



**Republic v Capital Markets Authority; National Bank of Kenya Ltd  
(Interested Party); Alubala (Ex parte) (Miscellaneous Application  
251 of 2018) [2022] KEHC 10634 (KLR) (Civ) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10634 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION 251 OF 2018**

**J NGAAH, J**

**MAY 27, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CAPITAL MARKETS AUTHORITY ..... RESPONDENT**

**AND**

**NATIONAL BANK OF KENYA LTD ..... INTERESTED PARTY**

**AND**

**SOLOMON MUYEKA ALUBALA ..... EX PARTE**

**RULING**

1. The application before court is the respondent’s motion dated 23 April 2021. It is stated to be brought under articles 47, 48, 50(1), 159(b) and 164(3)(a) of the Constitution and section 1A, 1B and 3A of the Civil Procedure Rules. The prayers in the motion have been framed as follows:
  1. That this application be certified as urgent and heard ex parte in the first instance.
  2. The honourable court be pleased to issue a stay of execution of such part of the judgement and decree delivered on 22 July 2019 as it is ordered that the respondent shall meet the applicant’s and interested party’s costs of the notice of Motion dated 4 July 2018 pending the hearing and determination of the intended appeal to the Court of Appeal.
  3. The honourable court be pleased to issue a stay of execution of such part of the judgement and decree delivered on 22 July 2019 as it is ordered that the respondent shall meet the applicant’s



and interested party's costs of the notice of motion dated 4 July 2018 pending the hearing and determination of this application.

4. That the honourable court be pleased to grant any other orders it deems fit.
5. The costs of this application be in the cause.”
2. The grounds upon which the motion is based are clear on the face of the motion itself.
3. By a judgment and decree of this Honourable Court (Nyamweya, J) rendered on 22 July 2019, the respondent was condemned to pay costs of the suit. Soon thereafter, the respondent filed a notice of appeal and requested for a copy of the proceedings within the prescribed timelines in accordance with rule 75 of the *Court of Appeal Rules*.
4. The applicant, on the other hand, filed a bill of costs which was eventually taxed at Kshs 1,950,420 on 4 June 2020. The respondent challenged the taxation by way of a reference to this Honourable Court dated 6 July 2020. The reference was, however, dismissed on 31 March 2021.
5. By letter dated 9 April 2021, the applicant gave notice to the respondent to pay the taxed amount in full within 14 days lest the applicant would proceed with execution to recover the taxed costs. It is because of the impending execution that the respondent seeks stay orders in terms of the prayers 2 and 3 of the motion.
6. The respondent added that if the amount is paid to the applicant, the respondent would suffer substantial loss if its appeal in the Court of Appeal succeeds and hence its appeal would be rendered nugatory.
7. It has also been urged that, being a State Corporation, the respondent is able to settle the amount certified as taxed costs and it is even ready and willing to make an undertaking to pay the taxed costs if its appeal in the Court of Appeal fails.
8. The motion is supported by the affidavit of Githendu Eric Timothy who is a legal officer of the respondent.
9. The applicant opposed the motion and to that end filed a replying affidavit sworn on 7 June 2021.
10. It is the applicant's case that under rule 11(3) of the *Advocates (Remuneration) Order, 2009*, any person aggrieved by the decision of the judge upon any objection to taxation referred to such judge may, with the leave of the judge but not otherwise, appeal to the Court of Appeal. The respondent has not sought leave to appeal as required.
11. The application is also said to be incompetent in the sense that it ought to have been made pending an appeal or intended appeal against the ruling of this Honourable Court of 31 March 2021 which dismissed the respondent's objections to taxation and not against the judgment of the court of 22 July 2019.
12. In any event, the draft memorandum of appeal exhibited to the respondent's further affidavit does not contain a single ground of appeal on the issue of costs.
13. Again, it is urged that it is more than one year since the judgment against which the appeal has been preferred was delivered and the inordinate delay in filing of the present application has not been explained.
14. The legal basis of stay of execution pending an appeal is order 42 of the *Civil Procedure Rules*; rule 6(1) and (2) (a)(b) of order 42 provides as follows:



6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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. (Emphasis added).
15. The only question upon which this application hinges, as it does in applications of similar nature, is whether the respondent has complied with conditions for grant of a stay order. The first of these conditions is whether the application has been made timeously.
16. In considering this condition, I note that the judgment or part of the judgment whose execution is sought to be stayed was rendered on 22 July 2019 but is not until 23 April 2021 or thereabouts, almost two years later, that the application for stay of execution is filed.
17. I have scrutinised the affidavit in support of the motion but I have not found any reason why it took the respondent such a long time which, by any standards, is inordinate or unreasonable, to file the application.
18. By the respondent's own admission, it was only jolted into action when the applicant issued notice demanding payment of the taxed costs and in default the applicant proceeds with execution. This suggests that the respondent was not always keen on initiating the application for stay after the impugned judgment was rendered. The instant application is, therefore, an afterthought.
19. Without belabouring the point, the law states, in no uncertain terms, that no stay can be granted if the application is delayed unreasonably.
20. On this ground alone, the respondent's application must fail. There should not be any debate that the delay in filing it was inordinate or, in the language of the rule, it was unreasonable.
21. If the application fails on the first ground, consideration of the condition whether sufficient security has been offered is rendered moot.
22. Be that as it may, no evidence has been given that if stay is not granted the applicant would suffer substantial loss. Neither can it be urged that the appeal would be rendered nugatory because the primary prayer which was granted by the court and which the appellant seeks overturned by the court of appeal is a prayer for certiorari couched as follows:

"1. An order of certiorari be and is hereby issued to bring into this Court for the purposes of quashing, the decision, and/or actions of the respondent contained in the notice of enforcement action dated 3<sup>rd</sup> April 2018 purporting to disqualify the applicant from holding office as a key officer of a public listed company and/or issuer, licensee or any approved institution of the 1<sup>st</sup> respondent for a period of ten years from the date of



notification; and purporting to impose a financial penalty amounting to Kshs 104, 800,000 being twice the amount of benefit that, allegedly, directly accrued to the applicant.”

23. If the respondent’s appeal succeeds, its decision that has been impeached will effectively be restored and would be enforceable against the applicant.
24. For reasons I have given, I am not persuaded that the respondent deserves the order for stay of execution as prayed or at all. Its application is dismissed with costs to the applicant.

**SIGNED, DATED AND DELIVERED ON 27 MAY 2022**

**NGAAH JAIRUS**

**JUDGE**

