REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 520 OF 2013

DR. JAPHETH OGENDO OWUOR.....PLAINTFF

VERSUS

ORIENTAL COMMERCIAL BANK.....DEFENDANT

RULING

The plaintiff/applicant has come to this court vide Notice of Motion brought under Order 22(2) and Order 42 Rules 6(4) and 5 and Section 63(e) Civil Procedure Act praying for orders that the plaintiff/applicant be granted orders of stay of sale of his property known as L.R. Eldoret Municipality Block 10/107 pending the hearing and determination of the appeal pending before the Court of Appeal. Costs of this application be borne by the respondent in any event.

The application is based on grounds the plaintiff/applicant filed this suit seeking injunction orders, which suit is still pending before court. Simultaneous with the suit, the plaintiff/applicant filed an application for interlocutory injunction to preserve the suit property both pending the application and the suit. The application was heard and dismissed vide a ruling delivered on 23.10.2014. The plaintiff/applicant was aggrieved by the whole of that ruling delivered by the Hon. Mr Justice Sila Munyao's and has commenced an appeal to the Court of Appeal. Before the appeal is heard and determined by the Court of Appeal, the defendant has set in motion the process of sale by public auction of the suit property as the sale was due on 15.4.2015. The applicant argues that Unless restrained by orders of stay of sale, the sale will render the appeal before the Court of Appeal nugatory. No prejudice will be suffered by the respondent since the applicant has already deposited Kshs.250,000/= as security of costs. Conversely, the greater interests of justice will suffer unless the orders sought are granted.

The application is supported by the affidavit of Dr. Japehth Ogendo Owuor who state that he was aggrieved by the decision of this Court (Munyao S. J.) of 23.10.2014 and he decided to challenge the same in the Court of Appeal by filing Notice of Appeal and applying for proceedings and ruling. That the first application which gave rise to the appeal was for injunctive orders, arising from an earlier attempt to realize his property comprised in title Number L.R. Eldoret Municipality Block 10/107. That his suit which contains several legal limbs is still pending before the court and he believes it has merit, which will become clear when the suit gets underway.

That he is still in the process of processing his appeal to the Court of Appeal, however the defendants have callously and with intent to defeat both the substantive suit and the appeal set in motion the process of realising his property. On the suit property stands his business known as Agri Millers Ltd whereat he runs an agro processing plant specializing in animal feeds, where he draws his livelihood. That his appeal to the Court of Appeal has overwhelming chances of success since no valid charge exists against his land or the machinery therein. He has demanded without success documents indicating how the loan account was originated, processed and disbursed since all he has was a letter of offer of financial accommodation,

which was never actualized. Unless the orders he seeks through this application are granted, the appeal to the Court of Appeal and the substantive suit before the court will be rendered nugatory since the subject matter will most likely change hands to his great loss. Both the substantive suit and the appeal to the Court of Appeal have merit. No prejudice will be suffered by the defendant bank since any loss they are likely to incur can be quantified unlike him who stands to suffer his entire life's investment and source of livelihood. That he is ready, able and willing to abide by any condition or conditions that the Honourable court may put forth for the grant of the orders he seeks.

The defendant has opposed the application vide the replying affidavit of Geoffrey Ating'a who states that the plaintiff's application for injunction to restrain the defendant from exercising its statutory powers of sale was dismissed on 23.10.2014. That he has been advised by the defendant's lawyers on record and which advise he verily believes as true that the current application purports to seek stay of sale pending appeal. That he knows of his own knowledge that the order issued on 23.10.2014 was a negative order that did not impose any obligations on the parties that would be capable of enforcement by way of execution except in so far as they relate to costs. That he knows of his own knowledge that the defendant is yet to move to enforce the part of the court order on costs. That he is informed by the respondent's Advocates on record which information he believes to be true that as a consequence, the court's jurisdiction to issue stay pending appeal cannot be invoked as what is pending on appeal are the negative orders that issued on 23.10.2014 against which no application for can be competently filed. That as a result, it is clear that the current application is an abuse of the court process and should be dismissed. That the issue of whether or not the defendant can competently exercise its statutory power of sale has come up and been determined several times and the current gimmicks by the applicant can only be considered as vexatious and without merit.

The applicant submits that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not rendered nugatory. He relies on the principles for the grant of injunction in tis interim form set out in ***Giella Vs Cassman Brown & Company Ltd EACA 51 (1973)***. The applicant argues that in granting an order of stay of execution pending appeal, the court is exercising its appellate jurisdiction and that it makes not that the order appealed from is capable of execution. He argues that the primary consideration is whether the appeal is arguable and not provisions and that if stay is not granted the appeal, if successful will be valid nugatory.

The respondent argues that the orders sought to be stayed are negative hence there is nothing to stay. Moreover, that the application is an abuse of the court and intended to delay justice.

I have consisted the provision of Order 42, Rule 6(1)(2)(3) and (6) which provides as follows:-

1. ***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.***
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.***

4. ***For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court notice of appeal has been given.***
5. ***An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.***
6. ***Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."***

After carefully considering the rule, I do find that the applicant has not satisfied the conditions therein as the decree appealed from is a dismissal not capable of execution. The court did not issue any positive order capable of being executed.

Order 42 Rule 6 is not relevant as this court is not exercising appellate jurisdiction over a decision of a subordinate court or tribunal.

I do find that the application for injunction ought to have been made in the Court of Appeal under Rule 5(2)b of the Court of Appeal Rules as this court has no jurisdiction to issue injunction under Order 42 Rule 6 unless the matter before it is an appeal from the subordinate court or Tribunal. The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE