



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CIVIL APPEAL NO.21 OF 2017

ISAAC MWANGLI.....1ST APPELLANT/APPLICANT

ANN NJERI MWANGLI.....2ND APPELLANT/APPLICANT

-VERSUS-

MOLYN CREDIT LIMITED.....1ST DEFENDANT/RESPONDENT

BENSURE AUCTIONEERS.....2ND RESPONDENT

SWALLEH SAKWA MOHAMED.....3RD RESPONDENT

DISTRICT LAND REGISTRAR, THIKA.....4TH RESPONDENT

(Being an Appeal from the Ruling and Order of the Chief Magistrate's Court at Thika delivered by Hon. G. Omodho (SRM) on 29th November 2017)

RULING

On 29th November 2017, Hon. G. Omodho (SRM) delivered a **Ruling** on **two applications** that had been filed in **Thika CMCC No.820 of 2013**. The **first** application was dated 17th February 2017, and the **second** one was dated 14th March 2017. After hearing the two applications, the Hon. Trial Magistrate dismissed the **Notice of Motion** application dated 17th February 2017 and partially allowed the **Notice of Motion** application dated 14th March 2017.

The Appellants/Applicants herein were aggrieved by the said Ruling and they lodged an Appeal in this court vide a **Memorandum of Appeal** dated 4th December 2017, and raised seven grounds of Appeal. The Appellants/Applicants urged the Court to allow their Appeal and wholly allow the **two Notices of Motion**.

Simultaneously, the Appellants/Applicants filed a **Notice of Motion** application even dated and sought for various prayers. The prayers sought were:-

1) That the Honourable Court be pleased to stay the orders of the Hon. G. Omodho (SRM) date 29th November 2017 dismissing the 1st Appellant's application dated 17th February 2017 and application dated 14th March 2017 to the extent that allows auctioning of the Appellant's household goods and disposal and/or interference with the suit property.

2) That this Honourable Court be pleased to grant a temporary injunction restraining the 3rd & 4th Respondents by themselves, their agents, their servants, their employees, or anybody claiming interest in their name otherwise jointly and/or severally from advertising, auctioneering, alienating, selling, transferring ownership thereof or hindering the Appellants and their family from peaceful occupation of their family parcel of land known as Juja/Kalimoni Block 8/462 in any manner pending the hearing and determination of the Appeal.

3) That the court be pleased to stay proceedings of the Lower Court pending the hearing and determination of this Appeal.

4) That this Honourable Court do grant Leave to serve the 3rd Respondent with this application and other pleadings herein by registered post on his last known postal address being P O Box 409-50100 Nairobi as has been the norm in the Lower Court Proceedings.

5) *That the costs of this application be provided for.*

The application was supported by the *Affidavits* of the 1st & 2nd Appellants/Applicants herein.

In his *Supporting Affidavit, Isaac Mwangi*, the 1st Appellant/

Applicant averred that between 2011 and 2012, he used the title deed of *LR.No.Juja/Kalimoni Block 8/462*, to obtain three loans from the 1st Respondent which came to a total of *Kshs.1,550,000/=*. That he also obtained a *Spousal Consent* from the 2nd Appellant/Applicant who is his wife and subsequently, the 1st Respondent retained the title deed as security. He also averred that he continued to repay the loan but before completion, the 1st Respondent instructed *Recovery Concepts Auctioneers*, to sell the charged property which contained the family land and house on allegations that he had defaulted. He contended that he filed *Thika CMCC No.820 of 2013*, against the 1st Respondent and Auctioneer and he obtained interim orders on *14th October 2013* to temporarily restrain the said Defendant from advertising, auctioneering or interfering with the Applicants suit property being *Juja/Kalimoni Block 8/462*.

It was his contention that as the case progressed, he completed repayment of the principal amount and in excess of *Kshs.87,710/=* which the 1st Respondent has not denied. Further that while the matter was still pending in court, the 1st Respondent's Advocate gave an undertaking that there would be no disposal of the suit property pending the hearing and determination of the suit. However, despite the said undertaking, the 1st Respondent instructed *Regent Auctioneers Ltd* to auction the suit property and ignored the fact that the matter was pending in court. The

said auction was therefore unlawfully as it was secretly done.

He alleged that on *16th February 2017*, the 2nd Respondent pinned a *Proclamation Notice* on the gate to the suit property distressing his household goods and that was on instructions from the 1st Respondent. Subsequently, the Applicant filed a *Notice of Motion* application dated *17th February 2017* seeking for various orders.

In response thereto, the 2nd Respondent averred that the instructions to levy distress were given by the 3rd Respondent who was the alleged purchaser of the suit property. Thereafter the Applicant filed a *Notice of Motion* application dated *14th March 2017*, seeking to enjoin the 3rd Respondent to the suit and have the said sale of the suit property declared unlawful.

He contended that after canvassing the two applications, the trial *Magistrate Hon. G. Omodho (SRM)* dismissed the *Notice of Motion* dated *17th February 2017*, and partially allowed the *Notice of Motion* dated *14th March 2017*. That the said dismissal has exposed the Applicants' family to the danger of being evicted by the 3rd Respondent from their family house. Further, that the 3rd Respondent might sell the suit property to a 3rd Party, charge the title to obtain a loan which actions might be adverse to the Applicant. He therefore urged the Court to allow the instant application.

In her *Supporting Affidavit, Anne Njeri Mwangi*, the 2nd Applicant averred that she is a spouse to the 1st Appellant/Applicant and that she gave her Spousal Consent to the 1st Appellant/Applicant to enable him obtain the final of three loans totaling to *Kshs.1,550,000/=* from the 1st Respondent who retained the title deed for the land parcel *No.Juja/Kalimoni Block 8/462* as security. She contended that she later came to learn that the 1st Respondent had unlawfully sold the parcel of land without *Notice* or reference to her and the subsequent buyer was the 3rd Respondent herein who demanded rent from them and they were not his tenants.

It was her further contention that she sought to be enjoined as an Interested Party in *Thika CMCC No.820 of 2013* to protect her legal and spousal rights. However, the trial court did not address her legal and spousal rights in her *Ruling of 29th November 2017*. She also contended that since the *Hon. Magistrate* dismissed the 1st Applicant's *Notice of Motion* dated *17th February 2017* and *14th March 2017*, then she is exposed to the danger of a possibility of being evicted by the 3rd Respondent from their family land or he might sell the suit property to 3rd parties, charge the same to obtain a loan which actions would be adverse to the 2nd Applicant and her family. She urged the Court to allow the instant application.

The application is contested and *Lydia Nyambura Anyagu*, a Director of the 1st Respondent filed a *Replying Affidavit* dated *5th January 2018*, and averred that indeed the 1st Applicant used the title deed of the land parcel *No.Juja/Kalimoni Block 8/462*, to obtain a first legal charge, further charge and second further charge to obtain a loan amounting to *Kshs.1,550,000/=* which was to be paid on monthly basis together with interest and as agreed in writing between the 1st Applicant and 1st Respondent herein. However, the 1st applicant failed to clear the loan amount together with interest accrued thereto. It was here contention that after the 1st Applicant failed to pay the loan, the 1st Respondent wrote to him asking him to clear up the loan account. The said request did not elicit any response from the 1st Applicant which prompted the 1st Respondent to issue the Applicants with the *Statutory Notice of Sale* as the registered owner of the suit property.

It was her further contention that despite the issuance of the said Notices, the 1st Applicant did not settle the loan arrears and consequently, the 1st Respondent instructed *Recovery Concepts Auctioneers* to exercise the 1st Respondent's right of *Statutory Power of Sale* by selling the charged property via *Public Auction*. She alleged that the Auctioneers duly notified the Applicants of the intended sale and also put an advertisement in the *National Newspaper*. She also denied existence of any interim orders to stop the sale as the last time the orders were extended was on *23rd May 2014*, and therefore there were no orders stopping the sale. Further that the sale by *Public Auction* was done according to the laid down procedures and the law. She contended that the 2nd Applicant was fully aware of the facts that the 1st Applicant had defaulted in paying the loan and despite being shown the advertisement in *Nation Newspaper*, the 2nd Applicant did not bother to apply

to be enjoined in the main suit but only sought to do so after the sale had already taken place. It was her contention that the 2nd Applicant is colluding with the 1st Applicant to ignite all manner of tactics so as to delay the hearing of the main suit. She deposed that as far as the 1st Respondent is concerned, the charged property was sold by Public Auction in accordance with the law, executed the transfer forms and the same was duly registered in the name of the 3rd Respondent herein. She urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions, which this Court has carefully read and considered. The application for consideration is the one dated **4th December 2017**. It is not the Appeal itself. However, the Court has noted that the Applicants have filed several written submissions and they have dealt with the merit of the Appeal rather than the merit of the **Notice of Motion** dated **4th December 2017**.

The Court also noted that the application was first drawn by **Dola Magani Advocates** who acted for the Applicants in the first instance. The Applicants later appointed the **Law Firm of Waithira Mwangi & Co. Advocates** to act for them through the Notice of Change of Advocates filed on **31st January 2018**.

However, on **12th April 2018**, the Applicants filed a **Notice to Withdraw the Advocate** and act in person and have been acting in persons all through.

As I have stated above, the Applicants' submissions are more in support of the main Appeal and not the instant application. However, that does not prevent the court from making a determination in the instant application because submissions are not evidence and court can decide a case based on pleadings and evidence presented to it. See the case of **Daniel Toroitich Arap Moi & Another..Vs...Mwangi Stephen Murithi & Another (204)KLR**, where the Court of Appeal held that:-

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties ‘marketing language’ each side endeavouring to convince the court that its case is the better one. Submissions we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented”.

With the above in mind, the Court will proceed to determine the instant application based on the available evidence.

A reading of the **Ruling** delivered on **29th November 2017** by **Hon. G. Omodho(SRM)** shows that the two applications were basically dismissed. In a dismissed matter, the court does not give any positive orders and it would be difficult to stay such an order of dismissal. This also being an interlocutory application and not the Appeal itself, the Court does not have the benefit of the whole court's proceedings to take into account. However, this Court will determine the application based on the available materials before the court, the relevant provisions of law and cited authorities.

The Applicants have sought for **Stay of Orders** issued by the **Hon. G. Omodho (SRM)** on **29th November 2017** dismissing the 1st Applicant's applications dated **17th February 2017** and **14th March 2017** to the extent that allows auctioning of the Appellant's household goods and disposal and or interfering with the suit property. As the court stated earlier, the orders granted by Hon. Trial Magistrate were dismissal orders which are not positive in any way. That is the reason why the Applicants have come to court to challenge the said dismissal in the filed Appeal. There was no evidence that there were any existing orders so that if the court would Stay the dismissal Orders then, the earlier existing orders would remain in place. From the proceedings and the Ruling, it is clear that a sale had taken place and therefore there would be nothing to stay. See the case of **John Omondi Odhiambo...Vs...James Oluoch, Civil Application No.31 of 1995**, where the Court of Appeal held that:-

“Where the Stay is against a sale which has taken place, there is nothing for the court to Stay”.

It is trite that grant of Stay of Proceedings or Orders appealed against is a matter of Judicial discretion. However, the said discretion should be exercised judicially. See the case of **Pravin Galot...Vs...Chief Magistrates Court at Milimani Law Courts [2017] eKLR**, where the Court held that:-

“The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judicially”.

The court finds that there is no basis laid for court to Stay the Orders of dismissal of the two applications issued on **29th November 2017** and therefore the Court finds this prayer not merited.

The second prayer is for grant of temporary injunction to restrain the 3rd & 4th Respondents from dealing with the suit property in a manner that would interfere with the Applicants' peaceful occupation of the said parcel of land. From the available evidence, it is evident that the 4th Respondent was not enjoined in the suit. The Applicants have appealed against that decision. Therefore the 4th Respondent is not yet a party to these proceedings and no orders can be issued to bind him at this juncture.

