



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO 332 OF 2012**

**MILCAH JERUTO TALLAM T/A**

**MILCAH FAITH ENTERPRISES.....PLAINTIFF**

**VERSUS**

**FINA BANK LTD.....1ST DEFENDANT**

**GEORGE NJOROGI MUIRURI**

**T/A LEAKEY'S AUCTIONEERS.....2ND DEFENDANT**

**RULING**

1. The Plaintiff's application dated 29<sup>th</sup> November 2012 and filed on 4<sup>th</sup> December 2012 has been brought under the provisions of Section 79G and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. Prayer Nos (i), (ii) and (iii) are spent and I will therefore not deal with the same. This will effectively deal with the Defendants' concerns raised in Nos 1 and 2 of their submissions. The application sought the following orders;-

i. **THAT** the application be certified urgent and the same be heard ex parte in the first instance.

ii. **THAT** pending the hearing and determination of this application, this Honourable (sic) be pleased to stay the execution of the ruling and order delivered by this court dismissing the Plaintiff's application dated the 25<sup>th</sup> May 2012.

iii. **THAT** further or in the alternative this Honourable Court be pleased to issue conservatory orders stopping the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (sic) from by themselves, or through their agents, servants, assignees or representatives from advertising, offering for sale, alienating, transferring (sic) disposing, auctioning or in any manner dealing with the Plaintiff's property Property (sic) Title No Nairobi/Block 133/178-Komarock Estate Phase II House No 178- Nairobi pending the hearing and determination of this application or until such time as this court may order.

iv. **THAT** this Honourable Court be pleased to issue conservatory orders stopping the 1<sup>st</sup> and 2<sup>nd</sup> Defendant (sic) from by themselves, or through their agents, servants, assignees or representatives from advertising, offering for sale, alienating, transferring, disposing, auctioning or in any manner dealing with the Plaintiff's property Property (sic) Title No Nairobi/Block 133/178-Komarock Estate Phase II House

No 178- Nairobi pending the hearing and determination of the appeal filed herein or until such time as this court may order.

v. **THAT** costs of this application do abide by the outcome of the Appeal.

2. The grounds on which the Plaintiff relied on in support of her application are as follows:-

a. **THAT** by a ruling delivered on the 26<sup>th</sup> November 2012, this Honourable Court dismissed the Plaintiff's application for an injunction to stop the advertisement and sale of her house by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

b. **THAT** the Plaintiff applicant (sic) being dissatisfied with the said ruling has lodged an appeal to the said ruling and order of 26<sup>th</sup> November 2012. The Applicants (sic) were of the view that the court's findings were erroneous.

c. **THAT** in the meantime there is a real and imminent risk that the Respondents could proceed to advertise and sell the Applicants (sic) property notwithstanding the appeal thereby defeating and rendering the intended appeal nugatory (sic).

d. **THAT** it is therefore necessary that the present application be heard urgently and conservatory orders granted.

e. **THAT** unless a conservatory order is granted as sought, the said sale will defeat the Applicants (sic) statutory rights and the applicant risks losing her assets through the irregular sale.

3. I must point out that the Plaintiff withdrew its application dated 25<sup>th</sup> May 2012 on 18<sup>th</sup> June 2012. The Notice of Motion herein shows that the Plaintiff is seeking a stay in respect of orders issued in that application. I have, however, heard this application as drafted as it was clear in my mind that the application that the Plaintiff was referring to was the one dated 11<sup>th</sup> July 2012 and not 25<sup>th</sup> May 2012. This is a fact that was acknowledged by the Defendants' counsel in paragraph 2 of their submissions. It would have served no purpose for me to dismiss this application on a point of technicality.

