



**NCBA Bank Kenya PLC v Nyaata & another (Civil Appeal
E036 of 2024) [2024] KEHC 8398 (KLR) (Civ) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E036 OF 2024

CW MEOLI, J

JUNE 20, 2024

BETWEEN

NCBA BANK KENYA PLC APPELLANT

AND

PERIS MORAA NYAATA 1ST RESPONDENT

JOGEDAH AUCTIONEERS 2ND RESPONDENT

RULING

1. Before the court for determination are two (2) applications. The first is the Notice of Motion dated 28th March 2024 (hereafter the first application) brought by NCBA Bank Kenya PLC (hereafter the Appellant) supported by the grounds laid out on its face and amplified in the affidavit of the Appellant's Legal Counsel, Jackson Nyaga. Seeking an order to stay execution of the ruling delivered by the lower court on 13th December, 2023 in Milimani CMCC No E396 of 2023 (the suit) and consequential orders, pending the hearing and determination of the appeal. The first application is expressed to be brought under Sections 3A and 3B of the *Civil Procedure Act* (CPA); Order 42, Rule 6 and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR); and Articles 50(1) and 159(1) and (2) of the *Constitution*.
2. By his supporting affidavit, Jackson Nyaga deponed that sometime in the year 2015 Peris Moraa Nyaata (hereafter the 1st Respondent) obtained a loan facility with the Appellant to finance the purchase of the motor vehicle registration number KCF 784G Isuzu NQR 33-seater (the subject motor vehicle); that the Appellant therefore wrote to Ryce East Africa Limited (the Company) on 11th May, 2015 communicating that the Appellant would pay a sum of Kshs 3,745,000/- while the 1st Respondent would provide a deposit in the sum of Kshs 1,605,000/- towards the purchase of the subject motor vehicle; and that it was further agreed between the parties that the 1st Respondent would repay the total



- loan sum of Kshs 4,706,717/- to the Appellant through 36 monthly instalments, ending in 2018. The deponent further stated that consequently, the subject motor vehicle was registered in the joint names of the Appellant and the 1st Respondent and further fitted with a tracking device.
3. The deponent averred that as of 11th May, 2018 when the loan sum stood at the sum of Kshs 2,283,721.31, the 1st Respondent approached the Appellant requesting restructuring of the loan facility. That the Appellant accommodated the 1st Respondent, by agreeing to have the latter settle the outstanding loan amounts by way of 20 monthly instalments of Kshs 128,200/- from 4th July, 2018 to 4th February, 2020, but on the latter date, the loan remained outstanding and the Appellant instructed Joyland Auctioneers (the Auctioneers) to recover the then outstanding sum of Kshs 3,518,593.55 from the 1st Respondent or in the alternative, to repossess the subject motor vehicle. However, attempts at realizing the Appellant's security were futile, as it was discovered that the tracker device previously installed in the subject motor vehicle had been removed, and the said vehicle could not be traced despite concerted efforts on the part of the Auctioneer as well as various other auctioneers, in tracing it, while the 1st Respondent equally claimed that she was unaware of the whereabouts of the subject motor vehicle, though she did not report it missing at any one point.
 4. The deponent further asserted that on 26th May, 2022 the Appellant received a request by the 1st Respondent for a loan discount so as to reduce the loan sum to Kshs 2,500,000/-; that subsequently, the 1st Respondent's daughter (Stella Kwamboka Oeri) wrote to the Appellant on 20th June, 2023 indicating willingness to settle the outstanding loan amounts on behalf of her mother; and the Appellant while acting in good faith, yet again accommodated the 1st Respondent accordingly and issued her with a fresh letter of offer dated 21st July, 2023 on new terms of settlement, including the term that an initial deposit in the sum of Kshs 50,000/- be paid by 31st July, 2023. That even so, there was non-compliance with the above term, with the deposit being made later on 1st August, 2023. That as of the date of the letter of offer, the outstanding loan amount stood at the sum of Kshs 3,6610,985.94.
 5. The deponent stated further that owing to the above sequence of events, the Appellant took steps to recover the subject motor vehicle eventually tracing and repossessing it on 31st July, 2023 discovered that the said motor vehicle had been in commercial use all along, contrary to the averments previously made by the 1st Respondent. That in addition, various physical alterations had been made on the subject motor vehicle to disguise its appearance. The deponent stated that rather than take active steps in settling the outstanding loan sums, the 1st Respondent filed the suit, accompanied by an application dated 8th August, 2023 seeking temporary injunctive orders against the Appellant, to restrain it from selling or otherwise disposing of the subject motor vehicle through Jogedah Auctioneers (hereafter the 2nd Respondent), pending the hearing and determination of the suit. That upon hearing the application *ex parte*, the lower court granted an injunctive order in the interim on 15th August, 2023 by which time the Appellant had already begun the recovery process.
 6. The deponent stated that soon thereafter, the 1st Respondent proceeded to file another application dated 17th August, 2023 seeking the release of the subject motor vehicle and a finding that the Appellant was in contempt of the order earlier made on 15th August, 2023 which prayers were granted by the lower court in the interim, on 24th August, 2023. Following which the Appellant subsequently moved the court through an application dated 25th August, 2023 seeking to stay execution of the order of 24th August, 2023. That the said three (3) applications were collectively determined by a ruling delivered on 13th December, 2023 by which the trial court issued an injunctive order restraining the Appellant from selling or otherwise disposing of the subject motor vehicle through the 2nd Respondent, pending the hearing and determination of the suit, and consequently, the subject motor vehicle was released to the 1st Respondent.



7. The ruling above prompted this appeal, and the deponent states that unless the stay order sought is granted, the Appellant will suffer substantial loss in view of the fact that the 1st Respondent may continue to earn a profit on the subject motor vehicle, whilst continuing to act in breach of the loan agreement. And moreover, that there is a likelihood that the subject motor vehicle may be removed from the jurisdiction of this court. That it is therefore imperative that the stay order sought be granted.
8. The 1st Respondent resisted the first application by swearing a replying affidavit on 8th April, 2024. Therein, she averred inter alia, that contrary to the Appellant's claims, she obtained a loan facility from NIC Bank Limited (the Bank) on 11th May, 2015 and not from the Appellant herein. That she had previously made consistent monthly payments of Kshs 128,877.06 to the Bank prior to the Covid-19 pandemic and upon its take-over by the Appellant, and hence the sums allegedly claimed to be outstanding by the Appellant are inaccurate. That the Appellant's action of instructing the 2nd Respondent to repossess the subject motor vehicle during pendency of the parties' consent agreement on restructuring of the loan ill-intended. The 1st Respondent equally stated that she is willing to settle all sums owing to the Appellant, upon being provided with a comprehensive statement of accounts.
9. The Notice of Motion dated 19th April, 2024 constitutes the second application, and was brought by the 1st Respondent under Section 3A of the [CPA](#) and Rule 40 of the [CPR](#). It is anchored on the grounds set out on its body and the facts deponed to in the affidavit of the 1st Respondent. By this application, the 1st Respondent essentially seeks compensation for loss of user from the Appellant at the daily rate of Kshs 20,000/- in respect of the period during which the subject motor vehicle is held pursuant to the court order made on 3rd April, 2024 allegedly obtained via misrepresentation and fraudulent material non-disclosure; and a further order for restitution of the sum of Kshs 300,000/- erroneously deducted by the Appellant towards a motor vehicle registration number KCE 784G and any other excess amounts that may have been debited by the Appellant on the 1st Respondent's account.
10. In her supporting affidavit, the 1st Respondent deposed that she had paid a total sum of Kshs 9,189,846,072/- including a sum of Kshs 300,947.95 which was purportedly erroneously debited from her account, respecting a strange motor vehicle registration number KCE 784G regarding the loan amount which stood at Kshs 3,745,000/-. That consequently, the sums demanded by the Appellant are exorbitant.
11. In opposition to the second application, the Appellant's Senior Legal Counsel Kenneth Mawira, swore a replying affidavit on 10th May, 2024 wherein he stated that the 1st Respondent is misleading the court by claiming that she has overpaid the loan facility. He asserted that the sums stated as owing in the first application are accurate; that the Appellant retains the automatic right to detect and write off any interest and penalty where necessary; that the claim by the 1st Respondent regarding the allegedly erroneous deductions on the loan in respect of a different motor vehicle as baseless; and explaining that any reference made on the motor vehicle registration number KCE 784G was not actuated by malice but the result of an innocent mistake by the person generating the loan statement. The deponent maintained that the Appellant has at all material times been transparent and honest in its dealings with the 1st Respondent.
12. The two (2) applications were canvassed through written submissions. Submitting in support of the first application, the Appellant's counsel anchored his submissions on the proviso of Order 42, Rule 6 of the [Civil Procedure Rules](#) (CPR) on the principles for consideration in applications seeking stay of execution pending appeal. Counsel further cited the decisions in [Charles N. Ngugi v ASL Credit Limited](#) [2022] eKLR regarding the condition in respect of substantial loss.



13. Counsel asserted that unless stay is granted, the Appellant is likely to suffer substantial loss in the manner elaborated in the said application, adding that the Appellant has an interest in the subject motor vehicle since it constitutes the sole security for the loan facility advanced to the 1st Respondent. Furthermore, counsel whilst citing the decision in *Orieny & another v National Bank of Kenya* (Commercial Case 6B of 2022) [2023] KEHC 101 (KLR) (18 January 2023) (Ruling), argued that special circumstances have been established to warrant the stay order sought. The Appellant having demonstrated that the 1st Respondent is still indebted to the Appellant while simultaneously benefiting from the proceeds derived from the subject motor vehicle. In the circumstances, the court was urged to exercise its discretion by allowing the first application.
14. In opposing the second application, counsel for the Appellant anchored his submissions on the decision in *Kamau v County Government of Murang'a* (Environment and Land Appeal E014 of 2021) [2022] KEELC 3135 (KLR) (9 June 2022) (Judgment) to argue that the 1st Respondent has not met the threshold for a grant of the orders sought therein. Counsel further termed the second application as an abuse of the court process and therefore urged the court to dismiss it with costs.
15. On the part of the 1st Respondent, her counsel briefly submitted that the Appellant has approached this court with unclean hands since it is apparent that deductions have been made on two distinct assets and that an overpayment has been made by the 1st Respondent on the loan facility. Reference was made to the decision in *David Karobia Kiiru v Lverage Company Ltd* [2017] eKLR where it was held that the defendant in that matter acted unlawfully by repossessing an asset without following due process, notwithstanding the fact that the plaintiff was in breach of the hire purchase agreement. For those reasons, counsel urged that the second application be allowed while the first application is dismissed with costs.
16. The 2nd Respondent did not participate at the hearing of the two applications.
17. The court upon considering the material canvassed in respect of the first and second applications, will first address the second application which as earlier mentioned, seeks compensation for loss of user essentially, against the Appellant at the daily rate of Kshs 20,000/- for the period during which the subject motor vehicle is held pursuant to the court order made on 3rd April 2024 and restitution of the sum of Kshs 300,000/- allegedly erroneously deducted by the Appellant towards a motor vehicle registration number KCE 784G and any other excess amounts that may have been debited by the Appellant on the 1st Respondent's loan account.
18. As earlier mentioned, the 1st Respondent supported the second application by stating that she has overpaid monies towards offsetting the loan facility. And that the Appellant has misrepresented the facts pertaining to the outstanding sums owed, while debiting sums relating to a motor vehicle distinct from the subject motor vehicle against her loan account. This assertion was denied by the Appellant.
19. The record herein reveals that upon the Appellant filing the first application, this court on 3rd April, 2024 granted a temporary order directing the Respondents herein to deliver up the subject motor vehicle into the custody of the Deputy Registrar, Civil Division, within five (5) days thereof, but not later than 9th April, 2024. When the parties attended court on the said 9th day of April 2024 Mr. Mogaka counsel for the 1st Respondent confirmed compliance with the aforesaid court order. That said, the court noted that no expert report had been tendered to ascertain the status of the said motor vehicle.
20. Be that as it may, the court issued an order that the subject motor vehicle remains within the court premises pending further directions. The record further shows that when the parties later attended court on 2nd May, 2024 Mr. Mogaka sought the release of the subject motor vehicle to the 1st Respondent on the premise that his client had made overpayments to the Appellant, which application



was vehemently opposed by Mr. Kabuchu, counsel for the Appellant. In the circumstances, the court ordered that the status quo be maintained and gave directions on the canvassing of the two (2) applications.

21. Concerning the prayer relating to loss of user of the subject motor vehicle, it is pegged on the orders of this court which the 1st Respondent claims were obtained through material non-disclosure and fraudulent misrepresentation. The 1st Respondent relying on alleged overpayments on the loan and the amount of debt outstanding not being accurately presented by the Appellant. Such matters could only be determined upon some sort of evidence, which was not presented here. Besides, these are matters to be finally determined after the trial of the pending suit. At this juncture however, the mere fact that a party in apparent default challenges the sums claimed by the lender gives no succour to such defaulter regarding the repossessed security.
22. In addition, it is trite that any allegation of fraud and/or misrepresentation must be strictly pleaded and proved, which is not quite the case here. The Court of Appeal in *Kinyanjui Kamau v George Kamau* [2015] eKLR stated that:

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

23. The prayer for compensation must fail. Similarly, concerning the prayer for restitution of sums allegedly erroneously debited from the 1st Respondent’s loan account, the questions relating to the amount of debt owing from the 1st Respondent to the Appellant or wrongful debit on the loan account comprise pertinent issues for determination by the trial court. It is apparent that the 1st Respondent is essentially seeking restitution of a sum which is yet to be ascertained as owing. In so doing, the 1st Respondent is inviting this court to prematurely delve into the merits of the dispute, when the dispute is yet to be heard or determined by the proper court. In the premises, the court similarly declines to grant the order for restitution, as the same is prematurely sought.
24. On all accounts, it appears that, rather than use the material now contained in her application to resist the first application, the 1st Respondent, having eschewed applying to set aside the interim orders of this court, is by her novel application attempting at this stage, to set up a distinct claim for compensation/restitution against the Appellant. Which claim is supposedly predicated on loss allegedly arising from a lawful order of this court and hoisted on this appeal. This entire claim as presented in the second application cannot lie in this appeal. The second application is misconceived and is hereby dismissed with costs.
25. Moving now to the first application, it seeks to stay execution of the ruling delivered by the trial court on 13th December, 2023 in the suit and other consequential orders, pending the hearing and determination of the appeal. By way of the impugned ruling, the lower court issued an injunctive order, restraining the Appellant from selling or otherwise disposing of the repossessed subject motor vehicle through the 2nd Respondent, pending the hearing and determination of the suit. It is pertinent to mention at this stage that the court is not concerned with the merits of the appeal.



26. It is trite law that the courts have discretionary power to grant an order for a stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See *Butt v Rent Restriction Tribunal* (*supra*). The applicable provision surrounding a stay of execution is Order 42, Rule 6 of the *CPR* which stipulates that:

- “(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”.

27. Concerning the first condition, namely, whether the first application has been brought without unreasonable delay, the ruling which triggered the said Motion was delivered on 13th December, 2023 and the first Motion filed on or about the 28th of March, 2024. The court upon discounting the Christmas period when time does not run pursuant to Order 50 Rule 4 of the *CPR* does not consider the delay to be inordinate in the circumstances.

28. The second condition relating substantial loss in any application for stay of execution was aptly addressed by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410 when it held that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

29. The Court proceeding to hold as follows:

- “1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.



4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
30. The decision of Platt Ag JA (as he then was), in the Shell case, in the court’s humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:
- “The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”
31. The learned Judge continued to observe that:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
32. Earlier on, Hancox JA (as he then was) in his ruling observed that:
- “It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton LJ in *Wilson v Church (No 2)* (1879) 12ChD 454 at page 458 where he said:-‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.’”
33. The court considered the contention by the Appellant as to the manner in which it stands to suffer substantial loss, alongside the opposing position taken by the 1st Respondent. Judging from material on the record, the questions touching on sums outstanding on the loan facility secured upon the subject motor vehicle, and whether the Appellant’s repossession of the security was justified are at the heart of the dispute. These matters cannot be finally determined at this stage. Be that as it may, the purpose of the court’s power to stay execution is to prevent an appeal from being rendered nugatory.
34. In the present case, the lower court has prohibited the realization of the security by the Appellant, while releasing the same to the 1st Respondent at the interlocutory stage. The Appellant has described the difficulty experienced in recovering sums it claims against the 1st Respondent and in tracing the vehicle for repossession. These claims are by and large not disputed by the 1st Respondent who



however asserts that she has overpaid on the loan facility, whilst hardly tendering proof of the alleged payments. Not even in respect of the admitted sum of Kshs 2,283,721.31 outstanding in 2018, that was the subject of the restructuring arrangement between the parties, by which the sums were payable to the Appellant, through 20 monthly instalments of Kshs 128,200/- from 4th July, 2018 to 4th February, 2020.

35. Ultimately the Appellant's entitlement to pursue their undisputed right of appeal concerning enforcement of their right to realize the security must be balanced against the Respondent's competing claims as asserted over the subject motor vehicle. The words stated in *Ndubiu Gitahi & another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to give advantage the Defendant while giving no legitimate advantage to the Plaintiff... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal...”

36. Thus, the court must balance the competing interest of the parties here. The Appellant is apprehensive that the appeal will be rendered nugatory if the orders sought are disallowed, hence occasioning the Appellant substantial loss. The 1st Respondent disputes that any debt is owing to the Appellant and desires to continue using the subject motor vehicle for business whilst evincing no intention to make any payments to the Appellant. In balancing the interest of the parties therefore, the court is persuaded to preserve the subject matter of the dispute until the appeal is heard and determined, which means maintaining the status quo obtaining pursuant to earlier orders by this court in respect of the subject motor vehicle. Given the asserted rights of the respective parties to the subject motor vehicle, the fact that no money decree or final order has issued yet in the suit, and the orders the court proposes to issue concerning the Appellant's application, it is not necessary or appropriate in this case to call for security from the Appellant.

37. Consequently, the following orders are made:

- a. The Notice of Motion dated 28th March, 2024 (the first application) is allowed, granting thereby, an unconditional order, staying execution of the ruling and orders of the lower court. For the avoidance of doubt, this means, concerning the subject motor vehicle, that the status quo hitherto obtaining, pursuant to the orders of this court of 3rd April 2024, will be maintained pending the determination of the appeal.
- b. In view of the foregoing, the court will hereafter give appropriate directions for purposes of expediting the appeal.
- c. The Notice of Motion dated 19th April, 2024 (the second application) is hereby dismissed.
- d. The costs of the respective Motions are awarded to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:



For the Applicants: Mr. Kabucho

For the 1st Respondent: Mr. Mogaka

C/A: Erick

