



**Ambwera v Ngurwe (Civil Case E006 of 2023) [2024] KEHC 2189 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL CASE E006 OF 2023  
PJO OTIENO, J  
MARCH 1, 2024**

**BETWEEN**

**JACKSON RIZIKI AMBWERA ..... PLAINTIFF**

**AND**

**GILFORD GITONGA NGURWE ..... DEFENDANT**

**RULING**

1. The Court is called upon to determine two applications; one by the Defendant seeking stay and the second by the Plaintiff seeking orders that the Managing Director, Absa bank Ltd, be committed to civil jail for failure to comply with the orders of 10.8.2023. The Court has purposed to handle the application for stay first, and only if it fails shall there be a reason to consider the application for contempt.
2. The Defendant's Notice of Motion application dated 27<sup>th</sup> December, 2023 is brought pursuant to sections 1,1A,1B,3,3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. It seeks, in the main, stay pending appeal against the orders and ruling delivered on 21<sup>st</sup> December, 2023. The application is premised on the grounds on the face of the record and the undated Supporting Affidavit of Gilford Gitonga Ngurwe.
3. Briefly, the grounds for seeking stay are given to be that the Plaintiff is a stranger to the Defendant and that the Applicant never instructed the firm of W.W. & Associates to enter appearance on its behalf and enter a consent judgment with the Plaintiff, on his behalf, in order to satisfy the Plaintiff's claim of Kshs. 132,720,000/-.
4. The application is resisted by a Replying Affidavit sworn by Kungu Nigel Wesutsa sworn on the 10/1/2024 in which he avers that the Defendant has failed to meet the conditions for an application for stay pending appeal by failing to neither state the substantial loss he is exposed to suffer and the manner in which he will suffer such substantial loss. He is equally accused of failure to offer security for the due performance of the decree.



## Issue, Analysis and determination

5. Being an application for stay pending appeal, a perusal of that application and the response thereto, the issue that arises for my determination is whether the application meets the threshold for grant of stay pending appeal. To this Court, whether or not to grant stay is a matter at the discretion of the Court, but in exercising that discretion consideration for the Court are circumscribed by Order 42 Rule 6.
6. For context purposes, the order that the Plaintiff is said seek to execute is dated 10<sup>th</sup> August, 2023 and reads as follows;
  - a. That the amount of Kshs. 3,000,000/- to be paid to the firm of M/S W W & Associates advocates, from funds in the defendant's fixed deposit account number 2022690263-34-34 ABSA Bank, Changamwe Branch.
  - b. That the remainder of the funds in the defendant's fixed deposit account number 2022690263-34-34 ABSA Bank, Changamwe Branch to be paid to the firm of M/S K.N Wesutsa and Company Advocates, subject to any penalties, charges and/or expenses in respect to the defendant's fixed deposit account number 2022690263-34-34 ABSA Bank, Changamwe Branch.
  - c. That the claim of the plaintiff against the defendant is hereby marked as settled without further orders as to costs.
7. By its Ruling dated 21<sup>st</sup> December, 2023 the Court declined to set aside the orders primarily for reasons that there was not disclosed a vitiating factor and that the matter having been reported to the police, it was appropriate to let the investigating agency execute its mandate without being preempted.
8. It is that Ruling that the Defendant seeks to stay. The principles governing a stay pending appeal, as said before, are coded in Order 42 Rule 6 (2) of the Civil Procedure Rules to be; a) that substantial loss may result to the Applicant unless the order is made; b) that the application has been made without unreasonable delay; and c) security is offered by the Applicant for the due performance of such decree or order.
9. All that an Applicant needs to do is to demonstrate all the above grounds to the satisfaction of the Court. In this case, the Applicant has not indicated the substantial loss he stands to suffer if the stay orders are not granted. He has also not expressed willingness and/or ability to provide security. The only condition which can be deduced from the record to have been met by the Applicant is that the application for stay was brought without delay in that the Ruling the Applicant seeks to appeal against was delivered on 21<sup>st</sup> December, 2023 while the application for stay was brought on 27<sup>th</sup> December, 2023.
10. The purpose of a stay of execution was explained by the Court in RWW v EKW [2019] eKLR as follows;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.”
11. In the context of this matter, where no substantial loss is not alleged nor proved and where the Applicant sees it unfit to offer security, it is difficult for the Court to exercise its discretion in favour of the Applicant. It is now the settled law, since Silverstein v Chesoni [2002] 1KLR 867, when the Court of Appeal underscored the important consideration the Court has to give to whether or not an Applicant



