



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. EO35 OF 2021

DIAMOND TRUST KENYA LTD.....APPELLANT/APPLICANT

VERSUS

PHILIP ODIWUOR ODUNYA

(Suing as the legal representative of the estate of the late

Jane Anyango Odiwuor).....1ST RESPONDENT

AFRICA MERCHANT ASSURANCE COMPANY LTD.....2ND RESPONDENT

RULING

1.The appellant/applicant moved the court by way of Notice of Motion dated 18th May, 2021. It was brought under Order 42 Rule 6 (1), Order 51 Rule 1 of the Civil Procedure Rules, 2010 & sections 1A, 1B & 3A of the Civil Procedure Act. The applicant is seeking the following orders:

a)That this application be certified as urgent and service thereof be dispensed with and the same be heard ex-parte in the first instance. [Spent]

b)That pending the inter-parties hearing of this application, this honourable court pleased to stay the execution of the ruling and Garnishee Order Absolute orders issued on 23rd December, 2020, by Hon. B.O. Omwansa(Mr.) Senior Principal Magistrate pursuant to the Garnishee Application dated 16th June 2020 filed in Oyugis CMCC No. 119 of 2016, Philip Odiwuor Odunya (suing as the legal representative of the estate of the late Jane Anyango Odiwuor –vs- Africa Merchant Assurance Company Limited & Another. [Spent]

c)That pending the inter-parties hearing of this appeal, this honorable court be pleased to stay the execution of the ruling and Garnishee Order Absolute orders issued on 23rd December, 2020, by Hon. B.O. Omwansa (Mr.) Senior Principal Magistrate pursuant to the Garnishee Application dated 16th June 2020 filed in Oyugis CMCC No.119 of 2016, Philip Odiwuor Odunya (suing as the legal representative of the estate of the late Jane Anyango Odiwuor –vs- Africa Merchant Assurance Company Limited & Another.

d)That this honorable court be pleased to grant any further order(s) it may deem fit in the circumstances.

e)That the costs of this application be provided for.

2.The application was premised on the following grounds:

a)Pursuant to a Garnishee Application dated 16th June 2020, the 1st respondent obtained a Garnishee Order Absolute on 23rd December, 2020, ordering the Bank to settle the decretal sum of kshs.1,185,410.60/-.

b)Being aggrieved with the foregoing, the appellant filed sought leave to appeal from the magistrate’s court vide an application dated 15th February, 2021 and by a ruling delivered on 28th April 2021, the court granted the appellant leave to appeal but no stay of execution was issued.

c)As a result, the 1st respondent obtained warrants of attachment and sale dated 13th May 2021 and proclaimed the appellants assets at its Kisii branch vide proclamation Notice dated 17th May 2021 and after the same lapses on 14th April 2021, the 1st respondent will be at liberty to proceed with execution.

d)If the execution proceeds, the appellant shall be irreparably prejudiced because:

i)Its instant arguable appeal which contests its liability to the 2nd respondent shall be rendered nugatory and a mere academic exercise; and

ii)The respondents may be unable to refund the decretal sum should the appeal succeed.

e)In any event, the 1st respondent is statute barred from commencing or proceedings with execution against the 2nd respondent pursuant to section 430 of the insolvency Act No. 18 of 2015, in light of the liquidation Order dated 18th November, 2020 issued in Nairobi HC Insolvency Petition No.E004 OF 2020, Elizabeth Wawira karithi & 6 others –vs- Africa Merchant Assurance Company Limited.

f)It is therefore in the interest of justice that the application herewith be certified urgent and the orders sought be granted to enable the appellant prosecute its instant appeal on merits.

g)That this application was made without unreasonable delay.

h)Such and/or further grounds to be adduced at the hearing thereof.

3.The respondent opposed the application on the following grounds:

a)That the consent of the 1st and the 2nd respondent dated 28th May 2020 was to liquidate the decretal amount by instalments.

4.It is trite law that an appeal does not operate as a stay for execution. Order 42 Rule 6 of the Civil Procedure Rules states as follows:

(1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

5.Before the decree nisi was made absolute, the appellant was invited in court. The issues now being canvassed herein ought to have been argued in the trial court. The appellant has not filed the record of appeal and am not in a position to know if they were raised or not. The appellant/applicant has not therefore demonstrated that the trial court erred.

6.On 28th May, 2020 the parties filed a consent in the trial court which was as follows:

OYUGIS PMCC NO.119 OF 2016, PHILIP ODIWOUR NDUNYA VRS AFRICA MERCHANG ASSURANCE CO.LTD & DIAMOND TRUST BANK (K) LLTD – GARNISHEE.

By consent, parties have agreed to settle the matter as follows:

a)The total outstanding sum due is kshs.1,207,965/-

b)The 1st defendant is to settle kshs.300, 000/- being the first instalment on 28/5/2021.

c)The balance of kshs.907, 965/- to be offset in by-weekly instalments of kshs.300, 000/- after payment of the 1st instalment.

d)Auctioneers fees is assessed at an inclusive sum of kshs.150, 000/- payable on or before 28/5/2021.

e)In default of clause 2, 3 & 4 above, execution shall proceed against the garnishee for the total sum due.

f)That this consent be adopted as an order of this honourable court.

DATED AT NAIROBI THIS 28TH DAY OF MAY, 2020

.....

G.S. OKOTH & CO, ADVOCATES (FOR THE PLAINTIFF)

.....
AFRICA MERCHANT ASSURANCE CO. LTD (DEFENDANT)

Both parties signed the consent.

7. In view of the consent by the parties and the part execution of the same, then the current application lacks merit. The same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF JANUARY, 2022

KIARIE WAWERU KIARIE

JUDGE.