



Sidian Bank Limited v Ngugi & 4 others (Environment & Land Case 40 of 2020) [2023] KEELC 22471 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 40 OF 2020**

CK YANO, J

DECEMBER 20, 2023

BETWEEN

SIDIAN BANK LIMITED APPLICANT

AND

STELLA NYAKIO NGUGI 1ST RESPONDENT

ANDREW LYALL 2ND RESPONDENT

GODFREY MUGAMBI KIMATHI 3RD RESPONDENT

THE LAND REGISTRAR MERU CENTRAL 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. Sidian Bank Limited the applicant in the main suit filed an originating summons dated April 24, 2019 alleging that the Land Registrar, Meru Central the 5th Respondent had unlawfully effected changes in the land register for Land Reference Number Nyaki/Kithoka/1914 without informing the Bank who wanted to carry out their statutory power of sale by cancelling entry number 3 in the encumbrance section and entry number 7 in the proprietorship section of the register of the suit property and proceeded to make various entries thereof. The bank wanted the said entries number 3 and 7 reinstated and all other entries made subsequent to the cancellation of entries 3 and 7 cancelled. They also prayed for orders of permanent injunction as well as costs against the respondents jointly and severally.
2. The suit was originally filed in Mombasa court as Mombasa ELC No. 78 of 2019. By a preliminary objection dated July 9, 2019, the 3rd and 4th respondents objected to the territorial jurisdiction of the court on grounds that the suit property is situate in Meru County and that the 3rd, 4th, 5th and 6th respondents hail from and that the substantive counsel representing the 5th respondent is also based



- on Meru county. By a ruling delivered on February 7, 2020, this court transferred the matter to the Environment and Land Court Meru pursuant to which it was given the current number.
3. On April 6, 2021, the 3rd respondent filed a replying affidavit dated March 25, 2021 in response to the originating summons herein, while the 4th respondent filed a replying affidavit dated March 15, 2021. The 5th and 6th respondents are yet to file their responses to the originating summons despite being granted several opportunities to do so. I note however that the 5th and 6th respondents filed what they referred to as a reply to the originating summons dated September 29, 2022 and filed on 21/10/2022.
 4. The matter subsequently came up for directions on the hearing of the suit and on October 25, 2022, the court directed that the originating summons be canvassed by way of written submissions. The Bank filed their submissions on December 5, 2022. The 1st and 2nd respondents filed their submissions on February 2, 2023 while the 3rd and 4th respondents filed theirs on October 3, 2023.
 5. By an application dated December 1, 2022 and filed on December 5, 2022, the 5th and 6th Respondents sought to enjoin the chargee Wilberforce Ndonga Njenga t/a There Mombasa Traders as a 7th respondent. By a ruling delivered on June 14, 2023, the court dismissed the said application for lack of merit. The 5th and 6th respondents were granted time to file and serve their response and submissions to the suit. Instead, the 5th and 6th respondents filed a notice of motion dated and filed on 2nd October, 2023 seeking an order of stay proceedings/further hearing pending the hearing and determination of Civil Appeal No. E181 of 2023. That application is the subject of this ruling.

The 5th and 6th Application Dated 2nd October, 2023

6. The application is brought under section 1A, 1B, 3A of the *Civil Procedure Act*, order 22 rule 22, order 42 rule 6(1) & (2) and order 51 rule 1 of the *Civil Procedure Rules*. The 5th and 6th respondents are seeking an order of stay of proceedings/further hearing and all consequential orders arising therefrom pending the hearing and determination of Civil Appeal No. E181 of 2023. The application is based on the grounds in the face of the motion and supported by the affidavit of Wachira Nguyo, state counsel sworn on 2nd October, 2023.

THE 5th & 6th Respondents Case

7. The 5th and 6th respondents aver that they were aggrieved by the ruling of this court delivered on June 14, 2023 and have filed an appeal on September 29, 2023 at the Court of Appeal in Nyeri. It is their contention that the said appeal raises numerous triable issues and has high chances of success. That the 6th respondent will be prejudiced if orders sought herein are not granted and further that the appeal will be rendered nugatory. It is further contended that the 6th respondent will be denied the right to cross-examine the witnesses if the proceedings are not stayed. That failure to stay the proceedings will occasion injustice to the 5th and 6th respondents by not being allowed to present their case in court *viva voce* and that they will be deprived of the right to bring up key parties to the trial. It is their contention that the bank will not be prejudiced in any way if the orders sought are granted as prayed.
8. Mr. Wachira Nguyo, Deputy State Counsel in the office of the Attorney General submitted that the principles to apply in stay of proceedings were discussed by the Court of Appeal in *Kenya Railways Corporation v Odola & 217 others* (Civil application No. 312 of 2012) 2022 KECA 662 KLR July 8, 2022) which cited with approval *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR where the court said that a party must demonstrate that the appeal is arguable and not frivolous and that it would be rendered nugatory. Learned counsel also relied on the case of *David Morton Silverstein v Atsongo Chesoni* [2002] eKLR, *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, *Kingori v Chege & 3 others* [2002] 2 KLR 243, *Martin Kirima Baithambu v Jeremiah Miriti* [2017]



eKLR and *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2018] eKLR. Learned counsel for the 5th and 6th respondents also cited section 56 of the *Land Registration Act* and articles 25 (c) and 50 of the *Constitution of Kenya*. He also relied on the case of *Reliance Bank Limited v Narlake Investment Limited* (2002) 1 EA 227 and *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR.

9. The 1st, 2nd, 3rd and 4th respondents do not oppose the application. However, the application is opposed by the Bank who filed a replying affidavit sworn by Jackline Ndungu on October 27, 2023 and filed on October 30, 2023.

The Applicant/1st Respondent's Case

10. The bank gave a brief background of the case. It is submitted that the prayer for stay of proceedings is an equitable relief and that an applicant must come to court with clean hands and must also do equity. It is the applicant's submissions that the intended appeal is tantamount to a calculated delay tactic and an attempt by the 5th and 6th respondents to hide their indolence in the guise of an appeal. That the 5th and 6th Respondent have a history of delaying the proceedings as they have on numerous occasions been required to file their responses to the originating summons, but have failed to do so. The applicant's counsel gave particulars of the alleged delay and submitted that the 5th and 6th Respondents conduct from the time of inception of this suit betrays them. That the interest of justice does not militate towards the exercise of the court's discretion to grant stay of proceedings as the same will only serve the purpose of delaying the suit. Further, that the Bank which was moving to exercise its statutory power of sale when it discovered that the property was purportedly transferred notwithstanding the existing registered charge, has been and remains severely prejudiced.
11. Learned counsel for the applicant relied on the case of *Re- Global Tours & Travel Ltd* HCWC No. 43 of 2000 and *Muchanga Investments Limited v Safari Unlimited (Africa) Ltd & 2 others* [2009] eKLR and submitted that this matter has been in court since 2019 and therefore due regard must be given to time in order to avoid delaying the matter any further.
12. Counsel for the applicant also relied on the case of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others, Muslim for Human Rights & 2 others (interested parties)* [2020] eKLR which laid down the principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher court and submitted that the notice of appeal was not served upon the bank or its advocates within seven days as required under rule 79 of the *Court of Appeal Rules 2022* which is couched in mandatory terms. They also relied on the Court of Appeal decision in *Daniel Nkirimpa Mouirei v Sayialel Ole Koilel & 4 others* [2016] eKLR and submitted that the court cannot grant a prayer of stay of proceedings where no appeal has been filed.
13. It is further submitted that the 5th and 6th Respondents have not satisfactorily demonstrated that the appeal will be rendered nugatory if the orders of stay are not granted for the reason that a judgment delivered by this court is capable of being stayed and a party aggrieved with the decision of the court retains the right to lodge an appeal. It is submitted that it is a cardinal principle of law that an order of stay of proceedings is a grave judicial remedy which is only granted in very exceptional circumstances. Further that the application ought to have been filed in the higher court as discussed in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others, Muslims for Human rights & 2 others* (supra)
14. It is also the applicant's submission that there was inordinate delay by the 5th and 6th respondents in filing the application for stay. Learned counsel for the applicant submitted that the delay in filing the application for stay was deliberate and only aimed at further delaying the hearing and determination of



this suit. It is therefore submitted that the 5th and 6th respondents/applicants have not met the threshold for grant of orders of stay of proceedings pending the appeal.

Analysis and Determination

15. I have considered the application, submissions raised by the parties together with cited statutory and case law. The only issue that arise for determination is whether the court should stay the proceedings in this case pending the hearing and determination of Civil Appeal No. E181 of 2023 at the Court of Appeal at Nyeri. A decision on whether or not to grant stay of proceedings is discretionary and this court has powers to stay proceedings pending appeal. This jurisdiction is derived from order 42 Rule 6 of the *Civil Procedure Rules*. I am also aware that any exercise of such discretion has to be done in the best interest of Justice and must be judicious. The discretion is also exercised depending on the circumstances of each case.
16. In the case of *Global Tours & Travels Limited* (*supra*) Ringera, J (as he then was) when confronted with a similar application had this to say:

“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 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.”
17. In *Kenya Wildlife Service v James Mutembei* [2019] eKLR, it was 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 proceedings is high and stringent ...”
18. The instant application was filed on 2nd October, 2023 while the ruling the subject of the appeal was delivered on 14th June 2023. The 6th respondent has stated that the appeal was filed on 29th September, 2023. The 5th and 6th respondents have stated that the delay in filing the application was occasioned by the inability to obtain the certified order in time. That the order was taken for signing and certification on 28th July, 2023. In my view, the 5th and 6th respondents are guilty of inordinate delay in filing the application for stay proceedings. I do not think that the 5th and 6th respondents required the certified order before filing their application for stay of proceedings.
19. I have also read through the proceedings and I find that the facts before court do not favour the 5th and 6th respondents/applicants. It is evident that the stay of proceedings as sought is seemingly a delay tactic as the 5th and 6th respondents have severally been required to comply with the court’s directions with regard of the hearing of the case and have failed to do so. Furthermore, it should also be noted that all the other parties in the case have fully complied and filed their written submissions. What is pending was highlighting of those submissions if necessary, and a judgment date be given. I am also not



persuaded that the appeal will be rendered nugatory if stay of proceedings is not granted as submitted by counsel for the 5th and 6th respondents. This is because a judgment delivered by this court is capable of being stayed and a party aggrieved with the decision of the court retains the right to lodge an appeal. I am therefore not convinced that the appeal will be rendered nugatory if the proceedings in this matter are to continue. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise the court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter which was filed way back in the year 2019. In my view, the 5th and 6th respondents have not met the threshold of grant of stay of proceedings pending appeal.

20. The upshot is that I find that the notice of motion dated 2nd October, 2023 is devoid of merit and is dismissed with costs.

21. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF DECEMBER, 2023.

C.K YANO

JUDGE

IN THE PRESENCE OF -:

Court Assistant – V. Kiragu/Lena M

Advocate for Applicant – present

Advocate for 1st, 2nd, 3rd and 4th respondents

No appearance for the 5th & 6th respondents

C.K YANO

JUDGE

