



REPUBLIC OF KENYA



**Nic Bank Limited v Ndumbi & another (Civil Appeal E707 of 2024)
[2025] KEHC 12186 (KLR) (Civ) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E707 OF 2024

TW CHERERE, J

MAY 29, 2025

BETWEEN

NIC BANK LIMITED APPELLANT

AND

JAMES MUNENE NDUMBI 1ST RESPONDENT

ROSEMARY NJERI MUNENE 2ND RESPONDENT

RULING

“The court must balance the right of appeal with the need to protect the fruits of a judgment.”

1. By a Notice of Motion dated 10th April 2025, brought under Sections 1A, 1B, 3A, and 95 of the *Civil Procedure Act*, and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, the Appellant seeks the following orders:
 1. A stay of execution of the judgment delivered on 23rd May 2024 and any resultant decree pending the hearing and determination of this appeal;
 2. Such further orders as this Honourable Court may deem just in the interest of justice
 3. That the costs of the application be in the cause.
2. The application is supported by the affidavit of Christine Wahome, the Appellant’s Senior Legal Counsel, sworn on 10th April 2025. The Applicant avers that there is imminent danger of execution, and unless stay is granted, the appeal will be rendered nugatory.
3. The application is opposed through a replying affidavit sworn by the 1st Respondent on 06th May 2025, who asserts that the Appellant has not come to court with clean hands having failed to comply



with the trial court's ruling dated 20th December 2024, which required the deposit of KES 3,000,000 in a joint interest-earning account within 45 days.

Issues for Determination

4. From the affidavits on record, the following issues arise for determination:
 1. Whether the Appellant has satisfied the conditions for grant of stay of execution pending appeal;
 2. Whether the Appellant's failure to comply with the trial court's conditional stay defeats the application;
 3. Whether the stay should be maintained on account of subsequent compliance with the court's directions issued on 11th April 2025.

Analysis and Determination

5. Under Order 42 Rule 6(2) of the Civil Procedure Rules, the court is enjoined to consider:
 - (a) Whether substantial loss may result to the applicant unless the order is made;
 - (b) Whether the application has been made without unreasonable delay; a
 - (c) Such security as the court orders for the due performance of the decree.
6. The Applicant contends that execution is imminent, and the appeal will be rendered nugatory if stay is not granted. No assertion is made regarding the Respondent's ability to refund the decretal sum if the appeal succeeds. This remains a vital consideration, as held in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, where the Court of Appeal stated:

“The onus is on the applicant to prove that the respondent would not be in a position to refund the decretal sum if the appeal succeeds.”
7. The Applicant concedes to non-compliance with the trial court order of 20th December 2024, explaining that the omission was not willful but resulted from an inadvertent mistake of its former advocates who failed to inform it of the court's ruling. This explanation has not been controverted.
8. The delay, while regrettable, was cured by subsequent compliance following this court's order of 11th April 2025, which temporarily stayed execution and allowed the Applicant to deposit the sum in court within 21 days. The record demonstrates that the deposit was made on 09th May 2025, within the period specified.
9. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal emphasized that:

“The discretion whether or not to grant a stay of execution must be exercised in such a way as not to prevent an appeal. The general principle is that a stay is normally granted so that an appeal may not be rendered nugatory.”
10. Although the Applicant has not demonstrated, with specificity, the substantial loss it stands to suffer if stay is not granted, the subsequent deposit of the security of KES 3,000,000, in court helps safeguard the appeal and the Respondents' right to the fruits of the judgment.
11. In the circumstances of this case, justice would be better served by preserving the subject matter of the appeal and safeguarding the right of appeal.



Disposition

12. Taking into account all the above, I find merit in the application dated 10th April 2025. Accordingly, I make the following orders:
1. A stay of execution of the judgment delivered on 23rd May 2024 and any resultant decree is hereby granted pending the hearing and determination of this appeal;
 2. The sum of KES 3,000,000 deposited in court on 09th May 2025 shall be retained as security pending the outcome of the appeal
 3. Costs of this application shall be borne by the Appellant
 4. Mention before the Deputy Registrar on 01st July 2025 to confirm filing and service of the record of appeal

DELIVERED AT NAIROBI THIS 29TH DAY OF MAY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellants - Mr. Dachi for Nyaanga & Mugisha Advocates

For Respondent - Mr. Njagi for Mugendi Karigi & Co. Advocates

