



**Kenya Programmes for Sustainable Development v CFC Stanbic Bank Ltd (Civil Suit 682 of 2009) [2023] KEHC 24259 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24259 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 682 OF 2009  
FG MUGAMBI, J  
OCTOBER 27, 2023**

**BETWEEN**

**KENYA PROGRAMMES FOR SUSTAINABLE DEVELOPMENT ..... PLAINTIFF**

**AND**

**CFC STANBIC BANK LTD ..... DEFENDANT**

**RULING**

**Brief Facts**

1. This ruling determines the Notice of Motion application dated 16<sup>th</sup> May 2022. It was brought under sections 1A, 1B and 3 of the *Civil Procedure Act*, order 22 rules 1, 22 and 23 of the *Civil Procedure Rules* and all enabling provisions of the Law. The application sought to discharge the amount of Kshs.1.7 million together with accrued interest to the applicant.
2. The application was premised on the grounds on the face of it and supported by the affidavit and further affidavit dated 11<sup>th</sup> April 2023 both sworn by Leonard Rufus Ochieng, an officer of the applicant. The applicant filed written submissions dated 13<sup>th</sup> April 2023 and 4<sup>th</sup> August 2023.
3. The background to the application was a judgment entered in favour of the applicant on 19<sup>th</sup> July 2017 for a sum of USD 16,000 and costs. The respondent preferred an appeal to the Court of Appeal and consequently applied for stay of execution pending the appeal. One of the conditions for stay of execution in the ruling delivered on 14<sup>th</sup> December 2017 was that the respondent deposits the decretal amount in a joint interest earning account, which was done.
4. Thereafter, the applicant argues that it had not been served with a Record of Appeal as directed by the Court. Five years lapsed hence the present application to discharge the security.



5. The application was opposed through grounds of opposition dated 13<sup>th</sup> March 2023 and a replying affidavit sworn by Simon Mwangi on 18<sup>th</sup> April 2023, and written submissions dated 4<sup>th</sup> May 2023 and 23<sup>rd</sup> August 2023. In response to the application the respondent noted that the matter was res judicata as the Record of Appeal had already been filed on 27<sup>th</sup> April 2018. In the end both parties agreed that the application had been overtaken by events and the only issue pending was whether the applicant was deserving of costs.

### **Analysis**

6. Having considered the application, evidence and the submissions by the parties, it is clear that the applicant was served with a Notice of Appeal lodged in Court on 27<sup>th</sup> July 2017. Although the respondent alleges that the Record was served in the applicant's previous address, there is no evidence on record to demonstrate how service was affected save for the letter of 7<sup>th</sup> June 2023 which demonstrates that the Record of Appeal was not served until after this application had been filed.
7. The import of this is that the application would have been avoided if the respondent had bothered to effect service of the Record of Appeal diligently instead of waiting until almost five (5) years after filing the same. By dint of section 27 of the *Civil Procedure Act*, costs are in the discretion of the court or judge, to determine by whom and out of what property and to what extent such costs are to be paid. Conversely, the Courts have also held, including the Supreme Court in the case of *Jasbir Singh Rai & 3 others V Tarlochan Singh Rai Estate of & 4 Others*, [2013] eKLR that there are instances where the general rule that costs follow the event may not apply.

### **Determination**

8. I am satisfied that this is one such exception where the applicant has shown legitimate occasion. Even though the application is defeated by events, I note that it was made in good faith as a result of the respondent's failure to serve the Record of Appeal. As such, the applicant is entitled to costs for the inconvenience caused and accordingly the respondent shall bear the costs of the application.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2023.**

**F. MUGAMBI**

**JUDGE**

