



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 233 OF 2012

JUSTUS WAMBUA KAVYU PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. It is most unfortunate that the original file in connection with this suit has gone missing from the Registry and, as a result, this Court has had to rely upon a reconstructed file from documents provided by the parties hereto. What is not available to the Court is its record since the suit was filed on 18th April 2012. That record includes the Ruling of my learned brother **Mabeya J.** as regards the Plaintiff's original Application dated 17th April 2012 seeking a temporary injunction pending the hearing and determination of the suit. I gather from the Application before this Court that the Judge refused to grant such temporary injunction by his Ruling delivered on 13th July 2012 against which the Plaintiff has given Notice of Appeal dated 17th July 2012. It would have been useful for this Court to have appreciated the reasons that the learned Judge gave as regards his refusal to grant such temporary injunction as such might have had considerable bearing upon the determination of this Court as regards the Plaintiff's Application before it dated 20th July 2012.
2. Be that as it may, the Plaintiff's said Application dated 20th July 2012 seeks orders by way of a stay of execution and maintenance of status quo that the Defendant bank be restrained by a temporary injunction by itself, its servants, agents and officers/employees whosoever and whatsoever from advertising the sale, auctioning, alienation, transferring or otherwise dealing with the Plaintiff's property being L. R. No. NAIROBI/BLOCK 127/347 SAIKA ESTATE, NAIROBI (hereinafter "the suit property"). The Application is brought under the provisions of **Order 42 rule 6 (1)** of the *Civil Procedure Rules, 2010* as well as **section 3A** of the *Civil Procedure Act*. The Plaintiff has brought his said Application on the following grounds:

“(i) The Plaintiff/Applicant filed this suit seeking an injunction against the Respondent restraining it from offering for sale LR. NO. NAIROBI/BLOCK 127/347 SAIKA ESTATE NAIROBI.

(ii) The Plaintiff/Applicant also took out an application seeking an interlocutory injunction against the sale.

(iii) The Honourable Court by a ruling dated and delivered on 13th July 2012 dismissed the Plaintiff/ Applicant's application with costs.

(iv) The Plaintiff/Applicant being aggrieved and dissatisfied with the said ruling has taken steps to file an Appeal to the Court of Appeal against the whole of the said ruling and/or order.

(v) The Plaintiff/Applicant is apprehensive that there is real danger of the Defendant/Respondent selling the suit property before appeal is heard and determined and hence this application seeking injunction orders pending the hearing and determination of the Plaintiff/Applicant's intended Appeal.

(vi) That unless the orders sought are granted the Plaintiff/Applicant will suffer substantial loss.

(vii) The Defendant/Respondent will not suffer any serious prejudice should the orders sought be granted pending the hearing and determination of the intended Appeal to the Court of Appeal.

(viii) The suit property constitutes the Plaintiff's matrimonial property with sentimental value and should the Respondent proceed and dispose the same the Plaintiff/Applicant will suffer irreparable loss and damage".

3. The Plaintiff's said Application was supported by his Affidavit bearing even date therewith. He noted that he had been employed by the Defendant herein with effect from 2nd October 1985 and had arisen through the ranks until on or about 18th February 2011 when he had received a letter from the Defendant terminating his employment on alleged acts of gross misconduct. Such termination had been now challenged in the Industrial Court in Cause No. 194 of 2012. The Plaintiff went on to confirm that his initial application for temporary injunction as regards the suit property was turned down by **Mabeya J.** in his Ruling dated 13th July 2012 but he had instructed his advocates on record to file an appeal to the Court of Appeal. He attached to his said Affidavit true copies of the Notice of Appeal and a copy of a letter bespeaking certified copies of the Ruling and the proceedings herein. He maintained that it was important that he be granted orders of injunction restraining the Defendant from exercising its statutory powers of sale pending the hearing and determination of his intended appeal. To this end, the Plaintiff attached a copy of his proposed Memorandum of Appeal. The Plaintiff then went on to say that he was advanced a loan by the Defendant in the amount of Shs. 1.9 million and had paid the agreed monthly instalments of Shs. 21,120/- from August 2007 up to September 2011. However, he gave no details as to any further payments that he may have made since September 2011. The Plaintiff noted that the suit property was his matrimonial home in which he had invested heavily, financially. Unfortunately for the Plaintiff, he gave no details as to the extent of his financial commitment to the suit property.

4. The Defendant filed Grounds of Opposition on 27th July 2013 which detailed as follows:

"1. THAT under Order 42 Rule 6 (1) of the Civil Procedure rules 2010 the Court's power is only limited to grant stay of execution or proceedings under a decree or order which it is sought to be appealed against.

2. THAT there is no decree or Order issued by the Court capable of execution in this suit. The Court only dismissed the Plaintiff's application seeking interlocutory Orders of injunction.

3. THAT the only power under Order 42 Rule 6 of the Civil Procedure rules given to the High Court with regard to Interlocutory Orders of Injunction is with regard to appeals emanating from the lower Court.

4. THAT the only remedy available to the Plaintiff in the circumstances is file a formal application seeking interlocutory Orders in the Court of Appeal. The prayers sought are res judicata.

5. THAT the court has no jurisdiction to grant the Orders sought and in the circumstances, the application is frivolous and should be dismissed with costs”.

5. The Defendant on the same day that it filed its Grounds of Opposition being 27th July 2013, also filed its submissions to the Plaintiff’s Application before Court. The Defendant emphasised that the Application was brought under the provisions of **Order 42 rule 6 (1)** of the *Civil Procedure Rules, 2010*. The Defendant maintained that the rule gave the Court power to grant a stay of execution or proceedings under a decree or Order appealed from. (Underlining mine). The Defendant pointed out that the Court had dismissed the Plaintiff’s Notice of Motion dated 17th April 2012 but there was no decree or Order emanating therefrom capable of execution. It maintained that the Plaintiff’s Application as worded was *res judicata*. In the Defendant’s opinion what the Plaintiff should have done was to file an application in the Court of Appeal under **Rule 5 (2) (b)** of the *Court of Appeal Rules, 2010*.
6. Undeterred, the Plaintiff filed extensive submissions in relation to his Application before Court on 12th May 2014. They commenced by detailing the prayers sought by the Application and quoting **Order 42 rule 6 (1) and (2)** of the *Civil Procedure Rules*. The Plaintiff submitted that the Court has the jurisdiction to grant a stay of execution of the Orders herein as provided under **section 2A and 3A** of the *Civil Procedure Act* and **Order 42 rule 6** of the *Civil Procedure Rules* pending the hearing and determination of the Plaintiff’s intended appeal. The submissions went on to say that the law governing the stay of proceedings and execution of decree had been fundamentally altered by the Court of Appeal into decisions namely **African Safari Club v Safe Rentals Ltd (2010) eKLR** and **Lake Tanners Ltd & 2 Ors v Oriental Commercial Bank Ltd (2010) eKLR**. The Plaintiff went on to quote extensively from those two cases (including references from the **Erinford Properties Ltd v Cheshire County Council (1974) 2 All ER 448**) and then submitted that the subject matter of the appeal was the matrimonial home of the Plaintiff in which he had heavily invested financially and that he would suffer irreparably should the Defendant proceed with the exercise of its statutory power of sale. The Plaintiff then went on to refer the Court to the cases of **Madhupaper International Ltd v Ker (1985) KLR 840** and **Bankruptcy Cause Nos 25 and 26 of 2009 Purity Githae & Anor v Oceanfreight Transport Company Ltd (unreported)**.
7. Continuing with his submissions the Plaintiff, cited the Ruling of **Mabeya J.** in the **Purity Githae** case as above in which the learned Judge quoted the Court of Appeal’s decision in **E. Muiru Kamau & Anor v National Bank of Kenya Ltd (2009) eKLR** as follows:

“The Courts including this court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as is practicable to place the parties on equal footing.”

Mabeya J. added that he was convinced when arriving at his decision:

“... it is imperative for this court to balance the interests of the parties before me. Whilst the Applicants are to be cautioned against suffering substantial loss, the Respondent must also be assured of the safety of its judgement. If the appeal succeeds, the effect of the receiving order may not be easily reversed.”

The Plaintiff set out its grounds of Appeal against the Ruling dated 13th July 2012 and then went on to say that if the stay was not granted then the appeal would be nugatory:

“since the appeal stems from the order which dismissed the Plaintiff’s/Applicant’s application for injunction and the Defendant/Respondent may proceed and exercise its statutory power of sale in respect of the suit property which may occasion the Plaintiff/Applicant irreparable loss and damage.”

