



**Katsran Limited v SBM Bank (Civil Application E069 of 2023)
[2023] KECA 1491 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1491 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E069 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
DECEMBER 8, 2023**

BETWEEN

KATSRAN LIMITED APPLICANT

AND

SBM BANK RESPONDENT

(Being an application for stay of execution pending appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (M. D.Kizito, J) dated 5th July 2023 in HCCC No 111 of 2018)

RULING

1. Before us is the applicant's notice of motion dated August 10, 2023 filed under rules 5(2) (b) and 41 of the *Court of Appeal Rules, 2010* seeking stay of execution of the ruling and consequential orders of the High Court of Kenya at Mombasa (Kizito, J) dated July 5, 2023 in Mombasa HCCC No 111 of 2018 pending appeal. The applicant (Katsran Limited) also prays that the costs of the application be provided for.
2. The applicant's motion is supported by the annexed affidavit of Henry Mutua Katambo (the applicant's director) sworn on August 10, 2023. The motion is opposed *vide* the replying affidavit of Kevin Kimani (the respondent's legal manager) sworn on August 30, 2023.
3. The précis of the applicant's motion is that, by a plaint dated November 27, 2018, the applicant instituted proceedings against the respondent (SBM Bank Limited) for: a declaration that the statutory notice of sale of LR No Kwale/Ngomeni/2401, Kiteje area, Kwale County (the suit property) by public auction on December 5, 2018 by Keysian Auctioneers *vide* the advertisement in the Daily Nation Newspaper of November 26, 2018 was unlawful; a permanent injunction restraining the respondent by itself, its agents, servants and/or employees from selling or offering for sale, transferring, charging, leasing, pledging or in any other way alienating or disposing of the suit property and/or otherwise howsoever from interfering therewith; damages; costs of the suit and interest.



4. The applicant's plaint was accompanied by its Notice of Motion of even date supported by the annexed affidavit of the said Henry Mutua Katambo sworn on November 27, 2018 seeking interim injunctive relief pending determination of its suit.
5. The applicant's motion was anchored on the grounds that despite request to the auctioneers to withhold sale of the suit property to facilitate negotiation, they nonetheless proceeded to advertise the property for sale; that the respondent and its predecessor (Chase Bank Limited) were malicious and unfair towards the applicant in that they were holding its investments in excess of Kes 17,000,000, which they were unable to repay in consequence of the bank's insolvency and liquidation; that the sums demanded were not due or payable to the respondent; that the suit property was being undervalued at Kes 4,500,000 instead of Kes 50,000,000; and that if interim orders of injunction were not granted, the applicant stood to suffer substantial loss and irreparable damage.
6. The respondent opposed the applicant's Motion vide the replying affidavit of Kevin Kimani sworn on February 15, 2019 and filed together with its defence of even date. It urged the trial court to dismiss the applicant's Motion with costs on the grounds that the applicant had defaulted in payment of the subject loan; that it had failed to respond positively to the respondent's written demand dated 10th July 2017 pursuant to section 90 of the *Land Act, 2012*; that the respondent issued a redemption notice of 90 days *vide* a letter dated January 15, 2018; that the respondent sent to the applicant a further demand of 40 days on May 24, 2018 pursuant to section 96(2) of the Act; that the applicant admitted its indebtedness and default in payment *vide* its letter of August 22, 2017; and that the respondent instructed Keysian Auctioneers to sell the suit property by auction in exercise of its statutory power of sale.
7. In addition to its replying affidavit, the respondent filed a defence dated February 15, 2019 denying the applicant's claim essentially contending that the applicant was not entitled to the orders sought. The respondent's case was that the applicant had charged the suit property sometime in the year 2015 to secure repayment of a loan advanced to it by the respondent in the sum of Kes 13,017,160; and that it had defaulted, giving rise to the respondent's statutory power of sale to enforce the security. It urged the trial court to dismiss the applicant's suit with costs.
8. When the applicant's motion came for hearing on September 26, 2019, the same was determined by consent of the parties in terms that: the suit property be valued by Maina Chege & Co Valuers; that the valuation fee be shared equally between the parties; and that the matter be mentioned on November 5, 2019 for further orders. When the applicant's Motion came for further mention on December 13, 2019, the learned Judge directed that "... the bank be at liberty to exercise its statutory power of sale based on the valuation by Maina Chege & Co Valuers and Property Investment Consultants dated October 31, 2019." The learned Judge also directed that the parties attend court on March 5, 2020 to confirm whether, after the sale, there was a dispute for determination by the court.
9. Two other applications by the applicant followed. The first in time was dated March 17, 2020 seeking review of the court's directions of Dr P J Otieno, J. dated December 13, 2019 directing the respondent to proceed and exercise its statutory power of sale in conformity with the valuation report dated October 31, 2019. That application was dismissed *vide* a ruling delivered on July 15, 2022. In its second application dated September 19, 2022, the applicant requested the court to order revaluation of the suit property, reconciliation of the loan account and vacation of the consent order recorded on September 26, 2019. The record as put to us does not disclose the fate of that application.
10. What is clear to us, though, is that, when the applicant's suit came for hearing on July 5, 2023 before Kizito, J, the trial court dismissed the applicants suit with costs assessed at Kes 425,000 payable within 30 days next following and, in default, execution to issue. And that is the decision that is sought to be



stayed in determination of the applicant's Motion now before us. The only question that falls to be determined is whether this Court can stay what are essentially negative orders.

11. This Court in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR held that:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High court judgment for this Court, in an application for a stay, it is so ordered.”

12. Likewise, the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR held that:

“Following that approach of looking at the nature of the orders even before delving into the said principles in a rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & anor* [2005] 1 EA 53 where it was stated:

‘... The order which dismissed the suit was a negative order which is not capable of execution...’”

13. In the same vein, this court in *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR held that:

“20. 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.”

14. The applicant has failed to meet the principles that govern the exercise of the court's discretionary power under rule 5(2)(b) of the *Rules* of this court. There is no order in the impugned decision in respect of which the court can exercise its discretionary power to put on hold pending the hearing and determination of the appeal. In the circumstances, we find no merit in the notice of motion dated August 10, 2023, which we hereby dismiss with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 8TH DAY OF DECEMBER, 2023.

A. K. MURGOR



.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....
JUDGE OF APPEAL

G.V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

