



REPUBLIC OF KENYA



KENYA LAW
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**Ndegwa & another v Kenya Commercial Bank Limited (Commercial Case 172 of 1997)
[2023] KEHC 18849 (KLR) (Commercial and Tax) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 172 OF 1997
FG MUGAMBI, J
JUNE 23, 2023**

BETWEEN

STEPHEN MUKIRI NDEGWA 1ST PLAINTIFF

CONTINENTAL MARKETING LIMITED 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. Before the court is an application dated March 10, 2021 brought under Section 1A, 1B, 3A of the [Civil Procedure Act](#) (CAP 21) and Order 42 rule 6 of the [Civil Procedure Rules 2010](#), Order 43 of the [Civil Procedure Rules 2010](#).
2. The application seeks the following orders;
 - i. Spent
 - ii. That this Honourable court be pleased to grant leave to the applicant to appeal against the ruling delivered by the Hon Justice Maureen Odero on February 25, 2021.
 - iii. That this Honourable court be pleased to stay the orders issued by Hon Justice Maureen Odero on February 25, 2021 pending the hearing and determination of this application.
 - iv. That this Honourable court be pleased to stay the orders issued by the Hon Justice Maureen Odero on February 25, 2021 pending the hearing and determination of the intended appeal to be filed by the applicant herein.
 - v. That the costs of and incidental to this application do abide the result of the said appeal.



3. The application is premised on the grounds on the face of it and supported by the affidavit sworn by Stephen Mukiri Ndegwa. The applicants rely on the fact that they had an arguable appeal with a high chance of success and which raises serious points of law and fact. It was also submitted that the respondent would not be prejudiced if the orders sought are granted.
4. The application was opposed by a replying affidavit sworn by Bonnie Okumu, the Director of Legal Services at KCB Bank Limited. He stated that lack of service of the present application to the respondent was meant to prejudice the respondent. Further, it was contended that the declaratory orders issued by the court were not amenable to stay of execution and that the plaintiffs failed to show that the appeal had reasonable chances of success. It was the respondent's averment that the grounds for appeal were weak and the plaintiffs did not show the substantial loss they would suffer.

Analysis

5. I have considered the pleadings and rival submissions before court. There are two main issues for determination being that of stay as well as leave to appeal. On the first prayer for stay of execution, Order 42 rule 6(1) of the Civil Procedure Rules gives the principles for granting stay of execution. The requirements for a party to successfully obtain the orders are provided for under Order 42, rule 6(2) which provides that:-

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 appellant 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 appellant.”
6. Three issues arise for consideration but even before getting into these elements, I wish to first of all consider the orders that the applicant seeks to stay. For the avoidance of any doubt, the orders of February 25, 2021 were as follows: -
 - i. That the consent entered into between the plaintiffs and the defendant dated August 10, 2015 and filed in court on August 24, 2015 is hereby adopted as an order of the court.
 - ii. Accordingly, the court declares that the defendant has fully satisfied its obligations to the plaintiff arising out of their claims in this suit.
 - iii. Costs of this application shall be borne by the plaintiff/respondent.
 7. I find it necessary to first of all deal with the question of whether the orders granted are capable of execution and therefore capable of being stayed by the applicants.
 8. The Court of Appeal in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR, was faced with similar circumstances, and with what is known as a 'negative order'. It made the following observations: -

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th 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). The same reasoning was applied in the case of *Raymond M. Omboga v. Austine Pyan Maranga* (supra), 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 seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the plaintiffs has lost. The refusal simply means that the plaintiffs 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...”

9. Similarly, in the case of *Western College of Arts And Applied Sciences v. Oranga & Others* [1976] KLR 63, this Court pronounced itself as follows: -

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

10. The orders that the applicant seeks to stay are negative in nature. The orders were simply for the adoption of a consent order and a declaratory order. The court did not order either of the parties to do or refrain from doing anything. It is not capable of execution or enforcement of and as such, my finding is that the order is not capable of being stayed.
11. As regards leave to appeal, the decision whether or not to grant leave to appeal is discretionary as was stated by the Court of Appeal in *Kenya Shell Limited vs. Kobil Petroleum Limited* [2006] eKLR. The threshold for success in an application for leave to appeal has been set out in many judicial pronouncements including the case of *Machira t/a Machira & Company Advocates v Mwangi & Anor.* [2002] 2 KLR 391

“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the



case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.”

Determination and orders

12. I have looked at the draft Memorandum of Appeal and my finding is that the appeal is not frivolous. It raises questions pertaining to the alleged consent which if substantially heard and determined by way of an appeal may bring to rest this long tussle between the parties. There would also be no particular prejudice occasioned to the respondent.
13. In the premises, the application for leave to appeal is hereby granted. In the interests of expeditious disposal of the appeal, I direct that the intended Record of Appeal shall be filed and served within 15 days from the date of this orders. Costs shall abide in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 23rd DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

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