



REPUBLIC OF KENYA



**Wakenda v Commercial Bank of Africa Ltd (Civil Appeal E032 of 2023)
[2024] KEHC 2891 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E032 OF 2023
JWW MONG'ARE, J
MARCH 18, 2024**

BETWEEN

MICHAEL BERENJU WAKENDA APPLICANT

AND

COMMERCIAL BANK OF AFRICA LTD RESPONDENT

RULING

1. What is before the court for determination is the Applicant's Notice of Motion application dated 25th April, 2023 brought under Order 42 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1A, 1B, 3A of the *Civil Procedure Act*.
2. The Applicant seeks the following orders:-
 - i. spent
 - ii. a temporary stay of execution of the judgment entered against the Defendant/Appellant on 12th July 2019 and the Ruling issued on 13th January 2023 together with all consequential orders, decrees & proceedings thereof pending the hearing of this application.
 - iii. An order of stay of execution of the judgment entered against the Defendant/ Appellant on 12th July 2019 and the Ruling issued on 13th January 2023 together with all consequential orders, decrees & proceedings thereof pending the hearing and determination of the instant appeal lodged by the Applicant against the said Ruling at the High court
 - iv. The costs of the application be in the cause.
3. The application is premised on the grounds of the face of the application and is supported by the affidavit and further affidavit of Michael Berenju Wakendasworn on 25th April, 2023 and 30th



May, 2023 respectively wherein he avers the trial court, by its Ruling of 31st January, 2023, erred in dismissing his application seeking to set aside the default judgment entered against him. He states he is apprehensive the Respondent will proceed to execute the decree as he was served with a Notice to Show Cause why he should not be committed to civil jail. He states that if the orders sought are not granted he will be subjected to suffer hardship and irreparable loss.

4. Opposing the application for stay, the Respondent through the Replying affidavit of Stephen Atenya, the Principal legal counsel at the Respondent bank now NCBA Bank Kenya PLC sworn on 3rd May, 2023, contends that the execution proceedings emanates from the decree of the court issued on 1st July 2019 and not premised on the Ruling on 9th April 2022. According to him the ruling of 31st January 2023 was a negative order which is incapable of being stayed. The Applicant has failed to demonstrate the loss to be suffered in the event the application is not allowed neither has the Applicant satisfied the threshold for granting stay of execution as enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#).
5. By the directions of this court the application was canvassed by way of written submissions which counsels later highlighted.

Analysis and Determination

6. I have carefully considered the application for stay, the grounds of the application, the affidavits in support and opposition. I have also considered the rival submissions and the authorities cited. To my mind, the main issue for determination before this court is whether the Applicant has demonstrated that the stay orders pending appeal are merited.
7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides:-
 - “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.
8. An order to grant or deny stay of execution pending hearing of an appeal is a discretionary remedy which should be exercised judiciously. A party seeking stay of execution must demonstrated the following:-
 - i. that substantial loss may result to the Applicant unless the order is made,
 - ii. that the application has been made without unreasonable delay, and
 - iii. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.
9. On the issue of substantial loss, the Applicant avers he has demonstrated to the court that he was not accorded a chance to defend the suit in the lower court against the principles of natural justice. He states if execution is allowed to proceed on his property the financial/economic impact would be unbearable.



10. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

11. It is imperative therefore that this court does protect the subject matter so as not to render the appeal nugatory.

12. On the second issue of unreasonable delay, the Applicant contends the instant application was brought expeditiously upon receiving a Notice to show cause dated 8th April 2022, on 27th April 2022 the Applicant filed at the trial court, an application dated 9th April 2022 seeking to set aside the ex-parte judgment but the application was dismissed on 31st January, 2023 which prompted the Applicant to file the instant application dated 25th April 2023.

13. The Respondent denies that the application was brought timely and it avers that the delay has not been adequately explained as the instant application was brought 4 years after the judgment and 3 months after the delivery of the Ruling. The Respondent argues the judgment of the trial court was proper as the Notice to Show Cause and the summons to enter appearance were served at the same location and place however the Applicant only seems to acknowledge the Notice to Show Cause.

14. I am also not satisfied that there has been no inordinate delay in bringing the instant appeal the judgment being appealed against was delivered on 12th July 2019.

15. As to the Security of costs, the Applicant contends he is desirous of abiding to the conditions this court may set on security. The court is bound to make appropriate orders that serve the interest of justice taking appropriate considerations of the issues at hand in an attempt not to render the appeal nugatory. I agree with the position in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:-

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

16. The Applicant argues it has an arguable appeal with a probability of success. It is the Applicant’s case that he was never served with the Plaintiff and Summons to enter appearance and was therefore was unaware of the proceedings at the trial court. He avers the failure to serve the summons occasioned the Applicant’s failure to file a defence defend the matter.



17. The Respondent on the other hand, submits the Applicant was duly served with the summons to enter appearance on 7th June, 2019 but the Applicant failed to enter appearance and or file a defence within the statutory timelines, which prompted the Respondent to apply for a default judgment. The Respondent argues that it is entitled to execute the judgment.
18. Therefore, taking all factors into consideration and in an attempt to balance the rights of the parties as well considering the overriding objectives. According to section 1A (2) of the Civil Procedure Act: “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”
19. Whereas I do agree the Applicant has the right to appeal while as the Respondent is entitled to enjoy the fruits of the judgment, the Applicant is denied of a chance to defend the suit by the failure of the Respondent to served him with the Plaint and Summons to enter appearance. In the spirit of Article 50 of the Constitution where every litigant ought to be given a chance to be heard, I do find that it is in the interest of justice that I allow the Applicant a chance to ventilate the appeal.
20. Accordingly, I hereby allow the application dated 25th April, 2023 and consequently stay the execution of the judgment and decree made on 12th July 2019 and the ruling issued on 13th January 2023, together with all consequential orders, decrees & proceedings thereof pending the hearing and determination of the instant appeal on the following conditions:-
 - i. The Applicant/Appellant shall deposit the entire decretal sum into an interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal, within 21 days of this ruling;
 - ii. The Appellant/Applicant to file and serve a record of appeal within thirty (30) days of this ruling;
 - iii. Costs shall be in the cause;

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MARCH, 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Ngugi for the Respondent.

Mr. Kamau for the Applicant.

Amos - Court Assistant