4. In opting to proceed this way, I have had due regard to Order 51 Rule 10 (1) and (2) of the Civil Procedure Rules which provide as follows:-

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.**

5. In addition, Article 159 (2) (d) of the Constitution provides that :-

**"In exercising judicial authority, the courts and tribunals shall be guided by the following principles.**

**(d) justice shall be administered without undue regard to procedural technicalities."**

6. Turning to the Supporting Affidavit sworn on 29<sup>th</sup> November 2012, Milcah Jeruto Tallam, the deponent therein reiterated the grounds on the face of her application. In addition, she contended that she had an arguable appeal with good chances of success. She averred that if the orders sought were not granted, she would suffer irreparable loss and substantial loss. She also stated that she was willing to offer security by making a down payment of the sum of Kshs 500,000/= and monthly instalments in the sum of Kshs 30,000/= as a sign of goodwill.

7. On its part, the Defendants filed their Grounds of Opposition dated 6<sup>th</sup> December 2012 on the same day. The grounds stipulated as follows:-

- a. **THAT** the application is grossly incompetent and misconceived to the extent that it seeks to stay a negative order that dismissed an application for injunction. The dismissal order is not capable of execution and there is nothing capable of being stayed.
- b. **THAT** the application in its totality does not meet the conditions for grant of the orders set out in the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

8. Both the Plaintiff and the Defendants filed their respective written submissions supported by authorities on 17<sup>th</sup> December 2012 for highlighting on 17<sup>th</sup> December 2012.

9. When the matter came up for highlighting of the written submissions, both Mr Ongegu and Mr Macharia, counsel for the Plaintiff and the Defendants respectively asked this court to give its ruling based on the said submissions without hearing any oral submissions on their part. They both relied on Order 51 Rule 16 of the Civil Procedure Rules Cap 21 ( of the laws of Kenya) which provides as follows:-

**“The Court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written submissions.”**

10. The court acceded to the counsels’ request. The ruling herein has been given on the basis of written submissions in the court file.

11. The Plaintiff relied on the case of **Duncan Nduracha vs Faud M Mohammed & 2 others [2011] eKLR Civil App No 24 of 2011** in which it was stated that an applicant had to demonstrate that an application for stay of execution was not frivolous and that the success would be rendered nugatory if such stay was not given. It was the Plaintiff’s case that the 1<sup>st</sup> Defendant’s right to sell the subject property had not accrued. The fact that the 1<sup>st</sup> Defendant had advertised her property for sale constituted an arguable point of law at the Court of Appeal and for that reason, the application herein was not frivolous.

12. The Plaintiff was apprehensive of encountering difficulties in having the property transferred back to her were it to move to a third party and she was successful on appeal. To further her argument, she relied on the case of **Peter Maina Maingi vs Lucy Kagure Wanjohi [2011] eKLR** where the court held that alteration of a title that had moved to a third party would be cumbersome so as to amount to substantial loss and thus granted an order for a stay. The Plaintiff also deposed that she was willing to satisfy the other condition precedent for the granting of stay orders by providing security pending the hearing and determination of the appeal.

13. On their part, the Defendants argued that the order sought by the Plaintiff could not be made in view of the nature of the order that was given by Ogola J on 26<sup>th</sup> November 2012. It was a negative order incapable of being executed. They submitted that the injunction could only be sought and obtained from the Appellate court as it is the court to which an appeal had been preferred.

14. The Defendants relied on **Civil Application No NAI 219 of 2007 (134/2007 UR) Sonalux Limited & Another vs Barclays Bank of Kenya Limited & others** (unreported) in which the Court of Appeal declined to stay the orders as there was nothing to be stayed. The superior court had in that case dismissed an application for injunction which essentially made it a negative order.

15. It was the Defendants’ case that the conservatory orders sought by the Plaintiff herein were only envisaged in the Bill of Rights contained in the Constitution of Kenya, 2010. It was the Defendants’ submission that the Plaintiff’s prayer for such conservatory orders would amount to a similar prayer for an injunction that was declined by this court and which can only be granted by the appellate court.

16. The Defendants were categorical that the issue of substantial loss emanating from the sale of the house had been canvassed in Notice of Motion application dated 11<sup>th</sup> July 2012 dismissed by Ogola J. The

Defendants therefore argued that the same arguments could not be re-visited at this stage.

