



**Kimotho v Equity Bank Limited & another (Civil Case 496 of 2014)  
[2024] KEHC 4225 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4225 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 496 OF 2014  
A MABEYA, J  
APRIL 30, 2024**

**BETWEEN**

**JACKSON NGECHU KIMOTHO ..... PLAINTIFF**

**AND**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me are two Motions on Notice dated 26<sup>th</sup> and 28<sup>th</sup> September, 2023, by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, respectively. They are brought under Section 7 of the *Appellate Jurisdiction Act* and Order 42 Rule 6 of the *Civil Procedure Rules*. They seek the stay of the judgment and decree made on 25/8/2023 by Mshila J pending appeal.
2. They also seek the extension of time for filing and service of the Notice of Appeal against the said judgment and decree.
3. The Motions are supported by the affidavits of Samuel Wamaitha and Anthony Maina sworn on 26<sup>th</sup> and 28<sup>th</sup> September, 2023, respectively. The grounds for the Motions are that the trial for the matter was concluded on 16/6/2022. The matter was severally mentioned for delivery of judgment until 14/8/2023 when Hon Osoro (DR.) directed that the same be placed before me on 27/9/2023 for directions.
4. That unbeknown to the applicants, the judgment was delivered on 25/8/2023 and they only came to know of it on 12/9/2023 when they received the plaintiff's computation of the decretal sum. That no notice of judgment was issued to them.



5. That as a result, the applicants were unable to file in time their respective Notices of Appeal to challenge the judgment that had been entered against them. That the plaintiff had since tabulated the claim at Kshs. 21,472,000/= . That the applicants have an arguable appeal. That they will suffer substantial loss if the stay is not granted as the respondent will not be able to refund the same were the appeal to be successful.
6. The applications are opposed by the plaintiff vide his replying affidavit sworn on 2/10/2023. He deposes that the Notice of Judgment was circulated to all stakeholder's known emails. That it is unreasonable in a democratic society for a bank like the 1<sup>st</sup> applicant, which has raked in trillion profits to fail to honour a judgment for Kshs. 21.4m.
7. That the applicants have not annexed any Memorandum of Appeal to show that they have an arguable appeal. That the intended appeal is a delaying tactic. That the applicants have not demonstrated the substantial loss they will suffer if the decree is enforced. That there is no Notice of Appeal on record and the applications are therefore technically incompetent.
8. That he has waited for 14years for the matter to be concluded and it would therefore be unjust to order a stay. That his small business should not be looked down upon vis a vis that of the 1<sup>st</sup> applicant.
9. I have considered the record. This is an application for stay pending appeal and for extension of time within which to lodge and serve Notices of Appeal.
10. The prayers sought are discretionary. However, as in all discretions, the same should be exercised judiciously. As regards, extension of time, the time required for lodging a Notice of Appeal under the Court of Appeal Rules is 14 days. The Judgment was delivered on 25/8/2023. The time run out on the 8/9/2023. The 2<sup>nd</sup> applicant lodged its Notice of Appeal on 14/9/2023 while the 1<sup>st</sup> defendant only drew a draft.
11. In such a situation, the court will consider the length of the delay and the reason for the delay. As regards the length, the present applications were lodged after 14 and 16 days, respectively of being notified of the judgment. The applicants became aware of the judgment on 12/9/2023. In my view that is a reasonable time. There was no inordinate delay in lodging the applications.
12. As regards the reason for the delay, both applicants contend that they were not notified of the delivery date. The respondent retort that all the parties were notified of the judgment date through their emails. However, he did not produce a copy of the email that he or his advocates received from the Court. It would have shown the date the notice was issued and the parties notified. From the record, I could find none.
13. Order 21 Rule 1 of the [Civil Procedure Rules](#) provides:-
  - 1 "In suits where a hearing is necessary, the Court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates."
14. It is clear from the foregoing that, where a decision is not delivered at once, a notice of delivery must be issued to the parties. The requirement is for obvious reason that the parties need to know the decision for their own subsequent eg. actions lodging an appeal or complying therewith.
15. In the present case, there is no evidence that any judgment notice was issued to the parties. I am therefore satisfied that the delay has been explained and is satisfactory. I allow the extension sought.



16. As for stay, it was incumbent upon the applicants to demonstrate that they would suffer substantial loss if stay is not ordered, that they made their applications timeously and offer security therefor.
17. I have already found that the applications were made timeously. They were lodged within 16 days of notification of the impugned decision.
18. As regards substantial loss, the applicants contended that if the decretal sum is paid over to the respondent and the appeals succeed, the respondent would not be able to refund the same. The respondent did not rebut or deny that contention.
19. In my view, once a party alleges that if the money decreed is paid over and there is likelihood of non-refund if the appeal is successful, that is enough substantial loss. A likelihood of not being able to recover ones funds is substantial loss. When ones funds are lost or put beyond ones reach is substantial loss.
20. Such an allegation is rebuttable if a respondent demonstrates that he is not a man of straw. That if the decretal sum is paid over to him, he will be able to refund the same when called upon. It is the respondent to show that if the money is paid over to him, it will not be lost of the applicant as he will be able to refund the same.
21. In the present case, the plaintiff did not deny the allegation that he will be unable to refund the decretal sum if paid over to him and if the appeals succeed. He only dwelt on how it would be unfair for a stay to issue as the case has dragged for 14 years, that the 1<sup>st</sup> applicant is able to pay the sum decreed among other contestations.
22. In view thereof, I am satisfied that there being no evidence that the plaintiff is capable of refunding the decretal sum were the appeals to succeed, the applicants have demonstrated that they would suffer substantial loss were they to pay over the said sum.
23. As regards security, both applicants stated that they are prepared to give such security as may be ordered by the Court. It is not in contention that the 1<sup>st</sup> defendant is a reputable and stable bank in Kenya. That the 2<sup>nd</sup> defendant is the government's only agent in the collection of revenue that run into trillions each year. There is no evidence that any of them will fold any sooner. In the premises, I see no need for any security to be offered.
24. One other thing, the decretal sum has been computed at Kshs. 21.4m. It is not clear how a simple sum of Kshs. 800,000/= and Kshs. 5,000,000/= could metamorphose to a colossal sum of Kshs. 21.4m. It should be noted that interest always has to be simple interest and not compounded unless expressly stated by the Court.
25. Accordingly, I allow the applications on the following terms:-
  - a. The applicants are granted leave to file and serve their respective Notices of Appeal within 14 days of this ruling.
  - b. There shall be an unconditional stay of execution pending the hearing and determination of the intended appeal.
  - c. The costs of the applications shall abide the outcome of the appeals.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

**A. MABEYA, FCI Arb, EBS**



**JUDGE**

