



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 183 OF 2011

VERONICA SUM APPELLANT/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD RESPONDENT

(Being an appeal from the Judgment of Hon. G. Mbogo (Chief Magistrate) in Eldoret Chief Magistrate's Civil Case No. 865 of 2003)

RULING

The application for determination before me is Notice Motion dated 27th September, 2013. The Applicant who is the Appellant herein prays for orders;

1. That pending the hearing and determination of this application inter parties, there be a temporary order of injunction and stay of execution to wit;

(a) A stay of execution for the costs in Eldoret Chief Magistrate's Civil Case No. 875 of 2003.

(b) An injunction to restrain the realization by the Respondent of parcel Eldoret Municipality Block 13/42.

2. That court be pleased to issue a stay of execution and injunctive orders in terms of the prayer above pending the hearing and determination of the appeal.

The application is brought under Order 42 Rule 6 (1), (2) and (6) of the Civil Procedure Rules. It is premised on the following grounds:-

(a) The Applicant's claim for declaratory orders in the lower court was dismissed.

(b) That with the dismissal, the Respondent is at liberty to advertise the suit parcel for sale in purported exercise of its statutory power of sale.

(c) That at the same time, without an order for stay of execution for costs, the Respondent is at liberty to move to execute for the same.

(d) The Applicant's appeal raises valid grounds with a high chance of success.

(e) That in the event of the events in (b) and (c) above taking place, the Appellant will suffer prejudice and the very substratum of the appeal will be lost.

It is further supported by the affidavit of Veronica Sum, the Applicant herein sworn on 27th September, 2012. She deposes that she charged her land parcel No. **ELDORET MUNICIPALITY BLOCK 13/42** to secure a loan facility to M/s. Sisibo Co-operative Society. After negotiations with the Respondent, it was agreed she pays Ksh. 1,500,000/= in full and final settlement thereof. After she had paid the full amount, the Respondent turned around and stated that the representation to pay the sum of Ksh. 1,500,000/= had no approval of the head office. She then declared that the Respondent was barred by the doctrine of estoppel from turning away from the representation on which she (Applicant) acted upon.

The Applicant avers that although the representation was not in writing, by the conduct of the parties, the doctrine of estoppel applied. She thus claims that she has a good appeal reasons wherefore the orders sought should be granted.

The application is opposed by way of a Replying Affidavit sworn by J. M. Kisuna, the Manager of the Respondent's bank at Eldoret Branch sworn on 12th October, 2012. It is deposed that there was time limit within which the Applicant ought to have complied with the agreement of paying Ksh. 1,500,000/=, a material disclosure she did not make. It is also averred that the prayer for injunction is immature and does not meet the minimum threshold of granting equitable orders. That further if the orders sought are granted, the interest on the loan would balloon to such levels that it will not be recovered by sale of the security held. It is urged that the application be dismissed with costs.

The first prayer of the application is spent since temporary orders of stay of execution were granted pending hearing inter-parties of this application.

This application is brought under Order 42 Rules 12 and 6 of the Civil Procedure Rules which basically deal with stay of execution. The Applicant has however sought an additional order for injunction for realization by the Respondent of L.R. No. Eldoret Municipality Block 13/42 which is the security for the loan facility secured with the Respondent bank. Although this court has not had the advantage of looking at the judgment of the trial court (as the same is not annexed to this application), it is my view that if the Applicant succeeds in the prayer for stay of execution, automatically the security cannot be realized.

I then need only focus on what the Applicant requires to satisfy as envisaged under Order 42 Rule 6 (2) of the Civil Procedure Rules. The same provides as follows;

“No order for stay of execution shall be made under sub-rule

(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.”

Sub-rule (1) of Rule (6) on the other hand provides as under;

“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. ”

On whether the Applicant is likely to sustain substantial loss, the answer is definitely in the affirmative. She deposited title to her land as security for the facility. If the Respondent was to realize the same, the

Applicant stands to lose her land which is an important asset.

As to whether the application was brought without undue delay, I note that the appeal by way of the memorandum of appeal was filed on 15th November, 2011. This application was filed on 27th September, 2013, hence a delay of close to two years. No reason has been advanced by the Applicant as to why she took upto two years to file this application whereas what is at stake is her land. It is my considered view that the delay of close to two years is inordinate. And there being no explanation for the same, it follows that the Applicant cannot benefit in this ruling when she has come to court with unclean hands.

As for depositing security in due performance of the decree, it is clear that the Applicant has not offered any. However, the court on its own motion may direct that such security as may be reasonable be deposited accordingly. In the present case though, the Applicant having come to court too late in the day, demonstrates that this application was brought as an afterthought. It is aimed at denying the Respondent from realizing the fruits of its judgment. The Applicant does not, in the circumstances, deserve the mercy of this court.

In the result, I find no merit in the application. The same is dismissed with costs.

DATED and DELIVERED at ELDORET this 11th day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Manani absent for the Appellant/Applicant

Miss Adhiambo holding brief for Mutei for the Respondent