

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**THE CIVIL APPELLATE DIVISION**  
*(Coram: A.C. Mrima, J.)*  
**CIVIL APPEAL NO. E826 OF 2021**

*-between-*

**GRACE MWELU  
KITISE.....APPELLANT/APPLICANT**

*-versus-*

**KCB BANK KENYA  
LIMITED.....RESPONDENT**

**RULING**

**Background:**

1. Judgment in this appeal was delivered on 31<sup>st</sup> January 2024 in favour of the Appellant/Applicant, *Grace Mwelu Kitise*, setting aside the trial Court's judgment and entering judgment in her favour for Kshs. 2,011,276.98.
2. Dissatisfied with the outcome, the Respondent, *KCB Bank Kenya Limited*, filed a Notice of Appeal on 5<sup>th</sup> February 2024 and subsequently sought a stay of execution.
3. On 16<sup>th</sup> May 2024, this Court granted a conditional order staying the execution of the judgment pending the hearing and determination of the intended appeal, on the condition that the decretal sum be deposited in a joint interest-earning account in the names of Counsel for both parties. The funds were duly deposited.
4. However, the Respondent failed to file its Record of Appeal within the statutory timelines. Consequently, the Applicant filed the instant Notice of Motion dated 3<sup>rd</sup> September 2025 seeking to lift the stay and release the funds.

### **The Application:**

5. By a Notice of Motion dated 3<sup>rd</sup> September 2025, supported by the Affidavit of *Grace Mwelu Kitise*, deposed to on a similar date, the Applicant sought the following orders: -
  1. *That the Order for Stay of Execution granted by this Honourable Court on 16<sup>th</sup> May 2024 be set aside;*
  2. *That the decretal sum of KES 2,011,276.96 deposited in the joint interest earning account No. 1332697844, together with accrued interest, be released to the Appellant/Applicant's advocates on record; and*
  3. *That the costs of this application be provided for.*
6. In the grounds and Affidavit in support of the application, the Applicant stated that while the Respondent filed a Notice of Appeal on 5<sup>th</sup> February 2024 and obtained a stay order on 16<sup>th</sup> May 2024, it failed to file the appeal within the prescribed time. It was the Applicant's case that the Respondent applied for proceedings on 17<sup>th</sup> October 2024, long after the requisite 30-day period, and collected them on 29<sup>th</sup> January 2025. The Applicant deposed that the mandatory 60 days for filing the appeal lapsed in July 2025, rendering the stay order spent and otiose. She argued that the continued holding of the funds was to the Applicant's detriment and denied her the fruits of her judgment while the Respondent remains indolent.

### **The Submissions**

7. In her written submissions dated 7<sup>th</sup> October 2025, the Applicant argued that the order for stay was granted to preserve the substratum of the appeal pending its expeditious filing and determination, but the Respondent had failed to comply with Rule 82 of the Court of Appeal Rules. It was argued that the Respondent applied for proceedings on 17<sup>th</sup> October 2024, months after the judgment, and thus could not rely on the proviso for exclusion of time.

8. The Applicant contended that a stay of execution is discretionary and should not shield an unsuccessful litigant indefinitely. Reliance was placed on *Kenya Shell Limited -vs- Benjamin Karuga Kibiru & Another* [1986] KECA 94 (KLR), where the Court of Appeal observed that it is not normal for money decrees to be rendered nugatory if payment is made, and that a claim that an appeal will fail is insufficient without reasons. Further, the Applicant relied on the case of *Absalom Dova -vs- Tarbo Transporters* [2013] eKLR, submitting that a stay order should not introduce disadvantage but administer justice.
9. The Applicant concluded that the pendency of an application for extension of time at the Court of Appeal does not operate as a stay nor revive the spent conditional stay.

#### **The Respondent's case:**

10. The Respondent opposed the application through a Replying Affidavit sworn by *Bonnie Okumu*, the Group General Counsel, on 18<sup>th</sup> September 2025. The deponent averred that the Respondent had filed a Notice of Motion dated 17<sup>th</sup> June 2025 before the Court of Appeal (*Civil Application No. E360 of 2025*) seeking an extension of time to file the Record of Appeal, admitting that the time had expired due to an inadvertent administrative lapse.
11. Mr. Okumu stated that the Respondent also filed a Certificate of Urgency on 11<sup>th</sup> September 2025 to expedite the Court of Appeal matter. He argued that the Applicant had not yet been served with the Court of Appeal application as they were awaiting directions. The Respondent contended that the current application is premature and that the pending application before the Court of Appeal should be heard and determined before any further steps are taken, urging the Court to dismiss the instant application to allow the appellate process to unfold.

#### **The Submissions**

12. In its written submissions dated 6<sup>th</sup> October 2025, the Respondent argued that the order of stay should not be set aside merely due to a minor procedural delay, especially where

a remedy is being sought before the appropriate appellate forum.

13. The Respondent submitted that maintaining the *status quo* would not prejudice the Applicant, whereas releasing the funds would render the intended appeal nugatory and occasion irreparable loss. It urged the Court to uphold the stay pending the determination of the application for extension of time at the Court of Appeal.

**Analysis:**

14. From the foregoing discourse, the issues that emerge for determination are:

- i. Whether the Order for Stay of Execution granted on 16<sup>th</sup> May 2024 should be set aside.*

- ii. Whether the decretal sum held in the joint interest-earning account should be released to the Applicant.*

15. This Court will now deal with the above issues sequentially.

**[a] Whether the Order for Stay of Execution granted on 16<sup>th</sup> May 2024 should be set aside:**

16. Having considered the application, the affidavits on record, and the rival submissions, it is common ground that judgment was delivered on 31<sup>st</sup> January 2024 and a conditional stay was granted on 16<sup>th</sup> May 2024 pending the intended appeal. The stay of execution was predicated on the filing and prosecution of an appeal. Under *Rule 82 of the Court of Appeal Rules*, an appeal must be instituted within 60 days of the date when the Notice of Appeal was lodged. The proviso allows for the exclusion of time taken to prepare proceedings, provided the application for such proceedings is made within 30 days of the decision.
17. The record indicates the Respondent applied for proceedings on 17<sup>th</sup> October 2024. However, it is on record that there is a pending application by way of a Notice of Motion dated 17<sup>th</sup> June 2025 before the Court of Appeal (*Civil Application No. E360 of*

2025) seeking an extension of time to file the Record of Appeal out of time. As such, since the matter is fully seized by the Court of Appeal, it is prudent for this Court to exercise restraint and allow the parties to ventilate their respective cases before the Court of Appeal.

18. Having so found, this Court will, therefore, not interfere with the *status quo* in respect of the stay orders and the funds held as security pending any orders by the Court of Appeal.

**Disposition:**

19. For the reasons set out above, the Notice of Motion dated 3<sup>rd</sup> September 2025 is not merited and the following orders hereby issue: -

**[a] The Notice of Motion dated 3<sup>rd</sup> September 2025 is hereby dismissed.**

**[b] Costs to abide the outcome of the appeal.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 20<sup>th</sup> day of February, 2026.**

**A. C. MRIMA  
JUDGE**

**Ruling virtually delivered in the presence of:**

**Mr. Omoiti**, Learned Counsel for the Appellant/Applicant.

**Miss Kimorwa**, Learned Counsel for the Respondent.

**Michael/Amina** - Court Assistants.