



REPUBLIC OF KENYA



**KENYA LAW**  
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**Equity Bank Limited v Tata Africa Holdings (Kenya) Ltd & 2 others (Civil Appeal E008 of 2022) [2023] KEHC 559 (KLR) (17 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E008 OF 2022  
F GIKONYO, J  
JANUARY 17, 2023**

**BETWEEN**

**EQUITY BANK LIMITED ..... APPELLANT**

**AND**

**TATA AFRICA HOLDINGS (KENYA) LTD ..... 1<sup>ST</sup> RESPONDENT**

**JOHN SARUNI OLE LEPARAKUO ..... 2<sup>ND</sup> RESPONDENT**

**NTEEI KEKYIAN LYDIA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. A.N. Sisenda (R.M) delivered on 27th June 2022 in Narok CMCC No. 288 of 2018)*

**RULING**

**Stay of Execution**

1. Before me is an application dated July 29, 2022 which is seeking for stay of execution of the judgment delivered on June 27, 2022 pending hearing and determination of the appeal herein.
2. On August 1, 2022 this court upon consideration of the application dated July 29, 2022 and the urgency stated in the certificate of urgency filed thereto, ordered ex parte;
  - i. That the application is certified to be urgent.
  - ii. That as it has been established on the basis of *prima facie* evidence provided there is imminent danger of execution; and the applicant is able, ready and willing to deposit a sum of Kshs 1,278,320 as security for stay of execution; I am persuaded to order.
    - a. There shall be an interim order of stay of execution pending the hearing and determination of the application herein; and



- b. The appellant shall deposit a sum of Kshs 1,278,320 in an interest earning account in the joint names of the legal counsel for parties herein within 30 days of today.
    - iii. The application be served immediately. The respondent to file replies thereto within 14 days of service.
    - iv. Hearing inter partes virtually shall be on September 29, 2022.
3. The application had 4 prayers but prayer 1 and 2 are now moot. The prayers for consideration are prayers 3 and 4 that state as follows;
  1. That there be issued stay of execution of the judgment order and any other consequential orders issued by Hon A N Sisenda on June 27, 2022 in Narok CMCC No 288 of 2018 pending the hearing and determination of the appeal filed by the appellant.
  2. That the costs of this application be in the cause.
4. The respondent filed grounds of opposition dated August 14, 2022 to the effect that;
  - i. The application is misconceived, bad in law and doesn't meet the legal requirements of the order and provisions of the law under which it is purportedly brought.
  - ii. The applicant did not issue a notice to the co-defendant pursuant to order 1 rule 24 of the *Civil Procedure Rules*, and an order for stay of execution of the decree will cause hardship to the decree holder in realizing the fruits of its judgement against the rest of the judgment debtors.
  - iii. The interim order of stay of execution should be set aside for material non-disclosure.
  - iv. The application is not meritorious and the inherent jurisdiction of the court being invoked spuriously.
  - v. The application be dismissed.

**Directions of the court.**

5. The application be canvassed by way of written submissions. The applicant and the 1<sup>st</sup> respondent have filed their written submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not filed.

**Appellant/ applicant's submissions**

6. The applicant submitted that the application herein is properly before this court as it is now settled law that citing wrong provisions of law does not render the application fatally defective. They further argued that the grounds of opposition do not cite any statute to support the claim that the application is bad in law, which in any event is not specific in what respect it is bad in law.
7. They stated that their application was brought under order 42 rule 6(1) & (2) (a) & (b) and order 51 of the *CPR*. Order 42(6) sets out the conditions of grant relief. They relied on *Faustina Njeru Njoka v Kimunye Tea Factory Limited [2022] eKLR*, *Hermanus Philipus Steyn v Giovanni Gnocchi-Rruscone [2013] eKLR* and *Stanley Kioko Nduku v Musyoka Muia & Another [2019] eKLR*.
8. The applicant submitted that whether the appellant/applicant had filed notice to co-defendant is an issue of fact that can only be addressed during the hearing of the substantive appeal. To them, the applicant Has demonstrated that it has an arguable appeal by annexing draft memorandum of appeal in supporting affidavit sworn on July 29, 2022. The evidence has not been challenged by the 1<sup>st</sup>



respondent. Therefore, the applicant was not obliged in law to issue notice to the co-defendant. They have relied on the case of Stanley Kioko Nduku *supra*.

9. The applicant submitted that the 1<sup>st</sup> respondent has not tendered any evidence to back the claim or given specifics of the nature of the hardship it will suffer if the orders herein are granted. The applicant argues that it has demonstrated that it has arguable appeal, willingness to and deposited part of the decree amount pursuant to the court orders issued herein.
10. The applicant submitted that costs of this application be provided for. They argued that it is trite law that costs follow the event. They relied on section 27 of the *CPA*.

### **1st Respondent's submissions.**

11. The 1<sup>st</sup> respondent submitted that the application is not meritorious. That the appeal was filed on July 29, 2022 after the lapse of statutory period without leave of court having been sought and granted. 30 days had lapsed on Jun 27, 2022 .
12. They urged this court to hold that the court lacks the requisite jurisdiction to entertain not only the instant application, but the appeal itself, and strike out the application and dismiss the appeal. They relied on section 70G of the *CPA*, *Owners of Motor Vessel 'Lilian S' v Caltex Oil (K) Ltd KLR1*, *Edith Wairimu Njoroge v Brooks Holding Co Ltd & Anor [2018] eKLR*.
13. The 1<sup>st</sup> respondent submitted that the applicant has simply stated on the grounds that it will suffer substantial loss without elaborating on the supporting affidavit. It is trite that execution is a lawful process and does not on its own amount to substantial loss. Therefore, the crucial ground of substantial loss has not been satisfied. They relied on order 42 rule 6(1) and (2) of the *CPR*, *Premier Industries Limited v Stephen Kilonzo Matiliku 2021* and *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*.
14. The 1<sup>st</sup> respondent submitted that the application before the court was filed 30 days and after receiving the 1<sup>st</sup> respondent's letter demanding for payment on settlement of the decretal sum. They urged the court to find that the period taken before the filing of the application was not unreasonable and the applicant does not deserve the orders of the court.
15. The 1<sup>st</sup> respondent submitted that the security offered by the applicant is not sufficient to pay off the decretal sum which now stands in excess of 6 million shillings. They urged the court to direct the applicant to deposit the full decretal sum. They relied on the case of *Gianfranc Manenthi & Another V Africa Merchant Assurance Company Ltd [2017] eKLR*.
16. The 1<sup>st</sup> respondent submitted that the order granting stay of execution of the decree will work hardship to the 1<sup>st</sup> respondent who will stand deprived of the fruits of its judgment against parties who have not preferred any appeal from the decree. They stated that the decree issued by the court was jointly and severally. The appellant did not issue a notice to the co- defendants pursuant to order 1 rule 14 of the *CPR* and in the absence of apportionment of the decree in the judgment the order will work injustices against the 1<sup>st</sup> respondent. That the appellant if at all aggrieved is entitled to recover the sum from the other defendants by way of reimbursement once they had settled the entire decretal sum. They relied in the cases of *Republic v PS In Charge of Internal Security Ex Parte Joshua Paul [2013] eKLR*, and *Sammy Mbugua Njuguna v Wakababa Agencies Ltd & 3 Others [2019] eKLR*.
17. In the end, the 1<sup>st</sup> respondent urged this court to find that the appeal which was filled is incompetent and dismiss the same by striking out the application with costs of the appeal and the application to the 1<sup>st</sup> respondent.



## Analysis And Determination

18. I have considered the application dated July 29, 2022, the respondent's grounds of opposition dated August 14, 2022, the applicant's and the 1<sup>st</sup> respondents written submissions. The issues that arise for determination are;
  - a. Whether the application for stay dated July 29, 2022 is merited.
  - b. Whether order 1 rule 24 is material to the application for stay dated July 29, 2022
  - c. Whether the judgment creditor /respondent will suffer hardship if the orders herein are granted.
  - d. Who should bear costs.
19. Under order 42 rule 6(2) of the [Civil Procedure Rules](#), in determining whether there is sufficient cause to grant stay:
  - (a) The court is to be 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) Call for 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.
20. See [Antoine Ndiaye v African Virtual University \[2015\] eKLR](#).

## On substantial loss occurring

21. In the instant case, the applicant averred that they stand to suffer substantial loss if stay of execution is not granted. They further averred that they are ready and willing to deposit a sum of Kshs 1,278,320. Pursuant to the orders of this court on August 1, 2022 the applicant have complied.
22. On their part, the 1<sup>st</sup> respondent has delved into the merits of the appeal but also urged that the applicant has not satisfied the requirement of substantial loss, unreasonable delay and that the deposited decretal sum is not sufficient. They propose that the applicant should deposit the full decretal amount.
23. The court, in [RWW v EKW \[2019\] eKLR](#), considered the purpose of a stay of execution order pending appeal, in the following words:

“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.”
24. The appellant is exercising their right of appeal. They claim that the appeal will be rendered nugatory unless stay is granted. I must balance this with the right of the 1<sup>st</sup> respondent to enjoy their fruit of



judgment. The provision of security ordinarily is to secure the performance of the decree that may ultimately be binding upon the applicant which really prevents prejudice to the respondent.

25. The appellant has already deposited a sum of Kshs 1,278,320 for the due performance of the decree appealed from as was ordered by the court. It should be noted that in ordering security, it should never be the policy of courts to insist on humongous amount in security which may stifle the right of appeal, especially where the decretal sum is huge.
26. In the circumstances, I do not see any prejudice that the 1<sup>st</sup> respondent will suffer if the orders herein are granted. Accordingly, I am persuaded that substantial loss has been proved.
27. I am also satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the June 27, 2022 and the memorandum of appeal filed two days later on the July 29, 2022.
28. On the issue of joint and severally liability, I find that the decree holder has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co- defendants in the event that the plaintiff only opts to recover from one of them (See the case of *Republic v PS In Charge of Internal Security Ex Parte Joshua Paul [2013] eKLR*). In this case, the decree holder retains the options. I leave this matter at that.
29. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicants deserve an order of stay of execution pending appeal.

### Conclusions and Orders

30. Accordingly, I hereby allow the appellant/applicant's application dated July 29, 2022 and grant stay of execution of decree made in Narok CMCC No 288 of 2018 pending herein and determination of this appeal on the following conditions:
  - a. The sum of Kshs 1,278,320 deposited in an interest earning account in the joint names of legal counsel for the parties herein shall remain in the said account as security in terms of order 42 rule 6 until the final determination of the appeal herein.
  - b. The appellant to file and serve a record of appeal within thirty (30) days of this ruling;
  - c. Costs shall be in the cause;
  - d. The appeal shall be mentioned For directions on the mode of disposal of the appeal.
31. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 17TH DAY OF JANUARY, 2023.**

.....

**F Gikonyo M**

**Judge**

