



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC CASE NO. 16 OF 2018**

**FORMERLY ELDORET LAND CASE NO. 139 OF 2014**

**DAPHINE BELINDA KETER.....PLAINTIFF**

**VERSUS**

**ECO BANK (K) LTD.....DEFENDANT**

**RULING**

The applicant, Daphine Belinda Keter comes to this court for an order that there be a stay of sale by public auction of all those parcels of land namely 9399/32, 9399/34 and 9399/36 situate adjoining Nandi Hills Town, Nandi County registered in the name of one Tony John Kiplimo Keter pending the hearing and determination of the appeal.

The application is based on grounds that the applicant has filed an appeal in Court of Appeal against the ruling of this court dated 10.3.2017 and that the defendant has advertised the properties for sale. The borrower claiming to have repaid a substantial amount of money. The applicant argues that the appeal will be rendered nugatory if stay is not granted. The defendant in the replying affidavit of Elizabeth Hinga states that the application dated 28.11.2016 was dismissed for being res-judicata. According to the defendant, the plaintiff/applicant has not demonstrated any substantial loss if stay is not granted. Moreover, the plaintiff has not explained the delay in filing the application and that the plaintiff has not offered any security for repayment of the outstanding loan and or the loss the defendant is likely to suffer for being restrained from exercising its statutory power of sale.

The principles for granting injunctions or stay of execution pending appeal are clear. The power of the court to grant stay of execution of a decree pending appeal is provided for in Order 42 Rule 6 of the Civil Procedure Rules. Under the said Rule, the court will only grant a stay of execution of decree pending appeal where the Applicant has shown sufficient cause. In determining whether to grant stay of execution, the court will consider: -

- (a) Whether the application for stay of execution has been brought without unreasonable delay;***
- (b) Whether substantial loss will occur if stay of execution is not granted; and***
- (c) If the court is inclined to grant stay upon consideration of the two foregoing factors, the court should call for such security for the due performance of such decree or order as may ultimately be binding on the Applicant.***

The cornerstone of the jurisdiction of the court in Order 42 rule 6 of the Civil Procedure Rules is whether substantial loss would occur if stay of execution is not granted. In other words, where it is not proved that substantial loss would occur it is less likely that a stay of execution will be ordered.

The principles that the court must consider in order to grant an application for stay of execution pending appeal are set out in the case of **Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000** cited in **Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi 2014 eKLR**, where Ringera J (as he then was) stated as follows:

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. the sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time***

*and whether the application has been brought expeditiously”.*

The court must therefore consider the following principles;

- a) Whether the application was filed without undue delay*
- b) Whether the applicant has established that he has an arguable appeal*
- c) Whether the applicant has established sufficient cause that it is in the interest of justice to grant the orders sought.*
- d) Whether the applicant is willing to furnish security for costs*

In this matter, the ruling was delivered on the 10.3.2017 whilst the application was filed on the 6.4.2017. The property was scheduled for sale on 7/4/2017 vide a daily nation newspaper notice dated 20<sup>th</sup> march 2017. I do find that a delay of 27 days after ruling and 17 days after advertisement in this matter is not unreasonable delay, and that the application was filed after the defendant advertised for the sale of the property.

On substantial loss, I do find that the properties are valued at more than Kshs.45,000,000 and therefore the plaintiff is likely to suffer substantial loss if she succeeds on appeal and the property is sold before the determination of the Appeal.

The upshot of the above is that the application is allowed on condition that the plaintiff deposits security of the value of Kshs. 2, 000, 000/= within 30 days. Costs of the application in the appeal. Orders accordingly.

**Dated, delivered and signed at Eldoret this 7<sup>th</sup> day of September, 2018.**

**A. OMBWAYO**

**JUDGE**