



**NCBA Bank v Wyss Logistics Ltd (Civil Appeal 277 of 2023)
[2025] KEHC 2094 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2094 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 277 OF 2023
JM NANG'EA, J
FEBRUARY 12, 2025**

BETWEEN

NCBA BANK APPELLANT

AND

WYSS LOGISTICS LTD RESPONDENT

RULING

1. Vide Notice of Motion dated 17th December 2024 the Appellant seeks reliefs as hereunder;
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to reinstate the orders of 14th February 2024 and extend the same to allow the appellant/applicant furnish the court with alternative security.
 4. That this Honourable Court be pleased to order that the appellant/applicant do deposit an alternative security equivalent to cash deposit of the decretal sum in a joint interest earning account in the name of advocates of both parties.
 5. That this Honourable Court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
 6. That the costs of this application be in the cause.
2. The Appellant's Senior Legal Counsel (Christine Wahome) swore an affidavit in support of the motion.
3. The Respondent opposes the application through an affidavit in reply sworn by its Director (Herodion Machoka) as well as Grounds of Opposition filed on 24th January 2025.



4. The Appellant's affidavit evidence is that the lower court delivered ruling dated 22nd September 2023 dismissing its application dated 31st May 2023 praying for inter alia an order setting aside *ex parte* judgment and decree of 21st April 2023 entered against it. Aggrieved by the ruling the Appellant preferred on this appeal. On 14th February, 2024 this court ordered stay of execution of the impugned decree pending hearing and determination of the appeal, on condition that the Appellant would provide a bank guarantee for the decretal sum within a stated period. According to the Appellant, the required guarantee was duly given.
5. It is further averred that the Respondent later filed an application dated 25th March, 2024 impugning the bank guarantee for the reason that it contravened the *Banking Act*. The court heard the application and agreed with the Respondent for reasons stated in its ruling delivered on 6th November 2024. The Appellant was, however, given 30 days from the date of the ruling to provide an alternative guarantee that does not infringe the *Banking Act*.
6. The Appellant concedes that the 30 days period within which the alternative guarantee was to be given lapsed before the guarantee was provided. Nevertheless, it expresses readiness and willingness to comply by depositing the decretal sum in a joint interest earning account in the names of the advocates for the parties, a proposal the Respondent is said to be reluctant to accept.
7. For the foregoing reasons inter alia the Appellant seeks the court's indulgence fearing that it could suffer substantial loss if execution of the impugned decree proceeds while the appeal pends.
8. The Respondent's affidavit evidence agrees with the narration of events leading to the bringing of the instant application. It, however, contends that the Appellant has not given reasons for its failure to furnish the alternative guarantee within the period allowed by the court. The court is therefore told that the Appellant is not deserving of exercise of the court's discretion to enlarge time in its favour. It is contended that the Appellant is not keen on compliance while enjoying stay orders granted by the court.
9. The Appellant's Grounds of Opposition are;
 1. That in its ruling of 6th November, 2024 the court granted the Appellant/Applicant 30 days to provide another guarantee or move the court to seek an alternative security.
 2. That the time fixed by the Court for bringing the application having lapsed, the Appellant required to obtain the leave of court or extension of time prior to bringing the instant application.
 3. That the application having been brought without leave of court or extension of time it is incompetent, hopelessly misconceived, frivolous, and totally devoid of merit and it ought to be struck out with costs to the respondent.
10. The Appellant filed a further affidavit on 24th January 2025 in answer to the Respondent's deposition. It confirms readiness to deposit the decretal sum in a joint bank account in the names of the parties' advocates. The court is urged to allow the application to avoid prejudice that would otherwise be occasioned to the Appellant.
11. Learned Counsel for the parties made brief oral submissions on the application. Mr Ojou for the Appellant reiterated the Appellant's affidavit evidence. He pleaded with the court to allow the application so that the appeal is not rendered nugatory.



12. Mr. Ratemo for the Respondent also underscored his client's affidavit evidence and Grounds of Opposition. Counsel stated that the Appellant does not deserve the court's discretion in the circumstances.
13. Having perused the rival affidavit evidence, the Respondent's Grounds of Opposition, Counsel Submissions and the record, the issue for determination is whether the Appellant has shown that the application for enlargement of time as desired is merited. The 30 days period the Appellant was granted to deposit the alternative guarantee lapsed on 6th December, 2024 or thereabouts given that the order was issued on 6th November, 2024. This application was filed around 17th December, 2024, around 10 days later. The Appellant appears to explain the delay to comply with the court order and/or bring this application as having been caused by the Respondent's Advocates who are said to have discussed but declined the former's proposal for deposit of the decretal sum into a bank account in the joint names of the advocates for the parties.
14. In the Supreme Court's decision in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others* [2015] eKLR, it was observed that the court is enjoined under the overriding Objective Principle enunciated in Sections 1A and 1B of the *Civil Procedure Act* to ensure a just, expeditious, proportionate and affordable resolution of disputes. The following principles inter alia guide the court in exercising its discretion to enlarge time for compliance with court orders as laid down in the cited case law:-
 - a. Extension of time is not a right but an equitable remedy only available to a deserving party.
 - b. A party seeking extension of time has the burden of laying the basis to the satisfaction of the court.
 - c. The court's discretion depends on the circumstances of each case.
 - d. The question of any prejudice that may be suffered by the Respondent should be taken into account.
and
 - e. The court should also consider whether the application was brought without undue delay.
15. As already noted, there is unexplained delay of 10 days to bring this application after the Appellant previously failed to comply within a 30 days timeline. The explanation that the delay was caused by discussions between Counsel on a proposal advanced by the appellant is not credible as it is the Appellant that shouldered the duty of expeditiously seeking any lawful reliefs. The Appellant has not therefore laid a proper basis for enlargement of time to the satisfaction of the court. The conduct occasioned prejudice to the Respondent who has a lawful decree in its favour.
16. The above findings notwithstanding, my brother H. M. Nyaga, J in his ruling of 14th February 2024, found that the Appellant would suffer substantial loss if execution is allowed while the appeal is pending determination.
17. Doing my best in the circumstances in balancing the competing interests of the parties the following orders issue on the application;-
 - a. The Appellant is given seven (7) days to deposit the entire decretal sum into court in default of which stay of execution granted pending hearing and determination of the appeal automatically lapses.



- b. The Appellant is further directed to pay the costs of this application assessed at Kshs. 20,000/= to the Respondent within seven (7) days from the date hereof failing to which the Respondent shall be at liberty to levy execution.

18. Ruling accordingly.

J. M. NANG'EA, JUDGE.

RULING DELIVERED THIS 12TH DAY OF FEBRUARY, 2025 IN THE PRESENCE OF:

J. M. NANG'EA, JUDGE.

Advocate for Appellant, Mr. Ojou

Advocate for Respondent, Mr. Ratemo

The Court Assistant (Jeniffer)

