



REPUBLIC OF KENYA



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Gitau v Bii; Bii (Plaintiff); Kenya Commercial Bank Ltd & another (Defendant) (Civil Case 882 of 2003) [2024] KEHC 1166 (KLR) (Commercial and Tax) (12 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1166 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 882 OF 2003
JWW MONG'ARE, J
FEBRUARY 12, 2024

BETWEEN

SAMUEL MWEHIA GITAU PLAINTIFF

AND

ELIJAH KIPNG'ENO ARAP BII DEFENDANT

AND

ELIJAH KIPNG'ENO ARAP BII PLAINTIFF

AND

KENYA COMMERCIAL BANK LTD DEFENDANT

SAMUEL MWEHIA GITAU DEFENDANT

RULING

1. By a judgment delivered by this Honourable Court on 12th May 2017, the following orders were granted:-
 1. That the Defendant is hereby directed to give vacant possession of the suit premises to the Plaintiff;
 2. That the Defendant do pay the Plaintiff Kshs.155,000/-
 3. That the Bank to pay Kshs.3,800,000/-
 4. There shall be no orders as to costs.



2. Subsequently, and pursuant to an application for stay of execution of the said judgment, this Honourable Court, having been properly moved by the parties granted the said orders of stay under the following conditions;
 1. That the Bank and the Defendant deposit the sums of Kshs.3,800,000/- and Kshs.500,000/- respectively within 30 days in an interest earning account in the joint names of all the parties in a reputable bank. In default of compliance the orders of stay would lapse automatically.
3. On 19th January 2023, the Plaintiff, Mr. Samuel Mwehia Gitau filed a Notice of Motion application seeking among others, an order for immediate eviction of the Defendant, Mr. Elijah Kipngeno Bii, from the suit premises being Land Reference Number 209/9854 located within Nairobi County in compliance with the decree issued on 13th July 2017 and upheld by the Court of Appeal by a judgment delivered on 22nd July 2022 as reflected in an order of the Court Appeal dated 27th September 2022.
4. The said application was premised on the grounds set on its face and the supporting affidavit of the Plaintiff, Mr. Samuel Mwehia Gitau sworn on 19th January 2023. The applicant seeks the assistance of the Police at Langata Police Station to help in the eviction process since, according to the Applicant since the Defendant has refused to yield vacant possession and instead placed his own guards at the property to prevent the Applicant from accessing the property.
5. Instructive, the Defendant, Mr. Elijah Kipngeno Arap Bii, did not file a response or grounds of opposition to this application. Instead, on the 10th May 2023, the Defendant, Mr. Elijah Kipngeno Arap Bii filed his own Notice of Motion application, seeking among other prayers, an order for stay of proceedings in this matter pending the hearing of the review application pending before the court of appeal. The Application was opposed by the Plaintiff through a Replying Affidavit sworn on 4th July 2023 by Mr. Samuel Mwehia Gitau.
6. Kenya Commercial Bank Limited, the 1st Defendant in the original suit, filed its own Notice of Motion application dated 15th May 2023 asking the Honourable Court to give directions on which party/parties was/were entitled to the interest emanating from the interest earning account held in the joint names of the Advocates for the parties herein. The Applicant, Mr. Samuel Mwehia Gitau, filed a Replying Affidavit sworn on 4th July 2023 in opposition thereto. Similarly, the Defendant Mr. Elijah Kipngeno Arap Bii opposed the application by filing a Replying Affidavit sworn on 2nd June 2023 by Nicholas Sumba, his counsel in the matter.
7. These three applications were disposed off by way of written submissions filed by all the parties. On 9th October 2023, parties appeared before the court to orally highlight their respective submissions.

Analysis and Determination

8. I have carefully considered the pleadings and the rival submissions filed by the parties herein. Three issues arise for determination by the court;
 - i. Whether this court should grant eviction orders as prayed by the Plaintiff/Applicant.
 - ii. Whether the Defendant/Respondent in the Original suit has met the threshold for grant of orders of stay of execution proceedings pending review proceedings before the Court of Appeal.
 - iii. Whether the Defendant/Respondent in the counterclaim is entitled to the interest emanating from joint interest account.



