



Oceanic Oil Limited v Standard Chartered Bank Kenya Limited (Commercial Case 467 of 2016) [2024] KEHC 3853 (KLR) (Commercial and Tax) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3853 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 467 OF 2016**

MN MWANGI, J

APRIL 12, 2024

BETWEEN

OCEANIC OIL LIMITED PLAINTIFF

AND

STANDARD CHARTERED BANK KENYA LIMITED RESPONDENT

RULING

1. The plaintiff filed a Notice of Motion application dated 13th December, 2022 under the provisions of Order 40 Rule 1(b) & Order 42 Rule 6 of the Civil Procedure Rules, 2010, and Sections 1A, 1B & 63 (e) of the Civil Procedure Act. It seeks the following orders –
 - i. Spent;
 - ii. Spent;
 - iii. That this Honourable Court be pleased to suspend the auction and/ or stay the orders made the 9th December, 2022 allowing sale of LR No. Uasin Gishu Mile Thirteen Scheme/73 located in Uasin Gishu County and LR No. South Ugenya/Yiro/2835 in Sidindi Market, Siaya County pending the hearing and determination of the Appeal filed by the plaintiff/applicant in the Court of Appeal; and
 - iv. That costs of this application be in the cause.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Joseph Gachuhi Karoba, the plaintiff's Managing Director. In opposition thereto, the defendant filed Grounds of Opposition dated 17th February, 2023 raising the following grounds -



- i. In the application dated 27th October, 2022 the plaintiff sought injunctive orders to stop the defendant from exercising its statutory power of sale pending the carrying out of valuations over the 3 suit premises known as LR No. 209/136/65 located in Nairobi County, LR No. Uasin Gishu Mile Thirteen Scheme/73 located in Uasin Gishu County, and LR No. South Ugenya/Yiro/2835 in Sidindi Market, Siaya County.
- ii. The Court in its ruling of 9th December, 2022 stayed the sale of the property LR No. 209/136/65 located in Nairobi County but dismissed the application with regards to LR No. Uasin Gishu Mile Thirteen Scheme/73 located in Uasin Gishu County and LR No. South Ugenya/Yiro/2835 in Sidindi Market, Siaya County.
- iii. The plaintiff is now seeking to stay the order dismissing its injunction application with respect to LR No. Uasin Gishu Mile Thirteen Scheme/73 located in Uasin Gishu County and LR No. South Ugenya/Yiro/2835 in Sidindi, Market Siaya County. There cannot be an order staying an application that has been dismissed. See *Enock Ptinek Manyu v Jamii Bora Bank* [2022] eKLR at paragraph 11 of the ruling.
- iv. The application is an abuse of the Court process as it is the fifth attempt by the plaintiff to stop the defendant from exercising its statutory power of sale. The plaintiff has previously filed the following applications:
 - a. An injunction application dated 21st November, 2016. This was dismissed by the ruling dated 22nd November, 2019.
 - b. An application dated 3rd February, 2020 seeking to review the ruling of 22nd November, 2019 dismissing the injunction application. This was dismissed by the ruling dated 26th January, 2021.
 - c. The plaintiff filed Nairobi Civil Application Number E065 of 2021 at the Court of Appeal seeking an injunction pending the filing and determination of an intended appeal against the ruling dismissing the plaintiff's review application. This was dismissed by a ruling dated 21st October, 2022.
 - d. An injunction application dated 27th October, 2022. This was partially dismissed by the ruling dated 9th December, 2022 leading to the current application by the plaintiff.
- v. In so far as the application dated 13th December, 2022 is brought under Order 40 Rule 1(b) of the *Civil Procedure Rules*, 2010 it is res judicata as the plaintiff had previously filed an injunction application dated 21st November, 2016 brought under the same provisions and that application was dismissed.
- vi. The plaintiff has not demonstrated the irreparable harm it will suffer that cannot be compensated by an award of damages. Once the charged properties were charged to the defendant, they became commodities for sale that could be sold to recover the facilities advanced to the plaintiff. See *Anita Chelangat O'donovan & 2 others v Fredrick Kwame Kumah & 2 others* [2017] eKLR.
- vii. If at all the order of 9th December, 2022 can be stayed, the plaintiff has not offered any security which is a condition for the grant of stay pending appeal under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, 2010.



