



Gathumbi & another v Equity Bank Ltd & 2 others (Commercial Civil Suit E291 of 2024) [2025] KEHC 7333 (KLR) (Commercial and Tax) (30 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E291 OF 2024**

FG MUGAMBI, J

MAY 30, 2025

BETWEEN

DAVID KARIUKI GATHUMBI 1ST APPELLANT

ARLINGTON CONSTRUCTION LTD 2ND APPELLANT

AND

EQUITY BANK LTD 1ST RESPONDENT

EVANSON KAMAU WAITIKI 2ND RESPONDENT

ROBERT WAWERU MAINA T/A ANTIQUE AUCTION 3RD RESPONDENT

RULING

Introduction and Background

1. This Ruling determines the application dated 27th October 2024 by which the appellants seek to stay the execution of the judgment and decree issued in *MCCC/10942/2018*, pending the hearing and determination of this appeal.
2. The application is supported by the affidavit of David Kariuki Gathumbi, sworn on even date. It is opposed through Grounds of Opposition dated 19th November 2024. Parties filed their respective written submissions which I have equally considered alongside the application, opposition, evidence and case law cited.

Analysis and Determination

3. The first ground of opposition raised by the respondent is that the orders in the impugned judgment are negative and, therefore, not capable of being stayed. The effect of an application for a stay of



execution in a case where the applicant's claim has been dismissed was considered by Court of Appeal in *Kaushik Panchamatia & 3 Others V Prime Bank Limited & Another*, [2020] KECA 418 (KLR).

4. The similarity between the present application and the case before the Court of Appeal lies in the fact that, in both instances, the applicants sought a stay of execution following the dismissal of their claims. In the appellate case, the applicants had filed an application seeking to stay the sale of properties, which was dismissed with costs to the respondents, prompting them to file an interlocutory appeal. Similarly, in the present matter, the appellants' suit was dismissed with costs at the trial court. I am of the view that the principle articulated by the Court of Appeal in the former case equally applies to this case.
5. The Court of Appeal stated as follows:

“The above finding notwithstanding, we cannot lose sight of the fact that the order that the applicants seek to stay is the order of the High Court issued on 24th June 2020 dismissing their application. This is a negative order.”
6. The Court went on to reaffirm its previous decision in the case of *Western College Farts and Applied Sciences V Oranga & Others*, [1976] KLR 63. In that case, perhaps more similar to the circumstances before me, the Court considered whether a stay of execution could be granted in respect of a negative order. It stated as follows:

“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. An execution can only be in respect of costs. ...

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 stay to enforce or restrain by injunction.”
7. Turning to the matter at hand, the appellants filed a suit in the trial court seeking, among other reliefs, an injunction restraining the respondents from dealing with L.R No. KIAMBAA/KARURI/T.380 (the suit property). They also sought orders prohibiting the 1st respondent from transacting with the accounts held by the 2nd appellant, as well as a declaration that the purported sale of the suit property by the respondents was illegal ab initio. However, the appellants' suit was dismissed with costs to the respondents.
8. As guided by the Court of Appeal, the judgment dated 6th September 2024 constitutes a negative order, as it did not require any party to take a positive step but merely denied the relief sought. It neither imposed any obligation nor directed any action to be taken. Consequently, in light of the established threshold, I lack the mandate to grant a stay order as prayed by the applicants.
9. With respect to the nugatory test, the Court of Appeal outlined the principles for consideration in *Stanley Kangethe Kinyanjui V Tony Keter & 5 Others*, [2013] eKLR. They stated inter alia:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.” [emphasis added]
10. In light of this, Section 99(4) of the *Land Act* establishes that if a person suffers harm due to the unauthorized, improper, or irregular exercise of the power of sale, they are entitled to seek



compensation in the form of damages from the party responsible for the wrongful exercise of that power. It provides specifically that:

“ A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

11. The appellants neither alleged nor demonstrated that the respondents would be unable to adequately compensate them for any damages that may be awarded by this Court should the intended appeal ultimately succeed.

Disposition

12. For these reasons the application dated 27th October 2024 lacks merit and it is accordingly dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF MAY 2025.

F. MUGAMBI

JUDGE

