



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. APPLICATION 239 OF 2018

FAMILY BANK LIMITED.....APPLICANT

VERSUS

DALILA ALI MUSA.....RESPONDENT

RULING

1. The Applicant herein filed a **Notice of Motion** dated **2nd March, 2020** brought pursuant to **Sections 1A, 1B, 3 & 3A** of the **Civil Procedure Act, Order 42 Rule 6, Order 43 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010, Article 50** of the **Constitution of Kenya, 2010** and all other enabling provisions of the Law.
2. In summary, the Applicant in summary prays for Stay of Execution pending the hearing and determination of the application herein as well as the Application before court dated **13th September, 2018**.
3. The Application is premised on the grounds on the face of it and the **Affidavit** in support thereof sworn on **2nd March, 2020** by **KELVIN KINYUA**, Advocate.

THE RESPONSE

4. The Respondent filed a **Replying Affidavit** sworn on **19th March, 2020** by **DALILA ALI MUSA**. The Respondent avers that Stay Orders issued on **17th September, 2018** were interim in nature pending hearing on **10th October, 2018**.
5. The Respondent contends that the Applicant did not attend court as required and thus the Stay Orders issued on **17th September, 2018** automatically lapsed as they were not extended on the date that the application had been set down for hearing.
6. The Respondent further averred that the execution process was lawful as there was no Stay Order in place. The Respondent prays that the Application dated **2nd March, 2020** be dismissed for being *sub judice* in view of the application dated **13th September, 2018** and for being a delaying tactic by the Applicant in an effort to deny the Respondent the opportunity to enjoy the fruits of litigation.

DIRECTIONS OF THE COURT

7. The parties took directions on the disposal of the application by way of written submissions. The Applicant filed its submissions on the **12th October, 2020** while the Respondent filed theirs on the **18th November, 2020**. Parties opted to rely on their respective written submissions as filed.

ANALYSIS AND DETERMINATION

8. I have considered all the pleadings and issues raised by the parties therein as well as their respective written submissions. In my view the only two (2) issues that arise for determination are:-

a) whether the Stay of Execution issued on 17/9/2018 on the application dated 13/9/2019 are still valid;

b) whether this court can extend the order for stay of execution in the application dated 13/9/2019.

9. On the issue of whether the Stay of Execution Orders issued on **17th September, 2018** are still valid, the Respondents argued that the Stay as was issued on the **17th September, 2018** had lapsed. In the Application dated **13th September, 2019**, the court issued Orders in terms of prayers No.1 and No.2 of the Applicant's Application dated **13th September, 2019**. The prayers read as follows: -

1) THAT on the grounds more specifically set out in. the Certificate of Urgency this application be certified urgent and heard ex-parte in the first instance.

2) THAT pending the inter-parties hearing and determination of this Application this Honourable Court be pleased to issue an Order of Stay of Execution of the Certificate of Costs dated 29th January, 2018 issued by the Taxing Officer in MOMBASA RMCC NO.475 OF 2015

10. The Stay of Execution Orders that were granted on the **17th September, 2018** were temporary pending the hearing of the Application dated **13th September, 2018** and the same set for interparties hearing on **10th**

October, 2018 by the court.

11. On the **10th October, 2018**, both parties were not present in court and thus the application dated **13th September, 2018** was not prosecuted. In the absence of the Applicant, the stay of Execution Orders that were temporary in nature were not extended since there was no prayer to that effect, and they thus lapsed. It is not a necessary requirement that the Respondent applies for the dismissal of the Stay Orders for them to be vacated.

12. It is worth noting that the orders were interim pegged to inter- parties hearing of the application. The Applicant has had various opportunities to prosecute its application but has not done the same, this being on **4th September, 2019** and **10th September, 2019**. The Application dated **13th September, 2018** had been set down for hearing but the Applicant made no appearance. This is clearly indicative that the Applicant are not keen on prosecuting their application.

13. As for whether the Court can extend the Stay of Execution Orders that were issued on **17th September, 2018**, this court finds that the Stay of Execution Orders having lapsed on the **10th October, 2018**, there is no order before this court capable of extension.

14. In view of the findings herein, I dismiss the application by way of **Notice of Motion** dated **2nd March, 2020** for want of merit with costs to the

Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 16th day of March, 2021.

D. O. CHEPKWONY

JUDGE

16/3/2021

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY