seeking stay of execution pending hearing and determination of an appeal under the foregoing rule must satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. Although the applicant has not annexed copies of the pleadings that were before the subordinate court in **Nakuru CM Miscellaneous Application No. 15 of 2019 George Ng'ang'a Mang'ara v Grandpark Investment Limited** as well as a copy of the ruling and order made by the said court, it is manifest from the various positions taken by the parties that the application that was dismissed by the subordinate court was in addition to seeking setting aside, was also seeking release of the applicant's goods which had been seized by an auctioneer as well as entry and repossession of the suit premises. I am persuaded that the entry and repossession were effected. The applicant has in fact conceded that the goods were sold at a public auction. With those developments, it is clear that there is nothing left to be stayed and no substantial loss to be forestalled. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. The applicant having failed to demonstrate that it will suffer substantial loss if stay is not granted, Notice of Motion dated 16th December 2019 cannot succeed.

9. In view of the foregoing discourse, Notice of Motion dated 16th December 2019 is dismissed with costs to the respondent.

10. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April 2020.

D. O. OHUNGO

JUDGE