



**Kawamambanjo Limited & another v National Bank of Kenya Limited & 6 others (Civil Suit 878 of 2009) [2023] KEHC 17359 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17359 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 878 OF 2009  
FG MUGAMBI, J  
MAY 12, 2023**

**BETWEEN**

**KAWAMAMBANJO LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
TIMOTHY BENSON KAMANDE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT  
WATTS ENTERPRISES AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT  
JULIET THEURI ..... 3<sup>RD</sup> DEFENDANT  
GICHURU ..... 4<sup>TH</sup> DEFENDANT  
CHARLES PATRICK WALKER ..... 5<sup>TH</sup> DEFENDANT  
JOHN NJOROGE MICHUKI ..... 6<sup>TH</sup> DEFENDANT  
NEW HOMES DEVELOPMENT LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

**Brief Facts**

1. The plaintiffs instituted a suit against the defendants by a plaint dated 2<sup>nd</sup> December 2009 seeking among others injunctive orders to restrain the defendants from disposing or alienating the property known as LR 170/35 Redhill Nairobi (hereinafter the suit property). On 15<sup>th</sup> September 2020 judgment was delivered in favour of the defendants and the plaintiffs suit was dismissed.
2. Aggrieved by the said judgment the plaintiffs preferred an appeal to the Court of Appeal and filed this application dated 13<sup>th</sup> October 2020 before this court. The application is brought under section 1A,



1B, 3A, 75(1) of the Civil Procedure Act, Order 42 Rule 6, Section 103 1(a) & 3, Section 104 (1), (2) & 3 and section 105 of the Land Act and order 50 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law.

3. The motion seeks the following orders;
  - i. Spent
  - ii. Spent
  - iii. That this Honourable court be pleased to stay execution of its judgment dated and delivered on 8<sup>th</sup> November 2019 and other consequential orders thereof or grant conservatory orders granting a temporary stay of any sale or howsoever interfering with the ownership or quiet possession over those parcels of land known as L.R. NO 170/35 Redhill Nairobi by 6 months or for such other period as the court may determine to enable the applicants/plaintiffs lodge an appeal in the Court of appeal.
  - iv. That costs of this application be provided for.
4. The application is supported by the affidavit of Maxwell Njonjo Kamande sworn on 13<sup>th</sup> October 2020. The plaintiff's case is that it has filed an appeal at the Court of Appeal against the judgment of the court delivered on 15<sup>th</sup> September 2020. It is the plaintiffs' contention that the appeal is meritorious and arguable and if the orders sought are not granted then the suit property would not be preserved pending appeal.
5. To further buttress their case, the plaintiffs filed their submissions where they contend that the court had previously granted the plaintiffs 45 days to move the court under Rule 5(2)(b) of the court of appeal rules but regret that the time granted was not sufficient. On whether the plaintiffs had an arguable appeal, it was the plaintiffs' submissions that the grounds of appeal were indeed arguable and the respondents had not controverted that fact. The plaintiffs were apprehensive that if the transfer of the suit property was not stopped the appeal would be rendered nugatory and the same would highly prejudice the plaintiffs.
6. The application was opposed by the defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the application vide grounds of opposition dated 30<sup>th</sup> June 2021 citing the following grounds;
  - i. That the application is misconceived in law as an order for stay of execution could not issue as sought in relation to a dismissal order which would be the subject of the plaintiffs' intended appeal in so far as the same is incapable of execution
  - ii. That the application is misconceived in law as the Honourable Court has no jurisdiction to grant any order in the nature of a conservatory order which is effectively a restraining order pending appeal against its own decision within the ambit of the provision of the law invoked or at all.
  - iii. That in any case, even if the application had been properly presented and the Honourable Court has the jurisdiction to determine the same, the Plaintiffs have not satisfied the threshold principles underpinning the exercise of such jurisdiction.



