



**NCBA Bank Kenya PLC & another v Mutemi (Civil Appeal
E056 of 2023) [2024] KEHC 16092 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E056 OF 2023
FN MUCHEMI, J
DECEMBER 19, 2024**

BETWEEN

NCBA BANK KENYA PLC 1ST APPELLANT

CAPITAL DIAMOND STORAGE & AUCTION YARD 2ND APPELLANT

AND

PAUL MUTEMI RESPONDENT

RULING

Brief facts

1. The application dated 15th January 2024 seeks for orders of stay of proceedings in Thika CMCC No. E651 of 2021 and consequential orders issued by Hon. P. Mutua on 6th December 2021 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 5th June 2024.

Appellants'/Applicants' Case

3. The applicants state that on 6th December 2023, the trial magistrate in Thika CMCC No. E651 of 2021 issued a ruling directing them to surrender possession of suit motor vehicle registration number KCL 622J to the respondent and in the alternative, they pay the respondent the sum of Kshs. 950,000/- within 7 days, which timeline lapsed on 13th December 2023.
4. Being aggrieved by the ruling, the applicants lodged an appeal vide their Memorandum of Appeal dated 11th December 2023. The applicants state that the appeal raises arguable points of fact and law.
5. The applicants aver that the respondent sought and obtained the impugned orders by non-disclosure and misrepresentation of facts that were material to the case. The said orders were issued based on the respondent purporting that there were ongoing proceedings in Milimani CMCC No. 395 of



2018 which were pending hearing of the main suit to determine the issue of ownership yet the said proceedings had been dismissed on 17th July 2023 for want of prosecution by the respondent.

6. The applicants state that the orders issued on 6th December 2023 are prejudicial to the parties as they are of a finality nature and are bound to occasion prejudice to them as the same is a case where the respondent would be able to be compensated in quantifiable damages at the final determination of the main suit.
7. The applicants state that the respondent issued them with a letter on 10th January 2024 demanding compliance with the impugned orders and further informed them of his intention to take additional steps in the event of non compliance. The applicants thus argue that they will suffer substantial loss and irreparable damage if the proceedings in CMCC No. E651 of 2021 are not stayed and the consequential order to pay out to the respondent Kshs. 950,000/- plus costs, as they would have the utmost difficulty in recovering the same or realizing their lawfully registered security over the suit vehicle from the respondent in the event the appeal is successful.
8. The applicants aver that the timeline for compliance with the impugned orders lapses by close of business on 13th December 2023 and they are apprehensive that the respondent shall at any moment initiate further proceedings in the suit which actions shall render the appeal nugatory.
9. The applicants aver that they have moved the court expeditiously and without unnecessary delay.

The Respondent's Case

10. The respondent states that the orders the applicants have appealed against are neither irregular nor final in the pending case. At the time the orders were made, the respondent avers that he was the lawfully registered owner of motor vehicle registration number KCL 622S pursuant to a court order which has not been challenged by the applicants.
11. The respondent states that the applicants have approached this court with falsehoods just like they did in the court below. Earlier before the magistrate's court, the applicants had stated that they had sold the motor vehicle. Having acted in contempt of the court, the respondent argues that the applicants cannot seek protection of the court as they are currently doing.
12. The respondent states that if the applicants were genuine they ought to have applied to have the motor vehicle held by a neutral party but not to say that it be released to them knowing very well that the respondent was the registered owner at the time the orders complained were made.
13. The respondent argues that the application is seeking the court's protection to continue enjoying fruits of an unlawful and fraudulent acts enumerated in the ruling by the learned magistrate.
14. The respondent avers that the appeal has no chances of success for reasons that the 1st applicant though a participant, was never a party in the lower court and has not applied to be enjoined in this appeal. Furthermore, the respondent argues that there is no nexus between himself and the 1st applicant as at the time they illegally took the suit motor vehicle. The proprietary interest had already passed and the applicants had no claim against him.
15. The respondent states that the orders made were appropriate considering the circumstances of the case. In the event that the orders sought are granted, the respondent will suffer as he will not be having his motor vehicle or his valuable items that the applicants were asked to give back to him in the ruling of the magistrate..



The Applicants' Submissions

16. The applicants rely on the case of William Odhiambo Ramogi & 2 Others vs the Honourable Attorney General & 3 Others [2019] eKLR and submit that they have met the threshold to guarantee them the orders for stay of proceedings. The applicants submit that they lodged an appeal vide their memorandum of Appeal dated 11th December 2023 within the prescribed time.
17. The applicants further rely on the cases of Port Florence Community Health Care vs Crown Health Care Limited [2022] eKLR and Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR and submit that their appeal is arguable as it raises numerous bonafide points worthy of consideration by the appellate court.
18. The applicants argue that if the orders sought are not granted, they stand to suffer substantial loss if the sum of Kshs. 950,000/- is paid to the respondent as they would have the utmost difficulty in recovering the same or eventually realizing their security over their suit vehicle.
19. The applicants further argue that denying an order of stay of proceedings shall cause the impugned orders to remain in force and consequently occasion a grave miscarriage of justice during the pendency of the appeal running concurrently with the trial proceedings. The trial court shall proceed to hear the suit and make a determination based on the prayers sought in the plaint, which is similar to the orders already issued in the impugned order of 6th December 2023, the subject of the appeal before the current court.
20. The applicants submit that failure to grant stay of the lower court proceedings shall make the trial court proceed notwithstanding a decision on the appeal that may seek to set aside the ruling. As such, the appeal will be incapable of reverting the proceedings to a state of clarity.
21. The applicants submit that the ruling and consequential orders were delivered on 6th December 2023 and they filed the current application on 15th January 2024. Accordingly, the application was filed 15 days after the ruling was delivered pursuant to Order 50 Rule 4 on the exclusion of computation of days between 21st December and 13th January. Thus, there has been no inordinate or inexcusable delay.

