



**Maseno University Sacco Society Ltd v Stima Sacco Society Ltd (Civil Appeal
(Application) E458 of 2021) [2022] KECA 1234 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1234 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E458 OF 2021
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
NOVEMBER 4, 2022**

BETWEEN

MASENO UNIVERSITY SACCO SOCIETY LTD APPLICANT

AND

STIMA SACCO SOCIETY LTD RESPONDENT

*(Being an application for stay of execution pending appeal against
the Ruling and Orders of the High Court of Kenya at Nairobi
(G.Ngenye, J.) delivered on 22nd July 2021 in H.C.C.A No. 4 of 2018)*

RULING

1. The applicant, Maseno University Savings and Credit Co- operative Society Limited, filed a claim against the respondent, Stima Savings and Credit Co-operative Limited, in Co-operative Tribunal Case No 32 of 2017 seeking to enforce a share transfer agreement entered into on January 9, 2016.
2. By its judgment delivered on January 12, 2018, the tribunal awarded the applicant general damages in the sum of Kshs 2,500,000 against the respondent. It also ordered that the applicant do pay to the respondent Kshs 43,057,365 together with interest thereon on account of a loan advanced to the applicant, less the sum awarded in general damages.
3. Dissatisfied with the decision of the tribunal, the applicant appealed to the High Court in Nairobi HCCA No 4 of 2018. In its judgment dated September 15, 2020, the High Court (Grace Nzioka, J) set aside the judgement of the tribunal and substituted therefor an order for specific performance of the share transfer agreement aforesaid on the terms therein specified. Aggrieved by the judgment and decree of the High Court, the applicant applied for review *vide* its notice of motion dated October 29, 2020, which was dismissed by a ruling dated July 22, 2021 against which the applicant has appealed to this court.



4. Before us is the applicant's notice of motion dated August 9, 2021 presumably made under rule 5(2) (b) of this *Court's Rules* seeking, *inter alia*: stay of the orders made on July 22, 2021 dismissing its application for review; stay of execution of the orders made in determination of its appeal to the High Court; leave to appeal; and that the costs of its application be in the cause.
5. We take note of the grounds of appeal set out in the applicant's memorandum of appeal dated August 9, 2021, which clearly show that the applicant seeks to appeal the High Court decision dismissing its application for review. It is that decision in the ruling of Grace Nzioka, J dated July 22, 2021 that we are now asked to stay. We hasten to observe that the learned judge's orders dismissing the applicant's motion for review of her judgment constitute negative orders incapable of being stayed.
6. This court in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR held that:

“Following that approach of looking at the nature of the orders even before delving into the said principles in a rule 5(2) (b) application the court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & anor* [2005] 1 EA 53 where it was stated that the order which dismissed the suit was a negative order which is not capable of execution.”
7. Likewise, the court in *George Ole Sangui & 12 others vs Kedong Ranch Limited* [2015] eKLR held that:

“20. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”
8. As regards the prayer for leave to appeal, we take note of the fact that there is an appeal already lodged, and in which the instant application is made. There is nothing on record to suggest that leave to appeal had been granted. Having considered the grounds of appeal, including the contention that: the High Court's decision of Grace Nzioka, J manifested contradictions between the reasoning and the orders granted; and that the application for review of the learned judge's decision was determined by a different judge, we form the view that it would only be fair and just to grant leave as sort.
9. Having carefully considered the applicant's motion, the affidavits in support and in reply thereto, the impugned ruling, the written submissions of learned counsel for the applicant and learned counsel for the respondent, and having heard both counsel, we reach the inescapable conclusion that:
 - a. The application for stay of execution of the impugned ruling fails and is hereby dismissed;
 - b. Leave be and is hereby granted to the applicant to appeal; and



c. Costs of this application be costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

