



Mohansons Food Distributors Limited & another v Kenya Commercial Bank & another (Civil Case 14 of 2003) [2023] KEHC 19131 (KLR) (19 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 14 OF 2003
DKN MAGARE, J
JUNE 19, 2023**

BETWEEN

MOHANSONS FOOD DISTRIBUTORS LIMITED 1ST PLAINTIFF

MEADOW VALE LIMITED 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK 1ST DEFENDANT

FAYAZ BAKERS LIMITED 2ND DEFENDANT

RULING

1. The 1st Defendant made an application dated 7/6/2021 and another dated 21/7/2021. The applications were, placed before me. I directed that other than submissions already filed, the parties were to submit, orally on the two application and a third one dated 22/7/2021.
2. The applications turned out to be more heat than light. I have sought to deal with all of them at one.

2nd Defendant's submissions

3. They note that the applications dated 7/6/2021 and 21/7/2021 are actually a duplicity for all practical purposes, the main application is dated 7/6/2021.
4. They rely on the authority of *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others* [2012] eKLR and *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnisbee)* [2019] eKLR and *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012] eKLR
5. Their view was that the application was made with undue delay. Their view was that there is no irreversible loss, if stay is not granted. To the 2nd Defendant, the 1st Defendant had not demonstrated



substantial loss. On this they relied on the decision of *Samvir Trustee Ltd versus Guardian Bank Limited (2001)* eKLR. In the later decision the court held: -

“It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant /defendant ...for the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

6. On the aspect that the 2nd Defendant can repay, they rely on the decision of *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986]* eKLR:-

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

7. For security for due the performance, they rely on *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015]* eKLR, where they state that the security offered should be a binding security. The authority states as follows: -

“The question is this; will bank-guarantee grow in tandem with the decretal sum herein which also attracts interest until payment in full? I think not. Also, contrary to the submission by the Applicants, bank-guarantee will not ensure due performance of the decree which may ultimately be binding herein or produce benefits to both parties. It will only produce benefits to the applicant in the sense that they will have provided insufficient security-if at all there is such benefit in cheating the law. I have stated before, in the case of *Apar Industries Limited vs Joe’s Freighters Limited [2015]* eKLR and I am glad it is a matter directly in issue in this application, that: -

“From the extracted Decree the amount due on the judgment is Kshs.104, 577, 533/= in addition to costs and interest thereon. It is worth repeating that security in Order 42 rule 6 of the CPR is for the performance of the decree which might ultimately be binding on the judgment-debtor-Applicant. See the case of *Visram Ravji Halai & Anor. vs. Thorn torn & Tupin [1963]* Ltd Civil App. No. NAI 15 of 1990, where the Court of Appeal held that the court ought not to place the Plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered. Accordingly, I order stay of execution of the decree herein but on condition that the Applicant deposits the entire decretal sum as reflected in the decree herein in a joint escrow account at Kenya Commercial Bank, Milimani High Court Branch; Nairobi within 45 of today. The account should be interest earning account in the joint names of the counsels for the parties. The Applicant will also pay costs of the application. It is so ordered.



- (6) In civil litigation especially where security required is in monetary form, it is prudent that courts are sensitive to the economic realities of the day and should direct that such funds be invested in an interest earning account so as to prevent any loss to the party who will ultimately realize or take back the security.

Plaintiff's submissions

8. The plaintiff filed submissions on 8/11/2022. They relied on the decision of *Job B. Muya and 2 Others =vs= Elkau Mukudi Gatimu and another (2015)* eKLR. Their view is that the order sought are declaratory in nature hence there is nothing to stay.
9. This is supplemented with The authority of Johana Nyokwoyo Buti and Another, which states that a declaration merely declares the rights of the parties. They also relied on the authority of *Association of Member Episcopal Conference in Eastern Africa (AMECEA) v Alfred Romani (T/A Romani Architects) & 3 others [2002]* eKLR, in which they rely on the authority of *MacFoy =vs= United Africa (1961) EA 1169*. This decision was made by the privy council. The same was also dealt with in the Case of *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998]* eKLR, the Court stated as doth: -

“Mr. Gautama again averred that no one, especially third parties, can be guilty of disobeying an order which is null and void. With this submission I agree. There cannot be as far as third parties are concerned interference with due administration of justice when the ex-parte order made is without any legal basis and is of no legal effect, and; as regards the parties to this suit, it cannot be said that there was disobedience of an order which was in the first place null and void.

In *Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169* Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

10. The case also dealt with the issue of Alleged contempt. The Decree was reportedly filed on 23/10/2020 in the Land Registry. An order of interim stay was given on 22/7/2021.
11. The filing on 23/10/2020 is thus said to be in contempt of court.
12. The plaintiff's view is that the action done on 14/10/2020 received on 23/10/2022 (The record indicates 23/10/2020) could not possibly have been in contempt and rely on paragraph 22 of the Replying affidavit.
13. They place reliance on case of *Sheila Cassat Issenberg & another v Anthony Machatha Kinyanjui (2021)* eKLR, where the court stated as doth: -

“

“ 57. As was again stated by the Supreme Court of India in *Mahinderjit Singh Bitta v Union of India & Others 1 A NO. 10 of 2010 (13th October, 2011)*:



In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is *lis* before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis).

