



Family Bank Limited v Guandaru (Environment and Land Appeal E003 of 2022) [2022] KEELC 2876 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

FO NYAGAKA, J

MAY 12, 2022

BETWEEN

FAMILY BANK LIMITED APPELLANT

AND

ISAACK MATHENGE GUANDARU RESPONDENT

RULING

1. The Notice of Motion before me for determination is that of the Appellant. It is dated 16/02/2022. It was filed on 17/02/2022. It is anchored on the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 (1), Order 43 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and Section 13 of the Environment and Land Court Act. It seeks the following reliefs:
 1. ...spent
 2. ...spent
3. That this Honorable Court be pleased to stay further proceedings in Kitale CMEL No. E004 of 2022; Isaack Mathenge Guandaru -vs- Family Bank Limited and another pending the hearing and determination of this Appeal;
4. That this Honorable Court be pleased to issue any other orders as it may deem just, appropriate and expedient in the interest of justice;
5. That costs of this application be provided for.
6. The Application is supported by the grounds on the face of it and by the Affidavit of one Sylvia Wambani, a legal officer in the employment of the Appellant. It was sworn on 16/02/2022. The Application follows the delivery of a Ruling made on 07/02/2022 by the trial Court in Kitale CM ELC No. E004 of 2022; Isaack Mathenge Guandaru -vs- Family Bank Limited & another. The Applicant being aggrieved by the Ruling appealed therefrom and filed the instant Application almost



simultaneously with the Appeal. The Order emanating therefrom was annexed to the Affidavit and marked as SW1. Annexed also to the Affidavit was the Memorandum of Appeal which was marked as SW2. It raised four (4) grounds upon which the decision of the trial court was impugned.

7. The Applicant contended that unless the proceedings were stayed, the present Appeal would be rendered nugatory; the Appeal was meritorious with extremely high chances of success; since an Appeal does not operate as a stay of proceedings the present Application was necessary. It was further stated that the Respondent stood to suffer no prejudice if the orders sought were granted. He contended that on the contrary, if the orders were denied, the Applicant will be condemned to face deep financial hardship if the Ruling is sustained. The Applicant urged this Court to consider that the Application was made without inordinate delay and prayed that the same be allowed.
8. The Application was opposed. In his Replying Affidavit sworn on 24/02/2022 and filed on 25/02/2022, the Respondent deposed that subsequent to the Ruling delivered on 07/02/2022 which was annexed and marked as IMG1, the trial Court reserved a mention date for the matter on 21/02/2022 for case conferencing and to fix a hearing date of the main suit. When the matter was mentioned on that date, the Court adjourned the case conferencing to 14/03/2022 as the Applicant sought and was granted more time to comply with pre-trial directions. The Respondent concluded that in view of the trial Court's directions in proceeding with the matter expeditiously, the said Court had not issued conclusive orders in the matter at the application stage.
9. The Respondent propositioned that the Applicant's remedy lay in seeking a review of the orders by the trial Court since the order was erroneously extracted. He added that whilst he sought conclusive orders in his Application inadvertently, the trial Court granted the orders pending the hearing and determination of the suit; that regardless, the Applicant failed to raise this issue of conclusive orders in its Replying Affidavit sworn on 13/01/2022 which was marked as annexure IMG2, when the Application was before the trial Court, and is therefore estopped from raising this issue in the present Appeal. He deposed further that the Appeal lacked merit and also that if the orders sought were granted, the Applicant would levy interest and penalties to his detriment hence condemning him to financial constraints. He stated that the Applicant failed to demonstrate how it would suffer financial hardship if the orders sought herein were not granted. Terming the Application as incurably defective, incompetent, misconceived and an abuse of the process of the court, he urged this court to dismiss it with costs.
10. In brief rejoinder, the Applicant's Further Affidavit sworn by the said Sylvia Wambani on 03/03/2022 and filed on 04/03/2022 clarified that the Application before the trial Court was granted as prayed and therefore there was no error apparent on the face of the record. Resultantly, this Court sitting on Appeal is the proper forum for the Applicant to ventilate its dissatisfaction with the findings of the trial Court. The deponent maintained that the orders sought ought to be granted for purposes of good order since the absence thereof would render the present Appeal an academic exercise.
11. Further, it posited that by proceeding for hearing, the trial Court would be sitting on its own appeal since it granted substantive orders at an interlocutory stage. The Applicant accused the Respondent of dishonesty following their claim that the orders drafted in their Application were done so inadvertently. The Applicant annexed SW3, a copy of its Replying Affidavit sworn on 13/01/2022 evincing that they raised issue in respect to the conclusive nature of the orders sought by the Respondent. The Applicant argued that the Respondent was not averse to the Application to the extent that he conceded that the Ruling posed grave issues. On whether it stood to suffer financial strain, the Applicant posited that the Court directed the Respondent to pay his arrears in full without any condition on the consequences for breach thereby exposing the Applicant.



The Submissions

12. The Applicant's submissions dated 03/03/2022 were filed on 04/03/2022. The Applicant maintained that it had satisfied the conditions precedent for grant of stay of proceedings as given in the case of Kenya Power & Lighting Company Limited -vs- Esther Wanjiru Wokabi [2014] eKLR. The Applicant further fortified its submissions by citing Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000 and stating that it had demonstrated that it had established a prima facie arguable case, the Application was filed expeditiously and sufficient cause was established to the satisfaction of the Court that it is in the interest of justice that the orders sought be granted. The Applicant further added that the orders challenged substantially concluded the suit at the interlocutory stage. It submitted that the trial Court stepped in the shoes of the parties yet it is trite law that a Court was prevented from rewriting a contract on behalf of parties. To avoid a multiplicity of Applications, the Applicant beseeched this Court to grant the present Application as prayed.
13. The Respondent filed his submissions dated 10/03/2022 on the same day. He continued with submissions that the Applicant's substantive grounds were never raised at trial. He stated that the Applicant could not, in the circumstances, renege on the Application. The Respondent submitted that the Applicant's remedy lay in Order 42 Rule 6 of the Civil Procedure Rules for discharge, variation or setting aside of the orders of the trial court. For this presupposition, he cited the case of Mobile Kitale Service Station -vs- Mobile Oil Kenya Limited and another [2004] eKLR. He submitted that the orders granted by the trial court were bereft of fault. He maintained that the orders were interlocutory in their nature and by virtue of the Court fixing a pre-trial date it spoke to the nature of the orders granted: they were not conclusive. He relied on St. Patrick Hill School Limited -vs- Bank of Africa Kenya Limited [2018] eKLR. He further suggested that the Applicant ought to have invoked the trial Court's jurisdiction per Sections 3A and 99 of the *Civil Procedure Act* for correction of the orders issued. He cited the case of Rev Mnadama Evans Okanga Dondo -vs- Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005 for this proposition.

Analysis And Disposition

14. I have considered the Application, the Supporting Affidavit and the Grounds of Opposition. I have also considered the respective written submissions by rival parties.
15. The Applicant's substantive prayer is for stay of proceedings before the trial court pending the hearing and determination of the present Appeal. The grant or refusal of and order of that nature is discretionary and ought to be granted judiciously. Order 42 Rule 6 (1) of the Civil Procedure Rules makes provisions for this. I reproduce it verbatim as hereunder:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
16. It is clear that an Appeal does not grant the appellant an automatic stay or right of proceedings, execution or decree of the lower Court matter. My reading and understanding of the above provision is that a party is required to, in the first instance, apply for stay of proceedings before the Court it is



appealing from. The relevant and guiding phrase of the provision reproduced above is, "...and whether the application for such stay shall have been granted or refused by the court appealed from..." Thus, the starting point is for the aggrieved party to apply to the Court appealed from. It is only after the aggrieved party is dissatisfied with the findings of the trial Court, in so far as an Application for stay of proceedings (or execution) is heard on its merits before the trial court, that the aggrieved party's right to invoke the audience of the Appellate Court on the issue again. He cannot decide to move to the Appellate Court without first moving the trial Court.

17. In my view the step to first move the Court appealed from is for good reason: it is for good order that the trial Court is informed of the step. For these reasons, I find that the present Application is inchoate and premature before this Court. The Applicant jumped the gun by moving straight to this Court to seek orders that it should have asked the trial Court to consider. The trial Court did not deny the Appellant the opportunity to move it for stay of proceedings. The Applicant ought to have moved the trial Court first before presenting the Application. That would give the trial Court chance to pronounce itself. That is the only time, by the said Rule, "whether the application for such stay shall have been granted or refused by the court appealed from..." this Court shall be seized of jurisdiction to consider the Application of such nature. The requirement to take such a step first is not an issue of mere technicality lest a party is convinced and argues that Article 159(2) (d) of *the Constitution* comes in to remedy the failure to follow the step. This is not one of those cases where the provision is rubbed in to cure and remove the pain of losing an Application. Absent of that, the Application is improperly before this Court.
18. Consequently, I find that the Application is devoid of competency. I will thus not make a determination on the same. It is thereby struck out with costs to the Respondent.

Orders accordingly.

RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 12TH DAY OF MAY, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

