



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 360 OF 2017**

**(Formerly Machakos ELC No. 137 of 2014)**

**NIXON SUNTE KARAINA.....1<sup>ST</sup> PLAINTIFF**

**MORRIS KAROKIA KARAINA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EPHRAIM KAINGI MBUTHIA.....1<sup>ST</sup> DEFENDANT**

**ESTHER GATHONI GACHUGU.....2<sup>ND</sup> DEFENDANT**

**RUTH NJAMBI WAWERU.....3<sup>RD</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiffs/Decreeholders' Notice of Motion application dated the 14<sup>th</sup> May, 2019 and the 2<sup>nd</sup> Defendant'/ Judgment Debtor's Notice of Motion application dated the 3<sup>rd</sup> July, 2019. In the application dated the 14<sup>th</sup> May, 2019, which is brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act including Order 22 Rule 48 (1) of the Civil Procedure Rules, the Decreeholders' seek the following orders:

1. Spent
2. That a Prohibitory Order stopping the transferring, charging or any further dealings in respect of all that property known as Land Reference number Kajiado/ Kaputiei North/ 415 situated in Kajiado and registered in the name of the 1<sup>st</sup> Respondent herein pending further orders of this Honourable Court.
3. That the subject property namely Land Reference number Kajiado/ Kaputiei North/ 415 to be advertised and sold by public auction to recover the total outstanding decretal sum of Kshs. 18,450,000/= together with further accrued interest thereon until payment in full.
4. That the Caution and restriction registered against Land Reference Number Kajiado/ Kaputiei North/ 415 be lifted forthwith.
5. That the Respondents be ordered to grant free and unlimited access to the subject property for the purpose of inspection and valuation.
6. That the Court to allocate a convenient date before the Deputy Registrar for the settlement of the terms and conditions of sale of the property.
7. That costs and valuation, Auctioneers fees and any other related expenses to be paid from the proceeds of sale herein.
8. That costs of this application be borne by the Respondents

The application is premised on the grounds that Judgment debtors are yet to satisfy the decretal sum awarded by the Court and despite engaging the Auctioneer to recover the said sum; the same was not realized, as there were no attachable assets to fetch the outstanding amount. The suit property is the only asset that can be attached to realize the full decretal amount and the accrued interest. The Application is

supported by the affidavit of the 1<sup>st</sup> Plaintiff NIXON SUNTE KARAINI where he reiterates their claim above and deposes that it is necessary to register a prohibitory order on land reference number Kajiado/ Kaputiei North/ 415 which is the suit property to enable them recover the decretal amount and enjoy their judgment. He confirms that the suit property is registered in the 1<sup>st</sup> Defendant's name and it is fair that no further registration or dealings should take effect to enable them execute the decree. He contends that the caution which had been registered in favour of the 2<sup>nd</sup> Defendant be lifted forthwith to enable execution and registration of the prohibitory order.

The application is opposed by the 1<sup>st</sup> Defendant EPHRAIM KAINGI MBUTHIA who filed a replying affidavit where he avers that the suit land is matrimonial property. He claims he does not have the legal capacity to pay the decretal amount. He confirms that he acquired the decretal property from the Bank of India Staff Benefit Scheme in 1994 when he was only married to 2<sup>nd</sup> Defendant. He contends that the Court should order the Plaintiffs' to surrender the original title deed of the decretal property in their custody to him. Further, that the 2<sup>nd</sup> Defendant should be ordered to lift the caveat on the decretal property. He insists the interest applied should be at court rates and the 3<sup>rd</sup> Defendant be struck out of the suit as she has never been a beneficiary of the suit property. He states that his ability to negotiate an agreeable and amicable settlement has been hampered by his lack of access to the title deed, bank discharge, presence of a caveat and the exorbitant interest rate charged including legal fees. He reiterates that the Plaintiffs' prayer for unlimited access to the attachable property is premature and unnecessary and only serves to disrupt the respondents' quiet and peaceful occupation of the matrimonial property.

The 2<sup>nd</sup> Defendant ESTHER GATHONI GACHUGU opposed the application by filing an affidavit where she deposes that she was dissatisfied with the findings in the judgment and instructed her lawyers to institute an appeal as well as pursue appropriate reliefs to safeguard her constitutional rights including matrimonial interest in the suit property. She contends that the decree extracted on 10<sup>th</sup> January, 2019 is erroneously and clandestinely extracted in flagrant violation of the mandatory procedures indicated in Order 21 Rules 7 and 8 of the Civil Procedure Rules. Further, that the impugned Decree does not contain particulars of the claim or the reliefs sought and the purported costs of Kshs. 2, 258, 875/= therein are unlawful since the same have not been taxed. She insists the application is res judicata in as much as it seeks prayer No. 4. She reiterates that the Plaintiffs have not made any tangible efforts to execute the Decree against her movable assets or of the other Defendants. She claims the Plaintiffs, 1<sup>st</sup> and 3<sup>rd</sup> Defendants have allegedly invested monies received on account of the purchase price to secure a piece of land and build alternative resident in Athi River. Further, that the Plaintiff has failed to annex a Certified extract of title as mandatorily required. She confirms that the Search produced dated the 12<sup>th</sup> March, 2019 shows the suit land is still charged to Bank of Baroda and Housing Finance Company Limited.