The Respondent's Submissions.

22. The respondent relies on the cases of Hadkinson vs Hadkinson (1952) ALL ER and Gillab Chand Pupaltal Shah & Another Civil Application No. 39 of 1990 and submits that the applicants are in contempt of court orders as the orders were meant to be complied with by 13th December 2023 but the applicant did not do so and it was only after the demand letter issued to them that they moved in action.
23. The respondent submits that the trial court's order giving rise to the appeal emanates from an application for review which sought to review or set aside an earlier interim, ex parte order dated 21/10/2021 issued to the 1st applicants notwithstanding they were not properly enjoined as such interested party as no application or order was made to that effect. However, instead of the 1st applicant ensuring the preservation of the said motor vehicle, it removed the same from the yard and disposed it off by selling it although it was still registered in his name who had no contractual or financial obligations with the 1st applicant.
24. The respondent submits that the applicants have abused the process of the court and they have withheld the truth as to the whereabouts of the said motor vehicle thus the court must refuse or decline to hear the applicants and dismiss their application for stay.



25. The respondent relies on the case of Antoine Ndiaye vs African Virtual University (2015) eKLR and submits that the applicants have not satisfied the grounds to warrant them to be granted stay of execution. The respondent submits that the impugned ruling was delivered on 6th December 2023 which was to be complied with within 7 days meaning compliance ought to have been carried out on 13th December 2023. Thus the applicants ought to have moved the court for an order of stay of execution within the 7 days but did not do so until 15th December 2023, after being served with a demand letter. The respondent argues that at the time the applicants filed the current application, they were already in contempt of court thus the respondent urges the court to take into account the prevailing circumstances and determine that there was inordinate delay in moving the court.
26. The respondent relies on the case of RWM vs EKW (2019) eKLR and submits that having been the registered owner of the suit motor vehicle pursuant to a court order which has never been appealed against, the court having eventually ordered the said motor vehicle to be released to him unconditionally and there having been no order of the court for the 1st applicant to repossess or dispose of the same, the applicants cannot purport to have been exercising their statutory power of sale. Thus, the respondent submits that the balance of interest tilts in his favour.
27. The respondent submits that the onus is upon the applicants to demonstrate that they are likely to suffer substantial loss should stay be refused and the appeal succeeds. Furthermore the respondent relies on the case of Machira t/a Machira & Co. Advocates vs East African Standard (No.2) (2002) KLR 63 and submits that the mere fact that he has commenced the process of execution or enforcement of the order being appealed from does not automatically call for or warrant for the issuance of an order of stay.
28. On the issue of security, the respondent submits that it is not enough for the applicants to state that they are ready and willing to abide by any orders of the court that may be granted. The applicants must go an extra mile and specifically state and where possible furnish the court by way of documentary evidence, what kind or the nature of the security they are ready and willing to furnish.

The Law

Whether the applicants have met the conditions for grant of stay of proceedings pending appeal.

29. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000*:-

“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 justicethe sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, 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.”



30. Similarly the threshold for stay of proceedings has been illuminated in the passages in Halsbury's Law of England, 4th Edition, Vol. 37 page 330 and 332 that:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

31. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-
- a. Whether the applicant has established that he has a prima facie arguable case;
 - b. Whether the application was filed expeditiously; and
 - c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Whether the applicants have established that they have a prima facie arguable case

32. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. *Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
33. I have keenly perused the memorandum of appeal and noted that the applicants' main contention is that the trial court issued orders, at an interlocutory stage, of a conclusive nature which delve into the merits of the main suit thus pre-empting the determination of the main suit which has not yet been heard. I have also perused the trial court's ruling and looked at the court's reasoning. Furthermore, I have perused the lower court file from the registry. Without going to the merits of the appeal, I find that the applicants have not raised any arguable grounds of appeal.

Whether the application was filed expeditiously

34. The ruling was delivered on 6th December 2023 and the applicant filed the instant application on 15th January 2024. Thus the application has been filed expeditiously.



Whether the applicants have established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

35. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR the court observed that:-

“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

36. The applicants state that they will suffer substantial loss and irreparable damage if the proceedings in the trial court are not stayed as they would experience difficulty in recovering the suit motor vehicle or realizing its lawfully registered security over the suit vehicle from the respondent in the event the appeal is successful. The record shows that the 1st applicant was not a party in the lower court proceedings. No application to join the 1st applicant as a party in this appeal was made. However, the applicants applied for orders of preservation of the suit motor vehicle, an order discharging or setting aside the respondent’s orders and an order for injunction restraining the respondent from taking possession of the suit motor vehicle and obtained the said orders from the court albeit unlawfully. The 1st applicant further did not disclose the existence of CMCC No. 395 of 2018 whilst they were obtaining the said ex parte orders whereby the respondent was granted ownership of the motor vehicle. The said orders have not been appealed against or set aside by the court. Thus it is evident that the 1st applicant’s actions have been contrary to the law. As such, the applicants have not demonstrated sufficient cause to warrant stay of proceedings. Conversely, the court is convinced that it would not be in the interests of justice if the proceedings are stayed. Since the test of granting such orders has not been passed by the applicants. The non-disclosure by the 1st applicant portrays an act of dishonesty on his part. The said act led to the 1st applicant obtaining interim orders herein.

37. In this regard, it is my considered view that the applicants have not shown sufficient cause to warrant stay of proceedings in Thika CMCC No. E651 of 2021.

Conclusion

38. It is my considered opinion that the application dated 15th January 2024 lacks merit and is hereby dismissed with costs.

39. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE

