



ABSA Bank Kenya Limited v Atieno (Miscellaneous Civil Application E041 of 2022) [2023] KEHC 324 (KLR) (23 January 2023) (Ruling)

Neutral citation: [2023] KEHC 324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL APPLICATION E041 OF 2022**

**KW KIARIE, J
JANUARY 23, 2023**

BETWEEN

ABSA BANK KENYA LIMITED APPLICANT

AND

JACKTON OSINDO ATIENO RESPONDENT

RULING

1. The applicant brought this application by way of Chamber Summons dated September 16, 2022 pursuant to under section 3A of the [Civil Procedure Act](#) & Rule 55(5) of the [Auctioneers Rule](#) 1997. The applicant is seeking the following orders:
 - a. Pending the hearing and determination of this appeal, this honourable court be pleased to grant an order of stay of execution of the warrant of attachment, warrant of sale and proclamation notice dated September 14, 2022 by Kimu Auctioneers. [Spent]
 - b. This honourable court be and is hereby pleased to set aside the taxation proceedings for September 14, 2022 and the certificate of costs dated September 14, 2022 for kshs 271,515/-.
 - c. The court be pleased to order for the taxation of the bill of costs dated July 28, 2022 afresh.
 - d. The honorable court be pleased to set aside and declare null and void the warrants of attachment, warrants of sale, proclamation notices and auctioneer's fees served on the applicant by Kimu Auctioneers.
 - e. In the alternative to prayer 4, the honorable court be pleased to order that the instructing party do meet the costs of Kimu Auctioneers.
 - f. The costs of this application be provided for.
2. The application was premised on the following grounds:



- a. This appeal has been filed promptly as required by the [Auctioneers' Rules](#).
 - b. The learned taxing master erred in law and in fact in failing to take into account the applicant's written submissions dated September 12, 2022.
 - c. The learned taxing master erred in law and in fact in taxing the bill of cost as drawn yet the items, especially item 1, were manifestly excessive.
 - d. The learned taxing master failed to note that the total amount indicated in the bill of costs as drawn was grossly exaggerated at kshs 271,515/- yet the calculation indicates the total amount as kshs 196,590.00.
 - e. The learned taxing master erred in law and in fact by allowing non-existence items and other items not supported by evidence or even the court record.
 - f. The learned taxing master erred in law and in fact by failing to tax off items that were repeated.
 - g. Further, having obtained the certificate of costs, the respondent did not serve the same upon the applicant or their advocates on record before proceeding to instruct auctioneers.
 - h. It is thus the interest of justice that the prayers sought in this application are granted.
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 application on grounds that the applicant 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 23rd Day of January, 2023

KIARIE WAWERU KIARIE

JUDGE.

