



**Directline Assurance Co. Ltd v Ogalle & 2 others (Civil Appeal
154 of 2022) [2022] KEHC 14630 (KLR) (Civ) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 154 OF 2022

JN MULWA, J

OCTOBER 27, 2022

BETWEEN

DIRECTLINE ASSURANCE CO. LTD APPELLANT

AND

DAVID OGALLE 1ST RESPONDENT

DIAMOND TRUST BANK (K) LTD 2ND RESPONDENT

SAFARICOM COMPANY LIMITED 3RD RESPONDENT

RULING

1. The appellant, Direct Line Assurance Company Ltd approached the court by an application dated 16/3/2022 seeking orders of stay of execution of the orders and ruling delivered on the 16/3/2022 in Milimani CMCC No 600 of 2020 including a garnishee order absolute granted therein pending hearing and determination of this appeal against the said orders.
2. The applicant further seeks an order that the 1st respondent David Ogalle is entitled to only Kshs 1,997,836/= as stated in the decree dated December 21, 2021; and that an order do issue that Kshs 1,292,942/= deposited at Kericho Law Courts be released to the 1st respondent and upon release, Kshs 704,893 paid to the respondent be deemed to be full satisfaction of the decree dated December 21, 2021.
3. On the 17/3/2022, the court (Meoli J) granted to the applicant a conditional temporary stay of execution upon depositing a sum of Kshs 1,000,000/= (one million) into court. This conditional stay was complied with by the applicant.



4. The supporting affidavits are sworn by Kelvin Ngiro, Deputy Head of Claims at the appellants company, on the 16/3/2022 and 22/3/2022. The garnishee order nisi is annexed to the affidavit as exhibit “KN1” as well as the amended decree issued on the 9/6/2021.
5. In opposition to the application, the 1st respondent David Ogalle filed grounds of opposition dated 20/4/2022 and a preliminary objection of even date. The preliminary objection raises an issue on jurisdiction stating that the court is not properly seized with jurisdiction to entertain the application on grounds that there is no appeal filed in this court for want of leave to appeal; that a garnishee absolute was issued against the 2nd garnishee (Diamond Trust Bank (K) Ltd) on the 31/1/2022, thus urging the court to dismiss the application as being incompetent, misconceived and an abuse of court process.
6. It is further stated that the garnishee absolute order against the 2nd and 3rd respondents was made on the 31/1/2022, and further that the applicant has not satisfied conditions set out under provisions of order 42 rule 6(2) of the Civil Procedure Rules 2010.
7. I have considered the parties’ pleadings as well as oral highlights before me. It was expressed that the 2nd and 3rd garnishee (2nd and 3rd respondents) are not affected by the application though they are cited as respondents in the memorandum of appeal hereof dated 16/3/2022 and filed on the 17/3/2022
8. The particulars of the decree dated 9/6/2021 are shown as:
 - a) Principal amount: Kshs 1,477,997.60
 - b) Interest at 12% per annum from 6/2/2020 to 14/1/2021 Kshs 193,881.00
 - c) Interest on substantive suit at 12% from 23/9/2016 – 6/2/2020 Kshs 111,413.00
 - d) Interest at 12% from 4/11/2020 – 14/1/2021 Kshs. 3,831,000.00Total Kshs 1,792,121.00
The certificate of costs shows a total of Kshs 205,715.00. Grand total is Kshs 1,997,836.00.
9. Thereafter, a garnishee order nisi was issued by the trial court on the 4/11/2020 against Diamond Trust Bank as the 1st garnishee and for a sum of Kshs 2,513,735.60, with an order for attachment of the applicants Account No 0801334001, to satisfy the decree.
10. The appellant/applicant therefore states that it has satisfied the decree in the sum of Kshs 1,997,836.00 as per the amended decree, and states that there is no merit in demanding payment to the tune of Kshs 2,513,735.60, being an additional Kshs 515,899.60.
11. I have considered the ruling of the trial court delivered on 16/3/2022 that ordered for payment by the applicant payment to the 1st respondent at Kshs 2,513,735.60. This ruling is the subject of the appeal, basically on the two “decrees” one stating the decretal sum as Kshs 2,513,735.60 while the other shows the decretal sum as Kshs 1,997,836.
12. As to whether there is a competent appeal filed, provisions of order 43 CPR comes into play. A memorandum of appeal was filed on the 17/3/2022 within the stipulated period under the CPR rules. Order 43 rule 1 provides:
 - (i) An appeal shall lie as of right from the following orders and rules under the provisions of section 75(1)(b) of the Act.
 - (k) Order 22, rules 25, 57, 61(3), and 73 (orders in execution)



13. At issue is execution of the decree of the court by way of garnishee proceedings.

Section 76(1) of the Act however provides:

“ That no appeal shall lie from orders of a court exercising its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal”.

13. Section 75(1) (c) provides for an appeal to be filed as of right for modifying or correcting an award and (b) on any order made under rules from which an appeal is expressly allowed by the rules.

14. By the above analysis, the court is thus called upon to determine whether garnishee proceedings are execution proceedings by dint of order 43(1)(k), and whether leave to file appeal therefrom is mandatory.

It is on record, by an application dated 11/1/2022 that the applicant sought to stay the execution proceedings under order 22 CPR, due to an error on computation in the decree, and by dint of section 76 of the Act, no leave was necessary to lodge the appeal from the trial court’s ruling dated the 16/3/2022, directing the garnishee to settle the decretal sum.

15. Though no formal application for review was made, the applicant made such an application to review the order an account of the alleged error on the computation of the decretal sum but was denied. Order 43 rule 1 CPR is also categorical that leave to appeal against an order of review is not necessary.

16. Garnishee proceedings are execution proceedings under the Civil Procedure Rules, for the attachment of money belonging to a judgment debtor, in the possession of a third party in satisfaction of a judgment sum or decree. They flow from the court that pronounces the judgment. Parties in this matter seem to have followed the procedure as the decree nisi was made absolute, but on the sum of Kshs 2,513,735.60 upon which the application for review to Kshs 1,997,836.00 declined, resulting to the appeal and this application.

17. I have already alluded to an appeal having been filed within time, and premised on order 43 rule 1 CPR. The court is therefore satisfied that the appeal is competently filed, having found that no leave to file the appeal is necessary by dint of order 43 rule 1(k) and order 22 CPR.

18. I hold the view that the appeal is arguable in view of the dispute as to what is the error in computation of the decretal sum and therefore the garnishee orders.

I am also minded that the appeal is on a portion of the decretal sum, being the difference between the two figures put forth by the applicant and the respondent being Kshs 515,899.60 as may be deduced from the two different decrees.

19. In line with the applicant’s prayer no 4, the court finds that the 1st respondent is only entitled to Kshs 1,997,836 as per the decree dated December 21, 2021 as read together with prayer no 6 thereof. To be seen to do justice to both parties having taken judicial notice that a litigant ought to be given an opportunity to be heard, and to exhaust all available avenues available under article 50 of the Constitution 2010.

20. It is also important to state that the existence of the two decrees bearing different decretal amounts has not been disputed by the respondent. Also not disputed is the sums deposited at the Kericho Law Courts *vide* CMCC No 353 of 2016, nor the sum of Kshs 704,893/= having been paid to the 1st respondent. There is also Kshs 1,000,000/= (one million) deposited in court by the appellant/



applicant in satisfaction of the conditional stay orders granted by the court on the 7/3/2022. The payments by the appellant in my view are sufficient security pending hearing and determination of the appeal.

21. Consequently, I find that the applicant has satisfied the conditions for stay of execution pending appeal under order 42 rule 6 CPR, and find the application merited.
22. The upshot is therefore that the application dated 16/3/2022 is merited, and succeeds partially upon the following terms:
 - a. That the trial court's ruling delivered on the 16/3/2022 is stayed and varied as shall be shown here below, pending hearing and determination of the appeal.
 - b. That the money deposited at Kericho CMCC No 353 of 2016, in the sum of Kshs 1,292,942 be released to the 1st respondent David Ogalle within 21 days of this ruling.
 - c. That the 1st respondent having been paid by the applicant a sum of Kshs 704,893/= in part payment of the decretal sum, pursuant to the decree dated 9/6/2021, makes a total payment by the appellant of Kshs 1,997,835/=.
 - d. That the sum of Kshs 1,000,000/= (one million) deposited in court as a conditional stay by the appellant on the 6/4/2022 be released to the depositor, the appellant Direct Line Assurance Co Ltd.
 - e. That the record of appeal be filed within 60 days of this ruling.
 - f. Costs of this application to abide the outcome of the appeal.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022

J. N. MULWA

JUDGE

