



**MSK v SNK; Prime Bank Limited (Objector) (Divorce Cause 6 of 1997)  
[2023] KEHC 21732 (KLR) (Family) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21732 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
DIVORCE CAUSE 6 OF 1997  
MA ODERO, J  
AUGUST 4, 2023**

**BETWEEN**

**MSK ..... PETITIONER**

**AND**

**SNK ..... DEFENDANT**

**AND**

**PRIME BANK LIMITED ..... OBJECTOR**

**RULING**

1. Before this court are two application for determination being
  - “1. Notice of Motion dated December 18, 2022.
  2. Chamber Summons dated December 30, 2022”.
2. Both applications were filed by SNK the Defendant/Judgement Debtor in this matter.

**Background**

3. This matter has had a very long and conducted history in the corridors of Justice.
4. The Petitioner herein MSK had filed a Notice to Show Cause dated September 22, 2022 seeking to enforce the Judgement and Decree of the court of Appeal dated April 24, 2015.
5. Vide a ruling delivered by the Hon. Catherine Nganga Deputy Registrar on December 16, 2022 the court declined to grant orders for stay of Execution of the judgement and Decree of the Court of Appeal delivered on April 24, 2015 in Civil Appeal No 159 of 2010.



6. The Notice To Show Cause (NTSC) was heard and on a ruling was delivered by Hon CN Nganga Deputy Registrar on December 16, 2022 in the following terms:-
- 7.
- “ a) The Notice to Show Cause dated September 21, 2021 is hereby allowed.
  - b) A Prohibitory Order is hereby issued and registered on LR No Nairobi/Block xxxxx, Nairobi/Block xxxx and LR No xxxxx (South C) registered in the names of SNK.
  - c) LR Nairobi/Block xxxxx, Nairobi/Block xxxx and LR No xxxxx (SOUTH C) registered in the names of SNK are attached for sale by public auction to recover the outstanding amount.
  - d) The petitioner/deed holder is hereby directed to avail a valuation report showing the current open market value and forced sale value of LR Nairobi/Block xxxxx, Nairobi/Block xxxx and LR No xxxxx (SOUTH C) registered in the names of SNK.
  - e) Settlement of terms of sale on December 28, 2022 at 9.00am.”
8. Being dissatisfied by that ruling the Judgement/Debtor filed the Appeal dated December 16, 2022. He also filed the two applications now before this court I will proceed to consider each application individually.
9. The applications were canvassed by way of written submissions. The Applicant filed the written submissions dated March 7, 2023. The Respondent also filed submissions dated March 7, 2023 whilst the Objectors submissions were dated March 3, 2023.

**(i) Notice of Motion dated December 18, 2022**

10. In the application the Judgement/Debtor sought the following orders:-
- “ 1. Spent
  - 2. Spent
  - 3. Spent
  - 4. That this Honourable Court be pleased to stay the execution of the orders made herein pending the hearing and determination of the Appellant’s appeal against the said orders made on December 16, 2022.
  - 5. That this Honourable Court be pleased to stay the settling the terms of the sale scheduled for December 28, 2022.
  - 6. That the costs of this application be provided for”.
11. The Summons was premised upon Order 40 rule 10, order 42 rule 6, order 47 rule 7(2) and order/ rules 1-301 the *Civil Procedure Rules* and matrimonial causes Rules 57-60 made under the repealed Matrimonial Causes Act and Article 162. 165 (6) (7) of the *Constitution of Kenya* and was supported by the Affidavit of even date sworn by the Judgement/Debtor.



12. The Objector Prime Bank Limited opposed the application through the Replying Affidavit dated February 8, 2023 sworn by George Mathu the Senior Manager Legal of the Objector Bank.
13. The Judgement/Debtor argued that the court had jurisdiction to make orders to protect the subject matter of the suit pending the hearing and determination of his Appeal. He pleaded that he is likely to suffer substantial loss if the orders made by the Hon. Deputy Registrar on December 16, 2022 are not stayed.
14. The Objector Bank in opposing the application for stay argued that the Judgement and Decree of the court of Appeal upon which the Notice To show Cause was premised have not been appealed against nor reviewed or set aside. That it is not disputed by the Judgement/Debtor that he is yet to comply with the orders made by the court of Appeal.
15. The Objector points out that in a Ruling delivered in this matter on May 12, 2017. Hon. Justice William Musyoka directed that execution of the orders made by the Court of Appeal should proceed. That the Judgement/Debtor has not filed an appeal against this ruling of May 12, 2017.
16. The Objectors stated that this court being a court of concurrent cannot purport to sit in appeal over an order made by a fellow High Court Judge. That no justifiable grounds have been set out by the Judgement/Debtor for a grant of a stay. The Objector urge the court to dismiss this application in its entirety.
17. I have carefully considered the application dated December 18, 2022 the reply filed thereto as well as the written submissions filed by both parties. The only issue to be determined is whether the stay prayed for ought to be granted.
18. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides the guiding principles which one must satisfy before the court can grant order of stay of execution as follows:-
  - “No order for stay of execution shall be made under sub-rule
    1. Unless-
      - a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay;  
and
      - b. Such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the Applicant”.
19. The impugned orders were made on December 16, 2022. This application for stay of execution was filed on December 18, 2022 barely two (2) days after the ruling was delivered. I am satisfied that the application was filed in a timely manner.



20. The Judgement/Debtor is also required to satisfy the court that he stands to suffer substantial loss if the orders of stay are not granted. In the case of *James Wangalwa And Others v Agnes Naliaka Cheseto* (2011) eKLR it was held as follows:-

“The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Application as the successful party in the appeal. This is what substantial loss would entail...”

21. Likewise, in *Machira t/a Machira & Company Advocates v East Africa Standard (No2)* (2002) KLR 63, court held:

“In this kind of application for stay it is not enough for the application to merely state that substantial loss will result. He must prove specific debate and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay....” [own emphasis]

22. In my view the Judgement/Debtor has not demonstrated what loss he is likely to suffer as the subject matter of this suit is a property which may be valued and the Judgement/Debtor adequately compensated in monetary terms.

23. Finally, I have read the ruling dated May 12, 2017 delivered by my learned brother Hon. Justice Musyoka. In that ruling the Hon. Judge stated as follows:-

“...the execution proceedings should go ahead, but at the settlement of the terms of sale of LR Noxxxxx Nairobi South C, the Deputy Registrar shall take into account the interests or claim of the Objector herein. It is so ordered....”

24. This ruling was delivered by a court of concurrent jurisdiction and this cannot countermand and/or review the orders made by a fellow Judge. If the Judgement/Debtor wished to arrest execution he ought to have filed an appeal against the Ruling of May 12, 2017.

25. I find that the High Court has already ordered that execution proceed in this matter. This present application is therefore Res Judicata and has no merit at all. Accordingly I dismiss in its entirety the Notice of Motion dated December 18, 2022.

**(ii) Chamber Summons dated December 30, 2022**

26. The application was also filed by the Judgement/Debtor seeking the following orders:-

- “1. Spent
2. Spent
3. Spent
4. That this Honourable Court be pleased to order that Ms. Kamau, Counsel for the Objector herein do show cause why she should not be punished/sanctioned under Section 56 of the *Advocates Act* for deceiving the court on December 30, 2022.
5. That the said Ms. Kamau do personally pay costs of this application”



27. The application which was premised upon Rule 3 of the High Court Practice and Procedure Rules made under the [Judicature Act](#) was supported by the Affidavit of even date sworn by Dr. Gibson Kamau Kuria SC an Advocate of the High Court of Kenya.
28. The Objector Prime Bank Limited opposed the application through the Replying Affidavit dated January 9, 2023 sworn by Ms. Gloria Kimani an Advocate of the High Court of Kenya practicing with the law firm of Ms Macharia Mwangi & Njeru Advocates which firm is on record for the Objector Bank.
29. As stated earlier the application was canvassed by way of written submissions.
30. The Judgement/Debtor accuses counsel Ms. Kamau of frustrating the hearing of the matter on December 30, 2022. That said counsel appeared before the court at 10.30am and failed to inform the court that the matter was due to be heard at 2.30pm. That as a result of this deception the Hon. Judge referred the matter for mention before the Hon. Deputy Registrar.
31. In the Replying Affidavit counsel states that the application continually makes reference to a Ms Kamau when in actual fact her correct name is Ms Kimani. That there is no Ms Kamau in the law firm representing the Objector.
32. Counsel states that on December 30, 2022 she informed Dr. Kuria that the court would begin its sessions at 10.30 a.m and advised him to log in. That Dr. Kuria expressly refused to log in at 10.30am and stated that he would only log into the court portal at 2.30pm when the matter was scheduled for hearing.
33. Counsel states that when she logged into the court session at 10.30am the matter was called out.
34. That the trial Judge did not appear to know why the matter was being mentioned on that date and ultimately gave orders that the matter be mentioned before the Hon. Deputy Registrar on January 10, 2023.
35. Counsel categorically denies the allegation that she frustrated the hearing of the Defendant's application dated December 18, 2022 by deceiving the court. She prays that this application be dismissed in its entirety.
36. I have carefully perused the record before court. On November 2, 2022 Hon. Nganga heard submissions from both sides on the NTSC dated June 17, 2022. On December 16, 2022 the Hon. Deputy Registrar delivered her ruling in respect of the NTSC.
37. Thereafter on December 30, 2022 the matter was mentioned in the High Court with only Ms Kimani in attendance. The court referred the matter for mention before the Deputy Registrar on January 10, 2023.
38. At no time did this court ever direct that the application dated December 18, 2022 would be heard at 2.30pm on December 30, 2022. In fact direction on the said application were only given much later on January 19, 2023.
39. It is erroneous of counsel to allege that Ms Kimani deceived the court what was the manner of her deception. The Advocate could not be blamed for failing to inform the court that the matter was to be heard at 2.30 p.m when no such order had been made in the file. These serious allegations against Ms. Kimani have not basis at all and have only been brought to tarnish her name. Accordingly, I dismiss in its entirety the Chamber Summons dated December 30, 2022.



**Conclusion**

40. Finally, this court makes the following orders:-

- (1) The Notice of Motion application dated December 18, 2022 is dismissed in its entirety.
- (2) The Chamber Summons dated December 30, 2022 is dismissed in its entirety.
- (3) The Judgement/Debtor is ordered to pay the costs for both applications.

**DATED IN NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

