



REPUBLIC OF KENYA



**Transnational Bank Limited v Jackson Ngibuini Gikandi t/a Gikandi &
Co Advocates & 10 others; NCBA Bank Limited (Interested Party) (Civil
Application E061 of 2022) [2023] KECA 463 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KECA 463 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E061 OF 2022
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
APRIL 28, 2023**

BETWEEN

TRANSNATIONAL BANK LIMITED APPLICANT

AND

**JACKSON NGIBUINI GIKANDI T/A GIKANDI & CO
ADVOCATES 1ST RESPONDENT
MARIAM SAIDI MWAMBORA 2ND RESPONDENT
BENSON KITETO 3RD RESPONDENT
ROSEBUD STELLA MUBIRU 4TH RESPONDENT
KON CHOO & CHRISTINE LYN JOGSCHAT 5TH RESPONDENT
ANTHONY BWIRE AKUKHA 6TH RESPONDENT
JOSEPH ONGÚTI 7TH RESPONDENT
STEPHEN K. NDEGWA 8TH RESPONDENT
SAMUEL G. MOMANYI 9TH RESPONDENT
DANIEL O. OMUYA 10TH RESPONDENT
OBADIAH G. MBUGUA 11TH RESPONDENT**

AND

NCBA BANK LIMITED INTERESTED PARTY

*(Being an application for release of money held in the joint account of Gikandi &
Co Advocates together with Muturi Gakuo & Kibara Advocates consequent upon
the judgement of this court dated 29th July 2022 in Civil Appeal No 135 of 2018)*



RULING

1. By a Notice of Motion dated September 21, 2022, the applicant herein, Transnational Bank Limited, seeks an order compelling the Interested Party, NCBA Bank Limited, to pay the sum of Kshs 32,000,000/= jointly held by the Applicant and the 1st Respondent with the Interested Party in Account No. 534xxxxxxx together with interest accrued thereon, to the Applicant's Advocate's Account No 100xxxxxxx, held at the interested party's Bank, without the participation of the respondent.
2. According to the applicant, the said sum was, in Civil Appeal No. 139 of 2018 consolidated with Civil Appeal No. 138 of 2018- Transnational Bank Limited v Mariam Said Mwabora & 56 others- directed by this Court to be deposited as security pending the outcome of the appeal. The said sum was initially deposited in Account No. 34xxx/500LCA00/x/x but was soon thereafter transferred to Mayfair Bank Limited in a joint interest earning account No. C000xxxxx. Later on the applicant and 1st respondents consented to transfer the same to a joint interest earning account with the interested party, being Account No. 534xxxxxxx since the interested party was offering better interest.
3. Vide its judgement delivered by this court on July 29, 2022, it was averred that the appeal was successful and consequently, the said security was to be forthwith released to the applicant. However, the 1st respondent has adamantly refused and/or declined to sign the requisite documents for the release of the security to the applicant for onward transmission to the successful appellant. According to the applicant the initial security has earned interest and is now Kshs 37,479,679.89.
4. It was the applicant's case that the respondent stands to suffer no loss if the orders sought are granted and that this court has the jurisdiction by virtue of Rule 1(2) of the *Court of Appeal Rules*, 2010 and article 159(2)(d) of the *Constitution* of Kenya, 2010 to issue the orders sought herein.
5. In opposing the Application, the 1st respondent averred that the application was defective for failing to cite all the parties interested in the joint account holding the said Kshs 32,000,000.00 and in particular, the firm of Musa Boaz & Thomas advocates for the 2nd to the 11th respondents in Civil Appeal No. 135 of 2018 who have an interested in the matter.
6. It was averred that after the opening of the said joint account and the deposit of the said sum therein, Civil Appeal No. 139 of 2018 was heard and determined and by the judgement delivered on July 29, 2022, the appeal was allowed. However, the 1st Respondent's clients being aggrieved by the said decision have appealed against the said judgement to the Supreme Court which, according to the 1st Respondent may either uphold or set aside the said judgement. It was therefore the 1st Respondent's view that while his clients are pursuing the said appeal, this court has inherent jurisdiction to issue an order for stay of release of the said funds pending the hearing and determination of the said appeal so as to preserve the subject matter of the appeal. He disclosed that he had since received instructions to apply for stay of such orders. In his view, the applicant stands to suffer no prejudice as the money shall continue earning interest if continue to be held in the joint account. On the other hand, should the money be released as sought by the applicant and 1st respondent's clients succeed on the appeal, the said clients would not be guaranteed recovery of the decretal sum as the applicant's financial capability is unknown hence the success of the appeal will be a pyrrhic victory.
7. It was urged that in the interest of justice the application ought to be declined.



