



Safari v KCB Bank Kenya Limited & another (Environment & Land Case E028 of 2022) [2025] KEELC 3514 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3514 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E028 OF 2022**

**YM ANGIMA, J
APRIL 30, 2025**

BETWEEN

MARY MUKABADEGE SAFARI PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

SERAH KALUME KITSAUMBI 2ND DEFENDANT

RULING

A. Introduction

1. By a judgment dated 26.09.2024 the court entered judgment in favour of the plaintiff in the following terms;
 - a. An order is hereby issued compelling the Land Registrar, Kilifi to cancel entry No. 6 on the Certificate of Title No. CR 60145 L.R. 6938/III/MN dated 12th June 2013 in the name of Kenya Commercial Bank Limited.
 - b. An order is hereby issued compelling the Land Registrar, Kilifi to register Mary Mukabadege Safari as the registered proprietor of Land Parcel No L.R. 6938/III/MN CR 60145.
 - c. A permanent injunction is hereby granted against the defendants, either by themselves, their servants, agents, employees or anyone authorized by them from continuing to occupy L.R. 6938/III/MN CR 60145.
 - d. The plaintiff is awarded Kshs. 500,000/= as general damages plus interest at court rates from the date of judgment until payment in full.
 - e. Costs of the suit are awarded to the plaintiff to be borne by the defendants jointly and severally.



2. Being aggrieved by the said judgment the 1st defendant filed a notice of appeal dated 01.10.2024 intimating its intention to appeal against the whole of the said judgment. In the meantime, the 1st defendant filed an application for stay of execution of the decree pending the hearing and determination of the intended appeal.

B. 1st defendant's application

3. By a notice of motion dated 18.10.24 filed pursuant the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21), Order 42 Rule 6 of the Civil Procedure Rules (the Rules) and all other enabling provisions of the law, the 1st defendant sought a stay of execution of the said decree pending the hearing and determination of the intended appeal. In the alternative, it sought an order for maintenance of the status quo pending the hearing and determination of the intended appeal.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Fredrick Ochieng on 18.10.2024. The 1st defendant contended, inter alia, that it stood to suffer irreparable loss and damage if its title to the suit property was cancelled; that it stood the danger of being dispossessed of the property; and that unless the stay sought was granted its intended appeal might be rendered nugatory.

C. Plaintiff's response

5. The plaintiff filed grounds of opposition dated 29.10.2024 raising the following objections;
 - a. The application does not meet the threshold for granting a stay under order 42 Rule 6 (2) of the Civil Procedure Rules.
 - b. The application is an afterthought and a ploy to deny her the fruits of her judgment.
 - c. The intended appeal is frivolous with no chances of success.
 - d. The application is incurably defective, vexatious, scandalous and an abuse of the court process.

D. Directions on submissions

6. When the application was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the plaintiff filed submissions dated 29.01.2025 whereas the 1st defendant's submissions were dated 17.03.2025.

E. Issues for determination

7. The court has perused the 1st defendant's notice of motion dated 18.10.2024, the plaintiff's grounds of opposition in response thereto as well as the material on record. The court is of the opinion that the following are the main issues for determination herein;
 - a. Whether the 1st defendant has satisfied the principles for the grant of stay pending appeal.
 - b. Who shall bear the costs of the application.



F. Analysis and determination

Whether the 1st defendant has satisfied the principles for the grant of stay pending appeal

8. The court has considered the material and submissions on record on this issue. The principles to be considered in granting or declining an application for stay of execution are set out in Order 42 Rule 6(2) of the Rules as follows;

“No order for stay of execution shall be made under sub-rule (1) unless”

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. The 1st defendant contended that it stood to suffer substantial loss if it was to be evicted from the suit property. There is no indication on record to show what activities the 1st defendant may be undertaking on the land. It was not alleged that the 1st defendant had any offices or facilities on which it was undertaking any banking, administrative or storage facilities. When the court inquired on the current use of the suit property from the 1st defendant’s advocate during a virtual appearance he informed the court that the 1st defendant had simply stationed security guards on the land and that it was not carrying out any business thereon. In the premises, the court is not satisfied that the 1st defendant has demonstrated that substantial loss shall ensue in the absence of a stay.

10. The 1st defendant also contended that its intended appeal may be rendered nugatory if it were to be evicted from the suit property and its title thereto cancelled by the land registrar. The meaning of the term ‘nugatory’ was considered by the Court of Appeal in the case of *Shah and Partners Ltd vs National Social Security Fund Board of Trustees and 3 Others* (2018) eKLR. In the said case the court quoted from its earlier decision in *Stanely Kang’ethe Kinyanjui vs Tony Keter & 5 Others* (2013)eKLR as follows;

- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- ix. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

11. The court is not satisfied that cancellation of a title document is an irreversible event. The court takes the view that the 1st defendant can still be reinstated as proprietor of the suit property should its intended appeal be successful. There is no allegation or demonstration that the plaintiff intends to dispose of the suit property so that it may not be available upon conclusion of the appeal. There is also no demonstration that damages shall not be an adequate remedy in the event that the property shall not be available. The court takes a similar view regarding vacation or eviction from the suit property.

12. The court has noted that even though the 1st defendant was aggrieved by the award of Kshs. 500,000 against it as general damages, it has not demonstrated that its payment shall cause substantial loss. There is no allegation or demonstration that the 1st defendant shall suffer undue hardship in raising the



amount and that its banking business may be substantially affected by such payment. Moreover, there is no allegation or demonstration that in the event the said sum is paid the 1st defendant may not be able to refund it in the event of the appeal being successful. The court is thus not satisfied that the 1st defendant has satisfied the principles for the grant of a stay of execution of the decree pending appeal as required under Order 42 Rule 6(2) of the Rules.

Who shall bear the costs of the application

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the plaintiff shall be awarded costs of the application.

G. Conclusion and disposal order

14. The upshot of the foregoing is that the court finds no merit in the 1st defendant's application for stay pending appeal. As a consequence, the notice of motion dated 18.10.2024 is hereby dismissed in its entirety with costs to the plaintiff.

Orders accordingly.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 30TH DAY OF APRIL 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Plaintiff present in person

Mr. Amakobe for the 1st defendant

No appearance for the 2nd defendant

Gillian Court assistant