In the application dated the 3<sup>rd</sup> July, 2019 filed by the 2<sup>nd</sup> Defendant/ Judgment debtor, it is brought pursuant to Order 9 Rule 9, Order 22, Order 42 Rule 6 and 7, Order 51 Rule 1 of the Civil Procedure Rules (2010) as well as Section 1A, 1B, 3A and 63 ( e) of the Civil Procedure Rules including Article 50 (1) and 159 (2) (a), (b) , (d) & ( e) of the Constitution of Kenya. The 2<sup>nd</sup> Judgement debtor seeks the following prayers:

1. Spent
2. Spent
3. Spent
4. The Honourable Court be pleased to grant stay of execution of its Order/ Judgement made on 20<sup>th</sup> February, 2018 against the 2<sup>nd</sup> Defendant/ Applicant pending the hearing and determination of this application and/or further orders of the Court.
5. The costs of this application be in the cause.

The application is based on the summarized grounds that the 2<sup>nd</sup> Defendant is partially aggrieved by the Judgment of the Court in as much as she is being directed to honour a null and void contractual agreement between the Plaintiff and the 1<sup>st</sup> Defendant in refunding the allegedly paid purchase price, notwithstanding her not being privy to the Agreement or in receipt of any purchase price. She is desirous of pursuing an appeal against the decree obligating her to reimburse the alleged purchase price. She is exposed to the risk of execution as there is no order of stay. She will suffer substantial loss and damage if the stay sought is not granted. She is suffering the consequence of the Judgment partly as a result of lack of due diligence/ negligence on the part of her outgoing advocates messrs L. Maina Irungu & Company Advocates who did not attend court on the scheduled day of delivery of judgment to take it, seek leave to appeal as well as stay of execution pending appeal. The application is supported by the affidavit of the 2<sup>nd</sup> Judgement debtor ESTHER GATHONI GACHUGU where she reiterates her claim above and confirms that judgment was delivered on 28<sup>th</sup> February, 2018. She contends that her previous advocates did not diligently represent her well as they failed to advise her on the outcome of the suit and steps taken to execute the Decree.

The 1<sup>st</sup> Plaintiff NIXON SUNTE KARAINI opposed the application and filed a replying affidavit where he explains that he purchased suit property from the 1<sup>st</sup> Defendant vide a Sale Agreement dated the 31<sup>st</sup> January, 2014. He claims the 1<sup>st</sup> Defendant disclosed to them that the suit property was charged but he had defaulted and the same was on the verge of being auctioned. Further, that they agreed to pay Kshs. 2,500,000/= to the Chargee bank which amount formed part of the purchase price. He insists after they paid the purchase price the 1<sup>st</sup> Defendant breached the terms of the Agreement while the 2<sup>nd</sup> Defendant totally refused to withdraw the restriction to enable them have the property transferred to them. He avers that judgment was delivered in their favour on 20<sup>th</sup> January, 2018 and the 2<sup>nd</sup> Defendant's assertion that she was not aware of the judgment is absurd as she was ably represented. Further, that her advocates were fully aware of the judgment. He reiterates that the prayer for stay of execution is misplaced, unwarranted and filed inordinately late since the same is being sought one year and five months after the judgment was delivered.

The parties filed their respective submissions to the two applications that I have considered.

## Analysis and Determination

Upon consideration of the Plaintiffs/Decreeholders' Notice of Motion application dated the 14<sup>th</sup> May, 2019 and the 2<sup>nd</sup> Defendant'/ Judgment Debtor's Notice of Motion application dated the 3<sup>rd</sup> July, 2019 including the respective affidavits as well as submissions, the following are the issues for determination:

- Whether there should be a stay of execution of the judgment dated the 20<sup>th</sup> February, 2018 against the 2<sup>nd</sup> Defendant.
- Whether the subject property namely Land Reference number Kajiado/ Kaputiei North/ 415 should be advertised and sold by public auction to recover the total outstanding decretal sum.
- Whether a prohibition order should issue in respect of Land Reference number Kajiado/ Kaputiei North/ 415

As to whether there should be a stay of execution of the judgment dated the 20<sup>th</sup> February, 2018 against the 2<sup>nd</sup> Defendant. The Court delivered its judgment against the Defendants jointly and severally. The 2<sup>nd</sup> Defendant claims her lawyer did not diligently represent her in the instant suit and never informed her of the outcome of the judgment. She contends that she was not privy to the agreement between the Plaintiffs and 1<sup>st</sup> Defendant and is not obligated to pay the decretal amount. The Plaintiffs opposed the application for stay and submitted that the Applicant has not demonstrated the contents of the intended appeal or even annexed a draft copy of her intended memorandum of appeal. Further, that the delay in filing the application is inordinate as well as unreasonable and is in violation of Order 42 Rule 6 of the Civil Procedure Rules. They relied on the case of **Wangui Kathryn Kimani V Disciplinary Tribunal Of Law Society of Kenya & Anor (2017) eKLR** to support these arguments.

