



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 1217 OF 2002

GEORGE W. OMONDI.....PLAINTIFF

VERSUS

GUILDERS INTERNATIONAL BANK LTD.....DEFENDANT

RULING

[1] Before the Court was the application by the Plaintiff dated 3rd September 2015 and filed on 7th September 2015. The application was brought pursuant to the provisions of **Order 42 Rules 1, 6(1), 7(2) & 9 of the Civil Procedure Rules and Sections 1A, 2, 3A & 34 of the Civil Procedure Act**. The Plaintiff prayed for the following orders inter alia;

1. *Spent*
2. *Spent*
3. *Spent*

4. THAT an injunction do issue restraining the Defendant, whether by itself, its agents, servants, employees or howsoever from transferring the parcel of land registered as L.R No. 3437/311 Lavington pursuant to the public auction conducted on 5th May, 2015 by Keysian Auctioneers pending the hearing and determination of the intended appeal from the ruling and orders of Honourable Justice Gikonyo delivered on 26th August 2015.

5. THAT there be a stay of any further proceedings to confirm the sale by public auction of L.R no 3437/311 Lavington pursuant to the public auction conducted on 5th May 2015 pending the hearing and determination of the intended appeal from the ruling and orders of Honourable Justice Gikonyo delivered on 26th August 2015.

6. THAT there be a stay of any further proceedings to confirm the sale by public auction of L.R No 3437/311 Lavington pursuant to the public auction conducted on 5th August 2015 pending the hearing and determination of Nairobi Civil Appeal No 91 of 2012.

7. THAT the costs of this application be granted to the Plaintiff/Applicant.

[2] The application is predicated upon the grounds that the Plaintiff has been granted leave to file his appeal against the ruling of Gikonyo, J which ruling was delivered on 26th August 2015. Further, it was reiterated that the appeal is meritorious and raises arguable points of law that ought to be determined by the Court of Appeal and has therefore, high chances of success. It averring that it was just and mete for the orders sought to be granted, it was contended that the sale conducted on 5th May 2015 by public auction was irregular, fraud and ought to be cancelled.

[3] In support of the application, the Plaintiff swore an affidavit on 3rd September 2015 which was filed on 7th September 2015. In rehashing the contents of the grounds of the application, the deponent further averred that being aggrieved by the ruling of Gikonyo, J delivered on 26th August 2015, they had sought to appeal the said ruling, and had commenced with the filing of the Notice of Appeal on 31st August 2015. Further, it was deposed to that there was reserved for delivery on 13th November 2015 the judgment of the Court of Appeal in Civil Appeal No 91 of 2012 George W Omondi v Guilders International Bank Ltd, which was an appeal from the judgment and decree of Kimaru, J delivered on 29th October 2010. It was deposed to that if the said appeal was allowed, the judgment and consequential proceedings will be set aside and that it would therefore be just and mete to allow the instant application pending the judgment by the Court of Appeal.

[4] The application was opposed through the replying affidavit of Narayanamurthi Sabesan, the Defendant's Chief Executive Officer sworn and filed on 14th September 2015. It was deposed to that the Plaintiff had previously made similar applications for stay of execution which had been rejected by both this Court and the Court of Appeal. Rulings to these applications were delivered on 30th November 2011 by Mabeya, J, on 7th November 2014, 2nd December 2014 and 13th March 2015 by the Court of Appeal all of which rejected the Plaintiff's applications. It was deposed to that there were no sufficient grounds for stay of execution pending appeal and, further, that the application was for an injunction pending appeal, which was not the same application that this Court was dealing with and that therefore, could not grant such application.

[5] The instant application was brought pursuant to the provisions of Order 42 Rules 1, 6(1), 7(2) & 9 of the Civil Procedure Rules, as well as Sections 1A, 2, 3A and 34 of the Civil Procedure Act. At Rule 6(1) of Order 42, it is provided 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 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.

Further at Rule 7(2), it is provided that;

Where an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the court which made the order, or to any court to which such appeal or second appeal shall have been made, be stayed on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of.

