



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. E721 OF 2021**

**DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**PERIS MUTIO MUTUA.....1<sup>ST</sup> RESPONDENT**

**INVESCO ASSURANCE CO. LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is the product of the Notice of Motion dated 2<sup>nd</sup> November, 2021 taken out by the appellant/applicant and supported by the grounds set out on its body and the facts stated in the affidavit of Jennifer Thiga, a Legal Officer working with the applicant. The order being sought is for a stay of execution of the garnishee order absolute issued by the trial court on 29<sup>th</sup> October, 2021 in Milimani CMCC NO. 5684 OF 2019 pending the hearing and determination of an appeal against the ruling issued on the abovementioned date.
2. The 1<sup>st</sup> respondent swore a replying affidavit on 14<sup>th</sup> December, 2021 in retort to the Motion.
3. Going by the record, the 2<sup>nd</sup> respondent did not participate in the proceedings leading up to this ruling.
4. The Motion was canvassed through brief oral arguments made by the parties' respective advocates, where they mostly relied upon the averments made in the supporting and replying affidavits.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting and replying affidavits; and the respective oral arguments.
6. As earlier indicated, the substantive order sought is that of a stay of execution pending appeal. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions in determining an application for stay.
7. The first condition states that the application must have been made without unreasonable delay. Jennifer Thiga states in her affidavit that previously, the applicant had sought for a similar order before the trial court but the same was not issued. This condition was not specifically addressed by the 1<sup>st</sup> respondent.
8. From my study of the record, it is apparent that none of the parties has availed a copy of the impugned ruling for this court's reference. Nonetheless, going by the averments of the parties, it is apparent that the aforementioned ruling which gave rise to the garnishee order absolute was delivered on 29<sup>th</sup> October, 2021. I note that there has been a lapse of just a few days between the date of delivery of the ruling and the bringing of the instant Motion. I am therefore satisfied that there has been no unreasonable delay.
9. The second condition concerns the substantial loss likely to be suffered by an applicant if the order for stay is denied. In her supporting affidavit, Jennifer Thiga states that unless an order for a stay of execution is granted, the 1<sup>st</sup> respondent is likely to execute the decree thereby rendering the appeal nugatory and resulting in irreparable loss to the applicant.
10. The deponent further states that upon execution, the applicant may not be able to recover the sum in question (Kshs.586,868.07) from the 1<sup>st</sup> respondent.
11. The 1<sup>st</sup> respondent on his part states that the applicant has not demonstrated the substantial loss it stands to suffer and that the instant Motion is purely aimed at delaying his entitlement to enjoy the fruits of his judgment. These sentiments were echoed in the oral arguments made by *Kariuki*, learned counsel for the 1<sup>st</sup> respondent.

12. The legal position on who has the burden of proof on the issue of refund of the decretal sum was considered by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held that:

***“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”***

13. In the absence of anything to indicate or ascertain the 1<sup>st</sup> respondent’s financial capabilities and upon considering the competing interest of the parties as well as the interest of substantive justice, I am satisfied that the applicant has shown to the satisfaction of this court the likelihood of substantial loss occurring should the order for a stay of execution be denied.

14. Under the final condition which is the provision of security for the due performance of such decree or order, the applicant has indicated its readiness and willingness to comply with the conditions to be set by this court, whereas the respondent urges that half of the decretal sum be paid to him while the remainder be deposited in a joint interest earning account.

15. In making an order on the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondent has not shown any pressing need that would require payment of part of the decretal amount to him at this stage.

16. In the end, I allow the Motion dated 2<sup>nd</sup> November, 2021. There shall be an order for stay of execution of the garnishee order absolute pursuant to the ruling delivered by the trial court on 29<sup>th</sup> October, 2021 in Milimani CMCC NO. 5684 OF 2019 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties’ advocates and or firm of advocates within 30 days from today’s date failing which the order for stay shall automatically lapse. Costs of the Motion shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent