REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

MISC. CIVIL APPLICATION NO. 419 OF 2011

OSERO & COMPANY ADVOCATES.................. APPLICANT

Versus

EASY PROPERTIES LIMITED ....RESPONDENT

RULING

Stay of execution pending appeal

[1] I am considering an application for stay of execution pending appeal. The application is made by a Motion dated 28th April, 2014. For purposes of this ruling, Easy Properties Ltd shall be referred to as the Applicant while Osero & Co Advocates shall be the Respondent. The Applicant, in compliance with order of this Court deposited in Court the decretal amount plus the auctioneer's costs. It now seeks for a substantive order of stay of execution pending the hearing and determination of intended appeals to the court of Appeal. The decree sought to be stayed emanated from the ruling delivered by the court on 25th March, 2014 in this case and Milimani High Court Misc. Application No. 422 of 2012. The Applicant also prays for costs of the application to abide the outcome of the intended appeal.

[2] The application is premised on the grounds set out in the application and the Supporting Affidavit of Stephen Onyambu sworn on 28/4/14. According to the Applicant, the major issue for determination herein is whether the applicant is entitled to order of stay of execution in Misc. 419 and 422 of 2012 pending appeal to the Court of Appeal. The Applicant is convinced it is entitled to the orders sought and gave its reasons, that: on 25th March, 2013 the Deputy Registrar in one ruling dismissed the Applicant's applications dated 21st September, 2012 both in Misc. 419 and 422 of 2012 which had been made on the basis that the Applicant was not liable to pay legal fees to Osero & CO. Advocates because under the Sale Agreements, the purchasers were liable to pay legal fees. The Applicant was the developer just selling apartments to purchasers. Then, the Applicant, on the 8th April, 2013 made applications in the two causes (which were later consolidated) seeking that the honourable judge to set aside the ruling by the DR made on the 25th March, 2013. The application was refused and judgment entered on the Certificate of Costs. The Respondent advocates have now attached the property of Easy Properties Ltd in execution of a decree resulting from a decreed delivered by the Honourable Havelock J on the 25th March, 2014. See the proclamation attached as SO2.

[3] The Applicant contended that it was never served with any court papers or decree and came to learn of the outcome of the ruling by the court when the auctioneers pounced. No information was passed to it by its former advocate despite attending the delivery of the ruling. The Applicant felt aggrieved by the said ruling of the court and prefers an appeal to the Court of Appeal and therefore urges this court to grant leave to appeal. They argued the appeal it intends to prefer against that ruling will be rendered nugatory if the execution was to proceed as the appeal is arguable. The points of appeal have been set out to be: 1) that the sale agreements are clear that the purchasers therein are liable to meet the Respondent's legal costs as provided for under Clause 9, 10, 15 and 16. Clause 9 at page 28 of the application states that ***"All documents shall be prepared and presented for registration by vendors' advocates. The purchaser hereby undertakes to pay the vendor's advocates on demand all sums necessary for the stamping and registration of the sublease."*** Further, clause 15 provides that ***"The purchaser shall pay the vendor's advocates charges in connection with the transaction as follows, payable on or before execution of the sale agreement."*** Secondly, the court did not correctly interpret clause 16 of the sale agreement in respect of Misc. Application o. 419 of 2012 in view of the fact that under clause 10 thereof, the purchasers were under an obligation to pay ALL costs necessary for registration. It should be noted that clause 10 of the agreement provides in part a follows:

> ***"all documents shall be prepared and presented for registration by the vendor's advocates. The purchaser hereby undertakes to pay the Advocates (Osero and Company) on demand all sums necessary for the stamping and registration of the sublease."***

[4] The Applicant submitted further that, contrary to the law, no decree was extracted in respect of Misc. Application No. 422 prior to execution. The Replying affidavit by Lewis Osero does not aver that the Applicant was involved at any stage in the drafting of the decree as required by the law. The Applicant cited Order 21 Rule 8(2) which provides as follows on the preparation of decrees;

> ***"8(2) Any part in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit who, shall approve it with or without amendment…. Or reject it.. without undue delay; and if the draft is approved by the parties. It shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.***
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> ***8(3) if no approval of or disagreement with the draft decree is received within seven days after deli very thereof to the other parties, the registrar on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.***

[5] The Applicant submitted that the law allowed parties to agree on the decree at first instance and the Registrar comes in where there is disagreement. Preparation of a decree is, therefore, part of the proceedings and none of the party including the judgment-debtor should be excluded. The Decree in Misc. Application 419 of 2012 was single-handedly extracted or settled without the involvement of the Respondent. Accordingly, there was a violation of the mandatory requirements of Order 21 Rule 8 which makes the decree illegal. Also no decree was drawn in Misc. 422 of 2012 and none was attached in the Replying Affidavit, and so no execution was possible. On the other hand, the Applicant argued it had fulfilled the conditional order.