[6] From the record, it is evident that the Plaintiff had made an appeal to the Court of Appeal of the judgment and subsequent decree of Kimaru, J delivered on 29th October 2010. On 30th November 2011 Mabeya, J delivered a ruling dismissing an application by the Plaintiff for stay of execution. Being aggrieved of that decision, the Plaintiff filed an appeal in the Court of Appeal, in which the Court of Appeal rendered its decision on the application for stay pending appeal on 7th November 2014, by

granting a conditional stay, in which certain conditions as set out had to be fulfilled. The Plaintiff further moved the Court of Appeal to vary the terms of the conditional stay, which terms were varied, extending the period of depositing security for a further period on sixty (60) days from 6th December 2014. On 23rd February 2015, the Plaintiff made another application for further variation of the conditions set out by the Court of Appeal for the grant of stay, which application was dismissed by the Court on 13th March 2015. In its rendering, the Court held inter alia;

“We do not see any merit in the application for further variation of the terms upon which we granted the application for stay of execution. As of now, the application for stay of execution already stands dismissed by the applicant’s failure to meet the conditions. We do not even see the basic bona fides in the application for further variation of the terms.”

[7] The Court of Appeal gave reprieve to the Plaintiff by granting a conditional stay order. The Plaintiff failed to comply with the terms of the said stay and subsequently, the application, as declared by the Court, was dismissed. The Plaintiff, in a rather dubious manner, filed an application to the superior Court, seeking once more to stay the execution of the decree of the Court, on the same grounds as had been advanced in its previous applications which had been dismissed, before Gikonyo, J, who also dismissed the application. It is the decision by Gikonyo, J that the Plaintiff now intends to appeal against.

[8] Under **Order 42 Rule 6(1)** and read together with **7(2) and 9**, the Court has no jurisdiction to order for stay of execution, or dismiss such application as it may deem fit, as the same had been proffered by the Plaintiff to the Court of Appeal, which Court had further dismissed the application as the Plaintiff had failed to comply with conditions set out therein. The instant application, an application for stay pending appeal, which the Plaintiff has ingeniously camouflaged as an injunction pending appeal, will not be let to fly before this Court. The Plaintiff seeks to obtain orders where both this Court and the Court of Appeal in previous attempts has declined to grant. The actions by the Plaintiff are not only frivolous in nature, but also an abuse of the processes of the Court, which unfortunately, have not been in favour of the Plaintiff. Further, the authorities relied upon by the Plaintiff hold no water in the instance, as the circumstances therein are quite dissimilar from those herein.

[9] In Civil Case No 418 of 2004 Kwality Candies & Sweets Ltd v Industrial Development Bank Ltd; (2006) eKLR, Ochieng, J in allowing an application for injunction pending appeal reiterated that the Court ought to be very cautious when handling such applications for injunction pending appeal whereby such similar applications had been dismissed. He further reiterated whereas in principle there was no absolute bar to new application, the question to be determined was whether the same was merited or not. The circumstances were that the application for stay of execution pending appeal had not been heard and dismissed by the Court of Appeal, as were the circumstances in the instant application, and therefore distinguishable.

[10] In Madhupaper International Ltd v Kerr (1985) KLR 840, reiterated in Anthony Raymond Cordeiro & 2 Others v Adrian Noel Carvalho & 5 Others (2014) eKLR, the Court of Appeal applied the principle propounded in Erinford Properties Ltd v Cheshire County Homes [1974] 2 All E.R 443, and held inter alia;

“Where a judge dismisses an application for an interlocutory injunction, he has jurisdiction to grant the unsuccessful litigant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed.”

The application that had been determined by Gikonyo, J even though it did not seek an injunction, but the grounds therein were similar to the grounds adduced in the instant application. The application being therefore similar to the present application, the Court does not have the jurisdiction to grant such order pending appeal.

[11] Further, the impugned determination by Gikonyo, J was with regards to the alleged fraud and irregularity of the sale of the suit property. The grounds of the application, being similar to the grounds

raised in the application dismissed by Mabeya, J on 30th November 2011, and similarly by the Court of Appeal on 15th March 2015, would therefore be indicative of the Courts resistance to award such orders as prayed for by the Plaintiff. The provisions relied upon in the application for stay were Order 42 Rule 6, 7 14 & 15 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. These provisions are similar to those applied in the instant application. No exceptional or special circumstances have been adduced by the Plaintiff to warrant the Court to re-issue the orders as prayed for in the Plaintiff's application. The issues have been conclusively and effectively been determined in previous applications, and in two different and competent Courts, and as such, the Plaintiff is estopped from seeking unfair redress on determined issues. It would be onerous therefor, for the Plaintiff to seek redress, if any, from the Court of Appeal, as an appeal was proffered to that Court.

[11] In the foregoing circumstances therefore, the application by the Plaintiff is unmeritorious and the same is hereby dismissal with costs.

Dated, signed and delivered in court at Nairobi this 2nd day of October, 2015.

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C. KARIUKI

JUDGE