



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
JUDICIAL REVIEW App No. 29 OF 2016
(Formerly I.R Appl. No. 63 of 2016)

CREDIT AGRICOLE INDOSUEZ CORPORATE AND
BANK (formerly known as CALYON and
 formerly also known as CREDIT ACGIROLE INDOSUEZ and
 formerly also known as Bank Indosuez).....**APP/RESPONDENT**

-VERSUS-

REGISTRAR OF TITLES, MOMBASA.....RESPONDENT

-AND-

D.J. LOWE & COMPANY LIMITED.....1ST INTERESTED PARTY/APPLICANT

PRIME BANK LIMITED.....2ND INTERESTED PARTY

RULING

1. The 1st Interested party moved the Court vide this application dated 4th May 2017 seeking for orders of stay of execution of the judgement delivered by this Court on 25th April 2017. The reasons given for the stay are inter alia; that the 1st interested party has a pending suit against the Applicant bank vide MSA H.C.C.C No 35 of 1997 whose substratum is challenging the legality of the intended sale of the property known as subdivision No 1280 Section I MN (C. R 11898) by the applicant to the 2nd Interested party. Secondly, the result of this judgement eroded the substratum of that High Court case and unless the stay order is granted the aforesaid suit will be rendered nugatory. Further that the sale of the property would also render the intended appeal of the 1st Interested party nugatory.

2. The application for stay is opposed by the applicant Bank and the 2nd interested party. The applicant vide a replying affidavit sworn by Chitranjan Bhanuprasad Gor advocate on 16th May 2017 deposed that the Court has no jurisdiction to grant any relief pursuant to the provisions of Order 42 rule 6 of the Civil Procedure Rules and Section 1A & B and 3A of the Civil Procedure Act because the current proceedings were instituted under the Fair Administrative Actions Act 2015. Mr Gor deposed that further that there is no order capable of execution in respect of which an order of stay can issue nor does it satisfy the

mandatory provisions for the grant of a stay order. On whether or not the substratum of the 1st suit will be eroded, Mr Gor stated that it is a matter that can only be addressed in that suit not by parallel proceedings. He made reference to his depositions in the previous pleadings whose judgement is to now appealed. Paragraph 15 of the applicant's affidavit deposed to issues of statutory notice, outstanding sums and that no payment has been made by the 1st interested party to the applicant. He urged the Court to dismiss the application with costs.

3. Mr Rasik Kantaria on behalf of the 2nd Interested Party deposed that the present application unmerited as the applicant seeks the aid of this Court in enforcing a restriction imposed contrary to the laid down procedures. Secondly that applicant does not satisfy the mandatory conditions for granting stay of execution as provided under Order 42 of rule 6 (2) Civil Procedure Rules. That any stay granted herein would be prejudicial to the 2nd Interested Party which is suffering and is continuing to suffer substantial loss as set in my earlier affidavit sworn by her on 17th October 2016

4. The parties made oral submissions after Mr C. B Gor was cross – examined on his affidavit by Mr Gikandi advocate for the 1st Interested Party/applicant. I have considered the submissions rendered and the cases cited in support thereof by both parties. The issues which I find arising for my determination are:

i) Whether the application as presented is proper.

ii) Whether there are any orders capable of being executed therefore an order of stay should be granted.

iii) Whether there is merit in the application.

iv) Who should bear the costs of the application?

5. The Applicant bank submitted that given the fact that their motion was premised on Fair Administrative Actions Act which excludes application of the Civil Procedure Act and Rules. In support of this submission they quoted the cases of **Shah vs Shah (No. 2) (2002) 2 KLR 607**, **Commissioner for Lands vs Kunste Hotel Ltd (1997) eKLR** and **M.M. Ole Keiwia & J. V Odera Juma vs Yash Pal Ghai (2002) eKLR** in which the parties sought orders of judicial review under the provisions of Order 53 of the Civil Procedure Rules and Section 9 of the Law Reform Act. It was held by the courts who heard the above cases cited that such applications excluded the application of the Civil Procedure Rules and I do agree with the said findings that applications brought under Order 53 excluded the rules. None of these cases cited however dealt with the issue of stay where a party was aggrieved by a decision founded on order 53 opted to appeal. The said findings are therefore distinguishable.

6. The right to appeal is a right bestowed on parties by the Constitution of Kenya. Where a party is dissatisfied with a decision and seeks stay, it is my considered view that the Court in exercising its inherent powers under **article 159 (2) (e)** and **article 165 3 (a)** of the Constitution to determine the application on its merits irrespective of the fact that it was brought under the Civil Procedure Rules whose application is excluded by the Fair Administrative Act. Section 12 of the FAA also states that the Act is ***in addition to and not derogation from the general principles of common law and the rules of natural justice***. It will thus serve no purpose to strike out the present application because it was anchored on the provisions of the Civil Procedure Rules only for the applicant to file a similar application after remedying the mistake. Consequently I will not strike out the same but proceed to hear it on its merits.

7. The second question is whether the orders granted are capable of being executed. In the judgement delivered allowed the orders whose result is to have the restriction registered on the suit title of the property no. 1280 Section I MN removed. The judgment further directed the Registrar to register a transfer in favour of the purchaser. These were the orders sought in prayer (2) & (3) of the originating motion. If no stay of execution is granted then it goes without saying that the property will change hands. Therefore it is clear there is an order capable of being executed.

8. Is there merit in the application? The 1st interested party pleaded that if stay not granted, then the substratum of their suit in HCCC no 35 of 1997 will be eroded. This argument formed part of the grounds presented by the 1st Interested Party in challenging the originating motion. I already made a finding on this issue in the body of the judgement that the restriction filed 10 years after the stated suit was filed in Court cannot be used as a basis to protect the substratum of that suit. As correctly submitted by the applicant, the 1st Interested Party should not obtain stay in parallel proceedings and apply to serve a purpose of protecting their interests in HCCC No 35 of 1997.

9. The second ground was that the sale of the suit property would render the appeal filed nugatory. The issue before this Court was not about a sale of the suit property but the legality or otherwise of the restriction registered by the Respondent. The impugned restriction was not placed by the 1st Interested Party but the Respondent in the originating motion. Since the rules of the Civil Procedure are excluded, this Court will not consider the grounds under which a stay of execution can be granted as set out under Order 42 rule 6 but shall rely on whether given the circumstances of this case, the 1st Interested Party merits the exercise of discretion in its favour pending the determination of his appeal.

10. On the basis that a notice of appeal has already been filed; And on the basis that I cannot at this juncture delve into the merits or otherwise of the intended appeal; And taking into consideration the rights of the applicant bank, I shall grant a stay of execution to enable the 1st Interested Party pursue his rights of appeal. However bearing in mind the interest of the applicant, the stay granted shall be granted conditionally upon the 1st Interested Party depositing into an account a sum of Kshs Five Million (5,000,000) as security in the account to be opened in the joint account of the advocates for the applicant bank and the 2nd Interested Party. The said sum shall be deposited within 45 days of the date when account details are provided to the 1st Interested Party's advocate. In default of compliance, the stay of execution orders granted lapses.

11. The costs of this application to abide the outcome of the appeal.

Dated, signed and delivered at Mombasa this 27th day of July 2017.

A. OMOLLO

JUDGE