9. In my determination, I shall consider the applications sequentially, in the order in which they were filed. The application by the Plaintiff/Applicant, Mr. Samuel Mwehia Gitau was filed on 19th January 2023. In the Application, the Plaintiff urges this Honourable Court to grant him eviction orders since the High Court issued a judgment in his favour by its decision of 12th May 2017 and that the same was affirmed by the judgment of the Court of Appeal on 22nd July 2022 though its judgment on the Appeals filed by the Defendant/Respondent, Mr. Elijah Kipngeno Arap Bii and Kenya Commercial Bank. The applicant has annexed to support his application both the Decree issued by the High Court and the judgment of the Court of Appeal issued on 22nd July 2022 in Civil Appeal No. 276 of 2018- Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited & Samuel Mwehia Gitau Consolidated With Civil Appeal No. 318 of 2018-kenya Commercial Bank Limited v Samuel Mwehia Gitau & Elijah Kipngeno Arap Bii.
10. Both Kenya Commercial Bank and Mr. Elijah Kipngeno Arap Bii did not oppose this application. During the oral submissions, counsel for Kenya Commercial Bank informed the court that the Bank was ready to abide by the orders of the court and was not intending to respond to the application. Counsel for Mr. Elijah Kipngeno Arap Bii urged the court to instead consider its application seeking a stay of proceedings filed in court on 10th May 2023. This therefore means that Mr. Elijah Kipngeno Arap Bii did not offer any opposition to the application by the Plaintiff and as such the Plaintiff's application is undefended and unopposed.
11. The Applicant has argued that the Defendant, Mr. Elijah Kipngeno Arap Bii is illegally occupying the suit premises and has denied the applicant access to the property despite him being the registered proprietor and owner, having been so declared by this Honourable Court in its judgment of 12th May 2017 and affirmed by the Court of Appeal, in its determination of the two appeals filed thereto by the Defendant and the Bank. The Applicant submitted that since there was no appeal filed pursuant to the decision of the Court Appeal to the Supreme Court, there is no bar to grant of orders of eviction.
12. The Applicant urges the court to find that the fact that the Defendant has filed an application for review of the orders of the Court of Appeal is not itself an automatic stay of the proceedings herein. I have considered the arguments put forward by the Applicant and in the absence of a Replying Affidavit or grounds of opposition by the Defendant or the bank, I am satisfied that the same are not controverted as no evidence either by way of a replying affidavit nor grounds of opposition was tendered by the Defendant.
13. Order 42 Rule 6 upon which the Defendant has filed its application provides as follows:-
 - “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.”

14. The Applicant, to buttress his argument, cited the authority in the matter of *Joseph Njuguna Kabugua v Peter Njuguna Gikkio & Another* (2022)eKLR , by which I am persuaded, where the court held that:-

“The mere fact that an Appeal has been filed does not necessarily result in the court ordering a stay of execution”

This fact is clear from a plain reading of Order 42 Rule 6 cited above. In the present case, the Defendant has not filed any appeal to challenge the decision of the Court of Appeal.

15. Further, it is important to note that the applicant herein moved to court in the year 2003 and has for the last 21 years been awaiting the outcome of this case in order to benefit from his investment in the suit property. The Plaintiff having paid for the property upon a successful sale by public auction and having been declared by this Honourable Court by its judgement of 12th May 2017 as the rightful owner of the suit premises and later affirmed by the Court of Appeal its judgment of 22nd July 2022. The continued occupation of the suit premises by the Defendant is therefore prejudicial to the Plaintiff.
16. What is before me is an application for eviction orders with a request that the same be supervised by the police at Langata police Station. For all intend and purposes this application is unopposed and I find no compelling reason not to allow the same. The findings of the court is that the Application by the Plaintiff filed on 19th January 2023 has merit and the same is allowed with costs to the Defendant. The Inspector General of the National Police Service, through the Officer Commanding the Langata Police Station is hereby directed to provide the necessary assistance to the Applicant, if the Defendant does not voluntarily yield vacant possession of the suit premises, within 30 days from the date of this ruling, to the Plaintiff.