- viii. The defendant will also rely on the facts set out in the affidavits filed herein of Vitalis Muthoka sworn on 16th November, 2022 and Cecilia Muendo sworn on 31st August, 2017 and 27th February, 2020.
3. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed on 30th June, 2023 by the law firm of Gachie Mwanza & Company Advocates, whereas the defendant's submissions were filed on 26th June, 2023 by the law firm of Hamilton, Harrison & Mathews Advocates.
 4. Mr. Gachie, learned Counsel for the plaintiff relied on the provisions of Order 40(1)(a) & (b) of the *Civil Procedure Rules*, 2010 and submitted that the instant application is meritorious and ought to be granted. He further submitted that currently there is no injunctive order in place against the intended sale, transfer and disposal of two of the suit properties, thus unless the orders sought herein are granted the intended appeal at the Court of Appeal is at risk of being rendered nugatory. In relying on the Court of Appeal decision in *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR, Mr. Gachie contended that the plaintiff has an arguable appeal in view of the fact that the Court in its ruling dated 9th December, 2022 gave the defendant the green light to proceed with the sale of two of the suit properties based on an inaccurate and incompetent valuation report.
 5. The plaintiff's Counsel stated that if the application herein is not allowed and the plaintiff succeeds in the intended appeal, an award of damages will not be adequate compensation as compared to the impending loss of two of the suit properties. Additionally, that once the said properties have been sold to third parties, restoring them to their original state would be a tedious process riddled with magnanimous losses.
 6. Mr. Ondieki, learned Counsel for the defendant cited the case of *Enock Ptinek Manyu v Jamii Bora Bank* [2022] eKLR, and submitted that the ruling delivered on 9th December, 2022 dismissed the plaintiff's application dated 27th October, 2022 thus the order emanating therefrom cannot be stayed since it is a negative order. He referred to the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 and urged this Court to regard the plaintiff's submissions on the fact that it has an arguable appeal as it is not one of the factors to be considered in an application brought under the aforesaid provisions. On the issue of substantial loss, Counsel cited the case of *Lawrence Mukora Munuu t/a Dynamite Civil & Electric Contractors v Kamandura Tarambana Water Development Society* [2021] eKLR, and further submitted that the plaintiff has not demonstrated substantial loss incapable of being compensated by an award of damages that it will suffer in the event that the instant application is not allowed. He stated that the value of the suit properties can be ascertained through valuation.
 7. Counsel for the defendant referred to the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, and asserted that even if the order of 9th December, 2022 could be stayed, the plaintiff had not offered and/or proposed to provide any security for the due performance of the said order.

Analysis and Determination.

8. On consideration of the instant application, the grounds on its face and the affidavit filed in support thereof, the grounds of opposition by the defendant, and the written submissions by Counsel for the parties, the issues that arise for determination are -
 - i. Whether the application herein is res judicata; and



- ii. Whether this Court should suspend the auction and/or stay the orders made on 9th December, 2022 allowing the sale of two of the suit properties.
9. In the affidavit filed in support of the instant application, Mr. Karoba averred that vide an application dated 27th October, 2022, the plaintiff sought orders of an injunction against the defendant restraining it from commencing realization of security, exercising its statutory power of sale, advertising, selling, disposing of, alienating, transferring and/or in any other manner interfering with the plaintiff's quiet possession, of all those parcels of land known as LR No. 209/136/65, Maisonette Number one (1) erected on LR No. 3734/937, Title Number South Ugenya/Yiro/ 2835 and Title Number Uasin Gishu/Mile Thirteen Scheme/73 before conducting valuations over the same as required by law.
 10. He further averred that the said application was determined vide a ruling delivered on 9th December, 2022 where the defendant was restrained from selling the property situate at Nairobi and directed that a joint valuation be done of it, but allowed the defendant to proceed with the sale of the other two properties situate in Eldoret and Kisumu. That being dissatisfied with the order allowing the sale of the two properties, the plaintiff filed a Notice of Appeal from the said decision.
 11. Mr. Karoba deposed that there is a real risk of the aforementioned properties being sold before the intended appeal is heard and determined since there are no injunctive orders in place, thus rendering the intended appeal nugatory. He contended that the intended appeal is not only arguable but also raises serious triable issues warranting a determination by the Court before any illegal disposition of the said properties.

Whether the application herein is res judicata.

12. The doctrine of *res judicata* is provided for under Section 7 of the [Civil Procedure Act](#), 2010 which states as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
13. The Court in the case of [Abok James Odera v John Patrick Machira](#) Civil Application No. Nai. 49 of 2001 laid down the principles to be established by a party who relies on a plea of *res judicata*, as hereunder:
 - “(i) a previous suit in which the matter was in issue;
 - (ii) the parties were the same or litigating under the same title;
 - iii. a competent court heard the matter in issue; and
 - iv. the issue had been raised once again in a fresh suit.”
14. In the case of [Gurbachan Singh Kalsi v Yowani Ekori](#) Civil Appeal No. 62 of 1958 the former East African Court of Appeal when addressing the doctrine of *res judicata* held as follows-

“The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties



exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

15. It is not disputed that the plaintiff filed an application dated 21st November, 2016 seeking orders of an injunction against the defendant restraining it from disposing of the suit properties but the said application was dismissed vide a ruling dated 22nd November, 2019. This means that there has been a previous application between parties litigating under the same title that was determined by a Court of competent jurisdiction, therefore this Court has to determine whether the issue in the application for injunction dated 21st November, 2016 and the instant application are similar and arise from the same cause of action.
16. The cause of action in the application for injunction dated 21st November, 2016 arose from the fact that the defendant was about to exercise its statutory power of sale over the suit properties since the plaintiff had defaulted in its loan repayment obligations. The cause of action in the instant application arises from the Courts ruling dated 9th December, 2022 dismissing the plaintiff’s application dated 27th October, 2022 seeking orders restraining the defendant from selling the suit properties before subjecting them to valuation. The doctrine of res judicata applies in a matter in which a Court has exercised its judicial mind and has after argument and consideration come a decision in a contested matter.
17. In present application, the issue of whether or not this Court should issue an injunction restraining the defendant from interfering and/or disposing of the suit properties, pending the hearing and determination of the intended appeal in the Court of Appeal against this Court’s ruling dated 9th December, 2022 has never been litigated on or determined by this Court, or any other Court of competent jurisdiction. In addition, the said issue could not have been raised in the application dated 21st November, 2016 since the ruling dated 9th December 2022 did not exist then.
18. It is however evident that the substantive prayer being sought by the plaintiff in this application is an order for stay of execution of the orders made on 9th December, 2022 and/or an order suspending the sale by public auction of the suit properties situate in Eldoret and Kisumu, and not an order for a temporary injunction. This Court therefore finds that the application herein does not offend the doctrine of res judicata as provided for under Section 7 of the [Civil Procedure Act](#).

Whether this Court should suspend the auction and/or stay the orders made on 9th December, 2022 allowing the sale of two of the suit properties.

19. Before I determine the above issue, it is important to note that in as much as the instant application has been brought under the provisions of Order 40 Rule 1(b) and Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010, the substantive prayer sought by the plaintiff in this application is an order for stay of execution of the orders made on 9th December, 2022 and/or an order suspending the sale by public auction of the suit properties situate in Eldoret and Kisumu. In addition, the correct provisions for an application for an injunction pending appeal is Order 42 Rule 6(6) of the Civil Procedure Rules, 2010 and not Order 40 Rule 1(b) of the [Civil Procedure Rules](#), 2010. Since what is before me is an application for stay pending appeal, I will be guided by the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010.



