



Equity Bank Limited v Tata Africa Holdings (Kenya) Ltd & 2 others (Civil Appeal E008 of 2022) [2024] KEHC 12304 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E008 OF 2022
F GIKONYO, J
OCTOBER 3, 2024**

BETWEEN

EQUITY BANK LIMITED APPELLANT

AND

TATA AFRICA HOLDINGS (KENYA) LTD 1ST RESPONDENT

JOHN SARUNI LEPARAKUO 2ND RESPONDENT

NTEEI KEKYIAN LYDIA 3RD RESPONDENT

(Being an application for stay of execution of the judgment and order of this court (Gikonyo, J) dated 19/09/2023 in Narok HCCA NO. E008 OF 2022 and an application for review of the orders made on 22/02/2024)

RULING

Stay of execution application

1. The appellant in the notice of motion dated 17/10/2023 sought stay of execution of the judgment and decree together with consequential orders by this court (Gikonyo J.) delivered on 19/09/2023 in Narok HCCA. NO. E008 of 2022 and stay of execution of the judgment and/ or decree together with consequential orders by Hon. A.N. Sisenda (R.M) delivered on 27/06/2022 in Narok CMCC No. 288 of 2018.
2. The application is premised on sections 3A, 79G, and 95 of the *Civil Procedure Act*, articles 159(2) (d) of *the Constitution*, Order 22 Rule 22, Order 42 Rule 6, and Order 51 Rules 1 and 3 of the Civil Procedure Rules.
3. The application is based on the grounds set out in the application and the supporting affidavit of Kennedy Irungu sworn on 17/10/2023.



Temporary orders of stay of execution

4. On 18/10/2023, this court certified the matter to be urgent, and noted that due to imminent danger of execution which may occasion substantial loss to the applicant, a case is made out on prima facie basis for issuance of stay of execution of the decree in the lower court as well as the decision of this court in this appeal at least until 27/11/2023. The court also noted that security had been deposited in a joint account in the joint names of legal counsel for the respective parties herein. Accordingly, the court issued a temporary stay of execution until 27/11/2023 for an inter partes hearing. This court directed that the security initially ordered in respect of the appeal to remain in-situ subject to confirmation by parties.

Grounds of opposition

5. The respondents filed grounds of opposition dated 08/11/2023.
6. The respondents contend that the application does not meet the legal requirements of the law. That a money decree is capable of being, restituted/ repaid and the intended appeal will not be rendered nugatory in the event that stay of execution is not granted. The respondent is a successful litigant and should not be deprived of the fruits of judgment without a just cause. The applicant has not shown evidence of substantial loss to the application if payment was made as execution is a lawful process and does not on its own amount to substantial loss. That by the court's judgment, a debt is owed to the respondent and in order to maintain the rights of the respondent, the entire decretal sum be deposited for the due performance of the decree in the likely event of the intended appeal failing. That prejudice will not occur if the court maintains its prior orders of stay granted in the trial court to reflect in this application.

Directions of the court

7. The application dated 17/10/2023 was canvassed by way of written submissions.

The Appellant's submissions on the application dated 17/10/2023.

8. The appellant submitted that this court has jurisdiction to hear and determine this application. The appellant relied on the case of *Mbula V Nzangani (Civil Appeal E150 of 2022)* [2023] KEHC 18249(KLR) (25 May 2023) (Ruling) and *Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani)HCC 795 of1997*.
9. The appellant submitted that the appeal would be meaningless if an order of injunction was not granted. Further, the 1st respondent will proceed to execute thus rendering the intended appeal nugatory. The appellant risks suffering a substantial loss. The appellant contends that the appellant did not purchase the suit tractor KCTB 308M from the 1st respondent and thus should it be made to pay for an asset it has no interest over it is unlikely that the appellant will recover the said amount from the 2nd and 3rd respondent who have since ceased operating bank accounts or any banking facility with the appellant and they do not possess any known property, assets or source of income. none of the respondents have sworn affidavit that they are capable of refunding the appellant. The appellant relied on the case of *Stanley Kang'ethe Kinyanjui V Tony Ketter & 5 Others and National Environment Management Authority V KM (Minor Suing Through Mother and Best Friend SKS & 17 Others [2021] eKLR*.



10. On substantial loss, the appellant relied on Sewankambo Dickson V Ziwa Abby- (HCT-00-CC=MA 178 Of 2005) [2005] Ugcomm C 9, and [Ndiaye V African Virtual University \[2015\] eKLR \(Civil Suit No. 422 of 2006\)](#)
11. The appellant submitted that the application was made timeously on 19/10/2013. The appellant relied on the case of Antoine Ndiaye v African Virtual University [2015] eKLR.
12. The appellant submitted that it had furnished security and is willing to comply with the directions of the court to deposit security. The appellant prayed that the same security be maintained. The appellant relied on Order 42 Rule 6(2)(b) of the Civil Procedure Rules and Butt Vs Rent Restriction Tribunal [1979].

Review application.

13. The 1st respondent filed a notice of motion dated 04/03/2024 seeking orders that this court reviews, / set aside, and vacates the orders made on 22/02/2024 and that the application dated 17/10/2023 be struck out and dismissed for being an abuse of the court process.
14. The application is premised on sections 1B, 3,3A, and 80 of the [Civil Procedure Act](#), Order 2 Rule 15, and Order 45 Rule 1(1)(a) of the Civil Procedure Rules.
15. The application is based on the grounds set out in the face of the application and the supporting affidavit of Muma Nyagaka, advocate.
16. The 1st respondent contends that while the parties were in the process of filing the submissions to the application, the applicant received a communication from the deputy registrar of the court of appeal to the effect that the appellant's application (namely Nakuru CA E088 of 2023 between Equity Bank Limited Vs Tata Africa Holdings Limited & 2 Others) has been certified urgent and direction for the hearing issued.
17. The 1st respondent contends that the application was filed earlier to the application before this court and the appellant did not disclose the same to this court. Further, the orders sought are identical and similar to those sought in this court making it an abuse of court process.
18. The 1st respondent contends that there is a real danger of the court issuing conflicting court orders which are likely to embarrass the judicial process and cause an absurdity.

The appellant's replying affidavit

19. The appellant opposed the application dated 04/03/2024 vide replying affidavit sworn by Clarkson Ochieng on 14/03/2024.
20. The appellant contends that the application pending before this court seeks stay whereas the one before the court of appeal seeks injunctive reliefs therefore the applications are distinct from each other.
21. The appellant contends that both applications were filed on the same day.
22. The appellant contends that there is a risk of being exposed to execution and therefore there is a need to have the substratum of the appeal preserved.

Directions of the court

23. The application dated 04/03/2024 was canvassed by way of written submissions.



The 1st respondent's submissions

24. The 1st respondent submitted that the orders sought by the appellant before this court are similar to the orders sought before the court of appeal. The effect of the prayers in both courts is to prevent the execution of the decree issued at Narok CMMC No. 288 of 2019. Therefore, the rule of sub judice applies. The 1st respondent relied on section 6 of the *Civil Procedure Act*, *Heritage Insurance Company Limited vs Patrick Kasina Kisilu* [2015] eKLR, Rule 5(2)(b) of the court of appeal rules, and *Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 others* [2012] eKLR.
25. The 1st respondent prayed that the application be allowed and the application dated 17/10/2023 be struck out and dismissed with costs. The 1st respondent relied on *Italbuild Imports Limited Vs Kimani Maundu* [2018] eKLR.

The appellant's submissions.

