



**Absa Bank Kenya Limited v Atieno (Civil Appeal E073 of 2022)  
[2023] KEHC 272 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 272 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E073 OF 2022  
KW KIARIE, J  
JANUARY 23, 2023**

**BETWEEN**

**ABSA BANK KENYA LIMITED ..... APPLICANT**

**AND**

**JACKTON OSINDO ATIENO ..... RESPONDENT**

*(An application for stay of execution of the judgment delivered  
in Homa Bay CMCC No 59 of 2020 on July 27, 2022.)*

**RULING**

1. The appellant/applicant has two applications brought by way of Notice of Motion. The first is dated August 11, 2022 and the second is dated September 16, 2022. They are brought under sections 1A, 1B & 3A of the *Civil Procedure Act*, order 42 rule 6, order 51 rule 1 of the *Civil Procedure Rules* and articles 47, 48, 159 & 165 (e) of the *Constitution of Kenya*. The applicant is seeking a stay of execution pending the hearing and determination of this appeal.
2. The applications were premised on the following grounds:
  - a. On July 27, 2022, the trial court delivered a judgment in Homa Bay CMCC No 59 of 2020 awarding the plaintiff, among others, general damages of Kshs 200,000/- and costs.
  - b. Aggrieved by the judgment, the applicant appealed against the judgment vide a memorandum of Appeal dated August 11, 2022. The applicant also filed an application for stay under certificate of urgency both dated August 11, 2022 which is scheduled for mention for directions on September 22, 2022.
  - c. Despite knowledge of the appeal and the pending application for stay, the respondent proceeded to file party and party bill of costs dated July 28, 2022. The court taxed the party



and party bill of costs at Kshs 271515 on September 14, 2022. The taxing master declined to issue stay of 309 days of the execution of the taxed amount.

- d. Aggrieved by the taxation, the applicant has also appealed against the taxation by way of Chamber Summons application dated September 16, 2022 on grounds that the taxation was manifestly excessive.
  - e. The respondent, without notice to the Bank's advocate on record and to defeat the pending appeal and application for stay, has now proceeded to instruct Kimu Auctioneers who has served the Bank with warrants of attachment, warrants of sale and proclamation notice all dated September 14, 2022 for the sum of Kshs 475,015.00.
  - f. Further, as per the warrant of sale dated September 14, 2022, the Auctioneer was required to give 45 Days previous notice yet Proclamation notice now gives 7 days contrary to the court's directions.
  - g. The change of circumstances has necessitated this application. I verily believed that from the respondent's action, the applicant faces an imminent and real danger of execution to satisfy the decree emanating from the above judgment.
  - h. Further, the decree is irregular since no draft decree was served upon the applicant for approval before proceeding to extract the same.
  - i. The applicant will suffer substantial loss if the execution proceeds. It is thus in the interest of justice that this honorable court grants interim orders of stay of execution pending the hearing and determination of this application.
  - j. The applicant has arguable appeal with high chances of success and unless stay is granted, the appeal from the judgment and the taxation will be rendered nugatory.
  - k. The respondent has no known sources of income therefore should the intended execution proceed; the Bank will surely be unable to recover the amount from the respondent hence suffer substantial loss.
  - l. The appellant is ready to furnish such security as the honorable court may direct.
  - m. There shall be no prejudice to any party if this application is allowed as prayed.
  - n. It is in the interest of justice that this application is allowed as prayed.
3. The respondent opposed the application on the following grounds:
- a. An appeal does not operate as a stay of execution.
  - b. The applicant did not show that she will be prejudiced.
4. This is an application essentially seeking stay of execution pending the hearing and the determination of the appeal. It is trite law that an appeal does not operate as a stay for execution. Order 42 Rule 6 of the [Civil Procedure Rules](#) states 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 appeal case of 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.

5. In the case of *RWW vs. EKW* [2019] eKLR, the court while addressing its mind to the purpose of a stay of execution order pending appeal, stated:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

6. In the instant case, in the interest of justice, I will allow the applications on grounds that the applicant/appellant deposit the decretal amount in an interest earning account in the joint names of the advocates on record within 30 days of this ruling. Failure to comply, the respondent may be at liberty proceed with execution.
7. Costs shall abide with the appeal.

**DELIVERED AND SIGNED AT HOMA BAY THIS 23<sup>RD</sup> DAY OF JANUARY, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