for stay pending appeal would be exposed to substantial loss and what constitutes substantial loss. For a loss to be termed and considered substantial it must present a situation that would render the appeal nugatory. The court said: -

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

12. In the absence of a cornerstone to any structure, it stands weakened and would be swept away by the slightest of the storm that passes by.
13. More importantly, here, the execution of the orders of the Court relate to the Defendant’s alleged bank account maintained with ABSA Bank Ltd. In a different application for contempt, it was the averment by Mr. Bwire for ABSA bank that the Defendant is not a customer of ABSA Bank. To clarify this position further, Mr. Nicholas Ombogo, a Branch Operations Manager at ABSA Bank, Kakamega Branch, took the stand and testified that from the bank records, account number 2022690263-34-34 does not exist and that they do not have a customer by the name of Gilford Gitonga Ngurwe.
14. The Plaintiff on the other hand denies this contention by arguing that at no point following the receipt of the consent order did the Defendant deny the existence of the bank account.
15. With ABSA Bank denying knowledge of a customer by the name of Gilford Gitonga Ngurwe and further denying maintaining an account number 2022690263-34-34, it then follows that even execution of the orders in itself is not possible. Without real threat at execution, over and above failure to meet the thresholds of stay pending appeal, I find that it would serve no legal purpose to orders stay. Court orders ought not be given for the asking but to serve the purposes of justice.
16. For the reasons foregoing, the Court finds that the Applicant’s application for stay pending appeal lacks merit and the same is dismissed with costs.
17. That determination leaves the Court with the application for contempt. It is of note that the Bank, Absa Bank Ltd, has not been joined to these proceedings and were named as 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the application for contempt without an order for joinder.
18. That notwithstanding, there is a court order entered by consent between the parties which is yet to be upset. It has been brought to the attention of the Bank who has by correspondence, acknowledged the receipt. In the email of acknowledgement, dated 23.8.2023 from the legal department of the bank, addressed to the Defendant’s/Applicants Advocates, the Bank actually appreciates that the order binds upon it and that it would not ignore it in a contemptuous manner. In its own words, the email reads: -

“We would advise that if the customer is indeed aggrieved, then it is right that the customer moves the court for orders. Should you not avail a court order holding or ceasing the current order immediately, the bank shall comply as directed in the current order.”
19. In the opinion of the Court that letter by the Bank says it all. It says the order had been verified to be authentic and that it was going to comply in the event there is no contrary order. One may ask what compliance the Bank was going to do if it had no funds in favour of the defendant. If indeed it had no such funds, nothing would have been easier than to just write back and say it is unable to comply.
20. The Court finds that the Bank is not being candid when it says that it has no account held by the Defendant, by one side of the mouth, having warned the Defendant of its intention to comply with the order served upon it, then later asserting that it has no account nor funds to the credit of the Defendant.



It is thus the finding of the Court that the Bank was duly served with an order whose terms are not equivocal and that in failing to comply therewith, it is in contempt.

21. However, the Court notes that the order did not timeline the Bank on when to comply. For that reason, it is now ordered that it does comply within 7 days from the date hereof and in default, the Plaintiff be at liberty to take an appropriate lawful step, as may be advised by Counsel, to enforce compliance.
22. The costs of the application are awarded to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1<sup>ST</sup> DAY OF MARCH, 2024**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Mr. Mwakisoso for the Defendant/Applicant

Mr. Bwire for the Bank

No appearance for the Plaintiff

Court Assistant: Polycap Mukabwa

