



**Waithanji v Absa Bank Kenya Plc (Formerly Barclays Bank of Kenya Limited)  
(Civil Appeal 104 of 2019) [2025] KEHC 1036 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 104 OF 2019  
HI ONG'UDI, J  
FEBRUARY 28, 2025**

**BETWEEN**

**SAMUEL KING'ORI WAIHANJI ..... APPELLANT**

**AND**

**ABSA BANK KENYA PLC (FORMERLY BARCLAYS BANK OF KENYA  
LIMITED) ..... RESPONDENT**

**RULING**

1. In the notice of motion application dated 18<sup>th</sup> June 2024 and amended on 24<sup>th</sup> September 2024 the appellant/applicant prays for the following orders;
  - i. That the court be pleased to set aside the ruling and consequential orders of stay made on 9<sup>th</sup> March 2023 by Justice H.K. Chemitei.
  - ii. That cost of this application be provided for.
2. The application is premised on the grounds on its face as well as the affidavit sworn on even date by the applicant. He deponed that on 23<sup>rd</sup> June 2022 this court delivered a judgment which was in his favour. That the consequential orders were that the respondent reverses unconditionally the unilateral entries it made on 9<sup>th</sup> April 2009 in respect to his account no. 4658762.
3. He further deponed that the respondent sought for stay orders on the basis that it would appeal the judgment delivered on 9<sup>th</sup> March 2023 but it has not filed the said appeal. That he believed that the stay sought was intended to delay and defeat ends of justice and he suffered prejudice. He added that it was in the interests of justice that the said ruling and consequential order of stay be set aside so that he could enjoy the fruits of the judgement delivered on 23<sup>rd</sup> June 2022.
4. In response to the application, the respondent filed a replying affidavit sworn by its legal officer one Michael Massava on 29<sup>th</sup> October 2024. He confirmed that indeed on 9<sup>th</sup> March 2023 the court granted



a stay of execution of the judgement delivered on 23<sup>rd</sup> June 2022 pending appeal. That the applicant was trying to delay the course of justice by filing an appeal (sic) that was frivolous, lacks merit and out of time, hence preventing the expeditious conclusion of this matter.

5. He averred that vide the application dated 20<sup>th</sup> March 2023 the applicant was granted time to file his appeal against the stay orders but had not filed the said Appeal. He further averred that a stay order could not be amended or varied by means of an application but only by way of appeal. He urged the court to observe the acts of the applicant which were unfair, undue and unjust, cause of delay and/or hindrance of justice and dismiss his application.
6. The application was canvassed by way of written submissions.

### **Appellant/applicant's submissions**

7. These were filed by Onesmus Githinji & Company Advocates and are dated 4<sup>th</sup> November 2024. Counsel submitted that one (1) year and 7 months had lapsed since the stay order was issued however, the respondent had not yet appealed against the judgment entered on 23<sup>rd</sup> June 2022 in his favour. That the period within which an appeal lay had lapsed and the respondent was statute barred from lodging a substantive appeal at this time. Further, that there was inordinate and undue delay on the part of the respondent thus and delaying justice since the appellant/applicant could not enjoy the fruits of his judgment. He urged the court to allow the application as prayed with costs to the respondent.

### **Respondent's submissions**

8. These were filed by Miller & Company Advocates and are dated 17<sup>th</sup> December 2024. Counsel identified one issue for determination which is whether the applicant had met the threshold for discharge of the stay orders of 9<sup>th</sup> March 2023. Counsel submitted in the negative and added that the respondent had shown willingness to pursue its appeal. That it should therefore be allowed time required to appeal the decision by this court.
9. He placed reliance on the decisions in Ochola Kamili Holding Limited vs Guardian Bank Limited (2018) eKLR as quoted in the case of Kenya Electricity Transmission Company Limited v Kibotu Limited [2019] eKLR and Kenya Electricity Transmission Company Limited v Kibotu Limited [2019] eKLR.

### **Analysis and determination**

10. I have considered the application, affidavits and submissions by the parties. I find the issue arising for determination to be whether the order for stay of execution issue on 9<sup>th</sup> March 2023 against the judgment delivered on the 23<sup>rd</sup> June 2022 should be set aside.
11. Order 51 Rule 15 of the Civil Procedure Rules, 2010 under which this application was brought provides that the Court may set aside an order made ex parte. This means that the court has unfettered discretion to set aside any ex parte order so long as it is done upon such terms as are just although such discretion must be exercised judiciously and not arbitrarily. This is in line with the principle set out in the case of Shah vs. Mbogo [1967] EA 116 where the court as follows:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”



12. In this case the ground upon which the application to set aside the stay of execution orders issued on 9<sup>th</sup> March 2023 has been brought is that the respondent has not filed an appeal after being granted stay of execution orders. That these actions have denied the appellant/applicant the opportunity to enjoy the fruits of the judgment entered in his favour. Further, I note that at the time the ruling was delivered only counsel for the respondent was present in court. I also note that the respondent did not respond to the appellant/applicant's allegation that it had not filed an appeal or availed to this court any proof of having filed the said appeal. The stay orders were issued on 9<sup>th</sup> March, 2023 for the reason that the respondent intended to file an appeal. For the respondent not to have lodged an appeal by now against the judgment entered in favour of the appellant/applicant is clearly a miscarriage of justice.
13. Section 3A of the *Civil Procedure Act* provides that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
14. In my humble opinion, a court's discretion to set aside its ruling/Judgment is not restricted but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking orders in its favour to adduce sufficient and plausible reasons that are demonstrable and persuasive to the court. In the present case I find that the respondent has not shown any good reason as to why it has not filed an appeal in the Court of Appeal which was the basis of the stay orders. I however find that the appellant/applicant has adduced sufficient reasons for this court to set aside the stay of execution orders issued on 9<sup>th</sup> March 2023.
15. In the unlikely event of any inconvenience to be suffered by the respondent the same can be remedied by an award of costs.
16. In light of the above, the notice of motion dated 18<sup>th</sup> June 2024 and amended on 24<sup>th</sup> September 2024 is allowed with costs.
17. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**  
**JUDGE**

