



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.138 OF 2018

ROSE JERONO TIREN.....APPELLANT/APPLICANT

VERSUS

ISAAC K. TALLAM.....RESPONDENT

ESHIKHONI AUCTIONEERS.....AUCTIONEER

RULING

1. The applicant moved this court vide an application dated 6.11.2018 seeking for the following orders:

(a) That the Honorable court do certify the application herein as urgent and dispense with service in the first instance.

(b) That pending hearing and determination of the application herein and the appeal, there be an order of stay of execution and sale of defendant's L.R No. Eldoret/Municipality Block 13/318.

(c) That in the alternative the court do retain the order of restriction on transfer obtained on the 18.5.2018 and registered against the property register pending hearing and determination of the appeal.

(d) That the costs of this application be provided.

2. The application was premised on the grounds that personal service was disputed, she had a credible defence; there was an error on record on representation and she would suffer irreparable loss if she loses her matrimonial home. She swore a supporting affidavit in support of her application and deposed that she was the legal owner of the suit land and that no personal service had been effected on her. The summons were just thrown in her compound. The ruling by the trial court determined the issue on injunction and not setting aside. She was willing to have her land offered as security and the land was appreciating in value. Further, she deposed that the court grants the orders sought in order to preserve the rule of law especially the right guaranteed by Article 50 of the Constitution.

Response

3. The respondent in his replying affidavit denied that the applicant had paid the loan. She could not dispute service since the process server testified and said the documents were delivered at her place of residence under her instructions, though she had avoided personal service at her Elgon View and Moiben homes.

4. The power to set aside an interlocutory judgment is discretionary depending on the circumstances of each case. The applicant's contention that the court fixes a reserve price is an admission of the debt owed to him. The draft defence is a sham and it does not raise triable issues. The loan agreements expressed the actions to be taken in the event of any default in repayment of the funds.

5. The applicant has not proved she may suffer irreparable loss. The property in question L.R No. Eldoret Municipality Block 13/318 the claim that it is a matrimonial property does not arise since she surrendered the same under the loan agreement. The provisions of *Section 101 to 104 of the Land Act 2012* does not apply to the transaction in question and also the Banking Act does not apply. In addition, the applicant was guilty of inordinate delay in bringing the application months after she was served with the Notice of entry of judgment since she knew she had no defence. In the event the court allows the application, she deposed that the amount of Ksh 7,500,000/= be deposited in court.

Auctioneers response

6. The deponent deposes that the application lacked merit, was frivolous and an abuse of the court process. The appellant had not met the threshold required for granting stay of execution and had not met the threshold for granting injunctive orders.

Submissions

Appellant/applicant's submission

7. The lower court had dismissed an application seeking to set aside an ex-parte judgment obtained by the 1st respondent and executed through the 2nd respondent. The appellant was dissatisfied with the same and filed an appeal. The appellant sought for orders of stay of execution of the decree pursuant to *Order 42 rule 6(1)* of the *Civil Procedure Rules*. The conditions are that the appeal has to be plausible, the court has to be satisfied that substantial loss may arise to the applicant and the applicant should offer such security as the court may order.

8. The 1st respondent had already sold the appellant's motor-vehicle registration no. KBR 523 T, she had also repaid all the monies borrowed and had copies of statements, receipts and valuation of the vehicle. The court issued a prohibitory order to the land and the appellant prayed that the same be upheld and be deemed as security for grant of stay of execution since the land valuation stands at Ksh 11,500,000/=. The court was referred to the Court of Appeal decision in **Butt v. Rent Restriction Tribunal [1982] KLR 417** where the court gave guidance on how to exercise discretion which ought to be exercised in a manner that wouldn't prevent an appeal.

9. In addition, the appellant urged that the purpose of stay of execution pending appeal was to preserve the subject matter so that the appeal is not rendered nugatory. The Court of Appeal decision in **Housing Finance Company of Kenya v. Sharok Kher Mohamed Ali Hirji & Anor [2015] eKLR** the court emphasized that an application involving a money decree, a stay of execution pending appeal may be granted so as to alleviate any undue hardship the applicant may suffer.

1st respondent's submission

10. It was their submission that the trial court was right in its ruling when it observed that the loan agreement and the addendum agreement was not disputed and that the payments made by the applicant were in relation to a separate transaction outside the loan agreement.

11. The court has discretion on whether to grant stay of execution which is provided for by *Order 42 rule 6(2)* of the *Civil Procedure Rules*. The appellant has not shown how she would suffer loss and how she would not be able to recover the decretal sum in the event the appeal succeeds, and neither has it been shown that the respondent is a man of straw and won't be able to refund the monies. In **James Wangalwa & Anor v. Agnes Naliaka Cheseto**, the court held that execution is a lawful process, which does not amount to substantial loss. In **Masisi Mwita v. Damaris Wanjiku Njeri [2016] eKLR** the court stated that the applicant had not addressed the issue of if the sum is paid, he may not recover it from the respondent.

12. In addition, the appellant's allegation that the property in question is matrimonial does not hold water since it was agreed the same could be sold in default of the loan repayment. In **Paul Muhoro Kihara v. Barclays Bank (K) Ltd (2001) 2 EA 420** the court held that:-

“once land has been given as security for a loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful as there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.”

13. Further the court could not amend an agreement that had been entered by the parties as prayed by the appellant, that the court do set a reserve price for the land. In **National Bank of Kenya v. Pipe Plastic Samkolit(K) Ltd & Anor [2001] eKLR the** Court of Appeal held that a court of law could not re-write a contract between parties.