58. The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it.

14. They pray that the application for contempt be dismissed with costs.
15. Submissions on the Application dated 7/6/2021 were filed on 21/7/2022. The plaintiff avers that the order for stay is discretionary.
16. They rely on the authority of *Flex Air Cargo Ltd = v s= Delta Connection Ltd. (2009)* eKLR to state that the Court cannot reverse that which has already been done. Their view is that stay is tantamount to setting aside

Applicant’s submissions

17. The 1st Defendant/applicant filed 2 sets of submissions. The first one is dated 30/9/2023. Their view was that the Court order of 22/7/2021 was willfully disobeyed.
18. The view of the 1st defendant is that the plaintiff was trying to execute the Judgment of 5/6/2020. The parcels of land concerned with this dispute being Kwale/Diani Beach/ 567, 568, 570, 571 and 572. The applicant main contention is that there suit herein is *res judicata*. They filed a yet to be determined appeal.
19. They rely on the case of *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005]* 1 KLR 828 Ibrahim, J (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.
20. They state that as per *R= vs= PPAR B and Another ex parte KPA (2021)* eKLR, it is only when a clear case of “contumacious conduct not explained others arises that the contemnor be punished.
21. Regarding stay the plaintiff’s director Sandeep Singh Kandhalin swore an affidavit opposing the application dated 4/7/2023. Their view was Jaspaul Singh Kandhan passed away long time ago. PritPal Singh Kandai had been abroad for 15 years as at 12/9/2022.



22. They state that the orders issued on 22/7/2021 reacts to the 2nd Defendant who has been given warrants of attachment and sale.

Analysis

23. Though the applications were shrouded in a Labyrinth of allegations, we have 2 clear applications.

1. Stay pending appeal.
2. Contempt.

24. I will start with the order for contempt.

25. The Decree was extracted and placed land registry. As at the time the Applicants came to court, the filing had been done. What I note that the Registration was done by the Registrar. It is a ministerial act with no input from the plaintiff. I am satisfied with the explanation given. Therefore, I am not convinced that contempt occurred.

26. It is therefore unnecessary to go into the test for contempt, when prima facie no contempt occurred.

27. Nevertheless, the ministerial acts continued after the orders were given. It was a duty of the person getting the orders to file them in Registry.

28. In the circumstances, thought he Respondents are not in contempt, it is necessary to maintain the dignity of the Court, I direct that all entry in the register of the named parcel of land that is Kwale/ Diani Beach Nos. 568, 570, 571 and 572 entered on or after e12/7/2021, other than restrictions or cautions be struck off the register.

29. In that connection each party shall bear their own costs on the application dated 4/7/2021.

30. The application for stay pending appeal is a rather straight forward application.

31. The test for the same is: -

- a. Made without undue delay.
- b. Offer security for due performance.
- c. An appeal.

32. I am satisfied that a notice of appeal was duly filed. The same has not been struck out. The Notice of Appeal gives jurisdiction.

33. In the case *Macharia t/a Macharia & Co. Advocates –vs- East African Standard (Supra)* the Honourable Court observed that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of



procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

34. Further this Court does not have powers to proceed in a matter where it has no jurisdiction.
35. In the case of Owners of the Motor Vessel “*Lillian S*” v *Caltex Oil (Kenya) Ltd* [1989] eKLR where, Justice Nyarangi Ja (as then he was) stated as doth:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

36. I am not entitled to deal with the merit or otherwise of the appeal. The court is to confined to having jurisdiction and leaving with security. Though the Application was filed on 2/6/2021, for a judgment of 5/6/2020, I hold that here was no undue delay. I am aware and take judicial notice that between 25/3/2020 to late July 2022, there was a global pandemic that forced the courts being closed for a long time. I am therefore satisfied that there was no inordinate delay.
37. The only question that is remaining relates to the security for due performance.
38. Before security, I need to deal with an issue courts deal with, irreparable loss. This element is not necessary. However, gives the huge amounts in issues, I am agreeable that the Respondents have not filed affidavits of names. It is not necessary that the applicant prove the same.
39. By dint of Section 112, of the *Evidence Act*, the Respondent’s know and it is within their knowledge on their capacity to refund. They need to show the same. They did not do so.
40. I am therefore satisfied that the Respondents have not demonstrated their ability to refund.
41. The only issue therefore is the security for due performance for the decree. I am not required that articulate interest on the decree. I am not even required to order the decretal amounts to be dealt with in one way or another. What is needed is a security. As to what constitutes proper security is a matter of discretion for the court to exercise discretion over.



42. As held in the case of *Bank of Africa Limited v Juja Coffe Exporters Limited & 4 others [2018]* eKLR, the court stated as doth: -

“The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case.”

43. I am not convinced that applicant is in dire financial stress. However, they must demonstrate that they are willing and able to give security for due performance. I therefore find merit in the Application for stay pending appeal allow the application dated 7/6/2021.

Determination

44. The upshot of the foregoing is that: -

- a. I allow the application dated 7/6/2021 and grant the 2nd Defendant stay of the entire decree and judgment of the court issued on 5/6/2020 pending the hearing and determination of the intended appeal.
- b. The applicant, KCB do deposit three bank guarantees for each of the Decree holders in a first tier bank as follows: -
 - i. 2nd plaintiff – A sum of Ksh 5,000,000/=
 - ii. 2nd Defendant Ksh 4,400,000
 - iii. 1st Plaintiff 1,000,000/= within 30 days.
- c. The Land Registrar is to delete all entries on land parcel Kwale/Diani Beach Block/567, 568, 569, 570, 571 and 572.
- d. The balance of the application is dismissed.
- e. Each party to bear its costs on the said applications.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF JUNE, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Sanjeev Khagram

Kariuki for the 1st Defendant

Miss Baraza for the 2nd Defendants

Court Assistant - Brian

