



NCBA Bank of Kenya Limited v Kirui (Environment and Land Appeal E042 of 2023) [2024] KEELC 13501 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E042 OF 2023
MAO ODENY, J
DECEMBER 3, 2024**

BETWEEN

NCBA BANK OF KENYA LIMITED APPLICANT

AND

NELLY CHEPKEMOI KIRUI RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 19th August, 2024 by the Appellant/Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That the Respondent be restrained from levying execution against the Applicant/Appellant herein for the entire decretal sum as per the Warrants for Sale of Movable Property in Execution of Decree for Money and Proclamation Notice both dated 9th August 2024 as issued in Nakuru Chief Magistrate ELC No 035 of 2023 pending the hearing and determination of the already filed Appeal.
 - d. That costs of this Application be in the cause.
2. The application is supported by the annexed affidavit of Stephen Atinya the Principal Legal counsel of the Appellant sworn on 19th August, 2024 whereby he deponed that the Applicant/Appellant has deposited the sum of Ksh 500,000/= in the escrow account as a condition to satisfy the order of stay of execution pending appeal as per the Court's directions given on 8th July, 2024.
3. The Appellant's Principal Legal Counsel further deponed that the Respondent already commenced execution proceedings for the entire decretal sum by having the Appellant's movable property proclaimed on 9th August, 2024 (the subject of this Appeal) and if the orders sought are not granted,



the Respondent shall execute against the Appellant occasioning the Appellant serious prejudice and injustice that this Court might not redress.

4. The Respondent's Counsel filed a Replying Affidavit sworn on 29th August, 2024 where he deponed that on 9th June, 2024 the orders issued on 9th May, 2024 had not been complied with. Counsel further deponed that subsequently an application was filed where the court indulged the Appellant/Applicant in allowing the depositing of the sum of Ksh 500,000/= within 10 days but the Applicant still did not comply.
5. The Respondent's counsel deponed that a further opportunity was granted to the Applicant on 8th July, 2024 where they were allowed a further 14 days to comply and that upon the lapse of the third extension, they appointed auctioneers to go after the full decretal amount as the Respondent did not receive any proof of extension of the orders, setting aside of the warrants of attachment or information of any opening of the bank account.
6. The Respondent's counsel deponed that he wrote in protest of the opening up of an account based on orders that had lapsed and that the Appellant should pay at least half of the decretal amount and deposit the other half of the decretal amount in a joint interest earning account.

Appellant/applicant's Submissions

7. Counsel for the Appellant filed submissions dated 15th October, 2024 and submitted that the Appellant had met the conditions of stay of execution and that the application has been filed without any unreasonable delay. Counsel submitted that the Appellant has deposited the amount ordered by the court as security for the due performance of the decree in an escrow account and urged the court to allow the application as prayed.

Respondent's Submissions

8. Counsel for the Respondent filed submissions dated 17th October, 2024 and submitted that the Applicant has failed to exhibit and or prove the necessary preconditions needed for stay orders to be issued.
9. Counsel further submitted that the Respondents should be allowed to receive half of the decretal sum as the same balances the interest of the two sides in the dispute and relied on the case of Michael Ntouthi vs Abraham Kivondo Musau [2021] eKLR. Counsel urged the court to dismiss the application with costs.

Analysis And Determination

10. This is a case where the court had heard and determined an application for stay of execution dated 11th December 2023 and granted a conditional stay of execution that the Appellant deposits Kshs 500,000/ in a joint interest earning account of the Advocates on record.
11. This court in its ruling dated 9th May, 2024 pronounced itself as follows at paragraph 27 and 28:

“The Appellant has met two of the requirements under Order 42 Rule 6 of the Civil Procedure Rules for grant of stay of execution. The procedure requires that the applicant meets all the requirements. However, the court has discretion to grant an order of stay but this discretion must be exercised judiciously taking into consideration the rights of the successful litigant and the Applicants right of appeal.



The court awarded the respondent Kshs 2,400,000/= as damages together with costs. In the quest of balancing the rights of both parties, it would be in the interest of justice that the court orders the Appellant deposits Kshs 500,000/= in a joint interest earning account of the advocates on record within 30 days from the date of this ruling failure to which the order of stay of execution lapses.”

12. Counsel for both parties appeared in court on two occasions and agreed on the modalities of opening and operationalization of the joint interest earning account. This was necessary for the conditional stay to take effect. Surprisingly, the Respondent went ahead to instruct auctioneers to proceed with the execution, which necessitated the Appellant to file the current application. The Appellant attached a copy of the deposit slip which shows that it has complied with the order.
13. The Court already found that the Appellant met the conditions for grant of stay of execution in its ruling dated 9th May, 2024. The Appellant having complied with the order of the court, the best is to allow the Appellant to pursue the appeal unhindered with the threat of execution while the appeal is still pending.
14. The Appellant is however urged to fast-track the hearing of the appeal noting that a record of Appeal has been filed. I therefore allow the application as prayed for execution the Appellant having complied with the order to deposit Kshs 500,000/ in a joint interest- earning account. Costs shall abide by the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF DECEMBER 2024.

M. A. ODENY

JUDGE