14. The respondent urged that the application was made 5 days after judgment which was inordinate delay.

15. The appellant ought to have offered security as a condition for stay of execution, which she has failed. The restriction order was granted by the court on 17.5.2018 and the same was registered on 18.5.2018, this was made under *Order 22 rule 48* of the *Civil Procedure Rules* and it was to preserve the property pending the execution process and also to prohibit the applicant from dealing in the land in any way that would render execution futile. The 1st respondent urged the application be dismissed with costs.

Auctioneer's Submission

16. It was their submission that the appellant was seeking for orders of execution restraining the attachment and disposal of parcel no. L.R No. Eldoret Municipality Block 13/318 as well as temporary stay of sale and further execution by the Auctioneer.

17. The application was res-judicata in the sense that the appellant had filed a similar application in court on 16.7.2018 in Eldoret CMCC No. 321 of 2018, the grounds relied upon are the same, the said application was dismissed after being heard. The appellant has not raised any new aspect for determination by this court, in **Omondi v. NBK & Ors [2001] EA 177** the court held that:-

“if parties were allowed to go on litigating forever over the same issue with the same opponent before the court of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court then I do not see the use of the doctrine of res-judicata.”

18. In addition, the auctioneer had been joined in the suit without any leave being sought as provided for by *Order 1, Rule 14* of the *Civil Procedure Rules*. This was improper, wrongful, unjustified and a total ambush by the appellant.

Issues for determination

19. The court has evaluated the application, the responses, the submissions and authorities and has formed the following issues for determination.

- (i) Whether the application is res-judicata
- (ii) Whether the appellant has fulfilled the legal requirement to warrant grant of stay of execution.

20. The 2nd respondent has raised an issue on res-judicata which has to be determined first. *Section 7* of the *Civil Procedure Act* states as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

This simply means that the issues sought to be determined had been determined and it was between the same parties. The Court in the English case of ***Henderson Vs Henderson (1843-60) ALL E.R.378***, observed thus: -

“...where a given matter becomes the subject of litigation, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

21. The application dated 16.7.2018 is supported by an affidavit sworn by the appellant herself (pg 48-52 of the record of appeal). The court shall have to reproduce the reliefs sought in the application which were:

- (i) “That the honorable court do certify the application herein as urgent and dispense with service in the first instance
- (ii) An order of stay of execution restraining the plaintiff from selling, appropriating or in any manner dealing with the proprietary interest in L.R No. Eldoret Municipality Block 13/318 pending the hearing and determination of this application inter-parties and thereafter the main suit and/or further orders of this honorable court.
- (iii) An order setting aside the ex-parte judgment obtained by the plaintiff due to lack of service upon the defendant pending the hearing and determination of this application inter-parties and thereafter the main suit and/or further orders of this Honorable court.
- (iv) That there be temporary stay of sale and/or further execution by the auctioneer pending further orders of the honorable court.
- (v) That the honorable court do allow the defendant unconditional leave to defend the suit as per the annexed draft defence herein annexed.
- (vi) Further and/or in the alternative without prejudice to (c) above the court do fix a reserve price for the plaintiff to sell the defendant’s L.R No. Eldoret /Municipality Block 13/318.

It is the 2nd respondent’s position that the above application is a replica of the instant application and the same had been determined by the court. The court delivered its ruling in the above application on 2.11.2018 in which it dismissed it. The instant application and the above application are the same, only that one was filed in the trial court and the other in the high court. I do agree fully that the current application is Res-Judicata.

On the stay of Execution

22. *Order 42 rule 6(2)(1)* sets the conditions for granting the stay of execution, and provides as follows:-

- (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 applications.

23. The court in *Butt v. Rent Restrictions Tribunal 1982 KLR 417* held that:

“The general principle in granting or refusing a stay is that if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed.”

The court went further to state that:

“ It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

24. The applicant averred that she stands to suffer irreparable loss since the property is matrimonial in nature and also that its value is more than the amount the respondent alleges she owes. There is a valuation report for L.R Eldoret Municipal/Block 13/318 prepared by Prime Valuers. It shows the value of the property to be Ksh 11,555,000/= as at 18.7.2018 (pg 90-96 of the record of appeal). The amount in question as per the demand letter is Ksh 7,500,000/=. The sale or execution process had started and the same is a legal procedure. The record shows the 2nd respondent followed the procedure put in place by placing an advertisement and notifying the judgment debtor.

25. In addition, there is also a valuation report for motor-vehicle KBR 523 T whose market value is shown as Ksh 3,000,000/=. The applicant averred that the 1st respondent had already proclaimed and sold off the vehicle. The applicant stands to suffer irreparable loss if the land too is sold.

26. The court had delivered its ruling on 2.11.2018 and the application in question was filed on 7.11.2018, which is not inordinate delay in the circumstances.

Finding

27. This court's finding is that the current application for stay is res judicata as the same had been considered and a ruling delivered on 2nd November 2018. The right procedure would have been to appeal against the said ruling rather than filing a similar application before this court.

If a party offers a residential property as collateral for a loan, it is with full understanding that failure to repay the loan will lead to its sale by the lender to recover the loan amount. Such collateral is therefore reduced to a commercial property and the right of the lender cannot be curtailed on the said ground.

I accordingly find the application unmerited and is dismissed with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of October, 2019.

In the presence of;

Mr. Kibii holding brief for Mr. Angu for the Appellant

Mr. Mburu Maina for the Respondent absent

Ms. Abigael – Court assistant