



REPUBLIC OF KENYA



**Jedrome Building, Civil Engineering & another v Oriental Commercial Bank
(Civil Suit 70 of 2018) [2024] KEHC 1425 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 70 OF 2018
RN NYAKUNDI, J
FEBRUARY 16, 2024**

BETWEEN

JEDROME BUILDING, CIVIL ENGINEERING & ANOTHER PLAINTIFF

AND

ORIENTAL COMMERCIAL BANK DEFENDANT

RULING

Representation

Kariuki Mwaniki & Co Advocates

Manani Lilan Mwetich & Co. Advocates

1. Before me is an application filed under certificate of urgency accompanied with a notice of motion dated 3/11/2023. It is expressed be brought under;
 1. That this application be certified as urgent and that service in the 1st instance be dispensed with.
 2. That pending the interparties hearing and determination of this application, this Honourable court be pleased to stay the enforcement/Execution of the judgment of this honourable court delivered on 16/12/2023.
 3. That upon interparties hearing and determination of the application herein, this Hon. Court be pleased to stay the judgment and decree of this Honourable Court, pending the hearing and determination of an intended appeal to the court of appeal against the said judgement.
2. In support of the application is an affidavit by William Kipkorir Kipkirui in which he depones as follows;
 1. That the plaintiff/applicants being aggrieved by the judgment herein which was delivered on the 16th June 2023 and whereupon the advised their counsel on record to appeal against the



judgement. (annex hereto marked WKK1, 2 and 3 are copies of the notice of appeal lodged in court on 16th June 2023, the letter requesting for proceedings and judgment and the receipt paid for the notice of appeal and the request for proceedings.

2. That the notice of appeal and the request for proceedings were thereafter served upon the defendant/respondent herein.
 3. That there has been attempts to dispose of the plaintiff/applicant parcel of land and if the plaintiff/applicant parcel of land No Uasin Gishu/Ilulla/1024.
 4. That the defendant/respondent has already instructed Agunja Traders Auctioneers to advertise and sell their said parcel of land which if auctioned while their appeal is yet to be heard and determined, then any success in the appeal shall be rendered nugatory.
 5. That the sale of our land before the hearing and determination of the appeal shall subject us to substantial loss as the parcel of land comprise our family home and we shall be rendered destitute.
3. In opposition to the application the respondent file a replying affidavit sworn by George Karanja the Branch Manager of the defendant Bank. In a nutshell the respondent stated on oath as follows;
1. That I am Branch Manager of the Defendant's Eldoret Branch and I have authority and competence to make this affidavit.
 2. That I have read and understood the affidavit of William Kipkorir Kipkurui sworn in support of his application dated 3/11/2023 and wish to respond thereto as follows;
 3. That in the judgment the court delivered on 16/6/2023, this trial court dismissed the applicant's suit with costs to the defendant respondent.
 4. That the defendant respondent bill of costs has yet to be assessed and consequently no risk of execution imminent.
 5. That the appeal proffered seeks to challenge the dismissal of the suit and no orders were made in favour of the defendant capable of execution as there were no counterclaim to found any order.
 6. That the loan remains outstanding and recoverable under the defendant rights power of sale under the law and the charge registered over the suit parcel.
 7. That the action taken by the Bank to recover does not flow from the judgment of the court consequently, execution of a decree being sought to be executed does not arise.

Decision

4. I have considered both affidavits for and against the remedy for stay of execution pending an appeal against the judgment of this court. The premise of the law is order 42 rule 6 (2) of the [Civil Procedure Rules](#) which expressly provides that;

“no order of stay of execution shall be made under sub rule (1) unless... (a) a court is satisfied that substantial loss may result to the applicant unless the order is made and the application had been made without unreasonable delay and (b) such security as the court orders for the due performant of such decree or order as may ultimately be binding on him has been given by the applicant.”



5. In construing and interpreting order 42 of the [Civil Procedure Rules](#) on stay of execution, the court in *Stephen Wanjohi v Central Glass Industries Ltd*, Nairobi High Court Civil case No 6726 of 1991 states;
- (a). For the court to order a stay of execution there must be;
 - a. Sufficient cause
 - b. Substantial loss
 - c. No unreasonable delay and
 - d. Security
 - (b) The grant of stay is discretionary and the High Court is also a court of equity.
 - (c) It is not just to deny a successful party the benefit of judgment because he is poor.
 - (d) The court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which, prima facie he is entitled pending appeal.
 - (e) Financial ability of a decree holder solely is not a reason for allowing stay. It is enough that the decree holder is not a dishonourable miscreant without any form income.
6. One particular area where this question on stay has arisen for determination is on the cumulative effect of what constitute substantial loss. The legal significance of it was discussed in the case of [James Wangalwa & another v Naliaka Cheseto](#) (2012) eKLR that;
- “no doubt, in the law the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the [CPR](#). This is so because execution will create a state of affairs the will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
7. Given the particular circumstances the hallmark features of the applicant’s contention is that in absence of stay the statutory notice may be issued by the defendant Bank which thereafter upon sale would occasion substantial loss. In discussing this issue it is most helpful to refer to [Halsbury Laws of England](#) 4th ed reissue which explains the duty of a mortgagee, reads as follows;
- “Duty of mortgagee on execution of power of sale. A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor. He is not obliged to delay the hope of obtaining a higher price, or if redemption is imminent. He owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price. This duty is owed to the mortgagor, subsequent mortgagees and a surety but not to others such as the beneficiaries under a trust of the mortgaged property. The duty cannot be replaced or supplemented by liability in negligence. It can however, be excluded by agreement.
- If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the ground of undervalue alone, and



still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale or if it would be inequitable as between the mortgagor and the purchaser for the sale to be set aside. However, if the mortgagor does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it.”

8. Will the intended appeal be rendered nugatory if we do not grant the stay sought? On this aspect of the matter, we wish to point out to the applicant that since it was it who alleges that its intended apple would be rendered nugatory if a stay is not granted, the legal burden is on it to prove that allegation.
9. The gist and the sum total of the applicant written head of argument and submissions on the grounds in support of the application for me this is not a proper case in which the court should exercise its discretion and grant stay pending appeal. I accordingly dismiss the application as lacking in merit.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16TH DAY OF FEBRUARY, 2024

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R. NYAKUNDI

JUDGE

