



Kenya Commercial Bank Limited v Matundura & another (Miscellaneous Civil Application E137 of 2022) [2023] KEHC 2057 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION E137 OF 2022**

RPV WENDOH, J

MARCH 16, 2023

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

NYABUTO MATUNDURA 1ST RESPONDENT

CREDIT REFERENCE BUREAU AFRICA LTD 2ND RESPONDENT

RULING

1. The applicant commenced these proceedings via an application dated 1/12/2022. The applicant seeks the following orders:-
 1. Spent;
 2. That this court be pleased to issue an order for stay of execution of the judgement and decree of the trial court dated and delivered on 4/10/2022 in Migori CMCC No 56 of 2021, Nyabuto Matundura vs Kenya Commercial Bank Limited and the Credit Reference Bureau, pending the hearing and determination of the appellant/applicant's appeal;
 3. Costs of this application be provided for.
2. The grounds upon which the application is based, are found in its body and the supporting affidavit of Alexander Gamimba Mvuko, Legal Counsel for the applicant. He deponed that the trial court delivered its judgement in this matter on 4/10/2022 in which it found that the applicant was liable and condemned it to pay the 1st respondent general damages of Kshs 2,000,000/= plus costs and interest thereon; that the applicant being aggrieved by the judgement, lodged a Memorandum of Appeal and requested for typed proceedings and is still waiting for them; that the applicant filed an application for stay of execution dated November 17, 2022 before the trial court but despite the same being unopposed it was dismissed for lack of merit.



3. It was further deposed that the applicant is now confronted with auctioneers to execute against the applicant and M/S Crescent Auctioneers have already obtained warrants and served the proclamation notice dated November 30, 2022 upon them; that the 1st respondent has commenced the execution and he has no known assets and abode which the applicant can recover the money which would render the appeal nugatory and a mere academic exercise; that the application has been made without unreasonable delay and the applicant is willing to furnish security for performance of the decree. The applicant asked this court to allow the application as prayed.
4. The application was opposed. The 1st respondent swore and filed a replying dated December 20, 2022 on even date. The respondent deposed that the applicant's application does not meet the threshold for stay of execution and it is an abuse of the court process; that the applicant has not demonstrated that the 1st respondent is a man of straw who cannot refund the money should the appeal succeed; that he is an assistant director under the Children's Department Job Group - P capable of reimbursing any amount should the court order so; that litigation should come to an end and this court should order the applicant to deposit in court the entire decretal sum together with Kshs 266, 396/= being the assessed costs of the suit; that the trial court did not err in dismissing the applicant's application. The 1st respondent asked this court to dismiss the application with costs.
5. The court directed that the application be canvassed by way of written submissions. Both parties complied. I have duly considered the position taken by each party in their respective submissions.
6. The application is one of stay pending appeal. Order 42 Rule (6) (1) and (2) of the [Civil Procedure Rules](#) makes provision for stay pending appeal 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 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."
7. In order for orders of stay of execution to issue, the applicant should demonstrate;
 - a. He will suffer substantial loss if stay is not granted;
 - b. That the application has been filed without unreasonable delay;
 - c. The applicant is willing to furnish security for the due performance of the decree;



- d. The applicant has an arguable appeal.
- e. .
8. Before proceeding to determine whether the applicant has met the conditions, precedent to grant of stay. I must note that, the applicant preferred a similar application in the trial court but the same was dismissed. This court's jurisdiction in light of the similar application being dismissed came into question. Order 42 Rule 6 (1) allows the court which the decree or order is being appealed from, to make an order for stay of execution. In the event the application is declined, the court to which the appeal is being preferred has the liberty to entertain the application for stay. Order 42 Rule 6 provides:-
- “Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
9. Flowing from the above provision, the instant application is properly before this court and this court has jurisdiction to hear and determine the same. This court's jurisdiction cannot be ousted on the principle of *res judicata* on account of the trial Magistrate's ruling dated November 29, 2022.
10. On the issue of substantial loss, it is the applicants' case that the appeal is meritorious with high chances of success and if the orders sought are not granted, they are apprehensive execution will issue and render the appeal nugatory. In rebuttal, the respondent stated that he is the assistant director in the children's department job group - P and he is capable of refunding any amount as ordered by this court.
11. In case of *Silverstein v Chesoni* (2002) 1 KLR 867 cited in *Superior Homes (Kenya) Limited vs Musango Kithome* (2018) eKLR the Court of Appeal held as follows:-
- “...issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory”
12. The assurance that the applicant will not suffer substantial loss is the ability of the respondent to refund the decretal sum if the appeal succeeds. In *Superior (Homes) Kenya Limited vs Musango Kithome (supra)*, the court held:-
- “...The law, however, appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”
13. A similar finding was made in *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua* (2001) eKLR as follows:-
- “...Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately.



But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so. An undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient.”

14. The evidentiary burden that the 1st respondent is a man of means lies on him. In as much as he stated that he is the assistant director in the children’s department, he did not prove by producing a letter of appointment or a payslip to demonstrate that in the event the decretal sum either in whole or part is released to him, he is capable of refunding the same. Hence, the applicant is bound to suffer substantial loss and the appeal will be rendered a nugatory if an order of stay is not granted.
15. The power to grant an order of stay of execution pending appeal is discretionary in that the court, needs to balance the interest of the appellant with those of the respondent. In the absence of evidence on the source of means by the respondent, I decline to order for a release of the decretal amount to the respondent.
16. On whether there was unreasonable delay in bringing this application, the application seeking stay of execution was brought to this court on 1/12/2022 after the same application was dismissed by trial court on November 29, 2022. I find that the period of 2 days was not unreasonable delay.
17. On security for the due performance of the decree, there was an order of this court dated 1/12/2022 that the applicant deposits half of the decretal sum as condition of stay. There is evidence that the applicant deposited the same on December 16, 2022. I find that the applicant has furnished security for due performance of the decree.
18. Whether the applicant has an arguable appeal: The applicant annexed “AGM -2” the already filed memorandum of appeal. The applicant preferred 16 grounds of appeal and among others, faulted the trial court for failing to appreciate that the 1st respondent’s accounts were never reported as non performing and there was never negative impacts on his account; that the trial court failed to appreciate that the *Banking Act* and Regulations do not impose civil liability on financial institutions; that the 1st respondent did not discharge his evidentiary burden to prove its case and the trial court allegedly conducted the hearing in a biased manner. These grounds among others are arguable.
19. In the end, I find that the application has merit and I make the following orders: -
 1. There shall be a stay of execution of the decree/judgement delivered on 4/10/2022 in Migori CMCC No 56 of 2021 Nyabuto Matundura vs Kenya Commercial Bank & Another pending the hearing and determination of this appeal;
 2. The applicant to file and serve the record of appeal within 60 days hereof;
 3. Costs of this application do abide the outcome of the appeal.
 4. Mention before Deputy Registrar on 22/5/2023 for compliance.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 16TH DAY OF MARCH, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Ms. Achieng .for the Applicant



Mr. Kaosa for the 1st Respondent

Nyauke Court Assistant

