



REPUBLIC OF KENYA



KENYA LAW
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Njuguna t/a Femfa Auctioneers v Premier Food Industries & 2 others (Civil Appeal 84 of 2023) [2024] KEHC 5332 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 84 OF 2023
REA OUGO, J
APRIL 24, 2024**

BETWEEN

FRANCIS GITAU NJUGUNA T/A FEMFA AUCTIONEERS APPELLANT

AND

PREMIER FOOD INDUSTRIES 1ST RESPONDENT

BHAVYA EXPORTERS & IMPORTERS 2ND RESPONDENT

NEW NYANZA WHOLESALERS 3RD RESPONDENT

RULING

1. This application relates to the Notice of Motion dated 31/12/2023 brought under section 3, 3A of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#). The applicant seeks the following orders:
 1. Spent
 2. That there be a stay of execution of the decree in Bungoma Chief Magistrates Court Civil Suit No. 2019 of 2021 pending the hearing and determination of this application inter-partes.
 3. The trial court's order of stay of execution in Bungoma CMCC No. 219 of 2021 and its terms therein be set aside.
 4. That there be a stay of execution of the decree in Bungoma Chief Magistrates Court Civil Suit No. 219 of 2021 pending hearing and determination of Bungoma High Court, Civil Appeal No. 84 of 2023.
 5. That the costs of this application be provided for.
2. The applicant supports his application on the grounds that he will suffer irreparable damage if the execution of the decree in Bungoma Chief Magistrates Court Civil No. 219 of 2021 is not stayed. He



explained that he was aggrieved by the judgment delivered on 13/7/2023 and preferred an appeal to the High Court vide Bungoma High Court Civil Appeal No 84 of 2023. He had applied for an order of stay of execution in the lower court but the lower court granted stay on condition that the title deed of land parcel No. Mabonde Block 1/Ex-Prison/279 be deposited in court with an executed transfer form. The applicant deposited the title but found it difficult to deposit an executed transfer form in view of the fact that the same did not specify in whose favour the transfer was to be effected and neither did it specify the consideration. He complains that the order was prejudicial to the appellant since the decretal sum was far less than the value of the land for which the title was being deposited. The order of the lower court offered no clarification on what would happen to the excess value of the pieces of land that was placed as security.

3. He argued that he had made this application without any delay and that the stay orders granted in the lower court lapsed on 11/11/2023. Further, if the orders are not granted, the appeal will be rendered nugatory and the applicant will suffer irreparable damage. He advanced that he is willing to provide security as a condition for the stay orders sought herein and annexed the copy of the title deed to land parcel No. Mabonde Block 1/Ex-Prison/278.
4. The application was opposed. Martin Mutuku filed a replying affidavit dated 7th March 2024 on behalf of the 1st respondent. He deposed that he is the 1st respondent's Chief Executive Officer. He averred that the applicant had sought orders of stay of execution in the lower court and upon hearing the application, the court issued conditional orders of stay to the effect that it was in the interest of justice that the applicant deposits the title deed of land number Kapkoi/Mabonde Block 1/Ex-Prison/279 together with executed transfer documents. The applicant did not adhere to the orders of the court despite the orders being in his favor. He did not apply for review and the lapse of the orders of the lower court should not be the reason why the 1st respondent is denied the fruits of his judgment.
5. The 1st respondent believes that the applicant is hell-bent on denying the 1st respondent the fruit of its judgment. The applicant failed to adhere to the orders of the subordinate court and this court should not entertain the application. The applicant has also not demonstrated that he will suffer irreparable loss if execution proceeds. Order 42 Rule 6 of the [Civil Procedure Rules](#) provides that an appeal does not serve as an automatic stay of execution. In any event, the 1st respondent is in the food processing industry and not in the business of buying and selling land. Therefore, holding the Title deed as security will be a challenge in realizing the amounts if there is a need to sell the security held.
6. The 1st respondent further deposed that the land parcel No Kapkoi/Mabonde Block 1/Ex-Prison/279 is right next to parcel No. Kapkoi/Mabonde Block 1/Ex-Prison/278. The 1st respondent avers that the proposed mode of security by deposit of title deed should not be allowed and instead the court should consider having the amount held in courts or otherwise.

Submissions by the Parties

7. The applicant submitted that he has fulfilled two conditions, he moved the trial court for stay orders which orders were granted but required that the applicant to deposit a title to land together with an executed transfer form. The order did not indicate in whose favor the transfer form should be executed and at what consideration. He also pointed out that the order did not also consider the value of the property used as security is higher than the decretal sum.
8. The applicant has also provided a copy of the title and valuation report for the property he intends to deposit as security. The applicant argued that the court has jurisdiction to set aside the lower court's order and grant a stay of execution of the decree as prayed.



9. The 1st respondent filed its rival submissions dated 12/03/2024. They submit that the applicant has not demonstrated that he may suffer irreparable damage and the extent of loss that is bound to occur. The 1st respondent contends that the applicant has not shown any evidence pertaining to the nature of substantial loss.
10. The 1st respondent submitted that the trial court entered a finding in favour of the applicant and it is surprising that the applicant argues that the finding of the court was not in his favour. It appears the applicant wants to have his cake and still eat it. On the one hand he is arguing that if stay is not granted, he will suffer substantial loss, on the other hand he is unwilling to comply with the requirements under Order 42, Rule 6. His intention is therefore to thwart or delay the course of justice and to prevent the respondent from enjoying the fruits of his judgment.

Analysis and Determination

11. I have considered the submissions by the parties and the issue before the court is whether the applicant is entitled to an order setting aside the trial court's order of stay of execution in Bungoma CMCC No. 219 of 2021 and its terms; and whether they are entitled to further order of stay.
12. It is not in dispute that the applicant was granted stay orders at the subordinate court on the following terms:
 - “ 1. That the application is allowed on condition that the Applicant deposit the Title deed per land number Kapkoi/Mabonde Block1/Ex-prison/279 in court together with executioner transfer documents in Court within 30 days from the date of this Ruling.”
13. The applicant herein is dissatisfied with the conditions of stay because it lacked clarity regarding the transferee. The applicant filed a fresh application by way of notice of motion seeking an order of stay of execution. Interestingly, he now wants the title of his property, land parcel Kapkoi/Mabonde Block1/ex-prison/278 to be used as security instead of Kapkoi/Mabonde Block1/Ex-prison/279 which he made available at the subordinate court.
14. Before delving into the issues raised by the application, the court should first determine whether this is the rightful forum for the applicant to seek his remedy. It is not in dispute that the applicant filed an application seeking orders of stay of execution before the subordinate court and that he was granted an order of stay based on the aforementioned conditions. The applicant therefore had two options, firstly, he could have filed an application for review at the subordinate court to have the orders of the magistrate reviewed. Secondly, the applicant ought to have filed an appeal against the said orders.
15. The applicant did not choose any of these routes. Instead, he has filed a fresh application before this court and asked the court to set aside the orders of the trial court on a stay of execution. The applicant has elected to invoke this court's appellate jurisdiction without filing an appeal. His application has therefore failed to adhere to procedures set out in the *Civil Procedure Rules* on appeal.
16. Therefore, I cannot consider the application that has been brought before the court as the orders of the subordinate court have not been set aside on appeal and neither did the applicant invoke the court's appellate jurisdiction on the matter.
17. Consequently, the application dated 31/12/2023 is hereby dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS DAY 24TH OF APRIL 2024

R.E. OUGO



JUDGE

In the presence of:

Applicant- Absent

Ms Owesi Kariuki For the Respondent

Wilkister - C/A

