



Diamond Trust Bank Limited v Nganyi & another (Civil Appeal E142 of 2023) [2023] KEHC 24677 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E142 OF 2023
RE ABURILI, J
OCTOBER 31, 2023**

BETWEEN

DIAMOND TRUST BANK LIMITED APPELLANT

AND

BEN NGANYI 1ST RESPONDENT

AFRICA MERCHANT ASSURANCE COMPANY LTD 2ND RESPONDENT

RULING

1. On 27th July 2023, the trial court vide Kisumu CMCC No. 25 of 2017 issued decree absolute against the Garnishee Diamond Trust Bank Limited, the Appellant herein, directing the Appellant/Garnishee to settle decree for Kshs. 2,281,545.12 with the money held in a fixed Deposit (contract) Ref. No. 071FDLC201750001 and Fixed Deposit (Contract Ref. No. 071FDLC203280001 and in current account Number 800365007 and Current Account Number 365537001 held by the Garnishee/Appellant in favour of the 2nd Respondent herein Africa Merchant Assurance Company Limited.
2. Aggrieved by the above Ruling and order, the Appellant/Garnishee herein filed this appeal vide a memorandum of appeal (undated) asserting that it no longer held an account for the 2nd Respondent Africa Merchant Assurance Company Limited and that the said account had been closed, hence, the assertion that trial magistrate erred in law and fact when she made the orders for attachment of debts from the Garnishee which Garnishee had no funds of the 2nd Respondent.
3. It should be noted that up to this stage, the ruling of the lower court has not been availed to this court to appreciate the reasoning behind the orders made by the trial magistrate.
4. The Applicant filed an application dated 22nd August 2023 supported by an affidavit sworn by Ms. Jeniffer Thiga, the legal officer of the Appellant Bank, seeking for stay of execution of the order made on 27th July 2023 pending the hearing and determination of this appeal.



5. The application was filed during the recess with the recess duty judge certifying the application as urgent and granting an interim stay of execution of the order.
6. In the grounds in support and the affidavit, the Appellant/Garnishee reiterated that it never held any account on behalf of the 2nd Respondent and is aggrieved by the entire decision and that if execution is carried out, the Appellant will be forced to pay the debt of the 2nd Respondent yet it does not hold any monies on behalf of the 2nd Respondent hence it will suffer substantial loss, having severed its Bank-Customer Relationship with the 2nd Respondent.
7. That the appeal herein is arguable and has high chances of success; that the application was filed without unreasonable delay and finally that it is willing to abide by any conditions that the court may order in allowing the appellant's application.
8. Opposing the application for stay of execution of the Garnishee order absolute, the 1st Respondent through his counsel Mr. Caleb D. Obura Obwatinya swore and filed a Replying affidavit sworn on 2nd October 2023 deposing that prior to filing of the application for Garnishee, the 1st Respondent/ Decree holder had done his investigations and found that the 2nd Respondent had an account with the Garnishee which amount would have settled the decretal amount.
9. That albeit the Garnishee filed a response claiming that it had closed accounts with the 2nd Respondent, no document or Bank Statement for the 2nd Respondent account were annexed on the replying affidavit then nor any has been produced in this honourable court to date hence there is alleged collusion between the Garnishee and the 2nd Respondent and that that was the basis of the ruling/Garnishee absolute order being issued against the Appellant herein by the trial court.
10. It was further deposed that this matter has dragged on for over ten years hence justice has been delayed and denied to the 1st Respondent.
11. The application was argued orally on 23rd October 2023, with each of the parties' respective counsel reiterating their client's positions as per the filed pleadings and or affidavits in support or in reply.

Analysis And Determination

12. I have carefully considered the application for stay of execution of Garnishee Order Absolute made on 27th July 2023, the grounds and supporting affidavit as well as the Replying affidavit. I have given equal consideration to the oral arguments by both counsel for the parties and in my view, the issue for determination is whether the application is merited.
13. Grant or refusal to grant stay of execution of decree or order appealed from is governed by Order 42 Rule 6(2) of the Civil Procedure Rules and is an exercise of Judicial discretion, which discretion must be exercised judiciously and not whimsically. In other words, an applicant must satisfy the conditions for grant of stay in order to benefit from the discretion of this court.
14. In *Butt vs Rent Restriction Tribunal (1972) KLR 417*, the Court of Appeal for Eastern Africa laid down principles that must guide the court in granting or refusing to grant stay in the following terms:-
 1. "The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an



appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion.

3. A Judge should not refuse a stay if there are good reasons/grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. (The special circumstances in the Butt vs Rent Restriction Tribunal case were that there was a large rent amount in dispute and the Appellant had an undoubted right of appeal).
 5. The court in exercising its powers under Order 41(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay to lapse.”
15. In this appeal, the Appellant was the Garnishee in the lower court and not the Judgment Debtor. However, where a court of law makes an order nisi and order absolute attaching debts belonging to a judgment debtor, that order is lawful and recognized under Order 22 Rule 8 of the *Civil Procedure Rules* which provides that:-
- “Application for attachment of movable property not in judgment debtor’s possession.
- Where an application is made for the attachment of any movable property belonging to a judgment-debtor, but not in his possession, the decree holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.”
16. In the matter herein, before the lower court, the decree holder gave a specific description of the two fixed Deposit accounts and two current accounts which it believed the appellant herein held for the Judgment debtor with sufficient funds to settle the decree passed against the latter.
17. The order was for attachment of monies held by the Garnishee Bank on behalf of the judgment debtor. It follows that the Bank was expected to either comply with that order, or file a response disputing that it held any such accounts or monies in the said accounts on behalf of the judgment debtor.
18. The Bank indeed filed a response denying that it held any account with the judgment debtor.
19. However, since the decree holder had specified the accounts which he verily believed that the judgment debtor held with the Garnishee Bank, it was now incumbent upon the Garnishee to file into court statements of accounts as specified and disclosed to show that those accounts had no funds, did not belong to the judgment debtor or have funds belonging to the judgment debtor or that the said accounts were long closed and if so, when. Nothing of the sort was filed into court hence, the decision by the trial Magistrate.
20. Whereas this court agrees that the Garnishee would suffer substantial loss if the money is paid out to the decree holder herein and in the end the appeal is successful, since the Garnishee is not a judgment debtor, I disagree with the Garnishee appellant that its duty was to simply say I don’t hold any money or account on behalf of the decree holder.



21. I find that the Garnishee withheld very crucial information to the court which information could have aided the trial court make orders in favour of the Garnishee, assuming the denial was based on true and accurate facts, if at all the accounts specified had no relation with the judgment debtor or there were no funds therein capable of being attached.
22. On that note, I find and hold that the applicant has not satisfied this court that it will suffer any substantial loss if the stay sought is not granted, for reasons that I withheld from court information in its possession which would have guided the trial court in making orders which are just and expedient in the circumstances.
23. On whether the application herein was made timeously, the impugned order was made on 27th July 2023 and the application was filed on 22nd August 2023. Albeit the application was made before execution was done, it is not clear to this court whether there was any stay granted by the lower court within that period hence it would not have taken the decree holder all that time waiting to receive the payments. Nonetheless, the application was made within the appeal period hence the delay is not inordinate though not explained.
24. On whether the court should order for depositing of security for the due performance of decree/order, the Appellant has indicated that it is willing to abide by any conditions that this court may make in order to fulfil the requirements under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#).
25. Having considered all the above, I make the following orders that will serve the interest of justice for all parties to this appeal.
 1. That there shall be a stay of execution of the order absolute made on 27th July 2023 in the lower court pending the hearing and determination of this appeal conditional upon the Appellant/Applicant Garnishee furnishing this court with all the statements of accounts in respect of Fixed Deposit Contract Ref. No. 071FDLC201750001 and Fixed Deposit Contract Ref. No. 071FDL203280001 and Current Account No. 800365007 and 365537001 at Diamond Trust Bank (K) Limited within seven (7) days of this order.
 2. That in default of compliance with the above order, the stay granted herein shall automatically lapse and the decree holder shall be at liberty to execute the order absolute made on 27th July 2023.
 3. In addition to order No. 1 above, the Appellant/Applicant shall, upon complying with order No. 1 and where there is no default on the same as stipulated in Order No. 2 above, deposit into this court the sum of Kshs.2,281,545.12 as security for due performance of decree within 14 days of the date of this court.
 4. That in default of compliance with order 1 and 3 above, the Decree holder shall be at liberty to execute decree absolute made on 27th July 2023.
 5. Cost of this application shall be in the appeal. Mention on 23rd November 2023 to confirm compliance.
26. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2023.

R.E. ABURILI



JUDGE

