



REPUBLIC OF KENYA



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**National Bank of Kenya Limited v Kamau (Civil Case
95 of 2003) [2022] KEHC 11758 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 95 OF 2003
RN NYAKUNDI, J
JULY 22, 2022**

BETWEEN

NATIONAL BANK OF KENYA LIMITED APPLICANT

AND

ALLAN GEORGE NJOGU KAMAU RESPONDENT

RULING

1. The defendant/applicant approached the court through the application dated the December 27, 2021 seeking for orders that;
 - a) Spent
 - b) This Honourable court be pleased to grant stay of execution of the decree emanating from the judgment delivered on September 27, 2021 and any subsequent orders pending hearing of this application inter-partes
 - c) This Honourable Court be pleased to grant stay of execution of the judgment delivered on December 27, 2021 pending the hearing and determination of the intended Appeal
 - d) Costs of this Application be in the cause
2. The application is based on the seven grounds on its face and is supported by an affidavit sworn by Edwin Mbugua , the defendant’s remedial analyst , on the December 27, 2021 where he contends that; on September 27, 2021, this court entered judgment against the applicant; that the applicant being dissatisfied with the aforementioned decision intends to appeal against the entire judgment to the court of appeal; that the applicant has an arguable appeal as the court came to an erroneous finding by applying the provisions of section 44(A)(3) of the *Banking Act* in respect of a loan which had been advanced before the coming into force of the in duplum rule in contravention of section 44(A)(6) of the *Banking Act* ; that unless this court grants stay of execution of the decree emanating from the



aforesaid judgment , the Applicant will be exposed to execution proceedings which will occasion it unnecessary costs and losses and further , the intended appeal will be rendered nugatory; and that the applicant is willing to abide by any conditions that the court may impose for the due performance of the decree pending the hearing and determination of the intended appeal.

3. The application is opposed by the plaintiff through a replying affidavit sworn on January 19, 2022. He deposes that the purported notice of appeal by the applicant is incurably defective and fatally incompetent and that he has filed an application in the Court of Appeal seeking to have it accordingly struck out; that the applicant has no arguable appeal as the ratio decidendi of the court's judgment in this case was in its application and interpretation of the provisions of Section 44 (a)(3) and 44(a)(6) of the Banking Act as the decision was principally based on evidence before court; that in any event and in response to the applicant's allegation that the provisions of sections 44 of the Banking Act had not come into force, the court clearly cited the case of James Muniu Mucheru vs National Bank of Kenya Limited ,Civil Appeal No. 365 of 2017 stating that the provisions had retrospective effect; that it is on record that the respondent has always had physical possession of the suit property and that no prejudice will be occasioned to the Applicant in making a refund of the overpayment and in discharging the title to the suit property; that filing an appeal does not operate automatically as a stay of execution.; that this suit has been pending in court for the last 19 years and it is imperative that this litigation be brought to an early end.
4. The application was canvassed by way of written submissions as directed by the court on January 13, 2022. Both parties filed their submissions on January 20, 2022.

Applicant's submissions

5. The applicant submitted that it had satisfied the grounds required under Order 42 Rule 6(2) of the Civil Procedure Rules for grant of stay of execution. On the issue of substantial loss, it was submitted that if stay of execution is not granted by this court, the applicant will have to satisfy the decree using its clients deposits which will occasion the applicant significant hardship. It was also submitted that if the orders sought are not granted and the decretal amount is paid to the respondent he may not refund in the event the appeal is successful as his financial means is unknown as he has not filed an affidavit of means before this court to demonstrate his ability to refund the decretal amount in the event the appeal is successful.
6. On whether the application was brought without unreasonable delay, the applicant submitted that it has been brought within good time as judgment was delivered on September 27, 2021 and the instant application was filed on 1January 4, 2022. The applicant submitted that it was unable to file the application instantly because the file was in Malindi with the learned judge and that once the file was availed in the registry, it was filed within two months. As such, it was submitted that there was no undue delay.
7. Lastly on security for due performance of the decree, the applicant submitted the it was ready and willing to provide security for due performance of the decree including depositing the entire decretal sum in a joint interest earning account pending the hearing and determination of the appeal.

Respondent's submissions

8. The respondent in his submissions questioned the applicant's prospects of prosecuting an appeal in the court of appeal in view of the alleged notice of appeal being incurably defective and fatally defective. He maintained that the impugned notice of appeal offends the mandatory provisions of Rule 75(3), Rule 75(6) and Rule 76 of the Court of Appeal Rules. It was the respondent's considered view that the



notice is appeal is totally invalid with the result that the prospects of the applicant launching an appeal are extremely far fetched.

9. On whether the Applicant has an arguable appeal, according to the respondent, the applicant's application before this court is that the honourable judge erred in invoking the provisions of Section 44A of the *Banking Act* stating that the loan subject to the proceedings of this honourable court was advanced to the Respondent before the said section of the *Banking Act* came into force. The respondent contended that the honourable court relied on the evidence advanced by both parties to determine the issues and not section 44A of the *Banking Act* and that the mention of section 44A of the *Banking Act* in the judgment does not form the ratio decidendi of the said judgment which is the binding part of any decision. It was contended that as such, there was no arguable appeal and the orders of stay should not be granted.
10. The respondent further submitted that the applicant had not satisfied the conditions for the grant of stay of execution and in particular, that it had not demonstrated that it will suffer substantial loss unless the order of stay is granted. It was contended that the applicant is a well established banking institution and therefore has the capacity of paying the minimal overpaid sum of Kshs. 609,659 together with interest as ordered by the court. In his defence, the respondent maintained that he is in a position to reimburse the said sum of Kshs. 609,659 plus interest in the unlikely event that the Applicant's appeal succeeds.
11. The respondent also took issue with the fact that the instant application was filed almost four months after judgment was delivered. He submitted that no explanation has been given for the delay in filing and as such the applicant is in breach of the condition requiring the application to be filed without unreasonable delay.

DETERMINATION

12. The only issue for determination in the instant application is whether or not the Court should grant the Applicant stay of execution pending hearing of the Appeal.
13. Order 42 rule 6 of the *Civil Procedure Rules* provides as follows:
 - “(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.”
14. It is important that I examine as to whether the applicant has filed an appeal. For the purposes of Order 42 Rule 2 and rule 4 I note that there is a notice of appeal filed on 6/10/2021.



15. However, the respondent's has vehemently argued that the notice of appeal is incurably defective and fatally incompetent and as such this application should be dismissed. I do not agree with the respondent that a defective notice of appeal would render this application a non-starter. The duty of this court is to ensure that a notice of appeal has been filed by the applicant notifying the respondent that the applicant intends to appeal against the decision of this court. It is for the Court of Appeal to determine whether the notice of appeal is proper or not.
16. Next, this court will examine whether the application was brought timeously. Judgment was delivered in this suit on the September 27, 2021. The application was filed on December 27, 2021, a period of three months.
17. I find that this to be unreasonable delay.
18. The second issue is whether the applicant would suffer substantial loss. In the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 the court stated

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.

The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

19. The applicant should not only state that he is likely to suffer substantial loss but he must also prove that he will suffer loss. The applicant submitted that it will have to satisfy the decree using its clients deposits which will occasion the applicant significant hardship. The kind of loss it stands to suffer, according to the applicant, is that the applicant will have to look for funds to repay the respondent plus the interest as ordered by the court.
20. Does this then count as substantial loss? Save for mentioning that it will have to satisfy the decree using its clients deposits which will occasion the applicant significant hardship does not tender any evidence to show the nature loss it is likely to suffer should an order of stay be denied. I therefore find that no evidence of substantial loss has been adduced by the applicant to warrant the orders of stay.
21. As regards the issue of security, the applicant submitted the it was ready and willing to provide security for due performance of the decree including depositing the entire decretal sum in a joint interest earning account pending the hearing and determination of the appeal.
22. It is this court's view that the three essential conditions for grant of stay of execution that is , the timeous filing of the application, the proof of substantial loss, and the security for due performance must in this court's view exist as a full combination and failure to prove one ground is fatal to the application for stay.



23. Having found that the applicant has not established before this court that it has an arguable appeal and would suffer substantial loss, the application dated 27/12/2021 therefore lacks merit and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 22nd DAY OF JULY, 2022.

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R. NYAKUNDI

JUDGE

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