



**Ombonya v Housing Finance Limited & 3 others (Civil Case 484 of 2004)
[2025] KEHC 2177 (KLR) (Commercial and Tax) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 484 OF 2004
F GIKONYO, J
FEBRUARY 20, 2025**

BETWEEN

JUDITH ONGAYO OMBONYA PLAINTIFF

AND

HOUSING FINANCE LIMITED 1ST DEFENDANT

STANDARD CHARTERED BANK LIMITED 2ND DEFENDANT

GIBSON OMBONYA SHIRAKU (DECEASED) 3RD DEFENDANT

CHAPEX LIMITED 4TH DEFENDANT

RULING

1. The plaintiff/applicant filed the Notice of Motion dated 2nd July 2024 under Sections 1A, 1B & 3A of the *Civil Procedure Act*, Orders 40 Rule 1 and 46 Rule 6 of the Civil Procedure Rules seeking orders to restrain the 2nd defendant/ respondent from selling L. R. No. 13786/69 (the subject property) pending the hearing and determination of her appeal.
2. The application is supported by the annexed affidavit sworn by the plaintiff on 2nd July 2024 and written submissions dated 8th October 2024. The grounds are that the plaintiff has appealed against the judgment of the court; that the appeal stands to be rendered nugatory if a stay is not granted and that no prejudice will be suffered by the 2nd defendant as the property remains charged to them.

Response

3. The 2nd defendant opposed the application through grounds of opposition dated 19th July 2024 and written submissions dated 20th January 2025. The gist of the opposition is that the plaintiff has not met the threshold for the grant of the order for stay pending appeal.



4. The 1st defendant did not participate.

Analysis and Determination

5. The issue arising from the application, the grounds and the parties' written submissions is: whether the plaintiff deserves an order for stay of execution pending appeal.
6. I note that the plaintiff's application is brought under Orders 40 Rule 1 and 46 Rule 6 of the Civil Procedure Rules which deal with temporary injunctions/ interlocutory orders and power of arbitrator or umpire appointed by the court respectively. The parties also based their submissions on these orders.
7. Nevertheless, the power of the court to grant a stay pending an appeal and the conditions thereto, is provided under Order 42 Rule 6 of the Civil Procedure Rules. The applicant should establish sufficient cause, but also focusing on whether substantial loss may occur unless stay is granted and the provision of security for the performance of the decree. Further, the application must be made without unreasonable delay. *Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai 15 of 1990 [1990] KLR 365*
8. In evaluating the application for stay of execution, the Court seeks to balance the right of the applicant to appeal vis a vis the respondent's right to enjoy the fruits of its judgment. Thus dictating exercise of court's discretion in a way that does not reduce a successful appellant into a mere pious explorer; or a holder of a barren result.
9. Has a case been made for a stay order aimed at preserving the subject matter of the appeal? *Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)*
10. A preliminary discernment; was the application filed without undue delay?
11. The impugned judgment was delivered on 30th January 2024. The plaintiff filed a notice of appeal dated 8th February 2024. The plaintiff then filed the present application dated 2nd July 2024 on 5th July 2024. There is inordinate delay in the filing of the application; and the delay has not been explained. Accordingly, the application was not filed without unreasonable delay.
12. Be that as it may, what substantial loss will the applicant suffer?
13. The plaintiff lamented that she faces the risk of losing the subject property which represents significant personal and financial judgment while waiting for the adjudication of the appeal. She submitted that she produced evidence showing that the charge encumbered her title to the suit property yet she was not the beneficiary of the loan advanced to the 4th defendant. She also submitted that she was not privy to any arrangements between the 1st and 2nd defendants to charge her property. She further submitted that despite clearing her loan with the 1st defendant, she is now on the verge of losing the Title.
14. On the other hand, the 2nd defendant contended that since the plaintiff has not exhibited its memorandum of appeal, this Court has no way of knowing whether she has an arguable appeal. It argued that the notice of appeal does not show that an applicant has an arguable appeal.
15. As earlier mentioned, the Court found that the plaintiff's claim was against the 3rd and 4th defendants, not the 1st and 2nd defendants. And, entered judgment for the plaintiff against the 3rd and 4th defendants for Kshs. 4,000,000/- being the value of the property.
16. For this reason, I am not persuaded that the plaintiff has established that she will suffer substantial loss if a stay is not granted, or put differently, that her appeal will be rendered nugatory.
17. In the upshot, the plaintiff's application dated 2nd July 2024 is dismissed with no orders as to costs.



Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 20TH DAY OF FEBRUARY, 2025

F. GIKONYO M

JUDGE

In the presence of:

Ms. Amemba for Mulanya for Applicant

Chege for 2nd Respondent

