



Ngare (Suing as the legal representative of the Estate of Stephen Ngare Ogamba (Deceased) v Ogamba (Environment & Land Case E001 of 2022) [2024] KEELC 4596 (KLR) (27 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E001 OF 2022**

JM KAMAU, J

MAY 27, 2024

BETWEEN

NYABATE NGARE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN NGARE OGAMBA (DECEASED)) PLAINTIFF

AND

ARNOLD RASUGU OGAMBA DEFENDANT

RULING

1. In the Application dated 11/03/2024 by way of Notice of Motion for stay of Execution under Order 42 Rule 6(2) of the *Civil Procedure Rules*, the Judgment Debtor/Applicant is apprehensive that if the Decree is executed, the intended Appeal would be rendered nugatory and would turn out to be a mere academic exercise as the subject parcel of land which forms the basis and substratum of the Appeal would have already been sub-divided into 2 portions and there is a likelihood that part of the parcel of land may be disposed of and alienated to third parties making it difficult to get it back. She also pleaded that save an Order of this Court, there is nothing that would stop the execution of the Decree dated 15/2/2024. The Decree Holder countered the above arguments in his Replying Affidavit by first admitting that it is at the discretion of this Court to grant the orders sought. He also said that the Judgment Debtor has not told the court whether she intends to satisfy the element of security and that the Application is devoid of merit.
2. Before retiring to write this Ruling, I was alive to the fact that the suit property and subject of this Judgment herein and the intended appeal, the parcel of land known as Matutu Settlement Scheme/641 was used as a collateral to secure a loan of kshs.2,000,000/= with the Co-operative Bank of Kenya by the husband to the Judgment debtor, the late Stephen Ngare Ogamba who was a Director of the said Bank. Strangely, evidence adduced in the court showed that this loan was never serviced at all from the date the same was advanced. At one point, the chargee commenced the process of the statutory power of sale in order to recover the advanced loan together with the accrued interest. The same was challenged



by the Decree Holder. Interestingly again, the Judgment Debtor did nothing to protect the property. The chargee was not made a party in this suit and therefore no orders can be made against her herein. The Question to ask here is, What would therefore happen should this court issue an order of stay of execution? Would this prevent or stop the chargee from disposing of the suit property? Certainly not. Making such orders would be contrary to the Rules of Natural Justice of condemning the chargee unheard. How then do we make orders in this Application and at the same time not trample on third parties' rights. On 9/4/2024 I ordered the Branch Manager of the Co-operative Bank of Kenya, Kisii to appear in court personally on 30/4/2024 to shed light on the status of the loan Account held by the late Stephen Ngare Ogamba with the suit property as collateral. In response thereto on 30/4/2024 Mr. Joel Odhiambo, the Business Manager of the Bank appeared in court and tabled documents to show that the outstanding loan in the loan Account of the late Stephen Ngare Ogamba, Account number 01613002097600 at 30/4/2024 was Kshs. 4,007,572.01. The same continues to accrue interest at the rate of 12% per annum. Mr. Odhiambo also told the court that should the loan not be cleared, the Bank intends to auction the collateral thereat being agricultural land L.R. No. Matutu Settlement Scheme/641. He said that the value of the property as at 2014 when the loan was advanced was Kshs. 25,000,000/= and that the Judgment pronounced in this case should not be applied against the Bank's interests.

3. This being the scenario, if an unconditional stay of execution is granted in this case, and the Judgment Debtor decides, as she and her late husband have done in the last 10 years, not to service the loan, then the Bank would dispose of the property by way of exercise of her statutory power of sale and both parties would lose the property and this will be the surest way of rendering the intended appeal an academic exercise and thus making the fears of the Applicant a reality. In addition to the order that the Title Deed in respect of L.R. No. Matutu Settlement Scheme/641 be deposited in court within the next 15 Days from the date of this Ruling, I will also give another condition to the stay. The Judgment Debtor will have to either:
 4.
 - a. Deposit in this court the sum of Kshs. 4,007,572.01 as security for the outstanding loan, or in the alternative,
 5.
 - b. Furnish this court with proof that she has cleared the said loan with the Co-operative Bank of Kenya and has had the property discharged, or further in the alternative,
 6.
 - c. Deposit a sum of money to be agreed with the Co-operative Bank of Kenya with an undertaking and commitment on how to liquidate the balance of the outstanding loan by monthly instalments until payment in full.
7. In the last option, in case of any default in payment of any one instalment on its due date, execution to issue.
8. Should any of the above 3 conditions be satisfied within the next days hereof, there shall be a stay of execution only limited to the sub-division of the parcel of the land known as L.R. No. Matutu Settlement Scheme/641. However, the Decree Holder shall remain in possession and occupation of the designated 8 Acres of the suit property as was his share and as is set apart on the ground until the Hearing and determination of the intended Appeal.

These are the Orders of the court.



Ruling dated, signed and delivered at Nyamira this 27th day of May 2024.

MUGO KAMAU

JUDGE

In the presence of: -

Court Assistant – Brenda

Plaintiff's Counsel – Mr. Ochoki

Defendant's Counsel – Mr. Bonuke.

Mr. Joel Odhiambo, Business Banker Co-operative Bank Kisii.

RULING ELC NO.E001 OF 2022	1
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