



**Family Bank Limited v Mutua (Civil Appeal E036 of 2023)  
[2024] KEHC 6592 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6592 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E036 OF 2023**

**MA ODERO, J**

**JUNE 6, 2024**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPELLANT**

**AND**

**SHADRACK MWANZIA MUTUA ..... RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 22<sup>nd</sup> May, 2023 filed by the Appellant/Applicant Family Bank Limited in which the following orders were sought.
  - “ 1. Spent
  2. Spent
  3. That this Honourable Court be pleased to grant an Order of Stay of Execution of the Ruling delivered on 17<sup>th</sup> May, 2023 in Nyeri MCCC No. 281 of 2015 - Family Bank Limited Vs Shadrack Mwanzia Mutua pending lodging, hearing and determination of the intended Appeal.
  4. That this Honourable Court does direct that the Suit in Nyeri MCCC No. 281 of 2015 – Family Bank Limited Vs Shadrack Mwanzia Mutua be transferred and heard before another magistrate.
  5. That the costs of and incidental to this Application be in the cause.”
2. The application was premised upon Sections 1A, 1B, 3A, 75, 78 and 79G of the *Civil Procedure Act*, Cap 21, Laws of Kenya, Order 42 Rules 1 & 6, Order 43 Rule 1 and order 51 Rule 1 of the *Civil Procedure Rules* 2010, Article 50 of *the Constitution* of Kenya 2010 and all other enabling provisions of the law and was supported by the Affidavit of even date and the further Affidavit dated 8<sup>th</sup> April, 2024 sworn by Henry Macharia an Advocate of the High Court of Kenya.



3. The Respondent Shadrack Mwanzia Mutua opposed the application through the Replying Affidavit dated 8<sup>th</sup> June, 2023 sworn by Karweru Muchemi Charles also an Advocate of the High Court of Kenya.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 12<sup>th</sup> April, 2024 whilst the Respondent relied upon his written submissions dated 16<sup>th</sup> February, 2024.

### **Background**

5. The Applicant herein had filed a suit against the Respondent being Nyeri MCCC NO. 281 of 2018. On 3<sup>rd</sup> August, 2022, the lower court dismissed the said suit for want of prosecution and awarded costs to the Respondent.
6. A Decree dated 13<sup>th</sup> October, 2022 together with Auctioneers Proclamation Notices were duly served upon the Applicant. The Applicant then filed a Notice of Motion dated 21<sup>st</sup> October, 2022 seeking the following orders:-
  - “ 1. Spent
  2. Spent
  3. Spent
  4. That the Honourable Court do set aside the order for dismissal of the suit made on the 3<sup>rd</sup> August, 2022, and the matter be reinstated and allowed to proceed to full hearing.
  5. That all the proceedings subsequent to the dismissal order made as from the 19<sup>th</sup> June, 2019, be vacated and/or stayed.
  6. That the costs of and incidental to this application be provided for.”
7. That application was heard and on 1<sup>st</sup> March, 2023 Hon. AG Kibiru Chief Magistrate delivered his ruling in which he made the following orders:-
  - “ 1. That the order made on the 3<sup>rd</sup> August, 2022, dismissing this suit for want of prosecution, and all other orders subsequent thereto are hereby set aside.
  2. That this matter be and is hereby reinstated and same to proceed to hearing forthwith.
  3. That the Applicant/plaintiff shall bear the thrown away costs as from the date this suit was dismissed for want of prosecution, together with the costs of this application.
  4. That the said costs in (3) above be agreed upon by both parties or be assessed by court and same be paid within sixty (60) days of this ruling.
  5. That failure to comply with (4) above, this application shall stand dismissed.” [Own emphasis]
8. As it transpired the Applicant did not meet the Sixty (60) day deadline in paying the throw away costs. Counsel for the Applicant averred that he reached out to the Respondents Advocate and requested



- a quotation for the throwaway costs. Vide a letter dated 20<sup>th</sup> March, 2023 the Respondent proposed throw away costs of Kshs. 51,814.
9. The Advocate for the Applicant felt that this amount was exaggerated proposed an amount of Kshs. 30,000/=.
  10. Thereafter an assessment of the costs was sought from the court. On 8<sup>th</sup> May, 2023 the Civil Registry issued an invoice for the requests by which time sixty (60) days had already elapsed.
  11. Eventually on 11<sup>th</sup> May, 2023 the Applicant proceeded to settle the amount of Kshs. 51,814 as throwaway costs. This was about seventy (70) days after the ruling of 1<sup>st</sup> March, 2023.
  12. The Applicant complains that on 17<sup>th</sup> May, 2023 the learned trial magistrate ‘whimsically’ dismissed a motion dated 21<sup>st</sup> October, 2023 filed by the Applicants.
  13. The Applicant contends that they did take all reasonable steps to execute the Decree, despite laxity on the part of the court in assessing the costs payable and despite the amounts demanded being in their view exorbitant. The Applicant now seeks a stay of the ruling delivered on 17<sup>th</sup> May, 2023 pending the hearing and determinations of their intended appeal.
  14. In opposing the application the Respondents Advocates avers that the orders issued on 1<sup>st</sup> March, 2023 allowed for reinstatement of the suit subject to payment of throwaway costs within sixty (60) days.
  15. The Respondents Advocates states that following the said ruling he wrote to the Applicants Advocate as a follow-up to the orders, and tabulated the throwaway costs at kshs. 51,814/=, Receiving no response to his tabulation the Respondents Advocate asserts that it was he, not the applicants Advocate who asked the court to assess the costs. The court issued an invoice for assessment of costs on 8<sup>th</sup> May, 2023.
  16. On 8<sup>th</sup> May, 2023 Counsel for the Applicant wrote a letter to the Respondents indicating that the tabulated costs of Kshs. 51,814 were in their view exorbitant and suggested a lower figure of Kshs. 30,000. That eventually on 11<sup>th</sup> May, 2023 at 5.07pm counsel for the Applicant sent to the amount of Kshs. 51,814/- by Mpesa to the phone of the Respondents Advocate.
  17. Counsel for the Respondent submits that by 8<sup>th</sup> May, 2023 the orders of the court of 1<sup>st</sup> March, 2023 had already taken effect thus the suit stood dismissed by operation of the orders made on that date. It is urged that the present application be dismissed with costs.

### **Analysis And Determination**

18. I have carefully considered this application, the reply filed thereto as well as the written submissions filed by both parties.
19. Order 42 Rule 6 which sets out the principles for stay of execution provides as follows;-
  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 appeal 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 to appeal is preferred may apply to the appellate court to have such order set aside. No order for stay of execution shall be made under sub rule



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.
  - c. ....”

20. Therefore in order to merit the orders being sought the applicants must satisfy the court.
  - a. That the application for stay was filed without unreasonable delay.
  - b. That they stand to suffer substantial loss unless the stay order is granted.
  - c. That security for the performance of the decree or order has been given by the Applicants.
21. The Ruling in question which I note was not annexed to the application was made on 17<sup>th</sup> May, 2023. The current application for stay was made on 22<sup>nd</sup> May, 2023 a few days after the said Ruling / Order. Accordingly I am satisfied that the application was filed in a timely manner.
22. The orders made by the trial court on 1<sup>st</sup> March, 2023 have been annexed and are referred to earlier in this ruling. The said orders allowed for reinstatement of the suit provided that throwaways costs were paid within sixty (60) days.
23. Those orders were clear and unambiguous. The clock began to click and time began to run on 1<sup>st</sup> March, 2023. The Applicant did not meet the set down conditions and failed to pay the costs within sixty (60) days nor did the Applicant approach the court seeking for an extension of time within which to make the payment required.
24. The Applicant states that he sought a quotation from the Respondent and on 20<sup>th</sup> March, 2023 the Respondent quoted an amount of Kshs.51,814 which in the applicants view was excessive. The Applicant then wrote to the court seeking an assessment of the throwaway costs.
25. However there is no evidence of any letter written by the Applicant to the court seeking an assessment of the throwaway costs. It is trite law that he who alleges must prove. There is no evidence of any letter written by the Applicant to the Respondent seeking a quotation.
26. On the other hand the Respondents have exhibited a letter dated 20<sup>th</sup> March, 2023 (Annexure ‘HM2’ to the Replying Affidavit dated 8<sup>th</sup> June, 2023) written to the Applicants Advocate quoting amount of Kshs. 51,814/=.
27. The Applicant vide a letter dated 8<sup>th</sup> May, 2023 (Annexure) responded that the quoted figure was on the higher side and proposed an amount of kshs. 30,000 instead.
28. On 8<sup>th</sup> May, 2023 the Civil Registry issued the applicants Advocate with an invoice for the assessment of costs (Annexure ‘Hm4’). This invoice came after the Sixty (60) day period specified by the trial court had elapsed. It was not until 11<sup>th</sup> May, 2023, more than



seventy (70) days after the order had been issued that the applicants Advocate forwarded the sum of Kshs. 51,814.00 to the Respondents Advocate (see Annexure ‘HM-5’)

29. As stated earlier the orders made by the trial court on 1<sup>st</sup> March, 2023 were clear and unambiguous. The court gave a time line being sixty (60) days for the payment of throwaway costs. In my view this was ample time to allow for any negotiations by the parties on the amount to be paid.
30. The case belonged to the Applicant. As such the Applicant had the obligation to ensure that the timelines set out by this court were strictly adhered to. The Applicant ought to have been vigilant in ensuring that throwaway costs were paid within the period specified by the trial court. If the Applicant felt that it required more time to comply then an application for extension of time ought to have been filed. This was not done.
31. In my view the Applicant was lax and waited for over one (1) month after it had been issued with the figure for throwaway costs to settle the same Equity it is said will not aid the indolent.
32. Finally the orders which the applicant now seeks to stay are the orders which were made on 17<sup>th</sup> May, 2023 dismissing the suit. An order of dismissal is a negative order and in the circumstances there would be nothing to stay. In the case of Raymond M. Omboga -vs-austine Pyan Maranga Kisii HCCA No. 15 of 2010 the court held as follows:-

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save perhaps for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be stay of execution of such an order. The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issue of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise.” [Own emphasis]

32. I am not persuaded that sufficient cause has been advanced to warrant this courts exercise of its discretion in favour of the Applicant. The Applicant simply took their time regarding their compliance with the orders of the trial court. They cannot blame any other party for their indolence.
33. As such I find no merit in this application. The same is dismissed in its entirety. Costs to be met by the Applicant.

**DATED IN NYERI THIS 6<sup>TH</sup> DAY OF JUNE, 2024.**

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**MAUREEN A. ODERO**

**JUDGE**

