



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 70 OF 2019

DAVID KARIMI NGIRIGACHA.....APPELLANT/APPLICANT

VERSUS

KENYA INDUSTRIAL ESTATES LIMITED.... 1ST RESPONDENT

JOSEPH KABUNGO NJENGA.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable J. M. Nangea, Chief Magistrate, sitting at Thika Law Courts dated 19th November 2019 in Civil Suit No.839 of 2011)

RULING

The matter for determination is the **Notice of Motion Application** dated **13th January 2020**, brought by the Appellant/Applicant herein who has sought for the following orders:-

- a. That there be a stay of execution of the Judgment delivered on **19th November 2019**, and the ensuing decree thereof pending the hearing and determination of the Appeal herein.
- b. That costs of this Application be provided for.

The application is premised on the grounds stated on the face of the Application and on the affidavit of **David Karimi Ngirigacha**. These grounds are:-

- i. That a Judgment in **Thika CMCC No. 839 of 2011**, was delivered on **19th November 2019** and the following orders were issued:-
 - That the Plaintiff (Applicant) to vacate the suit property within 60 days failure to which the 2nd Defendant (Respondent) will be at liberty to forcibly evict him.
 - That the plaintiff shall bear costs of the Counter Claim as incurred by the 2nd Defendant only.
- ii. That 60 days period expired on **19th January 2020**, and that the Plaintiff/Applicant lodged this Appeal on **19th December 2019**, without delay.
- iii. That the Appeal raises triable issues in law and fact and if the execution of the Judgment is not stayed, then the pending appeal shall be rendered useless and nugatory.
- iv. Further that it is only fair and just that a stay of execution of the judgment be allowed and the Appellant be granted an opportunity to prosecute his appeal.
- v. That the Appellant lives with his family in the suit property being **Ruiru East/Juja East/Block 2/9230**, where he had developed a four bedroom residential house and does some basic farming which is a source of his livelihood.
- vi. That the Appellant as the guarantor of the loan in issue was not notified of the debtor's failure to service the loan or the ensuring public auction sale as by law provided, hence his right of redemption were violated from the start by the impugned sale.

vii. That the Appellant stands to suffer irreparable loss and damages if stay is not granted.

The application is further supported by the affidavit of **David Karimi Ngirigacha**, who averred that indeed a **Judgment** and **Decree** were entered against him in **Thika CMCC No. 839 of 2011**, on **19th November 2019**, wherein he was ordered to vacate the suit property within 60 days from the date hereof.

That aggrieved by the said decision, he has already filed an **Appeal** which has strong grounds of appeal as is evident from the annexed **Memorandum of Appeal DKN 3**. Further that he lives on the suit property with his family as is evident from annexure DKN 4 which is residential house, and if stay of execution is not granted, his appeal shall be rendered useless and nugatory. He also contended that he does not have any other source of livelihood and there is a risk of being evicted from the said suit property in view of the Judgment entered on **19th November 2019**.

The Application is contested and the 1st Respondent filed **grounds of opposition** on **21st January 2020**, and averred that:-

- 1. That the Application does not meet the minimum conditions set out under Order 42 rule 6(2), of the Civil Procedure Rules.**
- 2. That the Appellant cannot suffer substantial loss as alleged since he voluntarily executed the charge and or guarantee thus surrendered the property to the 1st Respondent as security. It is trite law that any property offered as security for repayment of a loan facility becomes a commodity for sale unless the loan facility is repaid in full.**
- 3. That upon realization of the securities, as it is in this case, the only remedy available to the Appellant is a claim for damages.**
- 4. That the value of the property is ascertainable and if the Appellant will be successful, the 1st Respondent is capable of paying the damages incurred since it is a financial institution with a wide pool of funds.**
- 5. That the Appellant having not prayed for damages and or cancellation of the 2nd Respondent's title deed, the purported appeal does not raise any prima facie case and or issue to be determined by the Court, it remains an academic exercise.**
- 6. That this Court does not have jurisdiction to determine a dispute between the chargor and the chargee and the appeal ought to have been filed in the High Court Kiambu.**
- 7. That the Appellant was duly served with requisite notices as appears from the Record of Appeal and it is over 9 years from the date the Redemption Notices were issued and the loan has never been paid.**

The 2nd Respondent too, **Mr. Joseph Kabugo Njenga** filed a Replying Affidavit on **5th March 2020**, and opposed the instant Notice of Motion. He confirmed that indeed a **Judgement** was entered in his favour on **19th November 2019** wherein the Plaintiff was directed to vacate the suit property within **60 days**, failure of which the 2nd Defendant (2nd Respondent) would be at liberty to forcefully evict him.

That the Plaintiff/Applicant refused to comply with the order of the lower Court and failed to vacate from the suit property within **60 days** after delivery of the judgment. He averred that he is a successful litigant and should not be deprived of the fruits of a Judgment which was in his favour without any proper cause.

Further that the Applicant has not met the conditions set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules** as there is no evidence of substantial loss as the suit property has already been sold and the title issued in favour of the 2nd Respondent. That the Applicant does not merit the granting of the orders sought because he voluntarily guaranteed the loan facility from the 1st Respondent in the year **2003**, and no attempt have been made to negotiate with the 1st Respondent to repay the said loan facility advanced.

He contended that the **power** of the Court to grant or not to grant stay of execution is **discretionary** and the said **discretion** cannot be exercised in favour of the Applicant who does not have a strong appeal and that this appeal is just a time wasting gimmick. Again, the 1st Respondent has already exercised its **Statutory Power of Sale** and title issued in the 2nd Respondent's favour and therefore the said sale cannot be reversed. That the Appellant if successful can only be awarded damages since the value of the suit property is ascertained.

Further that granting stay of execution of the lower Court's Judgment will prejudice and disadvantage the 2nd Respondent, while giving undue advantage to the Applicant and therefore the Court has a cardinal duty of preserving the right of both parties. He also contended that his advocate has informed him that the appeal herein does not have an overwhelming chance of success, because the Applicant had not sought for damages and cancellation of the 2nd Respondent's title at the lower Court. It was his further contention that he is an innocent purchaser for value, who bought the suit property at a public auction and subsequently obtained a clean title. Further that this Court has **no jurisdiction** to deal with this Appeal as the dispute herein is a commercial transaction and the right forum would have been the High Court, Commercial Division. He urged the Court to dismiss the Applicant's Application with costs.

The application was canvassed by way of written submissions which this Court has carefully read and considered.

The Law Firm of **Kimandu & Ndegwa Advocates** for the Appellant/Applicant submitted that the only issue for determination is whether the Applicant is entitled to stay of execution of the Judgment and Decree of the trial Court pending Appeal.

It was submitted that the Court herein has jurisdiction to hear and determine this Appeal as provided by **section 13** of the **Environment & Land Court Act**, which section is pursuant to **Article 162(2)(b)** of the **Constitution**. The applicant relied on the case of **Cooperative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & 5 Others[2017]Eklr**, where the Court of Appeal held among other findings:-

“While exclusive, the jurisdiction of the Environment & Land Court is limited to the areas specified under Article 162 of the Constitution, Section 13 of the Environment & Land Court Act and Section 150 of the Land Act, none of which concern the determination of accounting questions on the other hand, the jurisdiction of the High Court over accounting matter is without doubt fall under Article 165(3) of the Constitution.”

The applicant further submitted that he has met the threshold for grant of stay of execution as provided in **Order 42 Rule 6(2)** of the Civil Procedure Rules. For this, he relied on the case of **Manchar Singh Sagoo & Another vs Caroline Njeri Mwicigi & 3 others (2018) eKLR**.

On whether the intended Appeal is arguable and merit to be heard, the Applicant relied on the case of **Ezekiel Mule Musembi vs H. Young & Co. (EA) Ltd (2019)eKLR** where the Court held that:-

“..... the prima facie merits of the intended Appeal in the sense of not where it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

On whether the Appeal will be rendered nugatory if the stay is not granted, the Applicant relied on the case of **Salaries and Remuneration Commission vs Parliamentary Services Commission & 4 others (2009)eKLR**, where the Court held:-

“One of the key objectives in granting an order of stay is to preserve the status quo pending the hearing and determination of the intended Appeal.”

It was finally submitted that the Court should not only ensure that the appeal will not be rendered nugatory but also ensure that fairness is observed.

On the part of the 1st Respondent, the **Law Firm of Millimo, Muthomi & Co. Advocates** submitted that the Applicant is not deserving of stay of execution orders. It was submitted that the Applicant was the guarantor of one **Geoffrey Nganga Mbachia**, who defaulted in loan repayment. The 1st Respondent exercised its Statutory Power of Sale and the said suit property **Ruiru East/Juja East Block 2/9320**, was sold to the 2nd Respondent through a public auction. Since the Applicant was served with the **requisite Notices** and since it is now over **9 years**, the equity of redemption was extinguished. Further that the Applicant cannot suffer substantial loss as alleged since he voluntarily executed the charge and or guarantee and thus surrendered the property to the 1st Respondent as security. That it is trite law that any property offered as security for repayment of loan facility becomes a commodity for sale unless the loan facility is repaid in full. The 1st Respondent relied on various decided cases among them the case of **Dr. Peres Malande Olindo vs Dr. John Karungari Nyamu & 3 others (2010) eKLR**, where the Court held that:-

“In any event, the law is clear that if the Plaintiff feels aggrieved by the public auction which eventually led to the transfer of part of the Plaintiff’s original land to the 3rd Defendant, his claim lies in damages and such damages are claimable from Diamond Trust Bank and not anyone else.”

It further relied on the case of **Stephen Boro Githa vs Family Finance Building Society & 3 Others (2009) eKLR** where it was stated:-

“There is no dispute that after the sale of the suit property to the 2nd Defendant, the same was transferred to him. The 2nd Defendant is now the registered owner of the suit property If the Plaintiff is aggrieved by the manner in which the 1st Defendant exercised its statutory power of sale, then the only remedy available to the Plaintiff is to sue for damages against the 1st Defendant.”

Further in the case of **Priscillah K. Grant vs Kenya Commercial Bank & 2 Others C. A Civil Appl. No. 227 of 1997**, the Court held:-

“That once a property has been sold by a chargee in exercise of its statutory power of sale, the only challenge to that sale is for the aggrieved chargor to sue for appropriate damages.”

It was also submitted that this court has **no jurisdiction** to deal with the issue of charges, as this is a pure commercial transaction or dispute. The Court relied on the case of the **Estate of Aloysius Ndungu Gakunga (deceased) 2019 eKLR**.

On part of 2nd Respondent, the **Law Firm of Ives Sewe Advocates** submitted that the Applicant has not met the threshold or conditions set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and therefore the Applicant does not merit the grant of the orders sought. That the Appeal does not have an overwhelming chance of success because the Applicant did not pray for the award of damages or cancellation of the 2nd Respondent’s title at the lower Court. He relied on the case of **John Odongo vs Joyce Irungu Muhatia (2019)eKLR**.

The Court has considered the instant Notice of Motion Application, the annexures thereto, the written submissions and the cited authorities and finds the issue for determination are as follows:-

1. Whether the court has jurisdiction to hear and determine this Appeal/Application.

2. Whether the Applicant is deserving of the orders sought.

1. Whether the court has jurisdiction to hear and determine this Appeal and/or Application.

It should be noted from the onset that jurisdiction is everything.

Court without Jurisdiction has no power to hear and determine a matter as a decision made by a court without Jurisdiction is **null and void**. Where a Court has **no Jurisdiction**, it has no option but to down its tools. See the case of *Owners of Motor Vessel "Lillian" ...Vs...Caltex Oil Kenya Ltd 1989 KLR* the Court held that:-

"..Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Respondents have submitted that the dispute herein is over legal charge that was created over the land parcel **No. Ruiru East/Juja East Block 2/9230**. It was the Respondents submissions that the **Environment & Land Court** is only clothed with Jurisdiction to handle land issues and therefore lacks jurisdiction to deal with issues relating to legal charges. The Respondents further submitted that this **Environment & Land Court** lacks Jurisdiction to hear and determines the Appeal, because the dispute herein is a commercial transaction and the right forum would have been the **High Court;- Commercial Division**.

However, the Applicant has submitted that the issue herein is not an accounting question and that as provided by **Section 13 of the Environment & Land Court Act**, this Court has jurisdiction to hear this appeal which involves validity of the charge instrument itself. The Jurisdiction of Environment & Land Court is set out in **Article 162(2) b** of the Constitution which states:-

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -

a.

b. The environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Further **section 13(1)** of the Environment & Land Court Act sets out the Jurisdiction of the Court as follows:-

"the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land."

The Court has considered the amended Complaint as filed by the Applicant/Appellant. One of the dispute or lamentation of the Applicant is that the 1st Respondent made changes in the rates of interests charged and / or applied to the account without informing the Plaintiff of the changes. Further, the Applicant also lamented that the 1st Respondent lent to **Principal debtor** other amount due and above what was guaranteed by the Appellant/Applicant. For sure, the dispute at the lower Court was due to the manner in which the security was realized and the changes in the rates of interest. These disputes involved **accounting questions** and did not involve areas that were specified under **Article 162** of the **Constitution** and **Section 13** of the **Environment & Land Court Act**.

