



Case Number	Civil Appeal E036 of 2021
Parties	<a href="#">Noor</a> & another v <a href="#">Bank of Africa Limited</a> & <a href="#">2 others</a>
Case Class	Civil
Judges	<a href="#">A Mabeya</a>
Advocates	1.Ms Ndungu h/b for Mrs. Makworo 2.Mr. Asimwe h/b for Ombachi
Case Action	
Case Outcome	Appeal dismissed
Date Delivered	02 Sep 2021
Court County	Nairobi
Case Court	<a href="#">High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)</a>
Court Division	Commercial and Tax

Noor & another v Bank of Africa Limited & 2 others (Civil Appeal E036 of 2021) [2021] KEHC 1 (KLR) (Commercial and Tax) (2 September 2021) (Ruling)

Neutral citation number: [2021] KEHC 1 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

September 2, 2021

A Mabeya, J

Civil Appeal No. E036 of 2021

Between

Hamza Ali Noor

1<sup>st</sup> Appellant

Abdi Ali Noor

2<sup>nd</sup> Appellant

and

Bank of Africa Limited

1<sup>st</sup> Respondent

Allied (EA) Limited

2<sup>nd</sup> Respondent

Midland Energy Limited

3<sup>rd</sup> Respondent

(Being an appeal from the ruling of the Hon. L. Gicheha (CM) in Milimani CMCC No. 333 of 2016: Bank of Africa Limited VS Allied (EA) Limited & 3 others delivered on 7/5/2021)

Ruling

1. Before me is an application dated 15/5/2021. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#).
2. The application seeks an order for stay of execution of the order granted by the subordinate court on 7/5/2021 in Milimani CMCC No. 333 of 2016, Bank of Africa Limited Vs Allied (EA) Limited & 3 others pending the hearing of the application and appeal. The application was supported by the affidavit of Hamza Ali Noor sworn on 12/5/2021.
3. The applicant's contentions are that; the subordinate court had issued warrants of arrest for non-attendance on 12/2/2021. Those warrants were suspended on the same day but the suspension was lifted on 12/10/2020. The applicant filed an application dated 2/12/2020 seeking to be accorded an opportunity to show cause.
4. That application was opposed by the 1<sup>st</sup> respondent whereby, by a ruling delivered on 7/5/2021, the subordinate court declined to lift the warrants of arrest. The applicants were aggrieved and they filed the Memorandum of Appeal dated 12/5/2021 and the instant application.
5. The respondents opposed the application vide their affidavit sworn by Charles Waiyaki on 3/6/2021. Their case was that; judgment was entered against the applicants in the sum of Kshs. 18,884,685.15 vide a decree dated 1/8/2017. On 18/2/2020, the subordinate court issued warrants of arrest against the applicants having failed to show cause for settlement of the decretal sum.
6. That the warrants were suspended on various occasions to allow the applicants to settle the debt upon their promise of selling off a parcel of land. On 9/9/2020, the subordinate court issued the last extension of suspension of the warrants.
7. That the applicants had been given several opportunities to show cause why they should not be committed to civil jail in line with section 38 of the [Civil Procedure Act](#). That vide a ruling made on 7/2/2018, the applicants had been ordered to pay a monthly installment of Kshs. 1,000,000/= until payment in full which they failed to.
8. Learned Counsel for both parties argued the application orally on 28/6/2021. I have considered those submissions together with the pleadings and evidence before me. The sole issue for determination is whether the applicants have met the necessary conditions for the grant of the orders for stay pending appeal.

9. Order 42 Rule 6 (2) of the Civil Procedure Rules sets out the principles applicable in considering such an application. The principles are that the application should be brought timeously, that if the stay sought is not granted, the applicant will suffer substantial loss and, offer of security for the due performance of the decree.

10. The impugned ruling was made on 7/5/2021 and this application was lodged on 15/5/2021; a period of 8 days. Accordingly, I find that there was no inordinate delay in bringing this application.

11. On substantial loss, I have carefully read the applicants' pleadings as well as oral submissions of the parties. The applicants failed to demonstrate any substantial loss. The applicants were only apprehensive that the respondents would execute the orders of the subordinate court leading to loss of their liberty. However, execution of a decree is not in itself substantial loss.

12. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, it was held that: -“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Appellant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Appellant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

13. The applicants failed to establish how execution would irreparably affect them in their appeal. It was not enough for the applicants to merely state that the respondents were likely to execute the orders of the subordinate court. Execution by whatever means is a lawful process and cannot be a basis of an application for stay. Substantial loss must be established once arrested, the applicants will be presented in Court where they will have an opportunity of showing cause. They cannot be sentenced without a hearing.

14. On security, I note that the respondents have an unsatisfied decree against the applicants hence the dispute is monetary. The applicants did not in any way offer security, or even allude to their willingness to offer security should the court so direct. The subject decree is dated 1/8/2017 for a sum of Kshs. 18,884,685.15/=. Almost four years later, the amount has not been fully settled. The applicants ought to have committed through their application that they were willing to abide by the court's directions on security.

15. The upshot is that the applicants have failed to meet the conditions necessary for the granting of stay orders. I thus find that their application lacks merit. Once the orders of the subordinate court are executed, the applicants will have an opportunity to show cause why they should not be committed to civil jail, in line with section 38 of the [Civil Procedure Act](#).

16. In the premises, I find that the application dated 12/5/2021 lacks merit and order that the same be and is hereby dismissed with costs.

It is so ordered. **DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2021.**

**A. MABEYA, FCI ArbJUDGE**