



REPUBLIC OF KENYA



KENYA LAW
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Ideal Locations Limited v Nakumatt Holdings Limited (Under Administration) & 3 others (Civil Case 69 of 2018) [2025] KEHC 1692 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 69 OF 2018
JK NG'ARNG'AR, J
FEBRUARY 4, 2025**

BETWEEN

IDEAL LOCATIONS LIMITED PLAINTIFF

AND

**NAKUMATT HOLDINGS LIMITED (UNDER ADMINISTRATION) 1ST
DEFENDANT**

PETER OBONDO KAHU 2ND DEFENDANT

PKF CONSULTING LIMITED 3RD DEFENDANT

ATUL SHAH 4TH DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion application dated 22nd August 2024 under Certificate of Urgency pursuant to Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The Plaintiff seeks for orders that pending the hearing and determination of the intended appeal, there be an order of stay of execution of the judgment and decree issued on 11th June 2024 including recovery of costs awarded therein, that this court does give such consequential, further or other orders as it may deem just, and that costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit sworn by Anish Doshi on 22nd August 2024 that the Plaintiff faces imminent threat of execution of the judgment delivered on 11th June 2024 and the decree thereof wherein the learned judge dismissed the Plaintiff's suit and granted the Respondents costs assessed at Kshs. 1,050,000. That the Plaintiff has filed a Notice of Appeal and sought certified written typed proceedings but the certified typed proceedings are yet to be supplied. That unless a stay order is issued by this court, there will be execution thereby rendering



- the intended appeal an academic exercise. That the Defendants stand to suffer no harm if the orders sought are granted, that the Plaintiff has an arguable appeal and is apprehensive that unless this court intervenes, the intended appeal will be rendered nugatory.
4. The 2nd, 3rd and 4th Defendants also filed a Notice of Motion application dated 4th September 2024 under Certificate of Urgency pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules, Article 159 of the Constitution, and all other enabling provisions.
 5. The Defendants seek for orders that this court do discharge, vary and set aside ex-parte stay of execution orders issued by this court on 23rd August 2024, that this court do strike out with costs the Plaintiff's Notice of Motion application dated 22nd August 2024, and that costs of this application be borne by the Plaintiff.
 6. The application is based on grounds in the application and the Supporting Affidavit sworn on 4th September 2024 by the 2nd Defendant that following the judgment of this court, the Plaintiff filed at the Court of Appeal an application for stay of execution dated 12th August 2024 which the court made orders on 19th August 2024 declining to issue interim orders or certify the matter as urgent and directed that parties do file responses and await a hearing date. That the Plaintiff filed an application herein dated 22nd August 2024 upon which ex-parte orders of 23rd August 2024 were issued. That the application dated 22nd August 2024 was clearly lodged before this court after directions of the Court of Appeal on 19th August 2024. That the purported Notice of Appeal and letter bespeaking of typed proceedings dated 14th June 2024 have never been served upon the Defendants. That the Plaintiff failed to disclose to this court that a similar application had been lodged at the Court of Appeal which appellate court had failed to issue any interim orders.
 7. The Plaintiff filed a Replying Affidavit sworn by Anish Doshi on 16th September 2024 opposing the application dated 4th September 2024 that contrary to the allegations in the said application, the Plaintiff disclosed the existence of the Court of Appeal in Civil Application No. E097 of 2024 at paragraph 11 of the Supporting Affidavit to the application dated 22nd August 2024. That the Defendants' previous advocates filed the application in the Court of Appeal and that upon seeking advice from the present advocates, they were advised that the first port of call in an application for stay of execution is this court. That the Defendants then instructed the former advocates to withdraw the application and file the current application in this court. That the application dated 22nd August 2024 cannot therefore be defeated on the basis of an application which has been withdrawn albeit there was delay in filing the same.
 8. The Plaintiff deposed further that the issues raised in the application dated 4th September 2024 ought to have been raised in response to the Plaintiff's application for stay dated 22nd August 2024 and not through an independent application. That the Plaintiff's erstwhile advocates served the Notice of Appeal and letter requesting for proceedings via email on 14th June 2024.
 9. The 2nd, 3rd and 4th Defendants filed a Replying Affidavit sworn by the 2nd Defendant on 30th September 2024 in opposition to the Notice of Motion application dated 22nd August 2024 where they reiterated contents of the Supporting Affidavit in their Notice of Motion application dated 4th September 2024.
 10. The Plaintiff filed a Further Affidavit sworn on 26th October 2024 by Anish Doshi that they are willing and ready to offer such security as this court may order for the due performance of the judgment and decree of this court as may ultimately be binding on the Plaintiff. The Plaintiff then reiterated contents of their Replying Affidavit sworn on 16th September 2024.



11. The application was canvassed by way of written submissions. The Plaintiff's submissions are dated 26th October 2024 while the 2nd, 3rd and 4th Defendants submissions are dated 28th October 2024.
12. I have considered the Plaintiff's Notice of Motion application dated 22nd August 2024, the 2nd, 3rd and 4th Defendants' Notice of Motion application dated 4th September 2024, the Plaintiff's Replying Affidavit sworn on 16th September 2024, the 2nd, 3rd and 4th Defendants' Replying Affidavit sworn on 30th September 2024, the Plaintiff's Further Affidavit sworn on 26th October 2024, and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
13. The Plaintiff seeks for stay orders pending the hearing and determination of the intended appeal against judgment of this court where they were ordered to pay costs of Kshs. 1,050,000. That unless the stay order is issued, there will be execution thereby rendering the intended appeal nugatory. That the Plaintiff has an arguable appeal and that the Defendants stands to suffer no harm.
14. The 2nd, 3rd and 4th Defendants seek for orders that this court discharges, varies and sets aside the ex-parte stay of execution orders issued by this court and strikes out the Plaintiff's application dated 22nd August 2024. That the Plaintiff filed an application for stay at the Court of Appeal and which court made orders on 19th August 2024 declining to issue interim orders or certify the matter as urgent and directed that that parties do file responses and await a hearing date. That the application dated 22nd August 2024 was lodged after directions of the Court of Appeal on 19th August 2024.
15. The Plaintiff states that their previous advocates filed the application in the Court of Appeal and that upon seeking advise from the present advocates, they were advised that the first port of call in an application for stay of execution is this court. That they instructed their former advocates to withdraw the application at the Court of Appeal and that an application was filed in this court. The Plaintiff argued that the application dated 22nd August 2024 cannot therefore be defeated on the basis of a withdrawn application.
16. This court has perused the Notice of Appeal dated 14th June 2024 and the letter dated 14th June 2024 requesting for certified copies of the judgment, decree and typed proceedings. This court has also perused the Notice of Motion application dated 12th August 2024 filed at the Court of Appeal, directions of the court issued on 19th August 2024, and the Notice of Withdrawal of Application dated 9th September 2024.
17. I note that the Plaintiff filed their application for stay in this court after directions of the Court of Appeal had been issued and their Notice of Withdrawal of Application filed at the Court of Appeal came way after they had filed their application for stay. The Plaintiff is therefore being untruthful by implying that their application dated 22nd August 2024 was filed after the application in the Court of Appeal was withdrawn.
18. This court relies on the holding in the *Menany Sacco Society Ltd v Robert Muriuki Gitonga & Another* [2018] eKLR which cited with approval the case of *King v The General Commissioner for the Purposes of the Income Tax Acts for the Districts of Kensington (1917)* I.K.B. 486 where it was held that: -

“The court is supposed to know the law. But it knows nothing about facts and the applicant must state fully and fairly the facts and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside and any action it has taken on the faith of imperfect statement.”



“A plaintiff applying for ex-parte orders ... comes under a contract with the court. If he fails to do that, and the court finds, when the other party applies to dissolve the injunction that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the court will not decide on the merits and that as he has broken faith with court the injunction must go.”

19. Menany Sacco Society Ltd v Robert Muriuki Gitonga & Another (Supra) further cited with authority the case of Princess Edmond De Polignac 1917 1KB 48 where it was held that: -

“It is perfectly well established that a person who makes an ex parte application to the court that is to say, in the absence of the person who will be affected by which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage form the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.”

20. Pursuant to the holdings above, actions of the plaintiff amounted to an abuse of the court process. This court therefore makes the following orders: -

- a. Ex-parte stay of execution order issued by this court on 23rd August 2024 and its extension is hereby set aside.
- b. The application dated 22nd August 2024 is struck out.
- c. The Plaintiff to bear costs.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4TH DAY OF FEBRUARY, 2025

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Plaintiff

..... Advocate for the 1st Defendant

..... Advocate for the 2nd, 3rd and 4th Defendant

Court Assistant – Shitemi

