



**National Bank of Kenya Limited v Githinji (Civil Appeal E069 of 2023)  
[2023] KEHC 25721 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25721 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E069 OF 2023  
AC MRIMA, J  
NOVEMBER 27, 2023**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**EZEKIEL MARINGA GITHINJI ..... RESPONDENT**

**RULING**

1. Before Court for consideration is the Applicant's application by way of Notice of Motion dated October 17, 2023.
2. The application sought a total of 9 orders. They are as follows: -
  1. That the application herein be certified as urgent and service of the same be dispensed with in the first instance.
  2. That pending the hearing and determination of this application, the firm of Igare Auctioneers be restrained by way of an injunction from seizing, taking away, holding and offering for sale the Appellant's property and tools of trade proclaimed by the said Igare Auctioneers of 16.10.2023.
  3. That there be stay of execution of the decree and orders of October 16, 2023 issued at Kitale CMCC No.16 of 2018 by Hon. S.K. Mutai Esq Senior Principal Magistrate pending the hearing and determination of this application.
  4. That there be stay of execution of the decree and orders of October 16, 2023 issued in Kitale CMCC No.116 of 2018 by Hon.S.K. Mutai Esq Senior Principal Magistrate pending the hearing and determination of the Appeal.



5. That there be a stay of the order of the Honourable court below issued on 16/10/23 declaring the Plaintiff/Applicant as having defaulted in the restoration of the suit premises pending the hearing and determination of this application inter-parties.
  6. That there be a stay of the order of the Honourable court below issued on 16/10/23 declaring the Plaintiff/Applicant as having defaulted in the restoration of the suit premises pending the hearing and determination of this application inter-parties.
  7. That there be a stay of the order of the Appeal of the honourable court below issued on 16/10/23 declaring the Plaintiff/Applicant as having defaulted in the restoration of the suit premises pending the hearing and determination of this application inter-parties.
  8. That there be a stay of execution of the order of the honourable court below issued on 16/10/23 allowing the Respondents to proceed with execution process pending the hearing and determination of the intended appeal.
3. The application was supported by two affidavits sworn by one Chrispus N. Maithya, the Applicant's Legal Officer on October 16, 2023 and November 10, 2023 respectively. The Applicant also filed written submissions dated November 15, 2023.
  4. In opposition, the Respondent filed a Replying Affidavit he swore on November 9, 2023 as well as written submissions dated November 17, 2023.
  5. The gravamen of the instant appeal relates to the execution of part of the judgment and decree in Kitale Chief Magistrates Court Civil Case No. 116 of 2018 *National Bank of Kenya Limited v Ezekiel Maringa Githinji & another* (hereinafter referred to as 'the civil suit'). The decision was rendered on December 22, 2022.
  6. In the judgment, the trial Court decreed as follows: -
    - a. The plaintiff/applicant be and is hereby ordered to pay a sum of Kshs.176,781/- to the 1<sup>st</sup> defendant within 21 days from the date hereof unless proof is adduced to the effect that the same was remitted to KRA as rental income tax on the rent arrears.
    - b. The plaintiff/applicant be and is hereby ordered to pay the 1<sup>st</sup> defendant a sum of Kshs.1,025,325/- the same being interest on the rent arrears from the date of filing the suit within 21 days from the date hereof.
    - c. The court is not *functus officio* since the decree issued on 8/2/23 has not been fully settled.
    - d. The 1<sup>st</sup> defendant/applicant be and is hereby ordered to resubmit his plan dated 14/2/2019 on renovations to the relevant government agencies for re-approvals and the applicant to meet the costs of such re-approvals within 14 days from the date hereof.
    - e. The plaintiff/applicant be and is hereby granted an extension of 60 days from 10/8/23 to restore the 1<sup>st</sup> defendant's premises.
    - f. In the event that the said restoration is not done by the applicant within the said period, the 1<sup>st</sup> defendant is at liberty to undertake such restoration at, his own costs and claim for reimbursement from the applicant.
    - g. An order of stay of execution of the decree in relation to the restoration of the said premises is only valid for 60 days from 10/8/23.



7. There is consensus between the parties herein that the Applicant partly complied with the part of the decree to the extent of paying the rent arrears. The point of departure has been the aspect of restoration of the subject suit premises to its original state in terms of orders (c) and (d) in the decree.
8. There has been allegations and counter-allegations between the parties. On one hand, the Applicant posited that it has all along been willing and read to undertake the restoration as decreed save that the Respondent has never been willing to release the keys to the suit premises so as to allow the process be undertaken, but instead the Respondent has threatened the Applicant with execution.
9. On the other hand, the Respondent decried foul play on the part of the Applicant. He accused it of applying delaying tactics in complying with the decree of the Court and, instead, that it reverted to filing of stay of execution applications to achieve the intended goal.
10. This Court has carefully considered the application at hand alongside the record in the civil suit.
11. It is the position that the Applicant herein filed a Notice of Motion dated 27<sup>th</sup> June, 2023 in the civil suit. The application sought to stay execution of the decree on several grounds.
12. In the main, the Applicant averred that the Respondent ‘... was yet to supply the design, architectural plans and structural plans of the suit premises to guide it in undertaking the restoration’.
13. The application was eventually considered and, in a resultant ruling rendered on July 27, 2023, the Court partly found as follows: -

..... I further find that the Applicant has not restored the 1<sup>st</sup> Defendant’s premises in accordance with the judgment and decree of the Court issued on 22/12/2022 due to the failure by the 1<sup>st</sup> Defendant to re-submitting his plan dated 14/12/2019 for re-approval by the relevant government agencies. As a result, the 1<sup>st</sup> Defendant is thus ordered to seek the said re-approvals within the next 14 days from the date hereof and the costs of the re-approvals be met by the applicant/plaintiff.

