



Bundotich v Housing Finance Company of Kenya Ltd (Civil Suit E024 of 2021) [2024] KEHC 10284 (KLR) (21 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E024 OF 2021
RN NYAKUNDI, J
AUGUST 21, 2024**

BETWEEN

DAVID LIMO BUNDOTICH APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA LTD RESPONDENT

RULING

1. Before me for determination is the Plaintiff's Notice of Motion dated 9th March, 2024 expressed to be brought under the provisions of Section 3A of the [Civil Procedure Act](#). The specific prayers sought are:
 - a. Spent
 - b. That there be stay of proceedings in this matter pending the hearing and determination of this application the first instance.
 - c. That there be a stay of proceedings and/or an injunction restraining further proceedings in this matter pending the hearing of the application by the Plaintiff for an injunction in Eldoret Court of Appeal Civil Appeal (Application) No E011 of 2024 – David Limo Bundotich v Housing Finance Company of Kenya Limited & 2 Others.
 - d. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by David Limo Bundotich and four substantive grounds. According to the Plaintiff, he has lodged an appeal and an application before the Court of Appeal for an injunction. The applicant further stated that the application before the Court of Appeal will be defeated unless the court herein halts further proceedings and prosecution in this suit. That the court has the jurisdiction to grant this motion under the principles settled in *Erinford Properties Ltd v Cheshire County Council* (1974) 2 ALL ER. 443 together with its inherent jurisdiction. He further stated



that the continued prosecution of this suit will have dire and trifling consequences on the Plaintiff as it will deny him an opportunity to ventilate.

Determination

3. I have perused through the application and the affidavit in support. Essentially the applicant seeks stay for reasons that he has already filed an appeal at the Court of Appeal. I have equally read through the attached Memorandum of Appeal filed at the Court of Appeal and the key argument is that the trial judge did not have jurisdiction to handle the matter for reasons that the issues involved therein were of a commercial nature involving a charge transaction and the execution of the chargee's statutory power of sale thus the matter fell within the purview of the High Court in tandem with Art. 165(3) of the Constitution.
4. To put the matter into context, I find it significant to point out that this court in its ruling dated 17th February, 2022 made a finding that the auction of 4th October, 2012 and the subsequent decision of court issued on the 26th of July, 2018 deregistering the earlier court order registered on the 30th of March, 2012 by the Land Registrar against the suit property extinguished the Plaintiff/Applicant's proprietary interest in the suit property. That is, ownership and subsequent proprietary interest moved from the applicant/Plaintiff to the 3rd proposed defendant. The 3rd proposed defendant became the legal owner of the suit property.
5. In making a decision in the said ruling, I pronounced myself as follows:

“I therefore do not see any reason as to why the court would warrant any further occupation of the suit property by the Plaintiff/Applicant considering that it has been more than 9 years since the 3rd proposed defendant acquired interest in the said suit land. To allow the applicant/Plaintiff to extend his occupation in the suit property would be to prejudice and disadvantage the legitimate and legal owner of the suit property being the 3rd proposed defendant together with the respondent. The two stand to suffer greater prejudice if an injunction is granted as opposed to the Plaintiff/applicant who brought this fate upon himself when he failed to honor his contract obligation and repay the loan owed to the Respondent.”
6. Having said that, the guiding principles operative in this discussions are fairly settled. In the William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others [2019] eKLR, a 5-judge Bench of the High Court, after considering variety of decisions on this question, laid out concrete principles that our courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. (See Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000), David Morton Silverstein v Atsango Chesoni [2002] eKLR & Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR). The following principles were laid down:
 - a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favor of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;



- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal;
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
7. The above-mentioned factors are what the court ought to consider before making a decision as to whether to grant stay of proceedings or not.
8. *In Global Tours & Travels Limited*; Nairobi HC Winding up Cause No 43 of 2000 Ringera J, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

9. I have gone through the application and considered the background of this matter. I am of the view that my ruling delivered on 17th February, 2022 essentially made findings to the crux of this matter and as such there are no proceedings to stay. I form the opinion that since the applicant has filed an appeal at the Court of Appeal, the said forum would be better placed to issue stay of any consequential orders.
10. The powers of this court are no doubt very wide and are intended to be and will be exercised in the interest of justice. However, that is not to say that an order can be made by this court which is inconsistent with the fundamental trial rights under Article 50 of the Constitution. An order which this court can make in order to do complete justice between the parties is not to stay proceedings for reason that their exist none capable of being stayed. Therefore, I do not think it would be possible to hold that proceedings be stayed when essentially in this connection this court is not able to appreciate such a trajectory or remanding the case with a view to have it adjudicated at future date. It is plain that the parties or the Applicant is yet to move the court within the relevant provisions of procedure necessary to do complete justice between the parties. It is just and equitable to ensure the observance of the due process of the law to deny the Applicant an order of stay. This will clog or obstruct the stream of justice within the policy guideline for the parties to comply that any suit pending more than one year shall be considered a backlog. The parties are put on notice that jurisdiction of this court is to do all what it takes within procedural and substantive law to adjudicate the dispute and complete justice between the parties within a reasonable time. The power to stay proceedings can only be exercised as a last result under the constitutional and statutory scheme as framed for the judiciary under Article 159 of the Constitution to carry out its mandate. The same Article provides that justice delayed is justice



denied. That is exactly what such an order of stay of proceedings is likely to infringe or violate which is not envisaged by the *Constitution*. I have therefore serious reservations on the question whether it is open to this court to answer the question raised in the application in the affirmative. In this case, I decline to concur with the Applicant on the Applicants plain reading of the motion to grant the relief of stay of proceedings.

11. For all the above reasons I am of the view that it is neither advisable nor feasible to further make such directions or orders which amount in parking the case docket from an active inventory to a dormant inventory by dint of an order of stay of proceedings. This is not permissible and the application is therefore lost for want of merit.
12. It is so ordered

SIGNED, DATED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF AUGUST 2024.

R. NYAKUNDI

JUDGE