8. At the virtual hearing before us, Mr G. N. Gakuo appeared for the applicant, Mr Gikandi Ngibuini appeared for the 1st respondent, while Mr Kogere appeared for the 2nd to 11 respondents. Despite service, the Interested Party was not represented.
9. On behalf of the applicant, reliance was placed on its written submissions filed on 26th September, 2022 which were highlighted by its Learned Counsel, Mr Gakuo. In those submissions, Learned Counsel cited the case of *Kim Jong Kyu v Housing Finance Company Ltd & 2 others* [2015] eKLR and *Mercy Wamboi Njoroge v Francis Babu Mwangi & another* [2019] eKLR. It was submitted this court has the inherent powers to Order for the release of the security jointly held by the applicant and the respondent by virtue of the Rule 1(2) of the *Court of Appeal Rules*.
10. It was submitted that the Interested Party, through a court Order, can be compelled to release the security held in Account Number 534xxxxxxx (in the joint Account of the applicants Advocates and the 1st respondent) to the applicants Advocates, without reference to the respondent, in the interest of justice to the applicants Advocates Bank Account Number 100xxxxxxx being also held in NCBA Bank.
11. The applicant contended that since the ruling delivered by this court in Civil Appeal No. 139 of 2018 consolidated with Civil Appeal No. 138 of 2018 was conditional that the security be held pending the outcome of the appeal, by virtue of the successful judgment, the stay Orders automatically lapsed. As things stand, it was submitted, there are no stay orders emanating from this court or any other court whatsoever preventing the applicant from realizing its security together with the security held therein.
12. The applicant further relied on the Overriding Objective of this court undersection 3A and 3B of the *Appellate Jurisdiction Act* as read together with the inherent power of the court in Rule 1(2) of the *Court of Appeal Rules* and urged that in order to do justice, it is vital that the funds be released immediately so as to meet the ends of justice. To the applicant, the 1st respondent's client's appeal is not a valid ground to object to the release of the money since there is no order that has been made for funds to continue being held as the condition for stay lapsed when the judgment was delivered.
13. According to the applicant, the conditions of the stay order lapsed upon determination of the appeal and this condition having been fulfilled, there is no lawful basis whatsoever for the 1st respondent to object to the release of the money to the applicant. Therefore, the refusal to facilitate the release of the money is unlawful and unjustified. Reliance was placed on the case of *Eastland Hotel Limited v Wafula Simiyu & Co Advocates* [2015] eKLR.
14. On behalf of the 1st respondent, reliance was placed on the written submissions dated October 17, 2022 as highlighted by Learned Counsel, Mr Gikandi. The said submissions regurgitated the contents of the replying affidavit and it was urged that in keeping true to the inherent power of the court to do justice to the parties, it is appropriate in the circumstances of the present case, for the court to decline to order the release of the money held in the joint account so that if the 1st respondent's clients ultimately succeed on appeal in the Supreme Court, the appeal is not rendered nugatory. This submission was based on *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR.
15. According to Mr Gikandi, as long as a party has filed an appeal, the court still has the jurisdiction to preserve the substratum of the dispute. Mr Gikandi also took issue with the filing of this application in a matter other than the matter in which the order was made.
16. It was therefore argued that for the reasons given, the application ought not to be granted.



17. Mr Kogere, who appeared for the 2nd to 11th respondents addressed us orally in this matter. He submitted that the application was incompetent since the order for deposit was made in the proceedings where the 1st respondent and the interested party were not parties. In his view, this application ought to have been made in the file in which the order was made. As a result of commencing new litigation, he submitted, new parties and new issues have been introduced while some parties have been omitted. It was his position that once the court delivers itself on a matter in a final judgement, it lacks jurisdiction to entertain any subsequent application since the application would be spent. In his view, while there is jurisdiction to entertain an ancillary application, no such jurisdiction exists in respect of a separate application. It was further submitted that since the order for stay was made by the ELRC and confirmed by this court, it is the ELRC that ought to have decided whether or not the order should be discharged.
18. In this case we were urged to balance the rights of a party exercising his right of appeal as against the successful party. Since there is a possibility that the Supreme Court may reverse this court's decision, it was urged that the same considerations that dictated the grant of the order ought to guide this court since no prejudice is likely to be suffered by the applicant.

Analysis and Determination

19. We have considered the issues raised in this application. The substantive issue for our determination is whether we should compel the interested party, NCBA Bank Limited, to pay the sum of Kshs 32,000,000/= jointly held by the Applicant and the 1st Respondent with the Interested party in Account No. 534xxxxxxx together with interest accrued thereon, to the applicant's Advocate's Account No 100xxxxxxx, held at the interested party's Bank, without the participation of the respondent.
20. On the issue of failure to join some of the parties, that defect, if defect it was, was cured when we allowed the 2nd to 11th respondents to be joined to these proceedings.
21. The respondents are of the view that this application ought to have been made in the matters in which the order for deposit was made. While we agree that that is the ideal situation, in this case where the lifespan of the order for deposit was tied to that of the appeal, what is being sought before us is just a consequential order which the court could have granted even on its own motion upon the determination of the appeal. Accordingly, we find no prejudice occasioned by the filing of the fresh application. We adopt the view that rules of procedure are meant to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and should not be elevated to a fetish and that the rules are the handmaidens of the court and

should not become too harsh mistresses. See *Ndegwa Wachira v Ricarinda Wanjiju Ndanjeru* Civil Appeal No. 44 of 1984 [1987] KLR 252; [1986- 1989] EA 577.
22. As we have stated hereinabove what is being sought in this application are consequential orders. These are orders which flow from the decision of this court upon the determination of the appeal. Unless a stay of execution of the said order is sought and granted, this court would have no justification in declining to grant the orders sought herein, the existence of an appeal to the Supreme Court notwithstanding. The submissions made before us by the respondents would have been relevant if what was before us was an application for stay of execution. We associate ourselves with the decision in *Eastland Hotel Limited v Wafula Simiyu & Co Advocates* [2015] eKLR where this court held that:

“When an appeal is heard and determined, the effect of the judgment is to



lapse any interlocutory orders that were made prior to the delivery of the final judgment. The conditional stay of execution and the order directing the deposit of Kshs. 5,000,000/= in a joint account lapsed with the delivery of the judgment of this Court on 24th October 2014; a conditional deposit is discharged and becomes due and repayable upon fulfilment of the condition.”

23. Consequently, we find merit in the Notice of Motion dated September 21, 2022. We hereby direct the interested party, NCBA Bank Limited, to pay the sum of Kshs 32,000,000/= jointly held by the applicant and the 1st respondent with the interested party in in Account No. 534xxxxxxx together with interest accrued thereon, to the applicant’s Advocate’s Account No 100xxxxxxx, held at the interested party’s Bank.
24. We make no order as to costs as technically the 1st respondent ought not to have been a party to these proceedings in which he was merely acting as counsel for his client who ought to have obtained proper legal advice from him.
25. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

