



REPUBLIC OF KENYA



**Wanjohi v Wanjohi & 3 others (Commercial Civil Case E087 of 2018)
[2021] KEHC 218 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E087 OF 2018
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

MICHAEL MWANGI WANJOHI PLAINTIFF

AND

PATRICK KANGETHE WANJOHI 1ST DEFENDANT

EDWARD NJUGUNA KANGETHE 2ND DEFENDANT

GEORGE JAMES KANGETHE 3RD DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED 4TH DEFENDANT

RULING

1. After hearing the Plaintiff's Notice of Motion dated 26th September 2018 seeking leave to continue this suit as a derivative claim on behalf of Wardpa Holding Limited and a temporary injunction restraining the 4th Defendant ("the Bank") from exercising its statutory power of sale in respect of Land Reference No. 209/2489/22 (IR No. 74175), Tuiyott J., delivered a ruling on 1st March 2019 stating as follows:

17. On this the Plaintiff's case is rather pale. An application for injunction is considered in the context of the pleaded case of the Applicant. A party must in arguing an application for injunction state a case that is consistent with his pleadings. The Plaintiff has filed a 23 paragraph Plaintiff. Yet in none does the Plaintiff impute any wrong doing or negligence on the part of the Bank. On the overall, the Plaintiff beseeches the Court to find that the 1st to 3rd Defendants should bear personal liability for the facility they took and to exonerate the Company from any obligation. Clearly the Plaintiff makes no case against the Bank.



18. For the reasons given, this Court grants permission to the Plaintiff to continue this claim as a Derivative claim but must decline the prayer for injunction. Only to that extent does the Notice of Motion dated 26th October 2018 succeed. Costs of the declined Motion for injunction to the Bank. The Plaintiff shall however have costs on the Motion as against the 1st, 2nd and 3rd Defendants.
2. The Plaintiff is dissatisfied with the aforesaid ruling and has now evinced its intention to lodge an appeal against it by filing a notice of appeal and writing a letter to the court bespeaking the proceedings. It has also filed the Notice of Motion dated 19th August 2021 made, inter alia, under Order 42 rule 6 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) seeking, “[A]n Order of Stay of Proceedings of the main suit pending hearing and determination of the Appeal lodged by the Plaintiff at the Court of Appeal.” The application is supported by the Plaintiff’s affidavit sworn on the same day. The 4th Defendant opposes the application through the replying affidavit of its Head of Legal, Lawrence Karanja, sworn on 23rd September 2021.
3. At this stage, I note that the Plaintiff filed this application after I delivered a ruling dated 29th July 2021 dismissing the Bank’s application to dismiss the suit for want of prosecution or in the alternative to strike out the Bank from the suit. In that ruling I stated that, “I am prepared to give the Plaintiff a chance to pursue its appeal but it ought to apply for stay of proceedings pending appeal if it is to guard against the suit being dismissed in the future.”
4. Both counsel appearing for the parties made submissions in support of their respective positions which I have considered bearing in mind the principles for granting stay of proceedings clearly elucidated by Ringera J., in *Re: Global Tours and Travels Ltd NRB HC Winding Up Cause No. 43 of 2006 (UR)* cited in *Kenya Wildlife Service v James Mutembei* MRU HCCA No. 40 of 2018 [2019] eKLR as follows:

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.
5. In light of the aforesaid principles, I am not inclined to stay these proceeding pending the hearing and determination of the appeal for several reasons. First, the ruling appealed from in fact allowed the Plaintiff’s plea to proceed with the suit as a derivative suit. Having succeeded on that limb, it cannot now put the proceedings on hold to the detriment of the other Defendants. Second, the court only dismissed the prayer for an injunction against Bank. Having dismissed the application for injunction, there is nothing to stay and an order of stay of proceedings would not assist Plaintiff in preserving the suit property (see *Western College of Arts and Applied Sciences v Oranga and Others* [1976] 1 KLR 63 and *Co-operative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya)* [2015] eKLR).



6. Finally, I have read and re-read the deposition in support of the application and I find that the Plaintiff has not demonstrated how the intended appeal will be rendered nugatory or it will suffer substantial loss if the order of stay is not granted. On the contrary, hearing of the suit will enable the parties ventilate their issues conclusively and without delay. On the whole, it would not be in the interests of justice to stay this suit.
7. I dismiss the Notice of Motion dated 19th August 2021 with costs to the 4th Defendant.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Mwanza instructed by Gachie Mwanza and Company Advocates for the Plaintiff.

Mr Kongere instructed by Muriu Mungai and Company Advocates for the 4th Defendant.