On whether to grant temporary injunction to restrain the 3rd Defendant, the Court finds that these are the same orders that were dismissed by the trial Court and forms part of the grounds for Appeal. It is evident that the suit property has now been sold to the 3rd Respondent and the Applicants are in possession. The suit at the Chief Magistrate's Court was filed in **2013**, whereas the suit property was sold in **2016**. Did the 1st Respondent go against the **doctrine of lis pendens**? The doctrine of *Lis Pendens* has been described as follows in the case of **In Re Estate**

of Solomon Muchiri Macharia [2016] eKLR;

***“The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in general interest of public policy and good and effective administrative of justice. It therefore overrides a title obtained during the pendency of proceedings touching on the property and prohibits a party from transferring property to others pending determination of the litigation on the parties rights on the property. Lis pendens is therefore the jurisdiction or control that courts obtain over property in a suit awaiting determination of the suit.*”**

These are issues to be determined in the main Appeal or suit but not

in the instant application. Since this is an application for injunction pending Appeal, the Court should not delve into the merit of the intended Appeal but only to consider whether the Applicants are deserving of injunction pending the determination of the intended Appeal.

It is trite that jurisdiction to grant an Order of Injunction pending Appeal is discretionary which discretion should be exercised judicially. See the case of Madhupaper International Ltd...Vs...Kerr (1985) eKLR;.

***“It took a little time to persuade the advocates that under rule 5(2)(b) the court has its own jurisdiction to grant an injunction pending an appeal. It is a matter for this court’s discretion according to the rule. It is exercised judicially and not in whimsical or arbitrary fashion”.*”**

Indeed an Appellate Court does not easily interfere with the exercise of a trial Court and it will only do so if there is fulfilment of the stringent conditions laid down in the case of Mbogo...Vs...Shah (1968) EA 93 at 96,

where the Court held that:-

***“An appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”.*”**

Without going to the merit of Appeal, it is evident that the Applicants charged the suit property to the 1st Respondent. It is also evident that the 1st Respondent attempted to exercise **its Statutory Power of Sale** in the year 2013. The 1st Applicant went to court and in the first instance, injunctive orders were issued. Since this court does not have the benefit of perusing the original file from the Lower Court, it is not evident what happened to the injunctive Orders though the trial Magistrate in her **Ruling of 29th November 2017** alluded to the fact that the said Orders were last extended on **25th August 2014.**

The Applicants have alleged that they have paid all the loan arrears plus some excess money. That is not a matter to be decided at this stage but at the full hearing of the main suit. However, it is evident that the suit property has now been sold to 3rd Respondent. Whether the said sale was done lawfully or not is not a matter for determination now. Whether there was breach of *lis pendens* doctrine is also not a matter for determination at this juncture. However, it is evident that there was a distress for rent in favour of 3rd Respondent. The 3rd Respondent has not filed any response to this application.

It was not disputed that the suit property herein is where the

Applicants family home stands. The Applicants have filed an Appeal against the **Ruling** that was delivered on **29th November 2017** dismissing their applications. Before the said Appeal is heard and determined, the Applicants need some protection so that the Appeal is not rendered nugatory. See the case of Board of Governors, Moi High School Kabarak & Another...Vs...Malcolm Bell & Another, Supreme Court of Kenya Petition No.6 & 7 (2013) eKLR, and Butt...Vs...Rent Restriction (1979) Eklr, where the court held that:

***“if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not be refused because the Judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceeding.....”*”**

For the above reasons, the Court finds that it is prudent to issue restraining orders against the 3rd Respondent who is allegedly the registered owner of the suit property. Consequently, the Court issues temporary injunctive orders against the 3rd Respondent herein restraining him, his agents, servants or employees from **alienating, charging, disposing** off or **interfering** with the Applicants’ peaceful occupation of the suit property, Juja/Kalimoni Block 8/462, pending the hearing and

determination of the Appeal.

The Applicants have sought for Stay of Proceedings at the Lower Court pending the hearing and determination of this Appeal.

As the Court held earlier, Stay of Proceedings is a matter of judicial

discretion. However, the Applicants must satisfy the court that the pending Appeal is an arguable one and which is not frivolous. See the case of UAP Provincial Insurance Co. Ltd...Vs...Michael John Beckett, Civil Appl. No.204 of 2004, where the Court held that:-

“In order for the Applicant to succeed in an application for Stay of Proceedings pending Appeal, it is necessary for the Applicant to satisfy the court, firstly that the pending Appeal is arguable one which is not frivolous and secondly that if the Stay of Proceedings is not granted, the Appeal when ultimately heard will be futile exercise”.

Having gleaned at the impugned Ruling, it is evident that the 1st Applicant had questioned the sale of the suit property to 3rd Respondent. It

is also clear, that the Applicants in **Thika CMCC No.820 of 2013** are challenging the 1st Respondent exercise of its **Statutory Power of Sale**. If indeed Stay of Proceedings is not granted and **Civil Suit CMCC No.820 of 2013** proceeds to its conclusion, then the Applicants Appeal would be rendered nugatory and an exercise in futility. See the case of **David Morton Silverstein...Vs...Atsango Chesoni, Civil Application No.Nai. 189 of 2001 [2002]1 KLR 867; [2002] 1 EA 296**, where the Court of Appeal citing **Kenya Commercial Bank Ltd...Vs...Benjoh Amalgamated Ltd & Another, Civil Application No.NAI 50 of 2001**, held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In **Niazons (Kenya) Ltd...Vs...China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No.126 of 1999 Onyango-Otieno, J** (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay..... should be granted.”

Similarly, the Court of Appeal in **Wachira Waruru & Another...Vs... Francis Oyatsi, Civil Application No.Nai. 223 of 2000 [2002] 2 EA 664** held that:-

“In an application for stay of proceedings pending Appeal where the Judgment is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

The Court of Appeal in the case of **Butt...Vs...Rent Restriction Tribunal (Madam Miller and Porter JJA)** while considering an application of this nature had this to say:-

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

Consequently, the Court finds this prayer for Stay of Proceedings

pending the hearing and determination of the Appeal merited and allowed.

On the 6th prayer seeking service of the 3rd Respondent through substituted service that is by registered post on his last known postal address, it is evident that the 3rd Respondent has not responded to this application and the earlier **Affidavit of Service** showed that he was served via registered post. However, in his lengthy submissions, the 1st Applicant has alleged that he was in contact with the 3rd Respondent. Let the

Applicants serve the 3rd Respondent personally with the pleadings and file a proper **Return of Service**. The Court finds no reason to allow this prayer given the allegations made by the 1st Applicant that he did get in contact with the 3rd Respondent herein.

On the issue of costs, the Court finds that the same be in the cause.

Having now carefully considered the pleadings herein, the written submissions and the cited authorities, the Court makes the following orders in respect of **Notice of Motion** application dated **4th December 2017**:-

i. In respect of **prayer No.2, the same is not merited and is dismissed entirely.**

ii. In respect to **prayer No.4, the Court grants temporary injunction restraining the 3rd Respondent only, by himself, his agents, servants, employees or anybody claiming under his name from alienating, selling, transferring ownership, disposing off, charging and/or from interfering with the Applicants' peaceful occupation of the suit property Juja/Kalimoni Block 8/462, pending the hearing and determination of this Appeal.**

iii. On **prayer No.5, Stay of proceedings at the Lower Court is allowed pending the hearing and determination of this Appeal. The Applicants to prosecute this Appeal within a period of 90 days from the date of this Ruling and in default, the Stay herein will automatically lapse.**

iv. *Prayer No.6 is disallowed and costs shall be in the cause.*

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of October, 2019.

L. GACHERU

JUDGE

4/10/2019

In the presence of

Isaak Mwangi, 1st Appellant/Applicant present in person

Mr. Gichuhi holding brief for Mr. Muchoki 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

No appearance for 4th Respondent

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

4/10/2019