



REPUBLIC OF KENYA



**Family Bank Limited v Joel (Civil Appeal E051 of 2022)
[2023] KEHC 1170 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E051 OF 2022
RN NYAKUNDI, J
FEBRUARY 21, 2023**

BETWEEN

FAMILY BANK LIMITED APPELLANT

AND

SIKUKU JAMES WAMBETE JOEL RESPONDENT

RULING

1. By way of Notice of Motion dated December 14, 2022 the intended Appellant Family Bank respectively seek the following orders:-
 1. That This Honourable court be pleased to grant an order for stay of proceedings in Eldoret Civil Suit No E772 of 2021 – Sikuku James Wambete Joel versus Family Bank Limited pending the hearing and determination on this Appeal
 2. That the Appeal be set down for directions on priority basis
 3. That costs of this Application be in the cause
2. This application is supported by the Affidavit of Ivy Ngui on behalf of the Applicant. The application for stay of proceedings in respect of CMCC NO E 772 OF 2021 against the back ground that the learned trial magistrate exercised discretion to restrain the Applicant from offering for sale all that Parcel of Land Known as Eldoret/Municipality/Block 20 Kapyemit 607. That impugned decision delivered on March 10, 2022 is the subject matter for the intended Appeal vide the memorandum dated April 1, 2022. The Respondent in opposition to the Application countered it by the grounds of opposition dated December 20, 2022. The application by the Appellant was canvassed by way of written submissions relying on the following authorities: 'Meru Civil Appeal 40 of 2018 Kenya Wildlife Service-versus-Mutembei (2019) eKLR, *Giella vs Cassman Brown & Co Ltd (1973) EA 358*, *Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others (2013) eKLR*, *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR*



They cannot be overlooked in the ultimate analysis

Decision

3. It is settled that the purpose of an Interlocutory judgement is to preserve the status quo but is of cause impossible to stop the entire world pending trial of a suit. What the court does is to order for the Respondent/Defendant to do something or not to do something else but such restrictions on the Defendant /Respondent would have certain consequences which the court has to take into consideration. Although I am not the trial court the threshold text for the grant of an injunction is clearly outlined in the various decisions, to mention just a few of the cases of *American Cynamind Co v Ethicon Ltd (1975) AC 396*. Lord Diplock developed a set of guidelines to establish whether a case on the merit has been made out by the Applicant which include the following
 - i. Whether there is a serious question to be tried
 - ii. What would be balance of convenience of each party should the order be granted, in other words, where does that balance lie?
 - iii. Whether there are any special factors; and what Lord Diplock referred to as the governing principle
 - iv. Whether an award of damages would be an adequate remedy.
4. In our case the classic decisions in *Giella –vs Cosman Brown (1973) EA 358 Nguruman Ltd vs Jan Bonde Nielsen & 2 Others CA No 77 OF 2012 (eKLR 2014)* and *Mrao Ltd vs First American Bank of Kenya and 2 Others (2003) KLR 125* set the tone for the courts seeking to exercise judicial discretion pursuant to an application for or against grant of a temporary injunction. Essentially, they are in line with the decision in the **American Cynamind case**. Mainly based on this reasoning such factors might well justify the refusal of the injunction or grant of it on the stated grounds going to discretion.
5. For the instant motion urged by the Applicant the complaint is against the grant of a temporary injunction by the learned trial magistrate which it thinks was unjustified and likely to confer an unjust enrichment or advantage given the nature of the contractual relationship and Applicants liability. In my considered view the trial court has the power and perhaps even the duty to consider the equities of the case before granting or denial of a temporary injunction. Determining the legal matter that has been raised it is within the discretion of the trial court to decide the limitations and latitude afforded order 40 Rule 1 and 2 of the Civil Procedure Rules
6. When I look at the proceedings before the trial court through lens of *Samka Ltd and Another v Mercedes Schez Rau Tussel Civil Application Nairobi NO 21 of 1999* (Gicheru Omollo and Owuor JJA on 19 July 1999) the emphasis supplied reads as follows:
 - a. Discretion must be exercised on reason and not caprice and the exercise must not be arbitrary or oppressive even if unfettered.
 - b. The burden of proving that a single judge in exercising unfettered discretion conferred by rule 4 of the court of Appeal Rules has exercised his discretion improperly lies on the person challenging the same.
 - c. Where on material placed before the court it is impossible to go on either side and the judge chooses to go on either side it is not open to the tribunal reviewing the exercise of discretion to upset the discretion simply because it would have gone the other side.



7. I state that from the extract of this case there is a relationship between legal indeterminacy and discretion. In all this accounts discretion can be formulated as a choice made by the interpreter of the law in decision making process. The realist account holds that it is possible to interpret the law in multiple different ways due to the multiplicity of legal materials. As Hart States: ' When the unenvisioned case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interest in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule of a general word' (See HLA Hart '*Positivism and the Separation of Law and Morals*' (1958) 71:4 *Harv L Rev* 593')
8. The strong reading of the Applicant's motion and affidavit implies that the completeness of the reasoning of the trial magistrate did not appreciate the evidence and principles on injunctions in our Legal System to grant the Respondent application. As a result, he failed to protect the rights of the Applicant hence the need for an Appeal. As I advanced further this question on stay of proceedings the principles in *Mbogo v Shah* (1968) EA 95 leads to a different interpretative outcome than what the Applicant may be legitimately expecting from this court. The rational guidelines states as follow: 'In considering the exercise of judicial discretion as to whether or not to set aside a judgement the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgement, if necessary upon terms to be imposed. The court will not interfere with the exercise of its discretion by an inferior unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not be acted or because it has failed to take into consideration matters it should have taken into consideration and in doing to arrived at a wrong decision. It would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Courts decision would have been different' (See also [*Price and another v Hilder* \(1986\) KLR 95](#) (Hancox, JA Chesoni and Nyarangi, JJA on 15 June 1984)
9. What I have come to learn over time there are no legal meta rules to regulate judicial discretion and the art of judgement. My appraisal of the dominant model of the judicial decision making by the learned trial magistrate does not signal any of the characterized elements in *Mbogo vs Shah* for the court to interfere with it.
10. On Appeal that is the substratum of the Applicants Memorandum to this court. In the circumstances at an opportune time, the interlocutory Appeal would be on this issue alone. It manifests therefore that the Applicants intended Appeal has slim chances of success.
11. Similarly in answer to the instant motion I rely on the case of *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR, Gijonyo held that: 'Stay of proceedings should not be confused with stay of Execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent'. (See also the principles in *Global Tours & Travels Limited: Nairobi HC Winding up Cause NO 43 of 2000*
12. Taking a cue from the decisions and analysis of the facts and the context of Order 42 rule 6 (1) of the [*Civil Procedure Rules*](#) as read conjunctively with section 1(a) 1(b) and 3(a) of the [*Civil Procedure Act*](#), I am of the very firm conviction that I will not create any vacuum in our jurisprudence by not properly and harmoniously exercising discretion to result in striking out the Notice of Motion. It lacks the necessary ingredients as propounded in the above decisions. I dismiss it with costs and in line with the trial court direction the pending suit be heard on the merits.



DATED, SIGNED AND DELIVERED ON THIS 21ST DAY OF FEBRUARY 2023

R. NYAKUNDI

JUDGE

Coram: Before Hon. Justice R. Nyakundi

Maina & Onsare Partners Advocates

M/s Rioba Omboto & Co Advocates

