



**Stanbic Bank Kenya Limited v Asige t/a Asige Kiverenge and Anyanzwa Advocates
(Civil Appeal 222 of 2022) [2023] KEHC 27575 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 222 OF 2022
F WANGARI, J
SEPTEMBER 29, 2023**

BETWEEN

STANBIC BANK KENYA LIMITED APPELLANT

AND

**JAPHETH ASIGE T/A ASIGE KIVERENGE AND ANYANZWA
ADVOCATES RESPONDENT**

RULING

1. This ruling relates to a Notice of Motion dated 21st December, 2022 which sought for the following orders: -
 - a. Spent way
 - b. That this Honorable Court be pleased to order stay of execution of the judgment delivered by the trial court on 24th November 2022 in Mombasa CMCC No. E325 of 2020 - Jaffe Asige T/A Asige Kiverenge & Anyanzwa Advocates v Stanbic Bank Kenya Limited and all consequential orders/ proceedings/ and/ or actions therein pending the hearing and determination of this application inter-partes.
 - c. That this Honorable Court be pleased to order stay of execution of the judgment delivered by the trial court on 24th November 2022 in Mombasa CMCC No. E325 of 2020 - Jaffe Asige T/A Asige Kiverenge & Anyanzwa Advocates v Stanbic Bank Kenya Limited and all consequential orders/ proceedings/ and/ or actions therein pending the hearing and determination of the present appeal.
 - d. That this Honorable Court be pleased to grant any further relief and/ or order it may deem fit and just to grant in the circumstances.
 - e. That costs of this application be in the cause.



2. The application was opposed through a replying affidavit dated 3/3/2023. It was directed that the application be disposed of by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.

Analysis and Determination

3. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellant has made out a case for grant of orders of stay pending hearing and determination of appeal preferred. Corollary to this finding is the issue of costs.
4. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides 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.

(2) No order for stay of execution shall be made under subrule (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 order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

5. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

6. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Applicant submitted that if stay is not granted, the Respondent has not shown his financial capacity to pay back the money if the appeal is successful, and they will suffer the financial loss. The Applicant must establish other factors which show that the if stay is not granted, it will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.
7. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
8. On the other hand, the Respondent has stated that being a firm of lawyers with over 30 years’ experience and having banked with the Applicants for the said period, they have financial capacity to refund the decretal sum in the event the appeal is successful.
9. The Applicant has submitted that the Respondent has not shown any proof of their financial capacity. Nothing would have been easier than for them to establish the Respondent’s financial capacity having been their banker for the last 30 years.
10. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

11. It is my considered view that were this court to deny the Applicant an order for stay of execution, it would not place it at a more prejudicial position than the Respondent. I find no reason to deny the Respondent the opportunity to enjoy the fruits of its judgement. The Applicant has failed to demonstrated that it is likely to suffer loss by failing to stay the execution proceedings.
12. On the issue of delay, I note that the application was filed on 21/12/2022. The Lower Court judgement was delivered on 24/11/2022. This is within the 30 days right of appeal period. I am satisfied that the application was filed timeously.
13. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment



is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

14. Though the Applicant is ready and willing to deposit the decretal sum in a joint interest earning account as security. There is no doubt that the Applicant has the capacity to deposit the decretal amount as security. However, having failed to prove that they are likely to suffer substantial loss if the say is not granted, the court exercises its discretion and disallows this prayer.
15. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The application dated 21/12/2022 is hereby disallowed.
 - b. The Applicant to compile, file and serve a Record of Appeal within thirty (30) days from the date hereof.
 - c. In default of (b) above, the appeal stands dismissed.
 - d. Costs to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2023.

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F. WANGARI

JUDGE

In the presence of;

Ndambuki Advocate for the Applicant/Appellant

Asige Advocate for the Respondent

Barile, Court Assistant

