



REPUBLIC OF KENYA



**Nyaboke v NCBA Bank Kenya PLC & 2 others (Commercial Case E176 of 2021)
[2023] KEHC 2736 (KLR) (Commercial and Tax) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E176 OF 2021
DAS MAJANJA, J
MARCH 29, 2023**

BETWEEN

JUDITH NYABOKE PLAINTIFF

AND

NCBA BANK KENYA PLC 1ST DEFENDANT

JAMES ONYANGO T/A NYALUOYO AUCTIONEERS 2ND DEFENDANT

BRICKLANE HOMES LIMITED 3RD DEFENDANT

RULING

1. On March 27, 2022, this court dismissed the Plaintiff's application dated July 29, 2021 made, inter alia, under Order 40 rules 2 and 4 of the *Civil Procedure Rules* seeking an injunction restraining the 1st Defendant ("the Bank") and the 2nd Defendant ("the Auctioneer") from selling her property; LR No 330/250 situated in Lavington, Nairobi ("the suit property") in exercise of the Bank's statutory power of sale pending the hearing and determination of the suit. The Plaintiff preferred an appeal to the Court of Appeal against the ruling and in due course filed an application for stay pending appeal in the Court of Appeal; *Nyaboke v NCBA Bank PLC and Another* [2021] KECA 323 (KLR). On December 20, 2021 the Court of Appeal issued the following orders:
 1. An order be and is hereby granted preserving the status quo obtaining as at November 17, 2021 with regard to the possession and ownership of property known as LR No 330/250 situate in Lavington within Nairobi County, pending the hearing and determination of the intended appeal
 2. The Applicant is directed to file and serve its intended appeal within ninety (90) days of today's date.



3. Upon default of Item 2 above by the Applicant, the orders on the preservation of the status quo granted herein shall automatically lapse.
 4. By status quo is meant both the physical possession and registration status of the suit property as at November 17, 2021.
 5. The costs of the application dated August 30, 2021 to abide the outcome of the intended appeal.
2. In compliance with the order, the Plaintiff filed Nairobi Civil Appeal No E517 of 2021 which is now pending determination in the Court of Appeal. In addition, the Plaintiff has now filed the Notice of Motion dated May 20, 2023 seeking an order of stay of further proceedings in this suit pending the hearing and determination of the appeal. The application is supported by the Plaintiff's supporting affidavit sworn on February 20, 2023. It is opposed by the 1st and 2nd Defendants through the replying affidavit of the 1st Defendant's Principal Legal Counsel, Stephen Atinya, sworn on March 15, 2023 and that of the 3rd Defendant's Director, Grace Chepkoech Chesiyana, sworn on March 13, 2023. The advocates on record made brief written submissions on the issue whether the court should stay the proceedings in view of the orders issued by the Court of Appeal.
 3. The thrust of the Plaintiff's case is that any step in light of the orders of the Court of Appeal will affect her interest in the suit property and thus amount to violating and contravening the orders of the Court of Appeal which remain in force. That the 3rd Defendant, being aware of the order made in the Court of Appeal applied for review and setting aside of the said orders. She complains that this court held in making definitive and final decision at an interlocutory state to wit, that the Plaintiff's equity of redemption was extinguished. As such, it is in the interests of justice that the current proceeding be stayed pending the outcome of the appeal.
 4. The 1st and 2nd Defendants argue that while the Court of Appeal issued orders to preserve the suit property, it did not issue an order staying proceedings and the said orders cannot be construed as such. They urge the Plaintiff has not made out grounds for the grant of orders of stay of proceedings and the court should not grant an order of stay as this would delay the hearing of the suit. They further contend that this application has been brought after unreasonable delay; about one year two months since the Court of Appeal issued its orders on December 20, 2021 and one year five months after lodging the appeal and only filed the application when directed to do so by the court.
 5. The 3rd Defendant opposes the application on the ground that while the Court of Appeal granted an order of status quo regarding the suit property, it did not make any order interfering with the proceedings. It therefore urges that these proceedings and those of the Court of Appeal are separate and distinct and proceeding with this suit would not affect the fair determination of the suit. It further urges that it is in the interest of justice that the suit be heard because it is the Plaintiff who is benefitting from delay of the suit. In any case, it states that if the suit proceeds, it will not affect the orders of status quo in the Court of Appeal.
 6. While I am alive to the fact that the Court of Appeal granted an order in respect of the status quo regarding the suit property, the court did not issue any order staying the proceedings before this court, leaving this court to proceed with determination of the suit. The Court of Appeal has already expressed itself on the Plaintiff's relief pending appeal and for this court to once again consider the same factors that the court considered would amount to reviewing or otherwise interfering with the processes in the Court of Appeal. The Plaintiff had the opportunity to seek an order for stay in the Court of Appeal but it failed to do so.



7. Since the Court of Appeal is already seized of the Appeal, I hold that this Court lacks jurisdiction to make any further orders that would call on this court to determine or otherwise comment on the efficacy of what the Court of Appeal did or could have done. If any relief should be sought in relation to the pending appeal, it should now be sought in the Court of Appeal.

8. The Plaintiff's application dated March 20, 2023 is struck out with costs to the Defendants.

DATED and DELIVERED at NAIROBI this 29th day of MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Abidha instructed by Abidha and Company Advocates for the Plaintiff.

Mr Mumia instructed by Mwaniki Gachoka and Company Advocates for the 1st and 2nd Defendants.

Mr Mwalo instructed by Kevin and Associates LLP Advocates for the 3rd Defendant.