[6] The Applicant submitted further, that the Court is empowered by the Civil Procedure Rules to grant the stay orders sought in the application. They cited Order 22 Rule 22 of the Civil Procedure Rules which provides as follows;

> ***"22(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court***

having appellate jurisdiction in respect of the decree or the execution thereof, decree of execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto."

[7] According to the Applicant, it has fulfilled the condition set by the court and has deposited the decretal amount plus the auctioneer's costs in court as ordered which is in satisfaction of Order 22 Rule 3 that requires:

"***Before asking an order to stay execution or for the restriction of property or the discharge of the judgment debtor the court may require such security from or impose such conditions upon, the judgment debtor as it thinks fit."***

[8] The Replying Affidavit does not address the issues set out in the application. The affidavit at paragraphs 9 and 10 merely states that a decree was duly extracted as required by law. At this stage, the parties cannot speculate as to speculate whether the appeal is frivolous or not as the Applicant is simply asking for a chance to test the ruling of the Honourable judge at the Court of Appeal.

The Respondent vehemently opposed

[9] The Respondent vehemently opposed the application. It filed a Replying Affidavit and submissions in opposition to the application. First, the Applicant filed its submissions out of time, i.e. on the 11th day of July, 2014, one month after the deadline set by this court. No leave was sought from the court on the late filing of submissions. The Applicant flouted the law and the question is whether or not the intention of the Applicant was merely to punish the Respondent and waste this court's time. The Respondents, therefore, beseeched the court to expunge the submissions from the record. Apart from that, the Respondent submitted that the Applicant herein is not entitled to the prayers sought for reasons that; 1) On the 25th March, 2012 the deputy registrar in one ruling dismissed the applicant's application dated 21st September, 2012 both in Misc. 419 and 422 of 2012. Again, on the 8th day of April,2 013 the Applicant made applications in the two files, seeking orders to set aside the ruling by the deputy registrar based on the same grounds as their applications dated 21st September, 2012. Justice Havelock heard the applications on merit and on 25th March, 2014 delivered his ruling, essentially dismissing the applications as begin frivolous and unmeritorious and that the respondents did not come with clean hands. Indeed, the court earlier on directed that the two matters (Misc. App. No. 419 and 422 of 2012) be consolidated and that Misc. App. No. 419 to serve as a test case. And counsel for the Applicant is fully aware. Applicant is, therefore, misleading the court and thus, has come to this court with un-clean hands to bog this court down with many unmeritorious applications based on the same facts and grounds. It is after the applications were dismissed, that Moran Auctioneers proclaimed the Applicant's good as judgment had already been entered. The application herein is merely aimed at scuttling the execution. After Justice Havelock dismissed the Applicant's applications, the ruling is to be adopted in the rest of the files, i.e. Misc. application Nos. 420, 421, 422 and 423. No issue on the procedure of obtaining warrants was raised by counsel for the Applicant the attention of counsel for the Respondent. The Applicant was represented and it admits its counsel was present during the delivery of the ruling by the DR and Justice Havelock. The Respondent is not responsible on how the Applicant's former advocates communicated with their client.

[10] The Respondent was of the view that Order 21 Rule 8(2) uses the words***..."Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit...''*** thus, not a mandatory command. The Applicant is simply wasting time and they have not filed any appeal. Their application should be dismissed with costs.

THE DETERMINATION

Stay of execution pending appeal

[11] The Applicant has premised its application on Order 22 rule 22 of the Civil Procedure Rules but I should think that rule relates to application for stay of execution made before the court to which a decree has been sent for execution. Such stay obtained under rule 22 is of an intermediate nature as its purpose is ***to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof.*** This court is not the court to which a decree has been sent for execution in the sense of rule 22 and basing this application under that rule is misleading. Some think that may not matter and will seek the magic cure under Article 159(2) (d) of the Constitution. What is most desirable, however, is that correct provisions of the law need be cited by parties and more so where legal counsels are instructed. There are benefits that accrue where proper applications are made, for instance, the party applying will clearly urge his case as he will be aware of the legal principles applicable in his case. The Respondent too will know exactly the case he has to respond to. Ultimately, the court will also easily discern the case before it without engaging in tedious disentangling of muddled-up issues. These things will become clearer after what I will say next. Since the Applicant is seeking stay of execution pending appeal, the correct law is Order 42 Rule 6 of the Civil Procedure Rules and this application must meet the thresholds thereto. I will, therefore, be guided by the thresholds in Order 42 rule 6 of the CPR in determining the application herein. See a work of the court in **JASON NGUMBA KAGU v INATRA AFRICA INSURANCE COMPANY LTD [2014] eKLR** that:

> ***[9] The thresholds for granting a stay pending appeal are set out under Order 42 rule 6 of the Civil Procedure Rules. The conditions therein simply act as legal guiding principles or considerations in the exercise of court's discretion-that is quite in line with the command of law that discretion should be exercised judicially and in accordance with defined legal principles. And to my knowledge, I do not think those considerations under Order 42 rule 6 of the CPR have been obliterated or in any way diminished by the introduction of the principle of overriding objective in sections 1A and 1B of the Civil Procedure Act as the Applicant seems to argue. On the contrary; the correct position arising out of the decisions of the Court of Appeal and recently the Supreme Court is that the principle of overriding objective now enables the court to have a much wider approach in applying those thresholds set out by law in a manner that it will exercise discretion for the sake of substantive justice under the Constitution. And, that does not mean the conditions in Order 42 rule 6 of the CPR are to be ignored or have been supplanted by other utopia or superior grounds. What it means, and I have already stated this, is that courts should apply them within the constitutional desire to serve substantive justice by acting fairly and justly; in the circumstances of each case as opposed to strict application thereof without regard to the context and the demands of justice in the case. Such approach and development of the law is a constitutional matter which recognizes that the law has always kept growing to greater levels of refinement, as it expands to cover new situations exactly not foreseen before. See the case of SULEIMAN v AMBOSELI RESORT LTD (2004) eKLR 589 Ojwang Ag.J (as he then was) and Justice Hoffman in FILMS ROVER INTERNATIONAL (1986) 3 ALL ER 772. That is the test and approach I shall apply here. Let me start with the straight forward issue on whether this application has been brought without unreasonable delay.***

Delay in bringing application

[13] The application was filed on 28th of April, 2014 which is slightly over one month after the decision by Havelock J was delivered on 25th March, 2014. This might not be construed to mean unreasonable delay. The application, therefore, passes the first hurdle.

Substantial loss occurring and the question of security

[14] As I have often stated, the possibility of substantial loss occurring unless a stay is issued is the cornerstone of the jurisdiction of the court in granting stay of execution under Order 42 rule 6 of the CPR. And the decision of the Court on whether substantial loss will occur will depend on the final analysis by the court in a delicate and always novel balancing act between the rights of the parties; the Applicant's right to his appeal and its prospects, on the one hand; and, the right of the Respondent to the fruits of his judgment, on the other. Where the court decides to grant stay, it must be on sufficient cause being shown, and then securing the pain of postponement of the Respondent's right to realize the judgment with sufficient security for the due performance of the decree that might ultimately become binding on the Applicant. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the Applicant. See what the case of **JASON NGUMBA** (supra) where the court stated that:

> ***''...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIAKA CHESETO that:***
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> ***''The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...''***

[16] Other than stating generally that the intended appeal will be rendered nugatory; that it has complied with the order of the court; and has deposited the decretal sum in court; the Applicant has not shown substantial loss will occur if an order for stay of execution is not made in this case. The order of the court that the Applicant deposits the decretal sum was issued ex parte as a condition for the ex parte order of stay issued. The Applicant was obliged to comply with the said order if it was to enjoy the ex parte stay order. Its compliance, therefore, is not a guarantee that a substantive order of stay of execution will be issued. The Applicant must meet the threshold set out in law. Accordingly, the fact that the Applicant deposited the decretal sum is not proof that substantial loss will occur unless the court issues a stay of execution of the decree. The best such deposit can become is a security for the performance of the decree that may ultimately become binding on the Appellant. I should also say here that filing of appeal is not proof of substantial loss occurring in the sense of Order 42 rule 6 of the CPR; otherwise there would be no need to apply. Much more is needed depending on the circumstances of each case to show the appeal will be reduced to pious venture unless stay is ordered. In fact, the Applicant did not even attempt to establish the loss it will suffer as is always expected in such applications. There was no allegation that the Respondent will not be able to refund the decretal sum if it is paid over to them, thus, rendering the intended appeal a barren result. The only thing which comes close to saying that substantial loss will occur is in the allegation that the decree was not extracted properly as the Applicant did not participate in its extraction. But that is an important matter and the Applicant ought to have applied for the formal decree drawn herein to be set aside instead of reducing such important matter into a mere argument in its submissions. Nothing shows the Applicant will suffer any substantial loss as it can always recover the decretal sum from the Respondent- the decretal sum stands at not more than Kshs. 97,000. The upshot of my analysis is that I dismiss the application dated 28th April, 2014 with costs to the Respondent.

Dated, signed and delivered in court at Nairobi this 6th day of November, 2014

F. GIKONYO

<u>JUDGE</u>