26. The appellant submitted that the law, under Order 22 Rule 22 and Order 42 Rule 6, this Court is clothed with the jurisdiction and power to handle the application before it. The appellant contends that the application pending before the Court of Appeal is premised on Rule 5(2) (b) of the Court of Appeal Rules. This is a clear distinction that even the law relied on and applicable between the two applications is distinct. Neither this court is bound nor applies the Court of Appeal Rules nor the Court does rely on or is bound by the Rules of this Court. The two applications cannot therefore be said to be one and the same, likely to raise conflicting orders.
27. The appellant submitted that contrary to the allegation by the Respondent, the application before this court is not an abuse of the Court as the law permits an aggrieved party to seek and be granted stay for a reasonable time to enable the judgment-debtor to apply to the to any court having appellate jurisdiction as is provided by Order 22 Rule 22.
28. The appellant submitted that Contrary to the allegation that it is likely to emanate conflicting Orders issued by this Honorable Court and the Court of Appeal the application before this Court dated 17/10/2023 seeks different Orders and is premised on different provisions of the law from the one pending before the Court of Appeal. Furthermore, both Order 22 Rule 22 and Order 42 Rule 6 permit an aggrieved party to approach this Honorable Court as well as the Appellate Court.
29. The appellant submitted that the only reason it has sought the Orders sought in the Application dated 17/10/2023 is to preserve the substratum of the Appeal. It does not in any way seek to evade honoring and satisfying the terms of the decree passed by this Honorable Court as well as the decree arising from the lower court. the appellant contends that t this Honorable Court already observed that execution may occasion the Appellant Substantial loss. Whereas the decretal sum is a substantial amount summing up into millions, rendering the appeal moot as well as the hardships of recovering the decretal sum from the Respondent if executed and then the appeal succeeds also amounts to "substantial loss". The appellant relied on *Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR.

Analysis And Determination

Issues

30. This court has considered the applications dated 17/10/2023 and 04/03/2024, the grounds of opposition and replying affidavit, and the respective written submissions. Arising therefrom are the main issues:



- i. Whether the application dated 17/10/2023 is sub judice.
- ii. whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.

Of application dated 17/10/2023 being sub judice.

31. The rule on sub judice prevents multiplicity of suits by parties (Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General,). See also, the Supreme Court of Kenya in the case of Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR, where the court held thus:

67 The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

32. However, care should be taken not to confuse or conflate sub judice with res judicata. Equity and the law draw a line here; the former intervenes between existing-and not determined- cases to prevent multiplicity of suits, whilst the latter interjects between existing and determined case and forecloses future litigation on a matter which had been completely determined by a competent court in a previous suit.
33. Another reason is that, in sub judice merely auxiliary order may be made which partakes only in allowing one of the existing suits to be determined. Yet, res judicata brings finality to litigation as a jurisdiction-regulating principle.
34. Be that as it may, Order 42 rule 6(1) of the Civil Procedure Rules vests jurisdiction to order stay of execution pending appeal in the court appealed from as well as the appellate court. The jurisdiction of the appellate court is exercisable whether the application for such stay shall have been granted or refused by the court appealed from. But, the rule makes special provision for 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.
35. These are special procedures provided in law to meet the ends of justice, and serve a party’s legitimate interest to relief rather than a party’s betting instinct.
36. Similarly, procedural rectitude and hygiene in seeking relief is unlikely to favour a party who, conscientiously and simultaneously, invokes the jurisdiction in both courts in seeking stay of execution pending appeal without making full disclosure thereof. Such party, may also, not only struggle to claim good faith, but suffer accusation of abuse of process, and possibility of causing embarrassment.
37. The applicant herein filed, on the same day, an application for stay of execution pending appeal in this court, and another in the Court of Appeal seeking an injunction under rule 5(2)(b) of the Court of



Appeal Rules. Despite arguments by the applicant that the provisions that attend to the two courts are different, good faith and the need to preserve the value of the remedy, does not support their approach.

38. Except, in the interest of justice, and to enable the applicant to pursue their application under rule 5(2) (b) of the Court of Appeal Rules, the temporary orders of stay of execution issued on 18/10/2023 and the deposit of security made thereto, shall remain in force for 90 days.
39. Save for the interim relief granted herein, the two applications; one by Equity Bank Ltd for stay of execution, and the other for by the respondent seeking review of earlier orders of stay of execution, are duly determined. No orders as to costs.
40. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
3RD DAY OF OCTOBER, 2024.**

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HON. F. GIKONYO M.

JUDGE

In the Presence of:

C/A: Otolu

Ochieng for Appellant – Present

Mumma for Applicant