17.They asked this court to consider **HCCC No 291 of 2012 Alex Mwangi Gitau vs Barclays Bank of Kenya Limited** (unreported) in which Musinga J (as he then was) stated that the sentimental value which the Plaintiff therein attached to the suit property could not be permitted to defeat the legal rights which had accrued to the defendant pursuant to the legal charge.

18.The bone of contention herein is whether or not the order issued by Ogola J could be stayed. To establish this fact, I have had due regard to Section 2 of the Civil Procedure Act Cap 21 of the laws of Kenya which in the definition of a decree holder, alludes to an order that “is capable of execution.”

19.In that section, a decree holder is defined as “any person in whose favour a decree has been passed or **an order capable of execution** has been made...” It therefore obtains that there are orders that are capable of execution while others are not.

20.I have carefully considered the application, the Supporting Affidavit, Grounds of Opposition and the submissions placed before me and find that the orders sought by the Plaintiff herein are distinguishable from those of the cases that she relied on in support of her case. In the **Duncan Nduracha** case, the Court of Appeal issued stay of execution of the judgment and order of eviction. In the **Peter Mwangi Maingi** case, the Court of Appeal issued a stay of execution pending the hearing and determination of the appeal and decree of the superior court. These were orders stayed because they were capable of being executed.

21.While dismissing an application for injunction in the case of **Yellow Horse Inns Ltd vs Nduachi Company Limited & others** [2011] eKLR, Mbogholi Msagha J said that :-

**“Whatever the case, the order that commends itself is the preservation of the subject matter in the name of the 2<sup>nd</sup> Defendant”.**

22.On appeal of his said ruling, the Court of Appeal heard an application under Rules 5 (2) (b) and 42 of the Court of Appeal Rules and granted an injunction. It is clear that the stay of execution of the order of the superior court was granted as it was capable of being acted upon.

23.Quoting **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 Of 2007 ( unreported)** in the **Re Sonalux** case, the Court of Appeal had this to say:-

**“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”**

24.To further emphasise the point in the **Re Sonalux** case, the Court of Appeal stated that in the matter that was before it, Kasango J in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money.

25.Undoubtedly, the Plaintiff strongly feels that she has an arguable appeal at the Court of Appeal. I am, however, alive to the fact that this court cannot sit on an appeal in a matter that has been handled by a court of similar and competent jurisdiction and give the same orders that such a court had refused to grant and more so when the law does not provide that the same can be granted.

26.A close scrutiny of the Civil Procedure Rules 2010 does not reveal any provision that would allow this superior court to grant stay orders emanating from the dismissal of an application that had sought injunctive order in the same court. Order 42 Rule 6 of the Civil Procedure Rules 2010 under which the Plaintiff’s application reads as follows:-

**“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or an order appealed from... the court appealed from may for sufficient cause order stay of execution**

**of such decree or order...”**

27.Ogola J neither ordered any party to do anything or abstain doing anything or to pay any money. It was a negative order incapable of being stayed. His ruling essentially concluded as follows:-

**“In view of the foregoing, I do not find that the Plaintiff has established a prima facie case capable of succeeding on trial.”**

28.I find that issuing conservatory orders as sought by the Plaintiff would amount to this court granting the same orders that Ogola J deemed fit not to grant. In any event, as has been rightly submitted by the Defendants’ counsel, a conservatory order can only be issued under Article 2 (3) (c) of the Constitution 2010 where a person has instituted court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. The transaction herein was commercial in nature and accordingly, the Plaintiff cannot rely on the conservatory order to assist her case herein.

29.In view of the fact that the order by Ogola J was a negative order and that there is nothing to be stayed and the fact that the Plaintiff is not entitled to any conservatory orders, I do not find any merit in the Plaintiff’s application. For that reason, I hereby dismiss the Plaintiff’s Notice of Motion application dated 29<sup>th</sup> November 2012 with costs to the Defendants.

30.Orders accordingly.

**DATED and DELIVERED at NAIROBI this 7th day of March 2013**

**J. KAMAU**  
**JUDGE**