



Gulf Africa Bank Limited v Petro Afric Company Limited & 2 others (Civil Suit E154 of 2020) [2023] KEHC 21828 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E154 OF 2020
JWW MONG'ARE, J
AUGUST 15, 2023**

BETWEEN

GULF AFRICA BANK LIMITED PLAINTIFF

AND

PETRO AFRIC COMPANY LIMITED 1ST DEFENDANT

AHMED ABDULAHI ALI 2ND DEFENDANT

NUR AHMED HARI 3RD DEFENDANT

RULING

1. On December 14, 2022 the Applicant by a Certificate of Urgency moved the court through a Notice of Motion brought under Section 1A, 3A and 80 of the *Civil Procedure Act*; Order 42 Rule 6 and Order 50 Rule 6 of the *Civil Procedure Rules* and Article 159 of the *Constitution* of Kenya seeking the following orders;
 1. Spent
 2. That this Honourable Court be please to grant leave to extend the time limited to filing of a Notice of Appeal and a memorandum of Appeal.
 3. Their be an interim stay of execution of the interlocutory judgments and decree herein against the defendants on November 12, 2020, and all consequential orders thereto, pending the inter parties hearing and determination of this application.
 4. In the event this application succeeds, a stay of execution do issue pending the hearing of the intended appeal.



5. This court be pleased to grant the Applicants leave to appeal out of time against the ruling of this honourable court dated October 21, 2022.
 6. That corollary to the foregoing, the Notice of Appeal filed by the appellant be deemed as properly and duly filed thus part of the record.
 7. That costs of and incidental to this application do abide the results of the said appeal.
2. The Application is premised on the grounds set on its face and the supporting affidavit sworn by Mary Koko Advocate on December 14, 2022. In opposing the application, the Respondents filed an application dated February 9, 2023.
 3. The Applicant raised two issues in their said application. Firstly, that they are seeking for enlargement of time within which to file their appeal and argue that they were not notified of the delivery of the ruling by the court on October 21, 2022. The Applicant further contend that failure to put in their appeal within the time frame allowed by law was not their fault since they became aware of the ruling only on December 8, 2023 and have since quickly moved the court through the application filed on December 14, 2022. Secondly, the Applicant is seeking to have the execution of the decree stayed pending the hearing and determination of the appeal. The Applicant argues that a substantial part of the loan had been paid amounting to ksh 26,000,000/- from the loan amount of ksh 76,000,000/- and that the court in its decision, failed to take note of that and hence execution of the judgment as issued would greatly prejudice the Applicant, as it would amount to double payment. The Applicant informed the court it was ready to comply with the conditions set by the court therein in terms of security for costs.
 4. In response to the application, the Respondents relied on the supporting affidavit sworn by Mr. Lawi Sato, the legal officer of the Respondent bank. The Respondent urged the court not to grant the orders sought. The Respondent contented that there was no good faith demonstrated by the Applicants since no payment had been made towards reducing the judgment debt since its issuance. The Respondent further argued that the Applicants were guilty of material non-disclosure in that they failed to notify the court that the Applicant had been sued and judgment obtained in the Environment and Land Court in respect of the property charged to the bank and the said court had ordered that the security to be discharged in ELC no 703 of 2011(*Tejprakash Sehm v Petroafric co. ltd*) and that any stay of the judgment herein will be prejudicial to the Respondent, since it technically held no security over its loans to the Applicant. The effect of the judgment in the ELC case was to deny the Respondent a security upon which to fall upon to realise their debt.
 5. The Respondent took issue with the supporting affidavit sworn by the Applicant's counsel on record and urged the court to strike it on account of the fact that she could not depose authoritatively on contentious matters. It was contended by the Respondent that the reason why the Applicant could not swear to the facts of the case was to avoid perjuring themselves on account of the material non-disclosure on the ELC case and its outcome. The Respondent urged the court to dismiss the application and allow the execution process to proceed.
 6. In considering whether the Applicant has made a case to be granted the orders sought I have considered the conduct of the Applicant in these proceeding. The orders sought herein are discretionary and so the court has to be persuaded that the Applicant is deserving of the same. I note that the Respondent has alleged that the Applicant did not offer any evidence in terms of witness statements and that even in the application before the court, the Applicant did not swear any affidavits in support thereof but left it to its lawyers to depose as to the merits of the same.



7. The Respondent alleges that the Applicant did not offer any evidence to defend the main suit and that their defence was struck out by the court and a subsequent application to set aside the judgment was dismissed by the court. I have considered the responses filed herein and the arguments advanced by the Respondents that this court has no jurisdiction to enlarge time to allow the Applicant to file an appeal. From the pleadings placed before me, the Applicant's defence to the suit was struck out as the court held that the same amounted to an admission and subsequently judgment was entered in favour of the Respondent. The Applicants did not place on record any evidence in terms of witness statement and nor has the Applicants' directors sworn any affidavits on record. All the affidavits on record throughout these pleadings are by the counsel representing the Applicants. It is trite that an advocate or agent can only swear an affidavit to matters that are uncontested and within their knowledge and in addition thereto with the direct authority of the parties to the suit. No authority to swear the affidavit on record has been availed to the court. Order 19 Rule 3 of the [Civil Procedure Rules](#) on affidavits provides as follows:-

“Matters to which affidavits shall be confined [Order 19, rule 3.] Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

The affidavit sworn by Mary Koko falls short of the requirements set out under Order 19 cited above, in my view. I am therefore persuaded that the affidavit by Mary Koko advocate is not properly before the court and I will strike it out from the records.

8. Secondly, on the intended appeal, the Applicant has moved the court under Order 50 Rule 6 of the [Civil Procedure Rules](#) seeking for enlargement of time to file the intended appeal. The said Order 50 Rule 6 provides as follows:-

“Power to enlarge time [Order 50, Rule 6.] Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed; Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Having struck out the supporting affidavit of Mary Koko for the reasons above, I find that the application for enlargement of time is not supported by evidential material for me to consider the same. I have also considered the draft Memorandum of Appeal. I have also considered the fact that this court, after weighing the evidence placed before it, properly found in favour of the Respondents and entered the judgment in their favour. In my considered opinion, the Applicant has not come to this court with clean hands. Failure to disclose that the security to the bank loan was ordered by a court of law to be discharged was in itself a demonstration of bad faith. In addition, and in my view, the Respondents have a legitimate expectation to realise the fruits of their judgment. I am not therefore persuaded that the Applicant has made a case for this court to grant the reliefs sought. I find and hold that the application as filed lack merit and it is hereby dismissed. Costs of this application are awarded to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF AUGUST 2023



.....

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Otieno holding brief for Allen Gichuhi for the Plaintiff.
2. Ms. Koko for the Defendant.
3. Sylvia- Court Assistant

