



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 227 of 2011

DELPHIN KANUU KAMAU.....PLAINTIFF  
VERSUS  
FINA BANK LIMITED.....DEFENDANT

RULING

By the notice of motion dated 15/8/2013, the plaintiff/applicant, Delphine Kamau seeks an order of temporary injunction to restrain the defendant/respondent by itself, its agents or servants from selling the property known as Kiambogo/Kiambogo Block 2/8737 (0.08 Ha) by Public Auction or otherwise until the hearing and determination of the applicant's appeal against the ruling of this court dated 1/8/2012 and that the proceedings be stayed until the hearing of the intended appeal. The application is predicated on grounds found on the face of the application, an affidavit sworn by the applicant on 15/8/2012 and a sworn affidavit dated 11/9/2012. Mr. Kanyi, counsel for the applicant also filed submissions. The application was opposed and the firm of Macharia Mwangi Njeru filed grounds of opposition on 29/8/2012 and submissions.

The notice of motion is brought pursuant to **Order 42 Rule 6(6)** and **Order 51** of the **Civil Procedure Rules, Sections 3A, 63(e)** of the **Civil Procedure Act**. For the court to grant orders under **Order 42 Rule 6(6)** of the **Civil Procedure Rules**, the applicant must demonstrate the following:-

1. **That the application has been made without unreasonable delay;**
2. **That substantial loss may result to the applicant if the order sought is not granted;**
3. **That the applicant provides security for due performance of the decree or order;**
4. **For any other ground or sufficient cause.**

The applicant had filed an application dated 23/8/2011 seeking orders of injunction to issue against the respondent to restrain it from selling the applicant's property Kiambogo/Kiambogo Block 2/8737. On 1/8/2012, this court dismissed the said application and being aggrieved by the said order the applicant has filed notice of appeal on 6/8/2012. The applicant has deposed that the appeal has high chances of success; that if an order of injunction is not granted, the respondent is likely to dispose of the property and she will suffer irreparable loss. The applicant also contends that the application was made without delay and that this court has jurisdiction under **Order 42 Rule 6** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and **Article 259** of the **Constitution** to grant the orders sought. Counsel relied on the decision in **Madhupaper International v Kerr (1985) KLR 840** where the court considered when an injunction may be granted pending an appeal either to the Court of Appeal or the High Court. Other cases relied upon are HCC 508/2010, **Riccatti Business College of E.A. Ltd v Kyanzavi Farmers Co. Ltd, Amin Ladak alias Amin Jaffer Gulamhussein v Rothmans's Holdings Ltd & Another HCC 458/2000** (MSA).

By the grounds of opposition the respondent contend that the application is incompetent in that it seeks to stay a negative order that was dismissed because the dismissal order is not capable of execution; that the applicant has not demonstrated that the appeal has high chances of success, or that she will suffer substantial loss and that the orders sought cannot be granted under **Order 42 Rule 6(6)**, Mr. Ngira, learned counsel for the respondent submitted that in dismissing the prayer for injunction, this court was sitting in its original jurisdiction and this court is being asked to sit on appeal of its own orders and that the orders being of a negative affect, cannot be stayed because nobody was required to do

anything. Counsel further urged that under **Order 42 Rule 6(2)** a party seeking an injunction must demonstrate that he will suffer irreparable loss, that he will provide security, and the application should be decided on a balance of convenience. He submitted that the subject matter is laid which has a value that is ascertainable and no loss will be suffered if the appeal is successful. Counsel urged that the application before this court is similar to what was before the court, there are no new circumstances and this court has no jurisdiction to hear it. Counsel relied on the decision of **Sonalux Ltd & Another v Barclays Bank of Kenya Ltd (App. NRB 219/2007)**.

I do agree with the respondent's counsel that ordinarily an order of stay would only issue where there is a judgment or an order capable of execution in favour of the successful party. In this case the application for injunction was dismissed and there is no order capable of execution. The respondent had urged that this court has no jurisdiction to grant an order of stay and relied on the **Sonalux** case. In my view, that case does not apply to the circumstances in this case because it was brought pursuant to **Order 5(2)(b)** of the **Court of Appeal Rules** and that court observed that under that rule, if a party asks for stay there must be something to be stayed. In this case, the applicant, apart from seeking for an order of injunction, seeks a stay of the proceedings. Under **Order 42 Rule 6(6)** of the **Civil Procedure Rules**. In the **Amin Ladak** case (supra), J. Waki had declined to grant an order of injunction to a party, the applicant by notice of motion sought an order of stay of execution and status quo. When placed before the same judge, he observed that since the subject matter was immovable property, the respondent may not be able to reconstitute it and substantial loss would ensue and he granted a conditional order of stay. In the **Madhupaper** case (supra) a judge had dismissed an application for an order of injunction and the Court of Appeal held that:-

**“..where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed..”**

The Court of Appeal had adopted the decision in the English case of **Ericford Properties Ltd v Cheshire County Council (1974) 2 ALL ER 448**. In the **Riccata** case, J. Njagi faced a similar situation as the present one and relying on the **Ericford** case (supra) he held that he had the jurisdiction to grant an order of injunction because the Court of Appeal may take a different view from that of the High Court and reverse his finding and if an order of injunction is not granted the intended appeal may be superfluous. I am satisfied based on the above decisions that this court has the jurisdiction to grant an injunction pending appeal despite the fact that I had dismissed the earlier application. I would grant an order of injunction in terms of prayer 2 of the notice of motion.

Has the applicant satisfied the elements for the Court to consider granting an order under **Order 42 Rule 6(6)** of the **Civil Procedure Rules**? The court delivered its ruling that is under challenge on 1/8/2012 and the applicant moved with alacrity and filed this application on 15/8/2012. The applicant has satisfied the first requirement. Will the applicant suffer substantial loss if the orders are not granted? The subject matter is land. If it is sold, it will be put out of reach of the applicant and I take into account the sentimental value placed on land in Kenya.

Mr. Kanyi urged the court not to order the applicant to provide any security because they are holding the title as security for the loan. I agree. In the circumstances, I would order that the proceedings in this case be stayed pending the hearing and determination of the appeal. Costs be in the cause.

**DATED and DELIVERED this 28<sup>th</sup> day of March, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Kariuki holding brief for Mr. Kanyi for the applicant

Mr. Komen holding brief for Mr. Njoroge for the defendant

Kenney – Court Clerk