



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Belinda Mbuu & another v John Kariuki Mbuu & 2 others (Civil Case 198 of 2022)  
[2022] KEHC 12735 (KLR) (Commercial and Tax) (30 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12735 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 198 OF 2022  
DAS MAJANJA, J  
AUGUST 30, 2022**

**BETWEEN**

**BELINDA MBUU ..... 1<sup>ST</sup> PLAINTIFF  
MUMBU HOLDINGS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHN KARIUKI MBUU ..... 1<sup>ST</sup> DEFENDANT  
STELLA NJAMBI MBUU ..... 2<sup>ND</sup> DEFENDANT  
SPIRE BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Following dismissal of the application dated June 2, 2022, the 1<sup>st</sup> plaintiff (“the plaintiff”) has now preferred an appeal against the ruling. She has moved the court by the Notice of Motion dated July 21, 2022 seeking stay of the ruling dated July 8, 2022 (“the ruling”) pending the hearing and determination of the intended appeal in the Court of Appeal.
2. The application is supported by the plaintiff’s affidavit sworn on July 21, 2022. The Bank opposes the application through Grounds of Opposition dated July 29, 2022. Counsel for the parties made brief oral submissions in support of their respective positions.
3. Before I deal with the substance of the application, a brief summary of the matter will suffice. The 1<sup>st</sup> plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are family members where the 1<sup>st</sup> defendant is the father and together, they are directors and shareholders in the 2<sup>nd</sup> plaintiff (“the company”). The 1<sup>st</sup> plaintiff holds xxxx ordinary shares, the 1<sup>st</sup> defendant holds xxxx ordinary shares and the 2<sup>nd</sup> defendant holds xxxx ordinary shares. The 1<sup>st</sup> defendant has two other children who are siblings of the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup>



defendant and are also directors and shareholders of the company and currently reside in the United States of America.

4. Sometime in July 2015, a company, Mbukabu Limited resolved to, *inter alia*, apply for a loan of Kes 90,000,000.00 from the bank for the purchase of a property; LR 209/2054 situated along Muthithi Road, Nairobi. The bank, in a facility letter dated December 1, 2016 agreed to advance the said loan to Mbukabu Limited which loan was to be secured by, *inter alia*, a charge over LR 7158/312, Spring Valley, registered in the name of the Company (“the suit property”) and a corporate guarantee by the company for kes 90,000,000.00.
5. The plaintiffs’ case is that the decision by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to obtain the facility from the bank and charge the suit property was done without any authorization from the other directors, that the purchase of the property LR 209/2054, Muthithi Road, Nairobi is mired in fraud and misrepresentation as the seller therein is not the owner of this property, that the company never received any benefit or consideration from the monies advanced from the bank to Mbukabu Limited and that the action of the 1<sup>st</sup> and 2<sup>nd</sup> defendants was done without the consent of the Company expressed by a resolution of all its board of directors.
6. As a result of the alleged fraudulent acts, the plaintiffs pray for an injunction restraining the defendants from selling or in any way manner whatsoever dealing with the assets of the company, a declaration that the charge and guarantee made by the company to the bank be rescinded and or set aside as having been procured by misrepresentation by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, that the charge created over the suit property be declared null and void and that damages be awarded in favour of the company from the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
7. Following default in loan repayments by Mbukabu Limited, the bank commenced the process of recovery of the outstanding amount by issuing demand notices to the said company. As the company had failed to regularize its account, the bank took steps to exercise its statutory power of sale over the suit property. It advertised the suit property for sale thus precipitating this suit by the plaintiffs to forestall the sale. The plaintiff sought permission to file a derivative suit under the provisions of part XI of the *Companies Act*, 2015. Together with the suit, the plaintiff filed an application dated June 2, 2022 made, *inter alia*, under sections 238 and 239 of the *Companies Act*, 2015 and order 40 rule 2 of the *Civil Procedure Rules* seeking an injunction restraining the bank from exercising its statutory power of sale and for permission to continue the suit as a derivative suit.
8. I heard the application and came to the conclusion that the plaintiff had not made out a case for grant of permission to proceed with the suit as a derivative suit. Having declined to the grant permission, I struck out the suit. The issue for consideration in this ruling is whether this court should grant stay of the ruling and orders therefrom pending appeal. It is not in dispute the plaintiff has exercised her undoubted right of appeal by filing a Notice of Appeal against the ruling. I am also prepared to accept that the intended appeal is not frivolous. But can the court stay an order which in effect struck out the suit?
9. The orders declining to grant permission to proceed with the suit as a derivative suit and the striking out of the suit are negative in nature and do not require the parties to do anything. An order of stay proceeds from the assumption that the order a party seeks to stay requires the party to do or perform some positive obligation which may be stayed. This is not the position in this case. In *Co-operative Bank*



*of Kenya Limited v Banking Insurance & Finance Union (Kenya)* Civil Application no NAI 133 of 2015 [2015] eKLR Kantai JA., explained this position as follows:

An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co Advocates v National Insurance Corporation* (Civil Appeal no 13 of 1984) where it was stated: ‘..... an order for stay of execution must be intended to serve a purpose .....

10. The court cannot stay a negative order hence the application dated July 21, 2022 lacks merit. It is dismissed with costs to the 3<sup>rd</sup> defendant.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF AUGUST 2022.**

**D S MAJANJA**

**JUDGE**

**Court of assistant: Mr M Onyango**

**Dr Khaminwa instructed by Khaminwa and Khaminwa Advocates for the plaintiffs**

**Ms Karanu instructed by Karanu Kanai and Company for the 3<sup>rd</sup> defendant.**

