



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 72 OF 2014
DAVID KIMAIYO(ON BEHALF OF
PATRICK KIBET MAIYO).....APPELLANT/APLICANT
VERSUS
MERCY JEBET BASWONY.....1STRESPONDENT
JONAH ROTICH.....2NDRESPONDENT
RULING

By Notice of Motion dated 3rd June 2014 the applicant prays for the following orders:

- a. That the Honourable Court be pleased to stay the orders issued and or made on 3rd/6/2014 in Eldoret CMCC No. 373 of 2014 discharging interim orders issued on 23rd/5/2014 which order has preserved that money held at the 1st defendant's **Co-operative Bank Account No. [particulars withheld]** relayed into the account as fixed deposit account be attached/preserved pending the hearing and determination of this application *interpartes*.
- b. The Honourable Court to issue an interim order that the orders preserving/freezing all the money held at the 1st defendant's **Co-operative Bank Account No. [particulars withheld]** relayed into the account as fixed deposit account be attached/preserved pending the hearing and determination of this application *interpartes*.
- c. Costs of this application be provided for.

The application is premised on the following grounds:

- a. The Eldoret CMCC No. 373 of 2014 was fixed for hearing on 3rd/5/2014 for *interpartes* hearing of application dated 23rd/5/2014.
- b. That the application was seeking orders to preserve/freezing all the money held at the 1st defendant's **Co-operative Bank Account No. [particulars withheld]** relayed into the account as fixed deposit pending the hearing and determination of this application *interpartes*.
- c. That when the application was called out for hearing the plaintiff's advocate applied for an adjournment because the replying affidavit was served on 30th/5/2014 which was on a Friday.
- d. That on Monday 2nd/6/2014 it was a public holiday and therefore the first working day was 3rd/6/June which was the day the application was fixed for hearing.
- e. That the plaintiff's counsel therefore applied for adjournment on the basis that Order 51 of the Civil Procedure Rules demands that the replying affidavit be served at least 3 clear days before the application is fixed for hearing.

- f. That instead of either adjourning the matter and extending the interim orders or order the parties proceed with the hearing of the application; the Honourable Magistrate proceeded to discharge the interim orders before affording the plaintiff a fair hearing.
- g. That if the money in the said account is withdrawn it would occasion the applicant substantial loss unless the orders sought are made.
- h. That the appellant has a good case with high probability of success.
- i. That unless orders sought are granted pending the hearing of the appeal and determination of the appeal the said appeal shall be rendered nugatory.
- j. That this application is brought without delay.

It is further supported by the affidavit of the applicant herein sworn on 3rd June 2014 which reiterates the grounds on which the application is premised. In addition, the applicant deposes that upon receiving instructions on 22nd May, 2014, he filed an application freezing all the money held in the 1st defendant's account. The application came up for hearing on the following day when the respondent's counsel sought an adjournment to file a response to the application which application was granted and the application set for hearing on 3rd of June 2014. On this date counsel for the applicant sought an adjournment to enable him go through the application including the affidavit that was served upon him on 30 May 2014 after which he would file a further affidavit. Unfortunately the application for adjournment was not granted and instead the court vacated the interim orders freezing the money in the first defendant's account. The consequence of the order was that the money in the account that was subject of the application would be released. The 1st respondent in addition disposed of a parcel of the land, the house and all household goods to the 2nd respondent with the intention of relocating to another country, namely Australia.

This application was brought as a matter of urgency on the same date the interim orders were vacated with a view of preserving the money in the 1st respondent's account as failure to do so would make it difficult to recover the same once the 1st respondent relocated to another country.

In reply, the 1st respondent filed a replying affidavit sworn on 6th June 2014. She stated that she attended court on the 28th May 2014 when her advocate applied for an adjournment which was granted. That the date for *inter partes* hearing was taken by consent and in any case the applicant's counsel was served with a replying affidavit on 30th May although it was indicated it was received on 2nd June. As such the first respondent deposed that the application was brought in bad faith, is premature and ought to have been filed before the subordinate court. She also deposed that she has no claim of the monies that is subject of the suit land and no substantial loss would be occasioned to the applicant if the orders sought are not granted.

In a further affidavit sworn by the applicant on 13 June 2014 he deposes that his son Patrick Kimaiyo Misoi made an agreement with the 1st respondent to buy a portion of land **KAPTAGAT/KAPTAGAT L.R. NO. 8802 PROV. NO. 4** jointly and he witnessed the agreement which upon execution a sum of Ksh 200,000/= was paid. His son sent a sum of Ksh. 230,000/= to pay the seller Judith Lagat which amount he deposited into her Equity Bank Account. That since the execution of the sale agreement his son had sent a total sum of Ksh 1,015,290/= which was used to develop the land. He later found out that the 1st respondent without any justification had sold the property to the 2nd respondent at a sum of Ksh. 2,300,000/=. He averred that by virtue of the marriage between his son and the 1st respondent and the money contributed towards the purchase of the land he is entitled to the 50% of the sale proceeds. He contends that since the 1st respondent intended to relocate to Australia it will be difficult for him to recover the money. In any event, the 1st respondent shall not be prejudiced in any way if the orders sought are granted since the money shall continue to be held in her account and in the event that the appeal does not succeed it can be released to her.

The application was canvassed by way of filing written submissions. Those of the applicant were filed on 16th July, 2014 by Messers Koril J.K. Associates and Company Advocates while those of the

1st respondents were filed on 16th July, 2014. The proceedings show that a Mr. Wafula twice came on record on behalf of the 2nd respondent having filed a Notice of Appointment of Advocates on 9th June 2014. He did not however file any submissions on behalf of the 2nd respondent. On the 10th June, 2014 he notified the court that his client had taken possession of the subject land and was an innocent purchaser who had carried out development on it.

I have accordingly considered the respective submissions and take the following view of the application. The application is majorly brought under Order 42 Rule 6 of the Civil Procedure Rules. Under Rule 6 (2) a party bringing an application for stay has to satisfy the following;

1. That he stands to suffer substantial loss if the orders sought are not granted.
2. That the application is brought without undue delay.
3. That he offers security for the due performance of the order.

On the 10th of June, 2014 there was concession between the applicant and the 1st respondent's counsel that out of the total purchase price of Ksh. 2,300,000/= a refund of Ksh. 520,000/= was made to one Claris Ruto leaving therefore a balance of Ksh 1,780,000/= and so if any loss were to be occasioned would be for the amount of the Ksh. 1,780,000/=. That said though the applicant's claim is for a share of 50% at the most. That alone necessitates the court to review/vacate the Honourable Magistrate's orders in favour of the applicant. I find the case of **INTERNATIONAL TRANSPORT ASSOCIATION & ANOR VS. AKARIM AGENCIES CO. LTD** relevant in this respect particularly in granting a freezing order. Honourable Justice Gikonyo enunciated the threshold for granting freezing orders as set out in **Goode on Commercial Law, 4th Edition at page 1287** as follows;

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions...Before granting a freezing injunction the court will usually require to be satisfied that;

- a. **The claimant has ‘a good arguable case’ based on a pre-existing cause of action;**
- b. **The claim is one over which the court has jurisdiction;**
- c. **There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and**
- d. **There is a balance of convenience in favour of granting the injunction;**
- e. **The court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets.”**

For the reasons I have outlined above, being that the applicant stands to suffer substantial loss, I think he has an arguable case as defined by **Mustil J in The Niedersachsen [1983] 2 Lloyd's Rep 600 at 605** to be;

One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have better than 50% chances of success.

It is without a doubt that this application was brought timeously and so the applicant is not guilty of delay. As to execution of a security, I think this need be ordered only where circumstances of a case demand so. The issue at hand is money being held in the 1st respondent's account part of which the applicant claims. As such I do not think this is a suitable case in which security need be deposited or paid.

On the whole, it is my view that the applicant has demonstrated why the application ought to be granted. He in addition exhibited a marriage certificate between the plaintiff and the 1st respondent in the Magistrate's Court and is therefore not mistaken in claiming his stake in the appeal. Though the 1st respondent submitted that leave to file the appeal is required I do not think that this is the case as the appeal lies as a matter of right. Further, the respondents do not stand to suffer any loss if the orders sought are granted. In contrast, it is the applicant who stands to suffer if the order granted by the magistrate releasing

the money from the 1st respondent's account is not vacated. But as I said earlier, the freezing order should only relate to the amount owing after Ksh. 520,000/= was refunded.

As at the time of hearing the application the applicant's counsel brought to the attention of the court the fact that the 1st respondent had already left the country. That fact was confirmed by the 1st respondent's counsel. However I do not think that the leaving of the country by the 1st respondent tilts the angle at which this court determines the application, and no more need be said about it.

In the end, this application succeeds with the following orders.

- a. That an order be and is hereby issued freezing the money in the 1st **respondent's Co-operative Bank Account No. [particulars withheld]** to the limit of Ksh. 1, 780,000/= relayed into the account as fixed deposit and to be preserved as such pending the hearing and determination of the appeal herein.
- b. Cost of this application be borne by the 1st respondent.

DATED and SIGNED this 22nd DAY OF June 2015.

G.W.NGENYE-MACHARIA

JUDGE

DELIVERED AT Eldoret this 6th DAY OF JULY, 2015.

BY: G.K. KIMONDO

JUDGE

In the presence of:-

1. Mr. Korir for the applicant.
2. No appearance for the 1st respondent.
3. No appearance for the 2nd respondent.