20. It was submitted by the defendant that the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 do not apply in this case since the ruling that the plaintiff seeks to stay dismissed the plaintiff's application dated 27th October, 2022 thus the order emanating therefrom is a negative order. On perusal of the record, it appears that there was a typographical error with the date that appears on the ruling that the plaintiff seeks to appeal from. This is because, I did not find a copy of a ruling dated 9th December, 2022 despite the fact that proceedings indicate that a ruling was delivered on the said date, but in the Court file there is a ruling dated 25th November, 2022 that arose from the application dated 27th October, 2022. In the said ruling, the Court gave several orders inter alia upholding the Valuation Report by Pinnacle Valuers Limited over the suit properties situate in Eldoret and Kisumu, and directed that the defendant could proceed with the intended sale of the said properties.
21. The Court of Appeal in the case of Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR declined to issue an order for stay of execution of a decree and held that -
- “With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30th July 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay.”
22. As explained herein above, the plaintiff intends to appeal against the order issued by the Court in its ruling dated 25th November, 2022 upholding the Valuation Report by Pinnacle Valuers Limited over the suit properties situate in Eldoret and Kisumu, and the Court's direction for the defendant herein to proceed with the intended sale of the said properties. It is therefore my finding that the orders issued in the ruling dated 25th November, 2022 are not negative orders but orders capable of being enforced by the sale of the two properties. The present application is therefore properly before this Court.
23. The principles that govern the grant of an order for stay of execution pending appeal are provided for under Order 42 rule 6(2) of the Civil Procedure Rules, 2010 which state as follows –
- “No order for stay of execution shall be made under sub rule (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.”
24. In the case of Vishram Ravji Halai v Thornton & Turpin [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant an order for stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010 is fettered by three conditions namely establishment of a sufficient cause, satisfaction of substantial loss, and the furnishing of security.
25. The plaintiff submitted that in the event the instant application is not allowed it will suffer prejudice since if the suit properties are sold to third parties during the pendency of the intended appeal and it ends up being successful in the appeal, an award of damages will not be adequate compensation. In addition, restoring them to their original state would be a tedious process riddled with magnanimous losses. The defendant on the other hand contended that the plaintiff does not stand to suffer any substantial loss incapable of being compensated by an award of damages in the event the instant



application is not allowed since the value of the suit properties can be ascertained through valuation. It submitted that once the suit properties were charged to the defendant, they became commodities for sale that could be sold to recover the facilities advanced to the plaintiff.

26. The law is well settled that that once a property is charged to a financial institution as security for a loan facility advanced to the owner of that particular property, the property becomes a commodity for sale capable of being sold to recover the facilities advanced to the borrower. The suit properties herein were charged to the defendant as security for a financial facility advanced to the plaintiff. This means that in the event of default as is the case herein, the defendant was at liberty to sell them in order to recover the monies advanced to the plaintiff. In order to determine whether the plaintiff will suffer substantial loss in the event the application herein is not allowed, and if it ends up being successful in the intended appeal, this Court needs to determine whether the value of the said properties can be ascertained.
27. This Court is of the view that the value of the suit properties can be ascertained through a valuation exercise in view of the fact that the assets in issue are parcels of land, and damages equivalent to the market value of the suit properties will be adequate compensation for any loss suffered by the plaintiff in the event that the intended appeal is successful. For the said reason, I am not persuaded that the plaintiff will suffer substantial loss in the event that the instant application is not allowed. To this end, I am guided by the holding of the Court of Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, where the Court stated thus–

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”. (emphasis added).
28. This Court takes judicial notice of the fact that the defendant is a reputable bank of good standing, whose financial position is within the public domain. It is thus capable of compensating the plaintiff for any loss suffered by way of damages in the event the intended appeal is successful.
29. It is not disputed that the plaintiff has not offered any security for the due performance of the decree as a demonstration of good faith. When dealing with an application for stay of execution, a Courts has the duty to balance the interests of the parties taking into account the fact that an appellant has an undoubted right of appeal, whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason. Courts however have the discretion of determining the nature and the amount of security that can be deposited by a successful litigant, even where security has not been offered. See the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR. This Court has however found that the plaintiff is not entitled to the orders being sought.
30. In the end, I find that the application dated 13th November, 2022 is not merited. It is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE



In the presence of:

No appearance for the plaintiff

Ms Obwangi h/b for Mr. Ondieki for the defendant

Ms B. Wokabi – Court Assistant.

