



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 245 OF 2014

MATI MUGENDI LOYFORD.....PLAINTIFF

-VERSUS-

EQUITY BANK LIMITED.....DEFENDANTS

RULING

[1] The Notice of Motion dated **25 July 2016** was filed herein by the Plaintiff pursuant to **Sections 3, and 3A, as well as Section 63(c) and (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 42 Rule 6(1), (2)(a) and (b) of the Civil Procedure Rules, 2010** for orders that:

[a] (spent)

[b] The court do grant an order of stay of execution and sale against the Defendant to stop the sale by public auction of **LR No. 209/9071/62** located in **Nairobi West Miller Estate**, pending the hearing and determination of this application and pending the Appeal filed against the Ruling delivered herein on **1 April 2016**.

[c] The Applicant be allowed to deposit a sum of **Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000)** in the Respondent's loan account or with the Court pending the hearing of the intended Appeal.

[d] That the costs of the Application be provided for.

[2] The Application is supported by the Affidavit annexed thereto sworn by the Plaintiff on **25 July 2016**, in which he deponed that, being dissatisfied with the Ruling of **1 April 2016**, he intends to file an Appeal therefrom. In the meantime, the Defendant's agents are determined to proceed with the sale of the suit property as per the advertisement dated **11 July 2016**. He further deponed that the suit property is matrimonial property in which he resides with his family and that he has no alternative accommodation. The application was accompanied by an offer to deposit **Kshs. 1,500,000** pending the hearing and determination of the intended Appeal.

[3] By the time the application came up for hearing on **26 July 2016**, the Defendant had not filed either a Replying Affidavit or Grounds of Opposition in response. However, Counsel for the Defendant,

Mr. Busiega, was in attendance and he opposed the application and urged the Court to allow the

Defendant to exercise its statutory power of sale as no justification had been made to warrant a stay thereof. It was his contention that the Applicant had neither shown that he had an arguable appeal nor demonstrated that he will suffer substantial loss.

[4] The Application has been brought under **Order 42 Rule 6** of the **Civil Procedure Rules**, which provides that:

"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..."

while **Rule 6(2) of Order 42** provides that:

"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."

Accordingly, the Plaintiff is under obligation to demonstrate that:

[a] he stands to suffer substantial loss unless the stay order is made;

[b] that the application has been made without unreasonable delay.

[c] that he has provided security or is ready to provide such security as the court may order.

[4] It is noteworthy that the Plaintiff offered to deposit **Kshs. 1,500,000** in the Respondent's loan account or in court as security pending the hearing and determination of the intended appeal. He annexed copies of three banker's cheques to his supporting affidavit for the aforesaid sum as a demonstration of his resolve. I would thus be of the view that condition (c) above has been met, notwithstanding that the amount offered may not be commensurate with the sum now outstanding.

[5] As to whether the application has been made **without unreasonable delay**, it is now well settled that what amounts to **unreasonable delay** for purposes of **Order 42 Rule 6, Civil Procedure Rules**, is dependent on the facts and circumstances of each case. For instance, in **Jaber Mohsen Ali & Another Vs. Pricillah Boit & Another [2014] eKLR** the court held thus:

"Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."

[6] The Ruling in question was delivered on **1 April 2016** and the Notice of Appeal was filed on **3 May 2016**, while the instant application was made on **25 July 2016**. The Applicant has explained that it was prompted by the advertisement dated **11 July 2016**, which he got to learn of only on **22 July 2016**. Thus, it is clear that, in the circumstances hereof, the application was promptly made. Hence, the only outstanding issue is whether there has been a clear demonstration that the Plaintiff runs the risk of suffering substantial loss unless the stay order is made.

[7] The Plaintiff/Applicant's case is that if the sale is not stayed, he will lose his matrimonial home and thereby suffer substantial loss. He averred in the supporting affidavit that he has no alternative residential house for himself and his family. He further contended that he has never been provided with statements of the loan account to understand how the interest had accrued, and that it would therefore be in the interests of justice that the sale be stopped to enable him pursue his appeal, which he contends is arguable.

[8] **Mr. Busiega**, Counsel for the Defendant was however of the view that no new matter had been raised

since the Ruling of the Court of **1 April 2016**. On the authority of **Eunice Atieno vs. Barclays Bank of Kenya [2011] eKLR**, he urged the court to dismiss the application on the ground that the Court had earlier found that the Plaintiff had not made out a prima facie case with probability of success and that nothing has changed since. This is significant, considering that, unlike in the **Eunice Atieno Case** (supra) where the applicant asked for temporary injunction pending appeal, the Plaintiff herein seeks an order of stay of execution and sale by public auction of **LR No. 209/9071/62** located in **Nairobi West Miller Estate**, pending the hearing and determination of his a Appeal.

[9] To the extent therefore that the Ruling of **1 April 2016** was not a final judgment or decree capable of execution, it is my finding that the application is misconceived. But even assuming that the application is tenable, granted that one of the enabling provisions cited is **Section 63(c) of the Civil Procedure Act**, which donates to the court the power to grant a temporary injunction in order to prevent the ends of justice from being defeated, there is no gainsaying that the court gave due consideration to the contention that the suit property is matrimonial property and dismissed the same. As rightly pointed out by Counsel for the Defendant, nothing has changed since. Accordingly, I would come to the same conclusion as did **Nyamweya, J** in **Virginia Njeri Murimah vs. Mbo-I-Kamiti Farmers Co. Ltd [2014] eKLR** thus:

"This court will therefore be rehashing and re-litigating issues it has already decided on if it proceeds to hear and determine the instant application. The proper forum for the Plaintiff to seek an injunction pending appeal is therefore in the Court of Appeal, where she has already filed her appeal..."

[10] Secondly, and more importantly, is the fact that the result of the Ruling dated **1 April 2016** was the dismissal of the application for injunction, and is therefore a negative order. It is now trite that such orders are not amenable to stay. In **Western College of Arts and Applied Sciences vs. Oranga and Others [1976-80]**, the Court of Appeal for East Africa held thus:

"The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs...the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered..." (per Law V-P)

[13] For the foregoing reasons, it is my finding that the Notice of Motion dated **25 July 2016** is **lacking in merit, and the same is hereby dismissed with costs.**

Orders accordingly.

OLGA SEWE

JUDGE

COUNTER SIGNED, DATED AND DELIVERED AT NAIROBI THIS 7th DAY OF OCTOBER 2016

FRANCIS TUIYOTT

JUDGE