



Kabaru & another v Standard Chartered Bank (K) Limited & 2 others (Civil Appeal E044 of 2024) [2024] KEHC 12161 (KLR) (Commercial and Tax) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E044 OF 2024
FG MUGAMBI, J
OCTOBER 11, 2024**

BETWEEN

DUNCAN JOSPHAT MURUGA KABARU 1ST APPLICANT

PERPETUA WACHEKE MUTURI 2ND APPLICANT

AND

STANDARD CHARTERED BANK (K) LIMITED 1ST RESPONDENT

**JOSEPH M GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND
RESPONDENT**

OCTAVIA KADENYEKA CHANZU 3RD RESPONDENT

RULING

Introduction And Background

1. This ruling determines the application dated February 23, 2024, brought under Sections 79G, 95, 63(e), 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The applicants seek orders of stay of execution of the Ruling delivered by Hon R. L. Musiega (the trial court) on 16/02/2024 in Milimani CMCC No. E176 of 2022 (the impugned Ruling), pending the hearing and determination of their intended appeal.
2. The application is supported by the affidavits of Perpetua Wacheke sworn on 23/02/2024 and 11/04/2024. By way of background, it is undisputed that following the alleged default in repayment of a facility extended to the applicants by the 1st respondent (the Bank), the Bank sanctioned an auction. The auction took place on 18/1/2022 and the 3rd respondent was declared as the highest bidder.



3. It is equally undisputed that the applicants challenged the auction at various stages: first at the trial court, then at this court in HCCA E073/2022, and finally at the Court of Appeal in CACA E370/2022. Following the dismissal of the applicant's application by the Court of Appeal, the 3rd respondent sought to obtain vacant possession to Nairobi/ Block76/139/Buruburu Phase III (the suit property).
4. To that end, the 3rd respondent filed an application dated 23/2/2023, seeking orders for the applicants to surrender the house keys, grant him access, and permit him to break the doors to obtain vacant possession of the suit property. The trial court allowed the application and hence the impugned Ruling. It is this Ruling that led to the appeal and consequently, the application for a stay of execution pending the appeal, which is the subject of this ruling.
5. The application is opposed by the three respondents. In a replying affidavit sworn on 15/03/2024 by Boniface Machuki, the Manager, Collection and Recoveries Unit of the Bank, the 1st and 2nd respondents contend that the application is res judicata. It is their case that the main issue in contention has been litigated and determined by courts of competent jurisdiction.
6. Octavia Kadenyeka, the 3rd respondent also swore a replying affidavit on 28/02/2024. He reinforces the point that the application is an abuse of the court process as the applicants had failed to secure injunction orders against the sale of the property at the High Court and the Court of Appeal. He confirms that on 18/1/2022 he participated in an auction where he was the successful bidder in the public auction of the suit property.
7. As such, it is his case that he is entitled to vacant possession of the property as the appellants lost the right under equity to redeem the property. He further states that he has lost income of Kshs. 960,000/= as the rent value of the property is Kshs 40,000/= monthly.

Analysis and determination

8. I have given due consideration to the application, responses, evidence and submissions filed by all the parties. The issues that arise for determination are as follows:
 - i. Whether the suit is res judicata;
 - ii. Whether the applicants' have met the criteria for grant of orders of stay pending appeal;
 - iii. Who shall bear the costs of the application.
9. The doctrine of res judicata forbids a court from trying a suit or an issue where a matter directly and substantially in issue has been determined either in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, so long as the issues have been raised, heard and finally determined in a court of competent jurisdiction. This is by dint of Section 7 of the *Civil Procedure Act*, 2010.
10. There is additionally, an abundance of judicial precedents on the rationale for the doctrine of res judicata. (See for instance the Court of Appeal decision in Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others, (2017) eKLR). The reasons include bringing finality to litigation, affording parties closure, protection against wastage of time and resources in endless litigation and providing swift, sure and certain justice.
11. In determining whether the application before the court is res judicata, I am mindful that this does not require the prayers sought in this application to be identical to those in previous applications. Guided by Section 7 of the *Civil Procedure Act*, the focus is on whether the substantive matter that is directly



and substantially in issue here was also directly and substantially in issue in a previous matter. Even if the present application is one for a stay of execution, and the previous applications sought injunctive relief, the substance of both applications must still be related.

12. A cursory review of the applicants' application filed in HCCOMMA No. E073 of 2022, in which this court rendered a Ruling on 7/10/2022, that damages are an adequate remedy as a matter of fact and a statutory remedy hence an injunction could not be issued' (see paragraph 20).
13. At paragraph 21 of the said Ruling, the court further stressed that 'the respondents' equity of redemption was extinguished and the suit property now belonged to the third party who was entitled to immediate possession of the property'. (emphasis mine)

This position was echoed by the Court of Appeal in Nairobi Civil Application No. E370 of 2022 in a ruling dated 16/12/2022.

14. Undoubtedly, the litigation in the present application revolves around the suit property and challenges the sale of the suit property and the 3rd respondent's right to it. I have reviewed the Memorandum of Appeal, and all the grounds on which a stay of execution of the impugned Ruling are being sought are substantially related to issues that have already been before this court and the Court of Appeal.
15. Both the Court of Appeal and this court have already ruled that, even if the appeal were to succeed, the applicants would be entitled only to damages, as the property has already passed to the 3rd respondent. It is on this basis that the 3rd respondent's application for vacant possession was made and granted. To grant a stay of execution of these orders would effectively reopen litigation on settled issues and constitute a breach of the stare decisis doctrine.
16. In any case, and for the sake of conclusiveness, even if I were to determine the application on its merits, I must ask what substantial loss might result if the order is denied. This is one of the key factors to consider under Order 42 Rule 6. I acknowledge that this question requires a delicate balancing act between the respondent's right to enjoy the fruits of their judgment and the applicant's right to pursue the prospects of their appeal.
17. This should not involve assessing the prospects of the appeal itself but rather determining whether requiring the applicant to comply with the judgment or ruling would turn them into a 'pious explorer' in the judicial process (see *Nicholas Mutuku Mwasuna V Patricia Mueni Kilonzo*, [2022] eKLR). My conclusion is that it would not. I am not convinced that the applicants would suffer substantial loss if the application were denied.
18. As I have stated, given the prior rulings of the Court of Appeal and this court, the applicants' right of redemption has been extinguished. Even if their appeal succeeds, their only available remedy would be damages.

Disposition

19. Accordingly, I find no merit in the application dated February 23, 2024. It is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

