



REPUBLIC OF KENYA



**Halifax Financial Services Ltd v Lengees (Civil Appeal 383 of 2022)
[2023] KEHC 18022 (KLR) (Civ) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 383 OF 2022

JN MULWA, J

MAY 25, 2023

BETWEEN

HALIFAX FINANCIAL SERVICES LTD APPLICANT

AND

NENELA SIMANOI LENGEES RESPONDENT

RULING

1. Before the court is an application dated 6/06/2022. The application/application seeks order of stay of execution of the decree and certificate of costs in Nairobi Small Claims Court Case No. E647/2022 delivered on the 27/04/2022, as well as seeking leave to file appeal out of time against the said decree, and upon leave be granted a stay of execution pending the hearing and determination of the intended appeal.
2. I have read the grounds upon which the application is premised together with the supporting affidavit sworn by Collin Nyaema Advocate for the applicant sworn on the 6/06/2022, and the annexures thereto.
3. In opposing the Application, the Respondent filed Grounds of Opposition Dated 8/07/2022 and an affidavit in support of the objection sworn on the 8/07/2022, which the court has perused together with the cited authorities.
4. By the impugned ruling annexed and marked as "CK2" in the applicant's affidavit, the trial court struck out the applicant's case against the respondent with costs for being time barred under the Limitations of Actions Act, Section 4(2), upon a preliminary objection raised by the respondent. Costs were thereafter assessed at Kshs. 35,800/- under provisions of Order 21 Rule 9 of the *Civil Procedure Rules*.



5. I have also considered the draft memorandum of appeal. It raises an issue based on Section 23 (3) of the Limitations of Actions Act that provides for fresh accrual of a right of action on part payment of a debt. In my considered view, this is a triable issue.
6. As ably submitted by the Respondent, the impugned ruling is one that is incapable of execution save for costs, as it is a negative order that requires the plaintiff to do nothing.
7. The Court of Appeal in the case *Catherine Njeri Maranga vs. Serah Chege & Another* (2017) rendered itself that: -

“By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in res where no execution proceedings can be made save in respect of costs only”

The same holding was earlier held in *Commercial Bank Limited v. Tamarind Meadows Limited & 7 others* (2016) eKLR and *Milcah Jinto v. Fing Bank Ltd* (2013) eKLR among others.

8. The instant application is similar to the above decisions. This court has no reason whatsoever to depart from the holdings on the issue.
9. It is therefore very clear to me that the impugned ruling is incapable of being stayed because there is nothing that the applicant has lost, or likely to lose except for costs.
10. On the costs assessed at Kshs. 35,800/= it is trite that costs follow the event as provided under Section 27 of the *Civil Procedure Act*, and unless there are circumstances that negate the said principle. None has been put forth in this application.
11. The court will therefore not order a stay of execution of the costs as assessed by the trial court.
12. On whether the Applicant has laid a basis for an order of leave to file Appeal out of time, I have considered the reasons for the delay. What unreasonable delay is dependents on each case -*Jaber Mohsen Ali & Chelugoi Mohsen Ali v Priscillah Boit & James C. Boit* (2014) eKLR.
13. The delay of slightly over one month has been sufficiently explained to the courts satisfaction. I find no reason to lock out the applicant from his right of appeal – Edith Gichungu Thoiithi (2014) eKLR.
14. Consequently, the application dated 6/06/2022 succeeds partly as follows: -
 - a. The applicant is granted leave to appeal out of time. The memorandum of appeal shall be filed and served within 7 days of this ruling; and the record of appeal within 60 days thereafter.
 - b. There shall be no stay of execution of the costs assessed by the trial court on the struck out suit.
 - c. Costs of this application shall be borne by the applicant.

Orders accordingly

DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF MAY, 2023.

JANET MULWA

JUDGE.

