



**Nganga v Inncity Properties Limited & 2 others (Environment & Land
Case 24 of 2020) [2024] KEELC 14029 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 24 OF 2020
MD MWANGI, J
DECEMBER 17, 2024**

BETWEEN

JOSEPHINE MUKUHI NGANGA PLAINTIFF

AND

INNERCITY PROPERTIES LIMITED 1ST DEFENDANT

HOUSING FINANCE CO LTD 2ND DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 3RD DEFENDANT

(In respect to the 1st defendant's Notice of Motion dated 28TH June, 2024 brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law)

RULING

Background

1. The 1st Defendant herein through its Notice of Motion application dated 28th June, 2024 prays that these proceedings be stayed pending the hearing and determination HCCOMM E030 of 2020 between Intercity Properties Limited -vs- Housing Finance & Gram Investments Limited. The application is premised on the grounds on the face of it and on the affidavit of Wilson K. Gachanja.
2. The 1st Defendant/Applicant explains that it sold apartments known as B3 and B4 to the Plaintiffs in the months of October 2016 and January 2018 respectively and handed over vacant possession to them and which they continue to enjoy to date. The Plaintiffs however instituted this suit against the 1st Defendant and two others on the allegation that the 1st Defendant had failed to procure partial discharges for the apartments from the 2nd Defendant in their favour. They sought an order of specific performance against the 1st Defendant and an order to compel the 2nd Defendant to execute the partial discharges.



3. The 1st Defendant on its part has instituted the suit HCCOMM E030 of 2020 against the 2nd and 3rd Defendants herein challenging the 2nd Defendant's intention to exercise its statutory power of sale over the 14 Apartments within the Zahara Gardens which include Apartments B3 and B4, claimed by the Plaintiffs and the subject matter of this suit.
4. The 1st Defendant therefore avers that the hearing and determination of HCCOMM E030 of 2020 has a direct bearing and impact on this case. It is therefore in the interest of justice and equity that this suit be stayed pending the hearing and determination of HCCOMM E030 of 2020. The determination of that suit will have one way or another an impact on this case and in particular, the Plaintiffs' cause of action. It will establish whether the 1st Defendant has the legal capacity to complete the sale transactions with the Plaintiffs.
5. The application is opposed by the Plaintiffs by way of the affidavit sworn by Henry Ng'ang'a Waweru on 18th September 2024, who accuse the 1st Defendant of suppressing material information at the time of entering into the sale agreements with them. He asserts that the 1st Defendant did not disclose to them that the suit properties were charged to the 2nd Defendant and that it could not therefore, without the consent of the 2nd Defendant complete the sale and transfer of the suit properties.
6. The Plaintiffs assert that there is no need of staying the current suit pending the hearing and determination of HCCOMM E030 of 2020 in view of the fact that they are seeking the alternative remedy of damages for breach of contract.
7. The 1st Defendant/Applicant filed a further affidavit sworn by Wilson K. Gachanja on 7th October, 2024 insisting that the Plaintiffs in their amended Plaint dated 19th January 2022 seek an order of specific performance and an order seeking to compel the 2nd Defendant to procure execution of partial discharges in respect of the Plaintiff's apartments. The deponent reiterates that the Plaintiffs have possession of the apartments and therefore will not be prejudiced by the stay orders sought herein.
8. The 2nd and 3rd Defendants did not participate in the application.

Court's Directions

9. The Court's directions were that the application be canvassed by way of written submissions. The 1st Defendant/Applicant and the Plaintiffs/Respondents complied and filed their respective submissions. The court has had the opportunity to peruse and consider their submissions which now form a part of the record of the court.

Issues for Determination

10. The sole issue for determination is whether it will serve the interest of justice to stay these proceedings awaiting the hearing and determination of HCCOMM E030 of 2020.

Determination

11. In the case of KWS –vs- James Mutembei (2019) eKLR, the court cautioned that stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right to access to justice, right to be heard without delay and overall, the right to a fair trial. Therefore, the test for stay of proceedings is higher and more stringent than that of stay of execution of pending appeal.



12. Earlier on, Ringera, J. (as he then was) had in the case of Re-Global Tours and Travel Ltd HCWC No. 43 of 2000, spelt out the principles to be considered in an application for stay of proceedings in the following words.

“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”.

13. It is not disputed that the suit HCCOMM E030 of 2020 and this suit are in relation to the same subject matter. HCCOMM E030 of 2020 is by the 1st Defendant/Applicant in this suit against the 2nd and 3rd Defendants herein challenging the 2nd Defendant’s intention to exercise its statutory power of sale over the 14 Apartments within the Zahara Gardens which include Apartments B3 and B4, claimed by the Plaintiffs and the subject matter of this suit. The outcome of the HCCOMM E030 of 2020 will indeed determine whether the 1st Defendant has the legal capacity to complete the sale transactions with the Plaintiffs. It will certainly determine the direction of this suit.
14. As the Applicant has pointed out, the Plaintiffs in their amended Complaint dated 19th January 2022 seek an order of specific performance and an order seeking to compel the 2nd Defendant to procure execution of partial discharges in respect of the Plaintiff’s apartments. The determination in HCCOMM E030 of 2020 is therefore critical in this aspect.
15. In my view therefore, it is in the interest of justice to stay, which I hereby do, the hearing of this case pending the hearing and determination of HCCOMM E030 of 2020. The costs of this application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF DECEMBER, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Gacanja for the 1st Defendant/Applicant

Mr. Kimani for the 2nd and 3rd Defendants

N/A by the Plaintiffs

Joan: Court Assistant

M.D. MWANGI

JUDGE.

