



Family Bank Limited & another v Awuor (Miscellaneous Civil Case E036 of 2022) [2023] KEHC 634 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL CASE E036 OF 2022**

**KW KIARIE, J
FEBRUARY 9, 2023**

BETWEEN

FAMILY BANK LIMITED 1ST APPLICANT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS 2ND APPLICANT

AND

DAVID OMONDI AWUOR RESPONDENT

RULING

1. The applicants moved the court by way of Notice of Motion dated July 26, 2022. It was brought under sections 3A, 63(e) & 89 of the [Civil Procedure Act](#). The applicants are seeking the following orders:
 - a) That this application be certified as urgent and service be dispensed with at the first instance. [Spent]
 - b) That this honourable court may be pleased to issue an order of stay of execution of the ruling delivered by the honorable Deputy /registrar, T.M. Orlando in High Court Civil Appeal No. E051 of 2021 Homa Bay being Family /bank Limited and Another Vs David Omondi Awuor on the 29th day of June 2022 pending the hearing and determination of this application.
 - c) That this honorable court may be pleased to issue an order of stay of execution of the ruling delivered by the honorable Deputy Registrar T.M. Orlando in High /court Civil Appeal NO. E051 OF 2021 Homa Bay being Family Bank Limited and another Vs David Omondi Awuor on the 29th day of June 2022 pending the hearing and determination of the applicant's reference.
 - d) That this honorable court may be pleased to issue such orders as it may deem just and fair to grant.
 - e) That this application be served on the respondent.



- f) That this application be heard inter-parte on such date times as this court may direct.
That the costs of this application be provided for.
2. The application was premised on the following grounds:
- a) That on the 29th day of June 2022 the Honorable Deputy Registrar T.M. Olando delivered a ruling in High Court Appeal no.E051 of 2021, Homa Bay being Family Bank Limited and another Vs David Omondi Awuor (“hereinafter HCCA No. E051 of 2021 Homa Bay”) and taxed and certified the Respondent’s costs in the sum of kshs.542,006.32/-;
- b) That on the same day the applicant’s advocates applied for the following:
- i) Leave to appeal;
- ii) An order for stay of execution of the ruling for a period of 30 days to allow the applicant to file a reference against decision; and
- iii) Certified copy of the ruling.
- c) That the application was allowed.
- d) That the applicants being aggrieved and dissatisfied with ruling instructed their advocates to file a reference against the same pursuant to which the advocates:
- i) Filed a reference challenging the taxed costs; and
- ii) Applied for a certified copy of the ruling on the 12th day of July 2022.
- e) That the thirty (30) stay of execution order issued on the 29th day of June 2022 is set to lapse on the 29th day of July 2022.
- f) That in view of foregoing unless the application for stay pending reference is heard very urgently on a priority basis the applicants’ are reasonably apprehensive that the respondent shall proceed to execute the ruling delivered in HCCA No. E051 of 2021 Homa Bay to their detriment. This is especially in view of the fact that the thirty (30) days stay of execution order issued on the 29th day of June 2022 is set to lapse on the 29th day of July 2022.
- g) That the applicants’ are reasonably apprehensive that if the taxed costs in HCCA No.E051 of 2021 Homa Bay are paid over to the respondent the respondent would not be in a position to refund the same if the applicants’ intended reference is successful.
- h) That if the taxed costs in HCCA No.E051 of 2021 Homa Bay are paid over to the respondents the applicants reference shall be rendered nugatory and the applicant’s shall suffer substantial loss and damage.
- i) That the applicants’ have an arguable reference has with high chances of success.
- j) That this application ought to be granted in the interest of equity and justice.
3. The respondent opposed the application on the following grounds:
- a) That the application is incompetent.
- b) That it is premature.



4. The dispute in issue is what costs the respondents are entitled to. It is only fair to allow the application so that the parties can have this issue settled. I am guided by the decision in *Labh Singh Harman Singh Ltd v Attorney General & 2 others* [2016] eKLR at paragraph 11 the court said:

This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates' Remuneration Order, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time.

5. The application is therefore allowed on condition that the applicant sets the reference for hearing within 30 days failure to do so, the respondent may be at liberty to execute. Costs shall abide with the outcome of the reference.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF FEBRUARY, 2023

KIARIE WAWERU KIARIE

JUDGE.