17. Turning to the second issue identified by the Court for determination as to “Whether the Defendant/ Respondent in the Original suit has met the threshold for grant of orders of stay of execution proceedings pending review proceedings before the Court of Appeal,” arising from the application by the Defendant Mr. Elijah Kipngeno Arap Bii filed on 10th May 2023, I note that the Applicant is seeking to halt the eviction proceedings herein and stay of proceedings as he seeks to have the court of Appeal review its decision rendered on 22nd July 2022. This Application is premised on the grounds set on its face and supported by the Affidavit of Mr. Elijah Kipngeno Arap Bii sworn on 10th May 2023. The Application is opposed by a Replying Affidavit sworn by Mr. Samuel Mwehia Gitau on 4th July 2023.
18. The Defendant, Mr. Elijah Kipngeno Arap Bii has urged the court to stay the execution proceedings herein as he pursues a review of the Judgment of the Court of Appeal. As earlier indicated, because the said application for review was not annexed to the pleadings in the matter before the court, the court is not privy to the grounds or the reasons why the Defendant has chosen to file an application for review. So far, this court has not been informed if the Defendant will be moving to the Supreme Court to challenge the decision of Court of Appeal rendered on 22nd July 2022 affirming the Judgment of this court of 12th May 2017.
19. In opposing this application, the Plaintiff has urged the court to find that this High Court and the Court of Appeal are *functus officio*, having conclusively rendered its judgment the original suit on 12th May 2017 and the judgment to the two subsequent Appeals on 22nd July 2022 respectively. Black’s Law Dictionary defines the term “*functus officio*” as “Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.” The gist of the argument is that by virtue of the two courts have rendered their judgments on the substantive matters before them, they have no more power to entertain any other motions by parties. Be that as it may, a court under the provisions of the [Civil Procedure Act](#) and rules may be invited back to a matter, by way of an Application for Review, to reconsider its decision, if the party feels that there are new and important facts that the court was not seized as it made its ruling or there is an apparent error on the face of the record. Not having had the opportunity to interact with the Defendants application for review filed at the Court of Appeal, this court is not privy to the grounds upon which the said review is being sought.
20. Order 42 rule 6 (2) (a) of the [Civil Procedure Rules](#), provides as follows:-
 - 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.
21. The grounds upon which a court can grant a stay of execution are clearly set out above. The Court must be satisfied that there is an appeal filed before a court of law and that the applicant stands to suffer substantial loss, if the order is not granted and further the same was brought without inordinate delay. In the present case, the Defendant has not placed any evidence to demonstrate what loss he stands to lose if these proceedings are not stayed. Secondly, the Defendant has not filed an appeal before the Supreme Court as he has exhausted the appeal in court of appeal, save for the application for review, to which I hesitate to make any comments on.



