



REPUBLIC OF KENYA



KENYA LAW

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**Ahmed v Chania Executive Cool Limited; Gulf African Bank Limited (Garnishee)
(Civil Suit 187 of 2022) [2023] KEHC 18222 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 187 OF 2022
DKN MAGARE, J
APRIL 28, 2023**

BETWEEN

SAKINA AHMED APPELLANT

AND

CHANIA EXECUTIVE COOL LIMITED RESPONDENT

AND

GULF AFRICAN BANK LIMITED GARNISHEE

RULING

1. Wise parties never execute immediately they let the Decree fester and will be successful when they come days later. The Respondent did exactly that in this matter. They bid their time on certificate of costs dated October 28, 2021.
2. The suit, being Mombasa E014 of 2020 Sakina Ahmed vs Chania Cool Executive was struck out with costs. The respondent requested for assessment of costs which was done on October 28, 2021.
3. Almost a year later, they moved to Garnishee the Judgment debtors Account at Gulf African Bank Ltd. The bank issued a garnishee order Absolute on 8/11/2022.
4. The appellant sought to Review costs and sought stay. The court, in its wisdom dealt with both matters. Upon considering the evidence and the law The court dismissed the application for Review and allowed the Application to make the garnishee order to be absolute.
5. The appeal herein was filed on November 10, 2022 and filed an application for stay dated November 11, 2022. Interim orders were granted on November 14, 2022 which have subsisted thence. The grounds of appeal relate to misapplication of Rule 11 of The *Advocates Remuneration Rules*.
6. The said application is subject of the subject of this Ruling.



Analysis

7. For stay of execution to be given, there should be an order capable of being executed upon. Two orders were issued. One dismissing the Application for Review of costs and another allowing the order for garnishee absolute in the dismissed application the court did not issue positive order.

8. Appeals are provided for under section 79G OF the [Civil Procedure Act](#), which provides as doth: -

“79G. Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

9. Appeals have to be from orders, decree, ruling or judgment. The order grnating costs was not appealed from. The costs were assessed and no reference was field under Rule 11 of the [Advocates Remuneration Rules](#).

10. It should be recalled that stay is governed by order 42 rule 6 of the [Civil procedure Rules](#). The rule provides as doth: -

“6. Stay in case of appeal [Order 42, rule 6.] (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
11. In dismissing the Application for review, the court did not issue a positive order. There is thus nothing to stay in the application for review. It stands dismissed. Even if stay is issued, it will serve no useful purpose. In the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR, the court of appeal [Okwengu, Kiage & Sichale, JJ A], had this to say in respect thereof: -
- “With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated July 30, 2020, merely dismissed the applicant’s case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:
- “what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay.”
12. The said decision reiterated the decision made in *Raymond M Omboga v Austine Pyan Maranga Kisii* HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:
- “The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”
13. The main application having fallen, the only order remaining is that of the garnishee order. The Garnishee order was issued against Gulf African Bank Ltd. They have no issue with the same. It is only the bank that can raise an issue then that they didn’t have funds belonging to the judgment debtor.
14. An order of stay acts as a barrier from releasing the money to the respondent but does not lift the garnishee order. Upon stay being lifted, the money should be released to the decree holder.
15. There is nothing pending except payment of costs. The court thus cannot stay the garnishee Order.



16. Regarding the Appeal, there is no Appeal pending. The appeal from an order on costs has its procedures. The current Appeal cannot be admitted and as such it is a waste of Judicial time to whether parameters for stay pending appeal have been made.
17. Before dealing with the application, I need to be satisfied that I have jurisdiction over the subject matter. This was the holding in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, by Nyarangi JA as then he was as doth: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

18. There are one aspects of jurisdiction that I need to address. This is whether there can be an appeal to this court on the issue of assessment of costs in the lower court. This is what I call jurisdiction *ratione materiae*. The issue of costs as rightly pointed out by the respondent is to be dealt with under rule 11 of the *Advocates act*.
19. I do not wish to address the rest of the other issues as they add no value to the determination as interim orders lapse today. I need to point out that the court should be able to deal with all issues, since it is not the last court. However, on interim orders, it is. Therefore, it is unnecessary to determine whether they were or were not properly obtained.
20. Consequently, I dismiss in like the Application dated November 11, 2022 with cost. I vacate any orders granted staying the garnishee order. The same is payable forthwith. Costs of 25,000 to the Respondent.
21. In order to foreclose this matter, I exercise my discretion and give directions on the Appeal. The appeal is summarily rejected with costs of 35,000/= to the respondent payable within 30 days.

Determination

22. The upshot of the foregoing is as the court makes the following orders:-



- a. The Application dated November 11, 2022 is dismissed in limine with cost of Ksh 25,000 to the Respondent.
- b. The appeal is summarily rejected with costs of 35,000/= to the Respondent payable within 30 days.
- c. Interim orders in force are hereby vacated.
- d. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mayieka for the Appellant

Mr. Masore for the Respondent

Firdaus for the Respondent.

Court Assistant - Firdaus