The Court has also considered the prayers that had been sought in the amended Complaint by the Appellant/Applicant, and noted that the Applicant had sought for declaration that the purported exercise of statutory power of sale was **null and void** and that the forced sale of the suit property was **null and void** for not following the laid down procedure prior to the sale. The said prayers were sought by the applicant herein due to the dispute over the realization of security that had been offered by the Applicant.

The Plaintiff (Applicant) had not sought for cancellation of the title conferred to the 2nd Respondent after purchase of the suit property by way of public auction. Further the Applicant had not sought for any compensation by way of damages. The Court will concur with the Respondents' submissions that the dispute herein is over a commercial transaction and the Appeal herein ought to have been field at the **High Court;- Commercial Division**, and not the **Environment & Land Court**, which deals with **use and title** to land. The Court is bound by the decision in the case of *Cooperative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & 5 others (2017) eKLR Civil Appeal No. 83 of 2016* where the Court of Appeal held that:-

"the Jurisdiction of the Environment & Land Court is limited to the areas specified under Article 162 of the Constitution. Section 13 of Environment & Land Act and Section 150 of Land Act, none of which concern the determination of Accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the Jurisdiction of the High Court over accounting matter is without doubt for under Article 165 (3) of the Constitution."

Taking into account the above findings of the Court of Appeal and given that the dispute herein is over of the changes in rates charged and the allegations that the 1st Respondent lend more loan facility to the Principal Debtor and also the manner of realization of security, this

Court finds that this is a commercial dispute. The Appeal ought to have been filed in the appropriate Court – **High Court; Commercial Division**. Consequently, this Court finds that it has **no Jurisdiction**, to deal with this Appeal and Application. For the above reasons, this Court has no option but to down its tools as was held in the case of *Owners of Motor Vessel “Lillian” ...Vs...Caltex Oil Kenya Ltd 1989 KLR (supra)*.

(ii) Even if the Court had jurisdiction, would the application have been merited?

The Principles to be considered in the grant or not to grant stay of execution are the ones set out in **Order 42 Rule 6(2)** of the **Civil Procedure Act**. These are:-

“No order for stay of execution shall be made under subrule (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.”

Firstly, the Applicant need to establish that he will suffer **substantial loss**. It is not in doubt that the suit property was sold by way of public auction and that the value for the suit property is ascertainable. It is trite that once the property is knocked down through public auction, the equity of redemption is extinguished. See the case of *Bomet Beer Distributors Ltd & Another vs Kenya commercial Bank Ltd & 4 others [2005] eKLR*, where the Court held that:-

“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”

Further it is trite that a chargor who is aggrieved by the manner the chargee exercised its statutory power of sale can only seek remedy in damages as against the chargee. See the case of *Downhill Ltd vs Harith Ali El-Busaidy & Ano CA Civil Appeal No. 254 of 1999* where the Court held that:-

“Once a property has been sold by chargee in exercise of its statutory power of sale, the only challenge to that sale is for the aggrieved chargor to sue for appropriate damages.”

Further the Applicant has admitted that he voluntarily allowed his suit property to be used as security for a loan by the Principal debtor. It is not in doubt that once a property is put out as security for a loan, it becomes a commodity for sale and the chargor or the applicant herein cannot prevent the innocent purchaser to enjoy the fruits of his judgment because of allegations of sentimental value and attachment. See the case of *Isaack O. Litali...Vs...Ambrose W, Subai & 2 others, HCCC No.2092 of 2000*, where the Court held that:-

“ I am of the opinion that once land has been given as security for loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful.

....for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security.....”

On the arguability of the Appeal, it is clear that the Appellant/Applicant had sought for various declarations;- one of them being that the Statutory Power of Sale was **null** and **void**. However, he never sought for cancellation of the Certificate of title which is in favour of the 2nd Respondent. This Court finds that the Applicant has not established to the satisfaction of this Court that he has an arguable appeal with high chances of success. In any event, if the Applicant would emerge successful in his Appeal, then he can be compensated by way of damages as a provided by the law.

Having now considered the available evidence, the Court finds that the Appellant/Applicant is not deserving of the orders sought of stay of execution of the Judgment entered on **19th November 2019**.

However, the Court found that it has **no Jurisdiction** to deal with this matter and has consequently downed its tools. For the avoidance of any doubt, any orders that had been issued earlier are **vacated**. Costs to the respondents.

It is so ordered.

Dated, signed and Delivered at Thika this **29th** day of October 2020.

L. GACHERU

JUDGE

29/10/2020

Court Assistant – Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Wangui holding brief for Mr. Kimandu for the Appellant/Applicant

No appearance for the 1st Respondent

Mr. Sewe For the 2nd Respondent

L. GACHERU

JUDGE

29/10/2020