Order 42 Rule 6 (2) and (3) of the Civil Procedure Rules provide that: **' (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. (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.'**

In the case of **Samwel Kimutai Korir (Suing as Personal and Legal Representative Of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] eKLR** the Learned Judge held that: **' ...Having regard to my above findings and to ensure that from this point forward none of the parties to these proceedings is prejudiced by an order of stay of execution pending the hearing and determination of the intended appeal, this court is minded to strike a middle ground and balance the competing interests of both parties. In the case of M/s Port Reitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997 the court observed that the power to grant an application for stay of execution pending appeal is discretionary in that the court when granting a stay needs to balance the interest of the appellant with those of the respondent.'**

In the current case, the 2<sup>nd</sup> Defendant has sought for stay of execution for a judgment delivered on 20<sup>th</sup> February, 2018. She has not explained why she delayed in seeking a stay and neither has she furnished any security. She has claimed she intends to lodge an appeal but did not annex Notice of Appeal or Memorandum of Appeal to support this averment. I find that this delay is unreasonable and inordinate. In the circumstance, and in relying on the legal provisions and the decision cited above, I decline to grant the stay of execution sought.

As to whether the subject property namely Land Reference number Kajiado/ Kaputiei North/ 415 should be advertised and sold by public auction to recover the total outstanding decretal sum. It is not in dispute that the Plaintiffs herein are the Decreeholders. It is further not disputed that Defendants are yet to settle the Decretal amount. From the annexures in the Plaintiffs' application, I note the auctioneer had attempted to attach the Defendants' movable assets to settle the Decretal amount but this was not successful. The Plaintiffs' submit that the only available asset is the suit property. The 1<sup>st</sup> Defendant confirmed in his affidavit that he is unable to settle the Decretal amount which he claims is exorbitant. The 2<sup>nd</sup> Defendant has submitted that the Decree sought to be executed is invalid, null and void ab initio. Further, that the Decree is erroneously and clandestinely extracted and not specific to the findings of the judgment. From the Court records, I note there was a Decree issued on 9<sup>th</sup> August, 2019 which clearly indicates the Claim the Plaintiffs sought for as well as the Orders the Court granted. Order 22, rule 48 of the Civil Procedure Rules provides that: **' (1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property. (2) A copy of the order shall be affixed on a conspicuous part of the property.'**

The 2<sup>nd</sup> Defendant has contended that the prayer for registration of an inhibition is res judicata since the court determined this in its judgment. I beg to differ with this averment, since the Court never made a finding on the issue of prohibition nor removal of the caution. Section 73 (1) , (2), (3) and (4) of the Land Registration Act provides that: **' (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar. (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice. (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution. (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.'**

I find that since the entry of a prohibition is a requirement within Order 22, rule 48 of the Civil Procedure Rules, I will proceed and direct the Land Registrar, Kajiado to register a prohibition against the suit property. As for the issue of removal of the caution, since I never made a finding in respect of the same in my judgment, I find that the same cannot be deemed to be res judicata. I will rely on section 73 of the Land Registration Act and direct the Land Registrar , Kajiado to lift it. I note the prayers sought in the Plaintiffs' application concerning being granted unlimited access to the subject property for the purpose of inspection and valuation; allocation of a convenient date before the

Deputy Registrar for the settlement of the terms and conditions of sale of the property including the costs and valuation, Auctioneers fees and any other related expenses to be paid from the proceeds of sale herein, are procedural. The 2<sup>nd</sup> Defendant has opposed the application insisting the Decree is null and void hence cannot be enforced. I find that the 2<sup>nd</sup> Defendant seeks to rely on technicalities to block the execution of the Decree against them. However, in the current Constitutional dispensation justice shall be administered without undue regard to procedural technicalities. None of the Defendants have indicated how they intend to settle the whole of the decretal sum. Since the Plaintiffs as Decreeholders have not been able to execute the Decree herein, as a Court I cannot deny a party the fruits of their judgement. In the circumstance, I will allow the Plaintiffs' to have access to the suit property for purposes of inspection as long as they notify the defendants. I will further direct the parties to appear before the Deputy Registrar, Environment and Land Court to settle the terms and conditions of the Sale and for all the aforementioned related expenses to be paid from the proceeds of the Sale.

It is against the foregoing that I proceed to allow the Plaintiffs/Decreeholders' Notice of Motion application dated the 14<sup>th</sup> May, 2019 and dismiss the 2<sup>nd</sup> Defendant'/ Judgment Debtor's Notice of Motion application dated the 3<sup>rd</sup> July, 2019.

I so order.

**Dated signed and delivered in open court at Kajiado this 18th Day of November, 2019**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Odhiambo for 2<sup>nd</sup> defendant/respondent

1<sup>st</sup> Plaintiff in person

1<sup>st</sup> Defendant in person

Court assistant - Mpoye