8. To this court, this is where the crux of this matter lies. The Defendant submits that there was no Order (or Decree) emanating from the Court in its said Ruling of 13th July 2012. On the other hand, the Plaintiff maintains that the Court's Order was that its Application dated 17th April 2012 be dismissed. As I said earlier, there is no copy of the Ruling dated 13th July 2012 on the Court file so that the Court cannot ascertain whether or not any Order was made by **Mabeya J.** In my view it was the Plaintiff's responsibility to provide a copy of the said Ruling to this Court, bearing in mind that the Court file had to be reconstructed and, further, that a certified copy of the Ruling would be required for appeal purposes in the Court of Appeal. Quite how this Court is expected to deliver a Ruling seeking a stay of execution as regards an Order to be appealed from without knowing what the Order is or entails, is beyond me.
9. Turning to the authorities cited to this Court by the Plaintiff, he seemed to be confusing the different applications which could be raised in circumstances pertaining to an appeal. The Application was brought under the provisions of **Order 42 rule 6 (1)** but some of the authorities cited to this Court related to applications for injunctions pending appeal against the dismissal of an application for an interlocutory injunction. The latter would have to have been brought before this Court under the provisions of **Order 40** of the *Civil Procedure Rules, 2010*. As a consequence, I do not consider the **Erinford Properties** and **Madhupaper International** cases (both supra) to be relevant to the Application before this Court. Further, I do not consider that the **African Safari Club** and **Lake Tanners** cases to be of much assistance as they were both applications for stay made to the Court of Appeal under the provisions of **Rule 5 (2) (b)** of the Court of Appeal Rules. It is trite law that the tests as regards applications for stay in this Court and in the Court of Appeal involve different criteria.
10. **Order 42 Rule 6** provides that no appeal shall operate as an automatic stay of proceedings or execution pending the intended appeal. It is the onus of the aggrieved party or intended appellant to make application under the said provision of the *Civil Procedure Rules*. The grounds upon which the Court will consider such an application are provided under **Rule 6(2)**. It is provided *inter alia*:

“(2) 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.** (Underlining mine).

In exercise therefore of its mandate under **Section 63(e)** of the *Civil Procedure Act* as regards the issuing of interlocutory orders and pursuant to the provisions set out under **Order 42 Rule 6(2)(a)** and **(b)**, the Court has the power to issue stay orders pending appeal should the Applicant satisfy the conditions set out under the said provisions of the *Civil Procedure Rules*. As regards **Rule 6(2)(a)**, Musinga, J. (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held *inter alia*:

“...substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted (emphasis added) and that applicant is therefore forced to pay the decretal sum.”

11. The Plaintiff's said Affidavit in support of his Application as regards the point of substantial loss has only detailed that the suit property is his matrimonial home. He has not detailed anything else as regards the loss. In this vein, I adopt the finding of **Ringera J.** in the **Isaac O. Litali v Ambrose W. Subai & 2 Ors HCCC No. 2092 of 2000 (unreported)** case as follows:

“However, since the plaintiff has in his pleading and affidavit made a mountain out of the fact that he has developed the land in question to a home and its sale would therefore occasion pain and loss which cannot adequately be compensated in damages, I think it would be fair to express a view on the matter. I am of the opinion 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. I say so 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. In that respect, land is no different from a chattel such as a motor vehicle or any other form security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.”

In my view and taking into account the dictum of **Ringera J.** as above, I do not consider that the Plaintiff has proved to this Court that he will suffer substantial loss and, accordingly, I do not believe that he has satisfied the provisions of **Order 42 rule 6 (1) (a)** as above.

12.As regards **Rule 6(2)(b)** in relation to security for costs, the Court in **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** (Mabeya, J.) held as follows:

*“As I stated in the case of **KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR** ‘in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced’.*

... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see why the same should not be applicable in this case.”

For the Court to issue an order for stay pending appeal, the Plaintiff would have to furnish security for the due performance of the decree. His Affidavit in support of the Application makes no mention whatsoever as to whether he is prepared to put up security before this Court and, if so, how much. In consequence, I do not consider that the Plaintiff has satisfied the condition detailed in **Order 42 rule 6(2) (b)** either.

13.For the above reasons but principally because this Court does not have the said Ruling of **Mabeya J.** dated 13th July 2012 before it, I dismiss the Plaintiff’s Notice of Motion dated 20th July 2012 with costs to the Defendant.

DATED and delivered at Nairobi this 16th day of July, 2014.

J. B. HAVELOCK

JUDGE