7. It was the 1<sup>st</sup> and 2<sup>nd</sup> defendant's submissions that the judgment and decree dated 15<sup>th</sup> September 2020 was a negative order which did not require the plaintiffs to do anything therefore that order was not capable of being stayed. It was further submitted that the court could not grant an injunction under Order 42 Rule 6 of the *Civil Procedure Rules*.
8. On the part of the 5<sup>th</sup> defendant, the application was opposed vide the replying affidavit dated 18<sup>th</sup> March 2022 sworn by Joyce Wamucii Ndumia practicing as an advocate of the High Court. She deponed that the plaintiffs since the inception of the suit had not disclosed a reasonable cause of action against the 5<sup>th</sup> defendant. She observed that in the judgment delivered on 15<sup>th</sup> September 2020 the plaintiffs claim against the 5<sup>th</sup> defendant was dismissed with costs.
9. It was further submitted that no evidence had been provided to show that there was an appeal against the 5<sup>th</sup> defendant. It was her averment that the 5<sup>th</sup> defendant had filed a bill of costs before the Deputy Registrar and intended to proceed with the taxation of bill of costs in order to enjoy the fruits of the decree. In the submissions, it was contended that the claim against the 5<sup>th</sup> defendant should be dismissed and orders given to allow the taxation of the bill of costs to continue.

### **Analysis**

10. I have considered the application, the supporting and replying affidavits and submissions together with case law cited by counsel for their respective clients. The orders sought in the application are twofold. The plaintiffs sought for stay of execution of the judgment delivered 15<sup>th</sup> September 2020 (sic) or in the alternative grant of conservatory orders granting a temporary stay of any sale or interference with the suit property pending appeal.
11. With respect to the prayer for stay of execution, order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* sets out the principles that guide the court in an application for stay of execution. It provides 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 plaintiffs 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 plaintiffs.



12. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the plaintiffs at the end of the proceedings. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal”.

13. In addition, the Court of Appeal in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, also stated as follows: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

14. In view of the above the plaintiffs are required to demonstrate that substantial loss may result to them unless the order of stay is granted, that the application has been brought without unreasonable delay and a provision for security for the due performance of the decree.

15. From a perusal of the pleadings before court and the submissions, no evidence has been provided by the plaintiffs to show that those three conditions were satisfied and that the prayer should be granted. Even if the prayer were to be granted for the reasons stated in the above decisions, I have also looked at the Judgment of the court dated 15<sup>th</sup> September 2020 which dismissed the applicants suit. With respect, I am inclined to agree with the respondents that the court did not require the applicants to do anything. In particular, the Court did not order the sale of the suit property. Technically, this makes it a negative order such that even if any purported sale of the suit property were to take place, it would not be premised on any orders or directions relating to this suit. There is therefore no order capable of being stayed as the parties are back to the same position they were before the suit had been instituted.

16. In *Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs



only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

17. The same reasoning was applied in the case of *Raymond M. Omboga v. Austine Pyan Maranga* that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The plaintiffs seek to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the plaintiffs have lost. The refusal simply means that the plaintiff stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

18. I could not agree more with these decisions and as such I find that this prayer cannot stand. The other prayer in the motion application was for grant conservatory orders granting a temporary stay of any sale or howsoever interfering with the ownership or quiet possession over those parcels of land known as L.R No. 170/35 Redhill, Nairobi by six (6) months or for such other period as the court may determine to enable the applicants lodge an appeal in the Court of Appeal. The Supreme Court addressed the nature of conservatory orders as remedies in *Judicial Service Commission v Speaker of the National Assembly & Another* (2013) eKLR,

“Conservatory orders are in my view not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme Law of the Land. They are not remedies between one individual as against another, but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which only attach to a particular person may.”

19. Likewise, in *Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others* case the Supreme Court stated as follows: -

Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

20. Additionally, in *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General*, Nairobi High Court Petition No. 16 of 2011; {2011} eKLR the Court held that

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”

21. Odunga J in *Kevin K. Mwiti & Others v Kenya School of Law & Others* stated that:

“the first issue for determination is whether the petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which discloses arguable issues and, in this case, arguable



constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the Court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.

22. The general thread passing through all these decisions is the requirement for a public interest connotation with a backing of a constitutional violation to succeed in an application for conservatory orders. From the pleadings and submissions of the applicant, there is no such connotation. This is a dispute between private entities. Moreover, the applicants have not demonstrated that they have a prima facie case with a likelihood of success. No explanation has been given as to why the applicants were not able to move the Court of Appeal under rule 5(2)(b) of the *Court of Appeal Rules* within the 45 days that they claim to have been granted.

**Determination and orders**

23. For the reasons stated above, I find no merit in the application and the same is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED IN NAIROBI**

**THIS 12TH DAY OF MAY 2023**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

