



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. E048 OF 2021**  
**THE CO-OPERATIVE BANK OF KENYA  
LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**ELISHA ONGOYA.....1<sup>ST</sup> RESPONDENT**

**LEMMY NYONGESA MULAKU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court for determination are two (2) applications: the **first** is the Notice of Motion dated 8<sup>th</sup> February, 2021 (“the first application”) taken out by the appellant/applicant and supported by the grounds set out on its body and the facts stated in the affidavit of Lawrence Karanja, Head-Legal Services of the applicant. The order being sought is for a stay of execution of the judgment delivered on 15<sup>th</sup> January, 2021 in Milimani CMCC No. 9662 of 2018 pending the hearing and determination of the appeal against the aforesaid judgment.
2. The second application is the Notice of Motion dated 21<sup>st</sup> December, 2021 (“the second application”) also taken out by the applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of Jackson Oire, Legal Officer of the applicant and seeking for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal.
3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents retorted to the second application by swearing replying affidavits separately on 17<sup>th</sup> January, 2022.
4. At the hearing of the two (2) applications, the parties’ advocates essentially echoed the averments made in the applications and replies.
5. I have considered the grounds laid out on the body of the first and second applications; and the facts deponed in the supporting and replying affidavits.
6. From a reading of the two (2) applications it is evident that they are seeking similar orders for a stay of execution of the decree pending appeal.
7. The respondents state that the second application is an abuse of the court process for the reason that the applicant had previously filed the first application which is yet to be heard and determined, or withdrawn for that matter.

8. The respondents further state that the applicant is yet to file a record of appeal despite being instructed to do so by the Deputy Registrar-High Court, Civil Appeals Division.
9. The applicant did not offer any specific response to the above issue.
10. From my study of the record, I observed that when the applicant attended court for the ex parte hearing of the first application on 17<sup>th</sup> February, 2021 the court granted an interim stay of execution to last for 30 days from that day, and directed the applicant to have the application fixed for interparties hearing.
11. Going by the record, it is apparent that the applicant did not comply with the above directions and instead brought the second application months later, seeking a similar order for a stay of execution.
12. The record shows that when the parties attended court on 22<sup>nd</sup> December, 2021 the court directed that the two (2) applications be heard together and granted an interim order for the status quo pertaining to the applicant's attached goods to be maintained pending the hearing on condition that the applicant deposits the decretal sum of Kshs.1,500,000/ in court by close of business on 30<sup>th</sup> December, 2021.
13. The applicant indicates that it has since complied with the above condition. This position has not been controverted by the respondents.
14. Suffice it to say that for the foregoing reasons, I am satisfied that the second application is an abuse of the court process and *sub judice*. Consequently, I do not hesitate to dismiss it with costs to the respondents. I am therefore left with the first application.
15. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for a stay of execution.
16. The first condition is that the application must have been made without unreasonable delay.
17. The applicant's compliance with the above condition was not controverted by the respondent. Moreover, upon my perusal of the record, it is apparent that the impugned judgment was delivered on 15<sup>th</sup> January, 2021 whereas the first application was filed on 17<sup>th</sup> February, 2021. In my view, the lapse of one (1) month does not amount to unreasonable delay.
18. The second condition touches on substantial loss to be suffered by an applicant. In his supporting affidavit Lawrence Karanja states that the applicant is apprehensive that in the event that the order for a stay of execution is denied, the respondents will proceed to execute the decree.
19. In his brief oral arguments, Mr. *Odongo* learned counsel for the applicant added that the respondents may not be able to refund the decretal sum once the same is paid to them and the appeal succeeds.
20. In reply, the respondents state and submit that substantial loss has not been demonstrated and that the applicant has not tendered any evidence to support its assertion that the decretal amount may be unrecoverable upon payment.
21. The respondents further state that they have steady forms of income and are therefore in a position to refund the decretal amount as and when called upon to do so.
22. The question on who has the burden of proof on the issue of refund of the decretal sum was aptly discussed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another** [2006] eKLR where it held thus:

***“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources***

*he has since that is a matter which is peculiarly within his knowledge...”*

23. In the absence of any credible evidence to indicate or ascertain the respondents’ financial capacity here and upon considering the interest of justice, I am satisfied that the applicant has reasonably shown the likelihood of substantial loss occurring should the order for a stay of execution be denied.

24. Under the final condition which is the provision of security for the due performance of such decree or order, I am satisfied that the applicant has demonstrated that it has complied with the same as indicated hereinabove.

25. Consequently, the Motion dated 8<sup>th</sup> February, 2021 is allowed giving rise to issuance of the following orders:

**i. There shall be a stay of execution of the judgment delivered on 15<sup>th</sup> January, 2021 pending appeal.**

**ii. Costs of the Notice of Motion dated 8<sup>th</sup> February, 2021 to abide the outcome of the appeal.**

**iii. The Notice of Motion dated 21<sup>st</sup> December, 2021 is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 18<sup>th</sup> day of February, 2022.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

.....for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents