



**Absa Bank Kenya Plc & another v Lwigado (Civil Appeal E043 of 2024)  
[2025] KEHC 13727 (KLR) (29 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL APPEAL E043 OF 2024  
JN KAMAU, J  
SEPTEMBER 29, 2025**

**BETWEEN**

**ABSA BANK KENYA PLC ..... 1<sup>ST</sup> APPELLANT**

**LEGACY AUCTIONEERS SERVICES ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HUDSON AMWAI LWIGADO ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon J. A. Agonda (PM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No E170 of 2024 on 20th August 2024)*

**RULING**

**Introduction**

1. In their Notice of Motion dated 4<sup>th</sup> September 2024 and filed on 18<sup>th</sup> September 2024, the Appellants herein sought an order of stay of execution of the Ruling delivered on 20<sup>th</sup> August 2024 in Civil Suit E170 of 2024 Hudson Amwai Lwigado vs Absa Bank Kenya PLC & Legacy Auctioneering Services pending the hearing and determination of this Appeal.
2. Samuel Njuguna, the 1<sup>st</sup> Appellant's Legal Officer swore an affidavit in support of the said application. Through the said advocate, the Appellants averred that they were aggrieved by the Trial Court's Ruling that was delivered on 20<sup>th</sup> August 2024 and had filed a Memorandum of Appeal. They argued that the said Memorandum of Appeal had raised fundamental questions of law in that the findings of the Trial Court contradicted settled principles regarding the remedies available to a charge in the event of default by the borrower in payment of advanced facilities, the rights available to a bona fide third-party purchaser of property disposed through a public auction and the remedies available to a charger upon an alleged irregular or illegal disposal of their property through a public auction.



3. They contended that the Respondent obtained orders in his favour despite having been in default of the 1<sup>st</sup> Appellant's loan repayment obligations under the Charge Instrument and Offer Letter. They pointed out that his arrears had marginally reduced from Kshs 6,291,518.45 to Kshs 5,726,219.10 thus, failing to meet the agreed loan instalments.
4. They stated that the Respondent misled the Trial Court into believing that the statutory notices required under the Land Act had not been duly served, despite the 1<sup>st</sup> Appellant having served all the requisite notices including the forty-five (45)-day Redemption Notice and ninety (90)-day Statutory Notice, in full compliance of the law and having exercised its statutory power of sale.
5. They were categorical that the Trial Court erred in allowing the Respondent to redeem the suit property when the 1<sup>st</sup> Appellant had already exercised its statutory power of sale. They added that the Trial Court wrongly varied, attempted to vary and/or rewrote the terms of the charge agreement between the 1<sup>st</sup> Appellant and the Respondent.
6. They were emphatic that unless the court granted the orders sought herein, the Respondent would proceed to execute the said Ruling and Order of the Trial Court by redeeming the suit property which might expose the 1<sup>st</sup> Appellant to a suit for damages by third-party purchaser due to breach of contract. They added that if the orders sought are not granted, their intended Appeal herein would be rendered nugatory.
7. They further averred that the orders issued by the Trial Court had reversed the 1<sup>st</sup> Appellant's right to enforce security, thus, jeopardising its ability to recover the outstanding loan balance and negatively impacting the bank's security interests. They were emphatic that the continued enforcement of the said orders would cause irreparable damage on their part as the 1<sup>st</sup> Appellant stood to lose not only the outstanding loan balance but also face reputational and financial harm in the banking industry where certainty of security rights was paramount. They asserted that they had brought this application without delay and that it was only fair and just that the court do grant the orders sought.
8. The Appellants' Written Submissions were dated and filed on 7<sup>th</sup> April 2025. The Respondent did not file any response to the said application. This Ruling is therefore based on the Appellants' Written Submissions only.

### **Legal Analysis**

9. The Appellants submitted that through the impugned Ruling, the Trial Court had attempted to reverse a successfully completed public auction by ordering the 1<sup>st</sup> Appellant to re-issue a forty-five (45) days' redemption notice despite having complied fully with the security realisation process. They further added that as the successful bidder had already paid the deposit of Kshs 1,250,000/= to the 1<sup>st</sup> Appellant, the 1<sup>st</sup> Appellant was barred from re-issuing the forty-five (45) days redemption notice to the Respondent lest it was sued for recovery of damages for breach of contract.
10. They argued that it was only proper and orderly that the Appeal be heard first noting the possibility of conflicting orders between the High Court and the Trial Court.
11. They asserted that the Ruling was delivered on 20<sup>th</sup> August 2024 and they filed this application on 18<sup>th</sup> September 2024 and hence, the delay between the said dates could not be termed as unreasonable. In this regard, they placed reliance on the case of *Makau vs Mwanzia*[2024] KEHC 9267 (KLR) where it was held that a month and some few days later was not unreasonable delay.
12. They further placed reliance on the case of *Tropical Commodities Suppliers Ltd & Others vs International Credit Bank Limited (in liquidation)*(2004) E.A LR 331 where it was held that



- substantial loss referred to any loss, great or small that was of real worth or value as distinguished from a loss without value or a loss that was merely nominal.
13. They were categorical that compliance with the Trial Court orders would re-open a completed auction setting a dangerous precedent for the 1<sup>st</sup> Appellant as well as other players in the banking industry and cause great confusion. They added that such a dangerous precedent would open a pandora box allowing loan defaulters the room to escape liability through reversal of already completed auctions.
  14. They argued that that was an outright violation of public policy and would likely cause chaos and uncertainty as to the remedy of a chargee upon violation of the terms of a charge instrument. They drew the court's attention to the definition of the word, "public policy" from the Black's Law Dictionary, as the principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society and argued that any precedent that would seemingly overrule principles that have already been established by courts of law to govern society and promote order in specific sectors was against public policy and any intention to enforce such a precedent ought to be stopped.
  15. They were emphatic that enforcing the orders of the Trial Court was against the law, public policy and would result in substantial loss not only to them but to the banking industry at large.
  16. They further contended that their appeal raised arguable grounds hence stood great chances of success. To buttress their point, they relied on the cases of Trust Bank Limited & Another vs Investech Bank Limited & 3 Others[2000]eKLR where it was held that to succeed in an application for a stay of execution, the applicants must show that their intended appeal was arguable and Dennis Mogambi Mang'are vs AG & 3 Others[2012]eKLR where it was held that an arguable appeal was not one that must necessarily succeed but was one that was deserving of the court's consideration.
  17. They submitted that they had satisfied the threshold for granting stay of execution.
  18. The present application was brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 which empowered a court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from.
  19. Under the said Order 42 Rule 6 of the Civil Procedure Rules, an applicant had to demonstrate the following:-
    - a. That substantial loss may result unless the order is made.
      - a. That the application has been made without unreasonable delay.
      - b. Such security as the court orders for the due performance of the decree has been given by the applicant.
  20. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
  21. A court was therefore called upon to be very cautious not to look into the merits or otherwise of the appeal at that stage as that was under the purview of the appellate court. In exercising its discretion whether to grant or refuse an application for stay, a court was needed to consider the special circumstances of the case and its unique requirements.
  22. On the issue of substantial loss, the applicant was not only required to state that it is likely to suffer substantial loss, it had to prove that it would suffer substantial loss if stay orders were not granted. What amounted to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs



- Abuoga (1988) KLR where it held that substantial loss was what had to be prevented by preserving the status quo because such loss would render the Appeal nugatory.
23. The Appellants averred that they would suffer substantial loss if the Respondent complies with the impugned Ruling and orders of the Trial Court subject of this appeal as it would re-open a completed auction.
  24. The Appellant's fear that the Respondent could proceed to comply with the impugned Ruling before the Appeal was heard and determined was therefore not baseless. Taking to account that the successful bidder had already paid the deposit of Kshs 1,250,000/= to the 1<sup>st</sup> Appellant, it was likely that he or she would lodge a suit for damages and recovery of funds already deposited. This court was, therefore, satisfied that the Appellants had demonstrated that they would suffer irreparable loss if the execution of the said Ruling and orders were to proceed.
  25. On whether the application had been brought without unreasonable delay, this court noted that the impugned Ruling was delivered on 20<sup>th</sup> August, 2024. The present application was filed in court on 18<sup>th</sup> September 2024. A delay of about twenty-eight (28) days was inexcusable.
  26. This court had due regard to the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal held that the power of the court to grant or refuse an application for stay of execution was a discretionary power which should be exercised in such a way as not to prevent an appeal.
  27. The general principle in granting or refusing a stay was; if there was no overwhelming hindrance, stay had to be granted so that an appeal would not be rendered nugatory in the event the appellate court reversed the lower court's decision.
  28. As the impugned Ruling involved an order for injunction and not a money decree, the condition for security did not apply in the circumstances of this case.
  29. Having said so, this court noted that the Trial Court granted the Respondent a temporary injunction pending the hearing and determination of the suit in the lower court. It was this injunctive order the Appellants intended to appeal against. It was a negative order and could not therefore be stayed.
  30. Theoretically, if it could be stayed, it would mean that the Appellant would proceed with the sale. They were seeking that the matter be heard on appeal first. Proceeding with the sale would be negating the very essence of hearing the appeal herein and the reason why they had come to this court thus rendering the proceedings herein an academic exercise.

### **Disposition**

31. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application dated 4<sup>th</sup> September 2024 and filed on 18<sup>th</sup> September 2024 was not merited and the same be and is hereby dismissed. Costs of the said application will be in the course.
32. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2025**

**J. KAMAU**

**JUDGE**

