



Tina Holdings Limited v Housing Finance Company Limited & 4 others (Civil Application 284 of 2016) [2023] KECA 1036 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KECA 1036 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 284 OF 2016
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
AUGUST 4, 2023**

BETWEEN

TINA HOLDINGS LIMITED APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED RESPONDENT

AND

HOTEL CONNECTIONS LIMITED 1ST INTENDED RESPONDENT

STEPHEN ROBI MAINA 2ND INTENDED RESPONDENT

STELLA WANGUI NJOROGE 3RD INTENDED RESPONDENT

**KIMISITU CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED 4TH INTENDED RESPONDENT**

(An application for stay of execution of the Ruling and Order of the Environment and Land Court at Nairobi (Gacheru, J.) dated 9th December 2016 in ELC Case No. 10 of 2016)

RULING

1. Before this court is an Amended Notice of Motion dated September 24, 2021 brought by the applicant under the provisions of rule 5(2) (b) of the *Court of Appeal Rules*. The applicant principally seeks two main orders, to wit: stay of proceedings in Nairobi ELC No. 10 of 2016 (currently Machakos ELC 113 of 2017) pending the hearing and determination of an intended appeal; and that, pending the hearing and determination of the intended appeal, the 3rd, 4th and 5th intended respondents be restrained by way of an injunction, either by themselves, their agents and/or servants, from completing any form of conveyance, transfer and/or executing any form of transfer relating to the suit property.



2. The background to the application is that the applicant was the registered owner of a property known as L.R. No. Athi River/Athi River Block 1/87 which was offered to the 1st respondent as a security for a loan advanced to the applicant. The applicant did not service the loan as per its agreement with the 1st respondent and, after issuing the necessary Statutory Notices, the 1st respondent instructed an auctioneer to advertise the applicant's L.R. No. Athi River/Athi River Block 1/87 and another property known LR No. 14968/173-Muthithi Gardens ('the suit properties') for sale by way of public auction.
3. The applicant approached the trial court vide a Notice of Motion dated January 6, 2016 seeking orders to restrain the 1st respondent and the auctioneer from continuing with the intended sale of the suit properties by way of auction. The trial court, vide a ruling dated July 18, 2016, allowed the application on the condition that the applicant deposits a security of Kshs.5,000,000.00 in court as undertaking in damages within 30 days from the date of the ruling.
4. The applicant did not comply with the orders issued by the trial court and, there being no injunctive orders in place, the planned auction took place on October 12, 2016. LR. Athi River/Athi River Block 1/87 was sold to the intended 2nd respondent herein and has already been charged to the intended 5th respondent to secure a loan facility of Kshs.14,000,000/=, while LR No. 14968/173-Muthithi Gardens was sold to the intended 3rd and 4th respondents herein.
5. The applicant had, through an application dated November 7, 2016, sought orders to: restrain the auctioneer from issuing a certificate of sale from the auction conducted on October 12, 2016; and to restrain the 1st respondent from receiving any sums of money as deposits or further deposits arising from the said auction. The applicant argued, inter alia, that the suit properties were sold during the pendency of the suit and that, therefore, there was breach of the doctrine of *Lis Pendens*. The trial court, vide a ruling delivered on December 8, 2016, declined to grant the interim orders sought by the applicant. Instead, it directed the applicant to file a supplementary affidavit within the next 7 days of the ruling, if it so wished, and the 1st respondent to file a replying affidavit within 7 days of service. Parties were directed to canvass the application by way of written submissions. The matter was to be mentioned on February 2, 2017 for purposes of obtaining a ruling date.
6. The applicant was dissatisfied with the decision of the trial court and intends to lodge an appeal before this court. The applicant contends that its intended appeal is arguable and relies on the grounds set out on the face of the motion, the replying affidavit sworn by Titus Kitonga, its Managing Director, as well as the grounds set out in the draft Memorandum of Appeal which is annexed to the said affidavit. The applicant contends that the learned judge erred, inter alia, by not granting interim orders as sought despite the applicant raising serious issues, such as of the doctrine of *Lis Pendens*; in issuing a mention date for the application without issuing interim orders to preserve the subject matter; in not considering the risk involved in not issuing interim orders; and in not exercising her discretion judiciously in favour of the applicant who had demonstrated that its rights had been violated by the 1st respondent.
7. It is contended that the suit properties were illegally sold and transferred to the intended 2nd, 3rd and 4th respondents to the detriment of the applicant. For the said reasons, we were urged to grant the orders sought.
8. At the hearing of this application, learned counsel, Mr. Onindo, appeared for the applicant while learned counsel, Mr. Mwangi, was present for the 1st respondent. None of the parties had filed written submissions. Mr. Onindo sought to rely entirely on the application, the supporting affidavit and the annexures thereto. Mr. Mwangi, on his part, made brief oral submissions and stated that the suit



properties had already been sold to the intended 2nd, 3rd and 4th respondents and the purchase price thereof duly acknowledged; and that the suit properties have already been transferred. In the premises thereof, the instant application had already been overtaken by events, and that any remedies due to the applicant lay in the trial court and not before this court, Mr. Mwangi submitted.

9. We have carefully perused the record, the submissions by counsel and considered the applicable law. It is trite law that, in an application of this nature, an applicant must demonstrate that the appeal (or intended appeal) is arguable, which is to say that the same is not frivolous. The applicant must also show that the appeal would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe v Tony Ketter & others* [2013] eKLR.
10. The applicant contends that the learned judge erred by not granting interim orders as sought despite the applicant raising serious issues, such as the alleged breach of the doctrine of *Lis Pendens* as well as the flouting of the rules of auction by the auctioneer, who declined to conduct a current valuation of the suit properties before the auction. According to the applicant, on this basis alone, the learned judge should have issued interim orders of stay as prayed.
11. The grounds raised by the applicant are, in our view, not idle. They can only be interrogated on appeal. On this basis, we are satisfied that the intended appeal is arguable.
12. Turning to the second limb of the nugatory aspect, it is conceded by the applicant that the suit properties have already been sold to the intended 2nd, 3rd and 4th respondents herein. The purchase price has already been received by the 1st respondent and transfers made to the respective parties. In essence, the process that the applicant seeks to stop has already been finalized. We cannot therefore stay what has already taken place. This court in *Jaribu Holdings Ltd v Kenya Commercial Bank Ltd* [2008] eKLR held thus:

“The application before us is for an order of stay of execution of a specific decree. As the applicant concedes through its counsel on record that the decree sought to be stayed has in fact been executed, regularly or otherwise, we see nothing to stay ...

It will not be within reason for us to grant an order of stay of a decree which we know and the applicant itself concedes has been executed. The general policy of the law is that courts should not act in futility. As we stated earlier if we were to order a stay, the applicant might use the order to seek possession. An order of stay is supposed to prevent execution from taking place. Execution does not imply only the formal execution of a decree or order through the court process. A successful litigant who is able to take over possession of suit property peaceably in pursuance of a decree or order of a court competent jurisdiction is deemed to be executing decree or order. Execution through the court process is normally resorted to where peaceable means fail. The respondent having obtained possession of the suit property we opine that an order of stay is made in this matter is likely to make the applicant seek forcible re-entry, which will be undesirable and possibly lead to violence, and breakdown of law and order.”

13. We do not see how the intended appeal will be rendered nugatory if we decline to grant orders of stay. In any event, it is trite law that a chargor's equity of redemption is extinguished at the fall of the hammer, and that the remedy for a chargor who proves that he has suffered loss as a result of an improper auction lies in damages. See *Joyce Wairimu Karanja v James Mburu Ngure & 3 others* [2018] eKLR.
14. As the applicant has only been able to satisfy one of the two limbs required in this kind of applications, and since the requirement is that both limbs be satisfied, the application fails and is accordingly dismissed. We make no orders as to costs.



DATED AND DELIVERED AT NAIROBI THIS 4TH DAY AUGUST, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