In view of the foregoing, the Applicant is granted an extension of 60 days to restore the said premises and which period shall run from 10/8/23.....

14. On September 29, 2023, Counsel for the Applicant confirmed before the trial Court that the Applicant had received the approved plans and sought for time to undertake the restoration. The Court granted the Applicant time to discharge its part of the decree.
15. When the matter came up before Court on October 16, 2023, no restoration had been undertaken and the Applicant, again, prayed for extension of time for 45 days. Going by the background of the matter, the Court declined the request and granted liberty to the Respondent to levy execution. It was that order that resulted to the instant appeal and application being preferred.
16. This Court agrees with Counsel for the Respondent that the issue that the Respondent was denied access to the keys to the suit premises was never raised before the trial Court all through when the Applicant, variously so, sought for time to undertake the renovations.
17. There is, however, evidence that the parties were involved in negotiations towards settlement. On September 29, 2023 the trial Court was informed that the parties had hit a deadlock on the actual cost of the restoration. That, whereas the Applicant rooted for Kshs. 5.2 million, the Respondent geared for Kshs. 6.2 Million. As a result, the negotiations broke down and the Applicant was unable to undertake the restoration of the premises. The Court then allowed execution to issue.



18. From the record, the Applicant consistently raised the issue of the prematurity of the execution process. That was in the application before the trial Court dated June 27, 2023 and the application under consideration herein.

19. On that issue, the trial Court in its ruling rendered on July 27, 2023, stated as follows: -

.... In view of the foregoing, the Applicant is granted an extension of 60 days to restore the said premises and which period shall run from 10/8/23. In the event that restoration is not done within the said period, the 1<sup>st</sup> Defendant [the Respondent herein] is at liberty to undertake restoration at his own costs and claim for reimbursement from the Applicant....

20. This Court has not been informed that the above ruling was appealed against or the orders were set-aside or otherwise reviewed. Therefore, the Respondent's claim was to be based on reimbursement. That seemed to have been the reason the appeal was preferred when the Court allowed execution to proceed.

21. This Court has taken the liberty to go through the record in the civil suit to date with a view of ascertaining whether the legal principles to be considered in stay of execution applications were satisfied.

22. Order 42 rule 6(2) of the *Civil Procedure Rules* gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree. (See *Antoine Ndiaye v African Virtual University* [2015] eKLR.)

23. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1979] KLR discussed what ought to be considered in determining whether to grant or refuse stay of execution. The Court stated that the power of the Court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the Judge's discretion. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his or her opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

24. The Court will now apply the above principles to this matter.

25. On the aspect of substantial loss, the Court of Appeal in *Mukuna v Abuoga* (1988) KLR 645 stated as follows: -

..... Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.

26. In *Daniel Chebutul Rotich & 2 others v Emirates Airlines* Civil Case No. 368 of 2001 (unreported) as referred to in *Beatrice Nanyama Murungav Benjamin Amchat and another* (2019) eKLR the Court held that: -

.... 'substantial loss' is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted  
.....



27. The parties herein also referred to several decisions where the aspect of substantial loss was discussed.
28. In this matter, the Applicant was opposed to the manner in which the execution was undertaken. It contended that whereas both the decree in the civil suit and the order made on June 27, 2023 granted the Respondent the liberty to undertake the restoration of the premises at his own cost and then claim for reimbursement from the Applicant, the Respondent had not carried out any renovations as decreed, but was instead executing for sums yet to be incurred contrary to the decree and the order. According to the Applicant the said sums had no basis or at all.
29. Going by the order made on June 27, 2023, the execution could only issue once the Respondent furnished the Applicant with the cost of the actual works undertaken. That was the amount to be reimbursed by the Applicant. If, therefore, execution is to be allowed to proceed without the Respondent complying with the express order of the Court, then that will be allowing an injustice to visit the Applicant.
30. The Applicant is about to be compelled to satisfy the sums yet to be incurred by the Respondent and ascertained. That will be tantamount to allowing a premature execution and such cannot be allowed in law. On its part, the Respondent did not avail any evidence of having undertaken the restoration and the actual cost incurred, which sums the Applicant had refused to satisfy.
31. By this Court compelling the Applicant to make payments as demanded or to suffer attachment of its assets in such circumstances is an outright visitation of substantial loss to the Applicant. This Court ought to exercise restraint.
32. It is now the finding of this Court that the Applicant has satisfied the first condition.
33. There was no delay in lodging the instant application. The order appealed against was made on October 16, 2023 and the application filed on October 18, 2023.
34. As appertains the aspect of security for the due performance of the decree, this Court finds that this condition does not attach in the meantime since the execution of the decree is premature.
35. The upshot is, therefore, that all the conditions are demonstrated in favour of the Applicant.
36. Consequently, the following orders do hereby issue: -
  - a. That there be a stay of execution of the order issued on October 16, 2023 or any other order allowing execution of the decree in Kitale Chief Magistrates Court Civil Case No 116 of 2018 *National Bank of Kenya Limited v Ezekiel Maringa Githinji & another* relating to alleged default of restoration of the suit premises by National Bank of Kenya Limited pending the determination of the appeal herein.
  - b. This dispute is hereby referred to mediation.
  - c. The matter be fixed for directions before the Hon. Deputy Registrar of this Court on a date to issue.
  - d. Costs of the application be in cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**A. C. MRIMA**  
**JUDGE**



**Ruling No. 1 delivered virtually in the presence of:**

**Mr. Teti**, Learned Counsel for the Applicant.

**Miss Ngeiywa for Mr. Songole**, Learned Counsel for the Respondent.

**Chemosop/Duke** – Court Assistants.