22. I have considered the rival arguments by the parties to this application and having allowed the application for orders of eviction of the Defendant in the application filed by the Plaintiff on 19th January 2023, I find that it would not be in the interest of justice to stay the proceedings herein on the grounds provided by the Defendant. To delay this matter further would, in my view, visit an injustice on the Plaintiff who has waited from 2003 to date for the opportunity to take possession of his property. I therefore find and hold that this application is devoid of merit and I shall dismiss the same with costs to the Plaintiff.
23. The final issue for determination arises from the application filed by the Defendant in the original suit, Kenya Commercial Bank Limited on 15th May 2023. Pursuant to the application to stay the execution of the judgment of 12th May 2017 on 27th July 2017 the court granted a conditional stay as follows:-
1. “That the Bank and the Defendant deposit the sums of Kshs.3,800,000/- and Kshs.500,000/- respectively within 30 days in an interest earning account in the joint names of all the parties in a reputable bank. In default of compliance the orders of stay would lapse automatically.”
24. Parties complied with the above conditions issued by the court and the dilemma that the court is invited to determine, by the Kenya Commercial Bank Limited, the 1st Defendant in the original suit, is “Whether the Defendant/respondent in the counterclaim is entitled to the interest emanating from joint interest account.” The account in question is held at the Standard Chartered Bank PLC in the names of N.o Sumba & Company Advocates, Igeria & Ngugi Advocates And Ndungu Njoroge & Kwach Advocates.
25. Failure by the parties as reach an agreement as to who is to be paid the interest that has accrued to the deposit held in the joint account has necessitated the filing of this application. In the judgment of this court issued on 12th May 2017, the court ordered the Bank(the 1st Defendant in the original suit) to pay to the Defendant, Mr. Elijah Kipngeno arap Bii the sum of Kshs.3,800,000/-. At the same time, Mr. Elijah Kipngeno arap Bii, the Defendant herein, was ordered to pay the sum of Kshs.155,000/- to the Plaintiff, Mr. Samuel Mwehia Gitau. It is these funds that were deposited in the joint account described above and from whence interest has now accrued. The Applicant in this application has argued that it is only proper that the interest be returned to those who provided the funds, meaning that the interest accrued from the sum of Kshs.3,800,000/- be paid to the Bank while the interest from the sum of Kshs.500,000/- deposited as security for costs be paid to Mr. Elijah Kipngeno arap Bii. The flip side of the argument is that the parties deserving of this interest payment are to those these funds were payable to in the first instance. This argument means that therefore interest accrued to the sum of Kshs.3,800,000/-, which the Bank was ordered to pay to Mr. Elijah Kipngeno arap Bii, while interest from the sum of Kshs. 500,000/- held as security for costs be paid to the Plaintiff, Mr. Samuel Mwehia Gitau, since the court had awarded him Kshs.155,000/- in the first instance.
26. I have considered the two arguments and note that from the facts of this case, once judgment was pronounced, Mr. Elijah Kipngeno Arap Bii was entitled to a payment of Kshs. 3,800,000 while Mr. Samuel Mwehia Gitau was to be paid the sum of Kshs.155,000/- which was enhance to Kshs.500,000/- to cater for security for costs for the stay of execution orders to issue. I therefore find that these two parties are the correct parties entitled to the interest that has accrued pending the disposal of the Appeal by the Court of Appeal. I direct that the sum of Kshs.3,800,000/- with interest accrued from the time of deposit to date be released to Mr. Elijah Kipngeno Arap Bii while the sum of Kshs.155,000/- be together with interest accrued on the sum of Kshs.500,000/- held in the account, be released to Mr. Samuel Mwehia Gitau, the Plaintiff herein. The difference from the sum of Kshs.500,000/- less the principal of Kshs.155,000/-(being Kshs.345,000/) be returned without interest to the party who made



the deposit, being Mr. Elijah Kipngeno arap Bii. The costs of this application are to be borne by the parties.

Final Disposition

27. For the avoidance of doubt these are the orders made by this court in respect of the 3 applications herein:-

1. As regards the Application dated 19th January 2023, an order for the eviction of the Defendant be and is hereby granted forthwith to the Plaintiff, for the eviction of the Defendant from the suit premises, being the property known as Land Reference Number 209/9854, situate in Nairobi County.
2. The Inspector General of the National Police Service through the Officer Commanding Langata Police Station is directed to provide the necessary assistance to effect these orders, if the Defendant has not yielded vacant possession voluntarily at the lapse of 30 days from the Date of this Ruling.
3. The costs associated with Application are awarded to the Plaintiff payable by the Defendant.
4. The Application dated 10th May 2023 filed the Defendant herein is dismissed for lack of merit.
5. Costs associated to this application are awarded to the Plaintiff payable by the Defendant.
6. As regards the Application dated 15th May 2023 filed the 1st Defendant, Kenya Commercial Bank Limited, the court makes the following directions:-
 - i. The sum of Kshs.3,800,000/- together with interest emanating from the said deposit be released to the Defendant, Mr. Elijah Kipngeno arap Bii.
 - ii. The sum of Kshs.155,000/- plus interest emanating from the deposit of Kshs.500,000/- be released to the Plaintiff, Mr. Samuel Mwehia Gitau.
 - iii. The balance of the funds of Kshs.345,000/- be released to Mr. Elijah Kipngeno Arap Bii without interest.
 - iv. Each party shall bear their own costs associated with this application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Ndirangu for Plaintiff/Applicant- Samuel Mwehia Giatu.
2. Mr. Nicholas Sumba Defendant/Respondent- Elijah Kipngeno Arap Bii.
3. N/A for KCB- (Ist Defendant- Original Suit.)
4. Amos - Court Assistant

