



Cooperative Bank of Kenya Ltd v Amasi (Suing as the administrator of the Estate of Dorcas Amasi) (Civil Appeal 205 of 2023) [2023] KEHC 27147 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 205 OF 2023
RE ABURILI, J
DECEMBER 21, 2023**

BETWEEN

COOPERATIVE BANK OF KENYA LTD APPELLANT

AND

SUSAN RIZIKI AMASI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DORCAS AMASI) RESPONDENT

RULING

1. The applicant/ appellant filed this appeal on 7/12/2023 and an application dated 4th December, 2023 seeking for stay of execution of decree in Kisumu CMCC No. E081 of 2023.
2. The application is opposed by the respondent who filed grounds of opposition dated 13th December, 2023. The parties' counsel argued the application orally reiterating the prayers sought and the grounds of opposition.
3. The issue is whether this court should grant stay of execution of decree pending appeal.
4. The conditions for stay pending appeal are now well settled as espoused in Order 42 Rule 6(2) of the [*Civil Procedure Rules*](#).
5. In this case, the application has been brought timeously as judgment was rendered on 7th December 2023 and therefore the Respondent cannot be heard to say that the application was filed prematurely since delay in such discretionary matters defeats equity.
6. In addition, there is no law that only allows applications for stay to be filed after taxation of costs or after decree is extracted.
7. There is no legal requirement for annexing of a decree on the application for stay.



8. On substantial loss, I observe that the Applicant challenges both awards for loss of user and general damages for breach of contract. No substantial loss has been demonstrated to be suffered by the applicant if the decretal sum is paid and the appeal is successful. It has not been shown how the appeal shall be rendered nugatory, in the circumstances.
9. On security for the due performance of decree and if it has been offered, Order 42 Rule 6(2) of the Civil Procedure Rules gives the court the power to make such orders as to the depositing of security for the due performance of decree as a condition for stay. It follows that the Applicant need not offer any such security and failure to offer the security is not fatal to the application for stay pending appeal. This is so because the court can make an order for security for the due performance of decree.
10. Having considered the application by the applicant/appellant which is a Commercial Bank of Repute and a going concern, I do not find that a sum of just about Kshs.800,000 is an amount that the bank can fail to pay to the Respondent Decree holder herein in the event that the appeal is not successful.
11. Therefore, whereas no substantial loss has been demonstrated to be suffered, I am satisfied that this is a case where the court can exercise discretion and grant stay of execution of decree pending appeal.
12. I hereby stay execution of judgment, decree and recovery of costs in Kisumu CMCC No. E081 of 2023 pending hearing and determination of this appeal on condition that the Applicant/Appellant deposits into court the entire Judgment sum of Kshs.845,062.25 within seven (7) days of today.
13. This appeal shall be fastracked with the Appellant filling a record of appeal within 30 days of today together with written submissions.
14. Mention on 1st February 2024 to confirm availability of the lower court file.
15. Cost shall be in the cause.
16. Registry to remind the lower court to avail the file.
17. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF DECEMBER, 2023

R. E. ABURILI

JUDGE

