



**Daytons Valuers Limited v Kenya Commercial Bank Limited (Civil Suit E688 of 2021)
[2025] KEHC 2932 (KLR) (Commercial and Tax) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E688 OF 2021
F GIKONYO, J
MARCH 6, 2025**

BETWEEN

DAYTONS VALUERS LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. The significant order sought in the plaintiff/applicant's Notice of Motion dated 19th December 2024 is, stay of execution of the judgment delivered on 29th September 2023 and the decree against it pending hearing and determination of the appeal lodged and stay of execution of costs awarded on the taxation ruling dated 4th November 2024.
2. The application is supported by the annexed affidavit sworn by the applicant's director, Justus Munene Munyi on 19th December 2024 and written submissions dated 21st January 2025.
3. The grounds are that: -
 - a. The Applicant filed an appeal against the Judgment of 29th September 2023 through a memorandum of appeal dated 24th April 2024 being Civil Appeal No. E483 of 2024 which is pending hearing and determination.
 - b. After the judgment, the Respondent filed its Bill of Costs dated 3rd November 2023 which was taxed on 4th November 2024.
 - c. The Respondent has never issued a request or demand for payment of the costs awarded but rather proceeded to apply for Warrants of Execution.



- d. On 16th December 2024, the Applicant learned that an auctioneer had purported to make a proclamation of movable property which the auctioneer believed to belong to the Applicant.
 - e. In any event, Betabase Auctioneers, instructed by the Respondent have proceeded to proclaim property belonging to Cajuu Estates Limited which is not party to the suit and is not liable to pay costs on behalf of the Applicant.
 - f. The auctioneers did not attempt to confirm who the assets belong to but rather prepared a blanket proclamation on assets not belonging to the Applicant.
 - g. Allowing the Respondent to sell any assets belonging to the Applicant would effectively cripple the business of the Applicant notwithstanding that there is an appeal which is ready for hearing.
 - h. This Application has been made without unreasonable delay.
 - i. It is in the interest of justice and fair trial that this application be granted.
4. The applicant relied on *Matata & another v Rono & another (Civil Appeal E034 of 2024)* [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling), *Njenga v Njeri & 2 others* (Civil Appeal E125 of 2023) [2023] KEHC 23991 (KLR) (24 October 2023) (Ruling) and *Butt v Rent Restriction Tribunal* [1982] KLR.

Response

5. The defendant/ respondent filed grounds of opposition dated 9th January 2025 and written submissions dated 27th January 2025. The core grounds are that the applicant has not met the conditions for stay; that the applicant has not proved substantial loss that might result if stay is not granted and that the application is frivolous, incompetent and misconceived.
6. In addition, the respondent argued that it ought to be reimbursed for expenses incurred as the applicant has not challenged the taxation ruling or the certificate of costs and that the pending appeal does not operate as a stay of execution.
7. The respondent relied on *Jamii Bora Bank Limited & Eliud C. Wambui t/a Chador Auctioneers v Samuel Wambugu Ndirangu* [2022] KEHC 1845 and *Shell Ltd v Kibiru and another* [1986] KLR 410.

Analysis and Determination

8. Is stay of execution pending appeal merited?
9. The court has discretionary power to order stay of execution of a decree pending appeal. In exercising the discretion to grant a stay pending appeal, the court takes a wider view of justice in determining whether there is a sufficient cause to order stay of execution; but also considering the traditional requirements in Order 46 Rule 2 of the Civil Procedure Rules, namely: -
 - i) whether the application has been made without unreasonable delay;
 - ii) whether substantial loss would occur upon the applicant unless stay of execution is granted; and
 - iii) the provision of security.



10. The exercise seeks to attain proportioned balance of the applicant's right of appeal and the respondent's right to enjoy the fruits of their judgment; avoiding prejudice to any party including rendering a successful appellant a mere pious explorer or a holder of barren result. *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR)
11. Was the application filed without unreasonable delay? *Visbham Ravji Halai v Thornton & Turpin* Civil Application No. Nai 15 of 1990 [1990] KLR 365
12. The respondent stated that the applicant took more than a year after the judgment and 45 days after the taxation to apply for a stay.
 - j. The record shows that, judgment was delivered on 29th September 2023. The Respondent filed its Bill of Costs dated 3rd November 2023 which was taxed on 4th November 2024. The present application was filed on 19th December 2024, over 1 year and 2 months after the judgment and about 1 ½ months after taxation of costs. The applicant did not see the need for stay of execution after it filed its appeal or immediately after costs were taxed. They are now coming to court in quite an interesting ground; that, 'Betabase Auctioneers, instructed by the Respondent proclaimed property belonging to Cajuu Estates Limited which is not party to the suit and is not liable to pay costs on behalf of the Applicant.'
13. This ground ushers in the next question; whether substantial loss would occur if stay is not granted?
14. The applicant submitted that it stands to suffer substantial loss in the form of income if the court does not grant a stay of execution against its tools of trade.
15. In the same vein, the applicant stated that the proclaimed goods belong to Cajuu Estate Ltd; which is akin to pleading an objection to attachment proceeding and stay of execution of their decree on behalf of Cajuu Estate Limited; the most unusual manner and contrary to order 22 rule 51 and 52 of the *Civil Procedure Rules*. One wonders how these facts would anchor a claim that substantial loss would occur upon the applicant.
16. On the other hand, the respondent submitted that the applicant has not demonstrated that it would suffer substantial loss because the costs can be recovered from it in the form of damages if the appeal succeeds. It pointed out that the applicant acknowledged the respondent's financial capacity, asserting that it would be capable of remedying any substantial loss, if any. The respondent however urged the court to direct the applicant to pay the costs because it has indicated its willingness to pay security.
17. To them, the applicant has not shown substantial loss would occur upon them unless stay is granted.
18. The court notes that the applicant's willingness to deposit the costs as security in court pending the hearing and determination of the appeal. In the circumstances of this case, this pledge assumes stay of execution is automatic upon the filing of appeal. Order 42 rule 6 of the CPR is emphatic; appeal does not operate as stay of execution. Courts have stated time without number that, the cornerstone of court's jurisdiction in granting stay of execution pending appeal is substantial loss to the applicant.
19. it appears the applicant, who is the judgment-debtor, is pleading an objection to attachment for Cajuu Ltd. There is no valid notice and application for objection to attachment as provided under rule 51, upon which, the court may consider a stay of the execution. And, the application before the court is not such valid notice and application.
20. From the above, I am not persuaded that the applicant shall suffer substantial loss if stay is not granted as it may be reasonably compensated by damages.



21. In the upshot, the application for stay lacks merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 6TH DAY OF MARCH, 2025**

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Rigaga for Ms. Cheruiyot for defendant

Ms. Purity Kariuki for Wamae for applicant

CA – Kinyua

