



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**NCBA Bank Kenya Limited v Kirui (Environment and Land Appeal  
42 of 2023) [2024] KEELC 4108 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4108 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL 42 OF 2023**

**MAO ODENY, J**

**MAY 9, 2024**

**BETWEEN**

**NCBA BANK KENYA LIMITED ..... APPELLANT**

**AND**

**NELLY CHEPKEMOI KIRUI ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 11<sup>th</sup> December 2023 by the Appellant seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That pending hearing and determination of the appeal, this honorable court be pleased to stay execution, of the judgment delivered on 23<sup>rd</sup> November 2023 by Hon. R Kefa, Principal Magistrate in Nakuru MCELC E035 of 2023; Nelly Chepkemoi Kirui versus NCBA Bank of Kenya Limited.
  - d. That the cost of this application be in the cause.
2. The application was supported by the annexed affidavit of Stephen Atenya the Principal Legal counsel of the Appellant sworn on 11<sup>th</sup> December 2023 whereby he deponed that the respondent had instituted Nakuru MCELC No. E035 of 2023 where the trial court awarded the respondent damages of Kshs.2,400,000/=, an order of a permanent injunction together with costs.
3. The Appellant being aggrieved by the judgment filed this current application and deponed that the appeal will be rendered nugatory if an order of stay of execution is not granted. Further, that the Appellant will suffer substantial loss as the respondent would not be able refund the amount paid in respect of the decree.



4. The respondent filed a replying affidavit sworn on 15<sup>th</sup> December 2023 where she deponed that the Appellant never gave evidence in the trial court hence the averments amounts to hearsay. Further, that the Appellant has not shown that the respondent is in the process of execution therefore the application is premature.
5. It was the respondent's case that the Appellant cannot litigate on behalf of individuals who never testified and that she is a lady of means and is able to refund the decretal sum should the Appeal succeed.

### **Appellant's Submissions**

6. Counsel identified two issues for determination namely; whether the Appellants has met the threshold for grant of stay of execution orders and who should bear the costs of the application.
7. On the first issue, counsel relied on Order 42 Rule 6 of the Civil Procedure Rules, and the cases of Hamisi Juma Mbaya vs Amakecho Mbaya [2018] eKLR, Butt vs Rent Restriction Tribunal (1982) KLR 417 as was cited in HGE vs SM [2020] eKLR and identified the conditions the appellant has to satisfy for the court to grant an order of stay of execution.
8. Counsel relied on the cases of James Wangalwa & another vs Agnes Naliaka Cheseto [2012] as was cited in Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR on the issue of whether the Appellant will suffer substantial loss if an order of stay is not granted.
9. Counsel submitted that the Appellant would suffer monetary loss if orders of stay of execution pending appeal are not granted, as the respondent's financial position is not clear and as such may not be in a position to compensate the Appellant in the event the appeal succeeds.
10. It was counsel's further submission that in the unlikely event that the appeal fails, the Appellant who is financially stable and has a well-established asset base, is capable of settling the judgment of the subordinate court without strain and relied on the case of Kenya Shell Limited vs Kibiru [1986] KLR 410.
11. On whether the intended appeal has merit, counsel submitted that the Memorandum of Appeal dated 13<sup>th</sup> December 2023 demonstrated that the learned trial Magistrate erred in law and fact by disregarding the Appellant's defence and evidence tendered and shifting the burden of proof contrary to the provisions of the *Evidence Act*.
12. It was counsel's submissions that the Appellant was unfairly punished for exercising its statutory power of sale of a charged property and therefore its appeal has merit. Further that the application was made without unreasonable delay as judgment was delivered on 23<sup>rd</sup> November 2023 and filed the application on 13<sup>th</sup> December 2023.
13. Counsel relied on the case of Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR and submitted that the dispute herein arises from a land ownership issue and it does not warrant deposit of any security but in the event that the court is inclined to issue an order of deposit of security, the Appellant is ready and willing to deposit the same.

### **Respondent's Submissions**

14. Counsel for the respondent submitted on whether the conditions for grant of stay of execution have been met and who should bear costs of the application.
15. On the first issue, counsel relied on Order 42 Rule 6 of the Civil Procedure Rules, the case of Vegpro Kenya Limited v Susan Wanja [2017] eKLR and submitted that the appellant has to first demonstrate



that substantial loss may occur in the event the order of stay of execution is not granted, secondly, the application must have been made without unreasonable delay with the last limb being the willingness to furnish security for costs.

16. Counsel relied on the cases of Trust Bank Limited v Ajay Shah & 3 Others [2012] eKLR, Peter Ndung'u Ngae & 3 Others v John Mugane Karomo [2015] eKLR, Kenya Shell Ltd v Benjamin Karuga Kiburi & another [1986] eKLR and submitted that the appellant had not demonstrated that it is likely to suffer substantial loss if the orders sought are not granted.
17. Counsel also submitted that the Appellant has not committed itself to pay security for costs hence the application should be dismissed with costs.

### **Analysis And Determination**

18. The issue for determination is whether the Appellant has met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“(2) No order for stay of execution shall be made under sub-rule (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.”

19. For the court to grant an order of stay of execution, the Appellant must file the application without unreasonable delay, must demonstrate that it is likely to suffer substantial loss if the orders of stay of execution are not issued and that it is willing to deposit security for due performance of the decree.
20. On whether the application was filed without unreasonable delay, a perusal of the court record indicates that the trial court delivered its judgment on 23<sup>rd</sup> November 2023 while the current application was filed on 13<sup>th</sup> December 2023 and therefore it was filed timeously.
21. On the issue of substantial loss, the Appellant argued that it stands to suffer monetary loss which might never be recovered from the respondent as she may not be in a position to compensate the appellant in the event the appeal is successful. In response the respondent argued that the appellant had not demonstrated that it would suffer substantial loss if the orders sought are not granted.
22. In the case of Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR, the court relied on the case of Equity Bank Ltd v Taiga Adams Company Ltd, [2006] eKLR the court held as follows:

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

23. Similarly, in the case of George Kimotho Ilewe v Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (Suing as Legal Representatives of the Estate of Judy Kioo Wanza – Deceased) [2021] eKLR the court held as follows:

“ 34. In this application the applicants have not alleged that the Respondent will be unable to refund the decretal sum if paid over to her. The Applicant has



simply contented itself by averring that the Respondent has not indicated that she is in a position to refund the decretal sum if paid over to her. It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business. I agree with the position in HCCA No. 161 of 2019; Awale Transporters Ltd vs. Kelvin Perminus Kimanzi where the court observed that:

“In this case it was the applicant's case that unless the stay is granted, the appeal will be rendered nugatory. It was not explained in what manner the said appeal would be rendered nugatory. The Applicant has not explained what loss, if any, it stands to suffer if the stay is not granted. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondent is simply exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless good reasons are given by the Applicant.”

35. Taking into account the fact that the amount the Applicant alleged that he is liable to pay is much less than the actual sum in issue, and the Applicant has not laid a basis for believing that the will not be able to refund the same in the event that the intended appeal succeeds, I find no basis for granting the stay sought.”
24. The Appellant other than alleging that the respondent would not be in a position to refund the decretal sum in the event the appeal succeeds, the Appellant did not lay a basis to demonstrate such allegation. It follows that the Appellant has not demonstrated that it will suffer substantial loss if stay of execution is not granted.
25. On the issue of security for the due performance of the decree, in the case of Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR the court held that:
- “...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.”



26. In the case of Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR the court stated as follows:

“The pre-amble to sub-rule (2) of Rule 4 of Order 41 is couched in very clear language and words: “No order for stay of execution shall be made under sub-rule (1) unless....” then follows the requirements, above, which have not been met by the applicant herein.

Let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay.”

27. The Appellant has met two of the requirements under Order 42 Rule 6 of the Civil Procedure Rules for grant of stay of execution. The procedure requires that the applicant meets all the requirements. However, the court has discretion to grant an order of stay but this discretion must be exercised judiciously taking into consideration the rights of the successful litigant and the Applicants right of appeal

28. The court awarded the respondent Kshs.2,400,000/= as damages together with costs. In the quest of balancing the rights of both parties, it would be in the interest of justice that the court orders that the Appellant deposits Kshs.500,000/ in a joint interest earning account of the advocates on record within 30 days from the date of this ruling failure to which the order of stay of execution lapses.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY 2024.**

**M. A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

