



Siloam Ministries & another v Family Bank Limited & another (Civil Suit E081 of 2022) [2025] KEHC 10009 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E081 OF 2022**

**J NGAAH, J
JULY 4, 2025**

BETWEEN

SILOAM MINISTRIES 1ST PLAINTIFF

JANE WANJIKU KIRATU 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

SUSAN WAWERU T/A TREVO AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiffs/applicants filed a motion dated 22 October 2024 under sections 1, 1A, 3 and 3A of the *Civil Procedure Act*, cap. 21; order 42 rule 6, and, order 51 rule 1 and 3 of the *Civil Procedure Rules*. They have, in the main, sought a stay of execution of the judgment and decree of this Honourable Court pending hearing and determination of their intended appeal to the Court of Appeal, against the entire judgment. The judgment was rendered by the Hon. Justice Julius K. Ng'arng'ar on 2 October 2024.
2. The application is premised on grounds on the face of the application and also supported by the affidavit of Nancy Wangeci, who has identified herself as the executive board member of Siloam Ministries. The impugned judgment, according to the applicants, dismissed the plaintiffs' suit against the defendants/respondents who were also awarded costs of the suit.
3. In the wake of the applicants' suit's failure, the 1st defendant/respondent issued instructions to the 2nd defendant/respondent to sale by public auction on 7 November 2024, the plaintiffs'/applicants' parcel of land known as LR. No. MN/II/4561. The 2nd defendant/respondent then issued a notice for the public auction dated 3 October 2024 and advertised the same by issuing fliers to members of the public notifying them of the public auction slated for 7 November 2024.



4. The plaintiffs/applicants state that if the judgment and decree are not stayed, the intended appeal which, according to them, has overwhelming chances of success, will be rendered nugatory. The plaintiffs/applicants will not only suffer irreparable loss and damage but members of the public who attend church services and children who attend school at the same premises will be permanently denied access and use of the suit property.
5. The plaintiffs/applicants further state that damages will not suffice to compensate the plaintiffs/applicants in the event the appeal succeeds. The defendants, it is deposed, will also not be prejudiced in any way if stay is granted and that in the unlikely event that the appeal does not succeed, they still have security, in the form of the suit property.
6. In opposing the application, the defendants/respondents filed a replying affidavit sworn on 8 November 2024 by Wambani Sylvia, the manager-legal services of the 1st defendant. According to Wambani, the applicants' suit was heard on merits and this Honourable Court delivered its judgment on 2 October 2024. The court found and held that the plaintiffs had not proved their case to the required standard and proceeded to dismiss the case with costs to the defendants.
7. Crucially for the determination of the instant application, the defendants/respondents have urged that the orders sought are not capable of being granted because the court did not make a positive order in favour of the 1st defendant capable of being stayed. To be precise, the public auction of the applicants' property is independent of the judgment and decree issued by this Honourable Court.
8. According to the defendants/respondents, the plaintiffs filed this suit on 4 November 2022 on the basis that the bank's statutory power of sale under the charge created over the suit property had not arisen since, according to them, the borrower had been paying monthly instalments without fail. However, when the matter proceeded to full trial, the bank demonstrated that it could exercise its statutory power of sale.
9. It is urged that the bank's statutory right of sale over the suit property has crystalized and there is no legal or contractual basis for the bank to be restrained from proceeding with the public auction to recover the funds advanced to the borrower.
10. It is also deposed that by plaintiffs' own admission, as of 30 September 2022, the 1st plaintiff owed the bank a sum of Kshs. 26,669,632.71 which amount stood at Kshs. 34,255,226.46 as at the time of filing the respondents' affidavit. The applicants are said to have stopped servicing the loan after they filed the instant suit.
11. The defendants/respondents contend that the plaintiffs have not made a case for the grant of the orders sought and that it is in the interest of justice that the application dated 22 October 2024 be dismissed with costs.
12. The application was canvassed by way of written submissions. However, although parties confirmed in court that they had filed and served their submissions, I could not trace the applicants' submissions on the Case Tracking System (CTS) portal. Only the defendants'/respondents' submissions dated 3 March 2025 are available on the CTS.
13. The defendants/respondents reiterated in their submissions that the judgment delivered on 2 October 2024 dismissing the plaintiffs' suit is not capable of being stayed for the reason that the court did not make a positive order in the judgment capable of being executed by the bank. They have relied on *Mukiri & 2 Others v Karimi* (Civil Application E002 of 2023) [KECA 1644 (KLR)] where the court observed that an order dismissing an application is inherently a negative order as it does not compel any party to act but rather denies the relief sought. Such orders are generally incapable of execution



except for that aspect of costs. In this case, the respondents are yet to file a bill of costs and obtain a certificate of taxation.

14. The defendants/respondents in their submissions argued that the applicants have not met the mandatory conditions for issuance of the order for stay pending appeal under order 42 of the Civil Procedure Rules. Again, the applicants have not shown how they will suffer substantial loss considering that the chargor executed a charge over the charged property and was all along aware of the consequences of failure to make repayment of the loan advanced by the bank.
15. The defendants/respondents have also urged that the applicant cannot suffer substantial loss having offered the suit property for sale in the event of default. In support of their argument, the respondents have relied on Matex Commercial Supplies Limited & Another v Euro Bank Limited (in liquidation) (2007) KEHC 2428 (KLR).
16. Further, a perusal of the notice of motion shows that the applicants have not offered any security as required under order 42 rule 6 (2)(b) of the Civil Procedure Rules. The defendants/respondents have prayed that the application be dismissed with costs.
17. In his judgment, the Hon. Justice Julius K. Ng'arng'ar, established the following: -

“ 17. Upon perusal of copies of offer letters on record, the indicated interest rates are indeed 24.5%. They also indicate additional interest to be levied where the borrower fails to pay any sums payable on its due date. This court also notes that the amounts indicated in the loan repayment statements were well below the amounts required to be paid as monthly instalments. The 1st Plaintiff therefore fell in arrears and contacted the bank on a few occasions seeking their indulgence.

18. This court is therefore of the view that the Plaintiffs willingly signed the letters of offer as well as charge documents. They are now bound by the contracts that they are referring to as unlawful and unconscionable, which the court has no jurisdiction to vary. In National Bank of Kenya v Pipeplastic Samkolit (K) Ltd and Another, NRB CA Civil Appeal No. 95 of 1995 (2001) eKLR the Court of Appeal observed: -

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported): “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

19. On the next issue of whether the Plaintiffs have met the threshold for grant of an injunction, it has been established that an injunction is an equitable remedy. The party seeking the remedy is therefore required to approach the court with clean hands to benefit from discretionary powers of the court. From the foregoing and pursuant to the principles set out in the case of Giella v



Cassman Brown & Co. Ltd (1973) EA 358, the Plaintiffs secured loan facilities from the 1st Defendant and fell in arrears. The Plaintiffs have therefore not satisfied the conditions for grant of the orders of injunction.”

18. And with that, the court dismissed the applicants’ suit. Against this background, the respondents urge that the orders sought are not capable of being granted as the court did not make a positive order in favour of the 1st defendant capable of being stayed. Proceeding with the public auction, should not be confused with implementing the judgment or decree issued by the court, for the court never granted such an order, in the first place.
19. Indeed, order 42 rule 6 of the *Civil Procedure Rules* contemplates that a decree or order to be stayed must be capable of execution. That rule reads as follows: -
 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.
20. Logically, therefore, if there is nothing to execute, an order for stay of execution or an application for such an order would be superfluous.
21. In *Western College Arts and Applied Sciences v Orange & Others* (1976) KLR 63, the Court of Appeal for East Africa addressed this issue and held that:

“The High Court has no power to issue a temporary injunction after it has given judgment in a suit; by order XXXIX, rule 1, it can only do so pending disposal of the suit.” (per Law VP) Order XXXIX which the court referred to is now order 40 of the Civil Procedure Rules, 2010.
22. On the specific question on whether, as in the applicants’ case, a stay order would be granted in a suit seeking for an order for injunction but which has been dismissed, the learned judge held as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.



23. Taking cue from this decision, it is obvious that this Honourable Court has not granted any order capable of execution. There is, therefore, no basis for an application for stay of execution pending appeal. The application for stay of execution is, in these circumstances, misconceived. The applicants' application is, therefore, dismissed with costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 4 JULY 2025

NGAAH JAIRUS

JUDGE

