



REPUBLIC OF KENYA



Gitau & another v Kenya Commercial Bank Limited & another (Civil Appeal E182 of 2024) [2025] KEHC 4625 (KLR) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E182 OF 2024
BK NJOROGE, J
APRIL 10, 2025**

BETWEEN

PATRICK NDICHU GITAU 1ST APPELLANT

PATRICK NDICHU GITAU & SONS LIMITED 2ND APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT

PURPLE ROYAL ACUTIONEERS 2ND RESPONDENT

RULING

1. This is a Ruling in respect of the Appellant/Applicant's application under a Certificate of Urgency by way of a notice of motion dated 25th July, 2024. It is supported by the Affidavit in support sworn on 25th July, 2024. It seeks the following orders;
 - a. Spent.
 - b. Spent
 - c. That there be a stay of future proceedings in the Senior Principal Magistrate's Court at Gatundu Civil Case No. 67 of 2020 and specifically any sale of the suit premises Ngenda/Githunguchu No. 1426 and 1427 pending the hearing and determination of this appeal.
 - d. That the costs of this application be in the cause.
2. The application is opposed. The Respondents rely upon the Replying Affidavit of Velma Okoth sworn on 19th September, 2024.
3. Directions issued that the application be disposed of by way of written submissions.



4. The Court has seen the Appellant/Applicant's written submissions dated 3rd October, 2024. The Court has equally seen the Respondents' written submissions dated 27th November, 2024.

Issues for Determination

5. Having read the Motion, the Replying Affidavit and the submissions filed, the Court frames a single issue for determination.

a. Whether the court can stay proceedings of a suit that has been struck out pending the hearing and determination of an appeal.

Analysis

6. The Application is professed to be hinged upon Order 42 Rule 6 of the Civil Procedure Rules, which states as follows;

6. Stay in case of appeal [Order 42, rule 6.]

- (1) 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.
- (2) No order for stay of execution shall be made under subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.



7. The Court is persuaded by the decision of Odunga J (as he then was) in the case of African Merchant Assurance Co. Ltd v Nyamai Kea & another [2020] KEHC 1685 (KLR) where the Learned Judge expressed himself regarding a stay pending Appeal as follows;

“It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the



corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

a. Whether the Court can Stay Proceedings of a Suit that has been struck out Pending the Hearing and Determination of an Appeal

8. The Appellants/Applicants were the successful decree holders in the Senior Principal Magistrate’s Court in Gatundu Civil Case No. 67 of 2020 Patrick Ndichu Gitau & Another –vs- Kenya Commercial Bank Ltd & Another, vide a judgment delivered on 4th May, 2022.
9. They successfully obtained a declaration that the bank’s action of selling their property Ngenda/Githunguchu/1426 and 1427 Gatundu Township (hereafter referred to as the charged properties) was illegal, null and void ab initio. The bank was also directed to supply the 1st Applicant with bank loan statements of the 2nd Appellant from July 2007 to the date of the decision. The parties were ordered to take accounts into the proceeds of the sale of the 1st Applicant’s property known as LR. No. 21096/195. Upon taking accounts, if the Applicants were in arrears, the bank was to issue the Applicants with fresh statutory notices in compliance with section 90 and 96 of the Land Act, 2012. That if a sale was to take place subsequently it be guided by the valuation dated 10th October, 2020 or any other current valuation. The Appellants were granted the costs of the suit.
10. What followed is a point of contention in this Application. The bank says it supplied the Appellants with the accounts and thereafter went ahead to issue afresh statutory notice as the loan was still in default. Further, it was accruing interest. The Appellants maintained that no account statements were supplied. That the accounts were not taken as directed by the judgment for the Trial Court delivered on 4th February, 2022.
11. In the circumstances, the Appellants opposed the bank’s attempt to issue a fresh statutory notice of its intention to exercise its statutory power of sale.
12. The Appellants filed a Notice of Motion dated 19th August, 2023 seeking a permanent injunction on the grounds that the Respondents had not complied with the terms of the judgment of the Trial Court. That the accounts had not been taken. That no account statements had been supplied. Hence the bank could not proceed to issue a fresh statutory notice.
13. The bank responded stating that it had supplied all the account statements. That the mere dispute as to the accounts cannot be the basis for granting an injunction, restraining the bank from realizing the securities charged to the bank.
14. Fundamentally the bank raised the issue that the loan as at 19th August, 2023 stood at Ksh.95,606,499.70 way far in excess of the pecuniary jurisdiction of the Magistrate’s Court of Ksh.20,000,000.
15. Honourable D. Musyoka (CM) was persuaded that he lacked pecuniary jurisdiction and proceeded to strike out the Notice of Motion dated 19th August, 2023 as well as the entire sui. This is on the grounds that the Court lacked the pecuniary jurisdiction to hear the suit.
16. As per the Memorandum of Appeal filed herein, the issues to be determined in this Appeal are whether;
 - i. The Trial Court became functus officio after delivering its judgment on 4th May, 2020.
 - ii. Whether the Trial Court differently constituted could proceed to strike out a suit post judgment/decreed, on a question of jurisdiction.
 - iii. Whether the Decree of the Trial Court was valid and enforceable against the Defendants herein



17. Those are matters that will concern the Learned Judge who will ultimately hear this Appeal.
18. In this interlocutory application, the question that concerns this Court is whether there is any positive order arising out of the Ruling of 26th June, 2024 by the Trial Court, capable of being stayed.
19. The Trial Court struck out the suit for want of jurisdiction. As matters stand, there is no suit pending before the Gatundu Law Courts. There is no application for execution. There are no proceedings capable of taking place in that file. If that be the case, what pray then is this Court expected to stay?
20. Any process of issuing fresh statutory notices by the bank is taking place outside the Court proceedings before the Gatundu Law Courts. The Court does not hear the Plaintiff to be seeking an injunction to restrain the exercise of such statutory powers of sale.
21. Even if this Court was to grant a stay of proceedings pending an Appeal, nothing much would turn on this as there are no proceedings ongoing or expected in the lower Court file.
22. The Court agrees with the Respondents that the order sought is discretionary. See Global Tours & Parcels Limited Nairobi Winding Up Cause No. 43 of 2000.
23. When there are no positive orders capable of being executed, the Court sees no need to grant a stay of proceedings. Logically once a suit has been struck out it is expected that there will be no further proceedings. Perhaps what would be sought to be stayed is the execution process for costs. However, that is not the prayer sought herein.
24. The Court has said enough to show that the application is not merited. As to costs the same follow the event. The Respondents are entitled to costs.

Determination

25. The Applicants application by way of a Notice of Motion dated 25th July, 2024 is dismissed in its entirety.
26. The costs are awarded to the Respondents.
27. It is so ordered.

SIGNED, DATED, AND DELIVERED THIS 10TH DAY OF APRIL, 2025

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Miss Wambui holding brief for Mr. Mungai for Appellants/Applicants

Miss Swaka for Respondents

Mr. Luyai– Court Assistant

