



Murithi & another v Sidian Bank Limited & 4 others (Environmental and Land Originating Summons 40 of 2020) [2024] KEELC 7547 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 40 OF 2020**

CK YANO, J

NOVEMBER 14, 2024

(FORMERLY MOMBASA ELC NO. 78 OF 2019)

BETWEEN

**SAMUEL KIOME RIMBERE MURITHI 1ST APPLICANT
GODFREY MUGAMBI KIMATHI 2ND APPLICANT**

AND

**SIDIAN BANK LIMITED 1ST RESPONDENT
STELLA NYAKIO NGUGI 2ND RESPONDENT
ANDREW LYALI 3RD RESPONDENT
THE LAND REGISTRAR MERU CENTRAL 4TH RESPONDENT
THE ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. The subject of this ruling is a notice of motion application dated 9th May 2024 said to be brought under Article 10 (2) (b), Article 159 of *the Constitution*, Section 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 9 Rule 9, order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of Law. The application is seeking orders of stay of execution of the judgment of this court delivered on 14th March 2024 pending the hearing and determination of an intended appeal. The application is premised on the grounds thereon and is supported by the affidavit of Godfrey Mugambi Kimathi sworn on 9th May 2024.
2. In opposing the application, the 1st respondent filed a replying affidavit dated 17th July, 2024 sworn by Jackline Ndung'u.



3. The applicants state that they were dissatisfied with the decision of this court delivered on 14th March 2024 and have filed a notice of appeal. They are apprehensive that the respondents shall interfere with the property subject of the intended appeal and that they will suffer hardship and the intended appeal be rendered nugatory as a result, they shall suffer substantial loss.
4. It is the applicants' contention that they have an arguable case which has very high possibility of success and urge the court to issue a stay of execution to preserve the suit property pending the hearing of the intended appeal. That it is in the best interest of justice that this application be allowed to give the applicants their right of appeal as the parties await the decision of the court of appeal in the intended appeal. The applicants contend that they have come before court with speed within the limits of the law seeking stay of execution of this court's judgment pending appeal. That the application has merit and no person shall be prejudiced if the order for stay is granted pending the hearing and determination of the intended appeal.
5. In the supporting affidavit, the applicants have annexed copies of the judgment and decree, notice of appeal, draft memorandum of appeal, and a title deed for title No. Nyaki/Kithoka/1914 in the name of Godfrey Mugambi Kimathi who has deponed that he purchased the suit property from the 1st applicant after he conducted due diligence and that he has been in actual and exclusive possession of the property which is agricultural land and extensively developed. The applicants are apprehensive that the 1st respondent may take over the property for sale by public action in order to recover their loan amount thereby rendering the intended appeal nugatory.
6. It is the 1st respondent's contention inter alia, that the application is fatally incompetent, lacks merit, is an abuse of the court process and is for dismissal without further consideration. The 1st respondent further contends that following the delivery of the court's judgment on 14th March 2024, the court became functus officio. That unless the court is moved on a motion seeking to review its decision under the relevant provisions of the law, which is not the circumstance in this case, then the court cannot continue exercising jurisdiction over the matter. That there will be no finality in proceedings if a court is permitted to continually revisit or reconsider its final orders simply because a party intends to appeal.
7. It is also the 1st respondent's contention that the applicants have not satisfied the requisite conditions for granting stay of execution provided for under the law, to wit, that the applicants will suffer substantial loss, that the application has been brought without unreasonable delay and that the applicants have given an undertaking as to security.
8. The 1st respondent state that the application was filed 56 days after the delivery of judgment and no explanation for the delay has been provided. That the applicants have not demonstrated what substantial loss they stand to suffer if the orders sought are not issued. That in any event, it is the Bank that continues to suffer substantial loss as the acts of the 5th respondents herein in cancelling the entry connoting the Bank's charge left the bank with an unsecured facility which facility remains unpaid and continues to accrue interest and penalties. The 1st respondent wants the application dismissed with costs.
9. The application as canvassed by way of written submissions. The court has perused and considered the submissions filed and I need not reproduce the same in this ruling.
10. I have considered the application, the response and the submissions filed. I have also considered the authorities relied on. The main issue for determination is whether the applicants have met the prerequisite for grant of stay of execution of the judgment/decree pending appeal.



11. The jurisdiction of this court to grant orders of stay pending appeal is donated by Order 42 Rule 6 of the Civil Procedure Rules which provides as follows-;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 applicant 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 applicant”

12. My reading of the above rule is that this court, as the court appealed from, may order stay where sufficient cause has been shown. I am therefore not persuaded by the 1st respondent’s submissions that this court is functus officio. I will therefore proceed to determine whether the application has merit.

13. One of the most enduring authorities on the issue of substantial loss is the case of Kenya Shell Ltd Vs Kibiru & another [1986] eKLR. The principles enunciated in that case have been applied in countless decisions of superior courts. The pertinent issues are that in considering an application for stay, the court doing so must address itself to the question of whether to refuse it would render the appeal nugatory, that the court should balance two parallel prepositions, first, that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause, and secondly, that execution would render the appeal nugatory.

14. The court will interrogate if the application has been made without unreasonable delay, whether substantial loss will result to the applicants unless the order sought is granted and whether security for due performance of the decree has been given by the applicants (see also Kiambu Transporters Vs Kenya Breweries [2000] eKLR). It is also important to note that granting such an order is a matter of discretion and should be decided in the interest of justice.

15. From the record, the judgment herein was delivered on 14th March, 2024. This application was filed on 9th May 2024. This was a period of close to two months. In my considered view, there was inordinate delay which has not even been explained by the applicants. It would have been advisable for the applicants to explain the reason they never made the application timeously.

16. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss accruing to the applicants, the court in its judgment, found that the manner in which the suit land was transferred to the applicants was fraudulent since the original title documents were and are still held by the Bank as Security. In my view, any loss that the applicants may suffer can adequately be compensated in



damages in the form of the refund of the consideration paid. Therefore, the intended appeal may not be rendered nugatory.

17. The upshot is that the application dated 9th May 2024 is devoid of merits and the same is dismissed with costs to the 1st respondent.

18. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF NOVEMBER, 2024

In the presence of

Court Assistant – Tupet

No appearance for applicant

No appearance for respondents

C.K YANO

ELC JUDGE

