



REPUBLIC OF KENYA



**KENYA LAW**  
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**SBM Bank Kenya Limited v Josephat t/a Venture Auctioneers & 2 others  
(Civil Case E001 of 2022) [2024] KEHC 3681 (KLR) (2 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3681 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE E001 OF 2022  
SM MOHOCHI, J  
APRIL 2, 2024**

**BETWEEN**

**SBM BANK KENYA LIMITED ..... PLAINTIFF**

**AND**

**GEOFFREY NDUNGU JOSEPHAT T/A VENTURE AUCTIONEERS .... 1<sup>ST</sup>  
DEFENDANT**

**COUNTRY SIDE DAIRY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**OL -KALOU DAIRY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before Court for determination is the Application filed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Applicants dated 12<sup>th</sup> July, 2022 seeking:
  - i. Spent
  - ii. Spent
  - iii. That this Honourable Court be pleased to stay the execution of the Ruling and Orders issued by the Court on 7<sup>th</sup> July, 2022 herein pending the hearing and determination of the Appeal preferred in the Court of Appeal.
2. The Application is premised on grounds on the face of the Motion and on the separate annexed affidavits of Geoffrey Ndung'u Josephat and Kenneth Wachira. They deponed that vide a Ruling delivered on 7<sup>th</sup> July, 2022 they were found in Contempt of the Orders issued on 17<sup>th</sup> January, 2022 staying an auction. The Applicant directed to return to the 2<sup>nd</sup> Defendant all the properties were attached unconditionally within 3 days from the Ruling. The sale was cancelled and the deponents specifically were fined Kshs 250,000/- and in default be committed to civil jail for 30 days.



3. They added that there was no auction on 16<sup>th</sup> January 2022 and the auction took place on 21<sup>st</sup> January, 2022. That the Order was served on 21<sup>st</sup> January, 2022 after the auction had taken place so it had been overtaken by events.
4. That the Application was brought under the Contempt of Court Act which was declared to be inconsistent with the Constitution. The Court declared the Applicants in contempt and directed that the auction be set-aside the items be returned and each be fined Kshs 250,000. That by the time the orders were being issued the items were vested in third parties.
5. That when the orders were made the third parties were not participants and the order therefore cause difficulties to them thus the reason the Applicants preferred the appeal against those orders dated 12<sup>th</sup> July 2022. That they are ready and willing to abide by any conditions of security, there is risk of them being jailed for 30 days if the orders are not issued and they stand to suffer loss and difficulties as enumerated.
6. The Plaintiff/Respondent opposed the application vide Replying Affidavit sworn on 31<sup>st</sup> October, 2022 by Samuel Kamau Margaret, Regional/Business Manager of the Respondent. He deponed that the Applicants have not satisfied the conditions for grant of stay. That the order dated 17<sup>th</sup> January, 2022 staying execution of the ruling and consequential orders issued on 22<sup>nd</sup> December, 2021 and the scheduled auction was served on the 17<sup>th</sup> January, 2022. That the order was not defective and the Applicants deliberately opted to disregard the order and proceeded with the auction.
7. The Plaintiff moved Court by way of contempt proceedings where orders sought were issued. That to date the Applicants have not complied with the order. That the Applicants have not come with clean hands. They have not brought reasons to justify the order for stay and that the Court lacks jurisdiction to entertain the application. That the orders sought are prejudicial as they will interfere with the Applicant's enjoyment of the fruits of as successful litigation
8. The Applicant's filed a further affidavit sworn by Kenneth Wachira on 15<sup>th</sup> November, 2022. He deponed that the argument by the Respondent that the Court considers merits of the appeal ought not to be considered. That the application is premised on the difficulty of returning goods already vested in third parties and the accusation of unclean hands is not justified.
9. He added that the Respondent has failed to disclose to Court that the facility was further secured by a charge over Nyahururu Municipality Block V/80 therefore the extent of their loss is over estimated. He concluded that the Court has jurisdiction to entertain the application since the Applicant have already filed an appeal as No E100 of 2022

### **Applicants' Submissions**

10. The Applicants through their submissions dated 15<sup>th</sup> November, 2022 and filed on 18<sup>th</sup> November, 2022 submitted that, the Court has jurisdiction to entertain this application as they have demonstrated that they stand to suffer substantial loss which is central to the exercise of the Courts discretion to grant stay. Reliance was placed in the case of Boniface Kariuki Wabome v Peter Nziki Nyamai & another (2019) eKLR.
11. The nature of substantial loss is that they will be committed to civil jail if they fail to comply with the order of the Court. Their loss is qualitative. That loss does not have to be quantitative at all time. That the Court in factoring hardships of either party the scales tilt in favour of the Applicant since the facility was partly secured and the exposure can be compensated by damages whereas they risk losing their



freedom. Reliance was placed in the case of *Reliance Bank Limited v Norlake Investment Ltd* (2002) EA 227 eKLR and *African Safari Club Limited v Safe Rentals Limited* Nbi CA No 53 of 2020 eKLR.

12. On the issue of Security, the Applicants submitted that the condition of grant of security is within the discretion of the Court and all that was needed is for the Applicant to demonstrate willingness to abide by the conditions set by Court. The Applicants offered to deposit the fine in Court as they wait for the outcome of the Court.

### **Respondent's Submissions**

13. The Respondent on the other hand vide its written submissions dated and filed on 31<sup>st</sup> October 2022 submitted that the right to grant and order of stay is within the discretion of the Court as was held in CA No 107 of 2015 *Masisi Mwita v Damaris Wanjiku* (2016) eKLR. That in exercising such discretion the Court should balance the rights of the parties. Accordingly, the Applicants will not be subjected to substantial loss since no evidence of legal sale was presented i.e. valuation, notification of sale, list of bidders and proof of payment despite requests. Further that Applicants are in actual occupation of the property continuing to benefit.
14. Further that the Applicants have not demonstrated willingness to provide security and should the Application be allowed the Respondent stands to lose 58,118,219 and therefore the Applicants should deposit Kshs 60,000,000 as security of due performance bearing in mind that there has been disobedience of Court orders.
15. According to the Respondent the Application is lacking in substance and procedure as no appeal has been filed thus the Court lacks the jurisdiction. The Respondent cited *Visbram Rauji Halal & another v Thornton & Turnpin (1963) Limited* Nairobi CA No 15 of 1990 as quoted in *Abraham Lenauia Lenkeu v Charles Katekyo Nkaru* (2016) eKLR.
16. The Respondent contended that it will be prejudiced should the Application be allowed.

### **Analysis and Determination**

17. The Court has considered the Application, the response thereto and the submissions on record and the issues for determination is:
  - i. Whether this Court has jurisdiction to entertain the instant application
  - ii. whether the Application is merited to grant an order of stay of execution pending appeal.
18. The law applicable for Stay of Execution Pending Appeal is provided for under Order 42 rule 6(2) of the *Civil Procedure Rules, 2010* thus:
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
  - (2) No order for stay of execution shall be made under subrule (1) unless—



- (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
- (3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”
19. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal pointed out on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The Court stated thus:
- i. The power of the Court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
  - ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal Court reverse the judge’s discretion.
  - iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
  - iv. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
20. The Court of Appeal in *RWW v EKW* (2019) as hereunder: -
- “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. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
21. Therefore, for this Court to grant the orders sought the Applicants have to bespeak that:
- a. They stand to suffer substantial loss;
  - b. The Application has been made without unreasonable delay; and
  - c. Security for the due performance of decree has been given.
22. First and foremost, before deliberating on whether there was compliance with the parameters set for grant of such orders, the Respondent has questioned the Court’s jurisdiction to entertain the instant application on the ground that the Applicants have not yet filed an Appeal and Notice of Appeal is



not sufficient. It should be noted that a Notice of Appeal is a jurisdictional prerequisite for the Court to entertain the matter. The first step in prosecuting an appeal from the High Court to the Court of Appeal is by lodging a Notice of Appeal. It should be noted that at this point the Court is not concerned with the merits of the Appeal, that is the purview of the Court of Appeal.

23. Rule 77 of the *Court of Appeal Rules* is couched in mandatory terms. The Applicants Notice of Appeal dated 8<sup>th</sup> July 2022 satisfies the mandatory requirements of Rule 77. Further the reading of Order 42 Rule 6(1) of the *Civil Procedure Rules* is that this Court has original jurisdiction to hear and determine an application for stay pending appeal. Therefore, the Appeal is deemed to have been filed upon filing the Notice of Appeal
24. It can therefore not be rightly said that this Court lacks jurisdiction. This Court therefore finds that the application is properly before Court and this Court is vested with appropriate jurisdiction to deal with the same.
25. The second issue is whether the application meets the legal threshold. As to the time taken by the Applicants to lodge the application, the Court on 7<sup>th</sup> July, 2022 found the Applicants in contempt of the Court order dated 17<sup>th</sup> January, 2022. The Applicants filed the present application on 13<sup>th</sup> July, 2022 simultaneously with the Notice of Appeal dated 8<sup>th</sup> July, 2022. It is quite clear that the application has been made timeously as it was filed within a week. The Court finds that the application was filed without unreasonable delay.
26. As regards substantial loss, in the Application the Applicants are challenging the procedure used by the Trial Court in the issuance of the orders of Contempt of Court as well as imposing a fine among other orders on the ground that the act was declared inconsistent with the *Constitution* and that the orders stopping the auction were issued after the auction had taken place thus overtaken by events. That they have already surrendered the property to a third party and compliance will occasion them hardship.
27. The Applicants are further apprehensive that they will go to jail thereby curtailing their liberties. This Court takes note of the reasons advanced and fact that the Appellants risk being committed to civil jail. As to whether the property was sold to a third party and complying with the release being difficult to perform is up for interrogation by adducing proper evidence. However, there is an aspect of being committed to civil jail. Curtailing one's liberties is a drastic and last resort action and where the Court can afford an alternative, it should always strive for the alternative.
28. The Court also is alive to the fact that there were orders in place and the Respondent is the successful litigant. However, in the event the Applicants do pay the fine or alternatively they are arrested and committed to civil jail and the appeal thereafter succeeds, the Applicants will have suffered unnecessary hardship. If the Appeal does not succeed, the Respondent will still be the successful litigant an any challenge on their part can be compensated by way of costs. To this end in considering the interests of either party, the Court finds that the Applicants have proved that they are likely to suffer substantial loss should stay orders be denied.
29. Finally, on the issue of security, the Court has a duty to do justice to both parties by imposing certain conditions. The Applicants have indicated willingness to abide by any conditions to be imposed by this Court as security for the orders sought. They have even offered to deposit the fine amount of Kshs 500,000 as security.



30. Indeed, the Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that: -

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

31. The Respondent is of the view that the Applicant should deposit the sum of Kshs 60,000,000 which is outstanding from the loan facility advanced. The Applicants are opposed to that since the loan was also secured by another property and as such the Respondent is not as exposed as it claims. The Applicants also deponed that the rights of third parties to property would be curtailed.

32. The concerns of the Applicants are within reasonable grounds however the Respondent risks losing a considerable amount of money even if the facility was secured by another asset.

33. It was stated by Kuloba, J (as he then was) in *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63.

“to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

34. The Court agrees with the Respondent that there are pre-requisites to an auction. Saying property was sold was not enough. Since it was a public auction, they should not have a problem at least indicating the value after valuation and subsequently providing a valuation report, proof of sale and so on and so forth.

35. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the Court stated:

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”



36. In *Harit Sheth Advocate v Shamas Charania* – Civil Appeal No 68 of 2008, this Court held: -

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

37. This Court has taken into account the Respondent’s concerns about its property, the Court orders in place and its subsequent default. As noted above the Respondent can still pursue the Applicants should the appeal fail. The Court has also taken consideration of the reasons given by the Applicants and finds that the Applicants are entitled to this Court’s discretion albeit with conditions.

38. For the reasons I have set out above, I find the Applicant has satisfied the requirements of Order 42 Rule 6 of the *Civil Procedure Rules* and the Notice of Motion dated 12<sup>th</sup> July, 2022 is allowed on the following terms:

- a. There shall be a stay of execution of the Ruling of the Honourable Court of 7<sup>th</sup> July, 2022 pending the hearing and determination of the Applicant’s appeal.
- b. The Applicants to deposit the sum of Kshs 1,000,000 in an interest earning joint account in the name of their respective advocates within forty-five (45) days of this Ruling.
- c. In default of the order in (b) hereinabove the stay shall stand vacated and the Respondent shall be at liberty to execute.
- d. The costs of the application shall be in the cause.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 2<sup>ND</sup> DAY OF APRIL 2024.**

**MOHOCHI S. M.**

**JUDGE**

