



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS APPLICATION NO E008 OF 2020

DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT

VERSUS

PATRICK MWATAKI KANDA.....1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED.....2ND RESPONDENT

RULING

R. Nyakundi, Judge

Mohamed Madhani & Co. Adv for the appellant

P. a. Osino & Co Advocates

This is an application by way of a Notice of Motion brought under order 42 Rule 6, order 51 rule 1 of the Civil Procedure Rules, Section 75 (i), 3A of the Civil Procedure Act and all other enabling provisions of the law.

In this application, the applicant seeks the following orders:

(a) That the honorable court be pleased to grant stay of execution of the ruling and subsequent garnishee order absolute issued on 13.5.2020 in Kilifi No. 156 of 2017

(b) That this Honorable court be pleased to grant leave to the applicant herein to appeal.

The ruling and garnishee order absolute issued on 13.5.2020 pursuant to the garnishee application dated 19.12.2019. The application is brought based on the grounds on the face of the motion and an affidavit in support sworn by Francis Kariuki dated 9.9.2020 and supplementary affidavit deposed by Jennifer Thiga filed in court on 16.11.2020. The respondent's opposed the application vide replying affidavit dated 19.10.2020.

In addition to the affidavit filed to support the notice of motion, in his submission Learned Counsel pointed out there was no effective service as required under order 5 rule 3 and 17 of the Civil procedure rules. It was further submitted that the dispute relates to the ruling on garnishee proceedings which order the applicant is aggrieved with necessitating an appeal. Therefore, what is open to the applicant is to have the matter considered by the appellant court. Learned Counsel emphasized and referred to the factors that have been identified as material for the courts exercise of discretion to extend time limit under Section 75 (i) of the Civil Procedure Act. In order to buttress his arguments on this issue on leave to file an appeal out of time, Learned counsel relied on the following authorities, **Francis Mwanza Mulwa Kanji –vs- Vagjianni & 2 others (2018) EKRL; Kenya Shell Ltd v Kobil Petroleum Limited (2006) EKL; Machira T/A Machira & Company Advocates v Mwangi & Another (2002) 2 EKL 391; Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others (2013) eKLR**

On stay of execution Learned counsel submitted that the conditions precedent outlined under order 42 Rule 6 of the Civil Procedure rules have been established by the applicant. Learned Counsel also invited the court to be guided by the principles in the cases of **Tabro Transporters v Absalom Dova Lumbasi (2012) Ekl; Butt v Rent Restrictions Tribunal (1982) eKLR 417; Felix Michiemo Oindi v Gutonya Newton Mbogo (2018) Eklr; Munga N. Bichage v Richard Nyagaka Tongi & 2 others (2013) Eklr; Nairobi Women's hospital v Purity Kemunto (2018) Eklr; Antoine Ndiaye v African Virtual University (2015) Eklr; James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR**

With these background in mind learned counsel submitted that the applicant has been able to show existence of a prima facie case to warrant

exercise of discretion by this court on extension of time and stay of execution.

On the other hand, learned counsel for the respondent opposed the application for being incompetent in both fronts for stay of execution and extension of time to file an appeal. Learned counsel contended that the applicant is in breach of the appeal conditions under order 42 rule 6 of the civil procedure Rules . In addition, learned counsel relying on the cases of: **Peter Njuguna v Zipporah Nyambura (2013) Eklr; Joseph Gitahi vs Pioneer Holdings (A) Ltd CA No 124 OF 2008; Wambua Nyamai v Ufanisi Freighters (k) Ltd Eklr, No. 857of 2015** submitted that there is no rational basis to persuade the court to grant the orders under Section 75 (i) and order 42 rule 6 of the Civil court procedure rules.

Determination

I have considered the application and submissions by counsels appearing for the parties herein. From the material on record before me it would appear that the dispute relates to garnishee proceedings and subsequent garnishee order absolute issued in **Kilifi CMCC No. 156 of 2017**. The applicant aggrieved with the ruling /order now wishes to file an appeal to this court, but was unable to do so within the stipulated time line. The applicant therefore asks the court to exercise discretion that it may be able to file an appeal out of time.

In so far as the law stands its trite that a judge's discretion to extend time is unfettered but like any other judicial discretion that power must be exercised judiciously and with reasons. The principles to guide the court in these issues are no longer in controversy as reiterated in the cases of **Salat V IEBC (2014) KLR SCK** and in **Peter v Waweru and 2 others (2003) KLR 361**. The court in Waweru case held as follows:

“This is a matter in which the learned judge is called upon to exercise discretion under rule 4 of the rules of the Court. All that the applicant was required to do was to place sufficient materials explaining the reasons for what was clearly inordinate delay. the case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA No 254 OF 1997 the court stated it is now settled that the decision whether or not to extend the time for appealing is essentially discretionary it is also well settled that in general the matters which this court takes into accurate in deciding whether to grant an extension of time, are first, the length of the delay, secondly, the reason for the delay, thirdly the (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent of the open court is granted”.

In the instant application, the applicant has demonstrated the reasons for the delay and explained to the satisfaction of the court. On the length and the reasonableness of the delay this court has to factor in the extenuating and extra ordinary circumstances brought about by Covid 19 pandemic. It would be unfair in the broadest sense of justice for the applicant to be denied the opportunity to have the appeal determined notwithstanding the inordinate delay. There is nothing in the affidavit evidence to suggest that the conduct by the applicant was deliberate and aimed at delaying the final determination of the garnishee proceedings.

The basic issue is whether the applicant who became aware of the claim through the garnishee proceedings has established a strong prima facie case as a subject of inquiry on appeal. In my view, I have considered the history of this litigation and bearing in mind all that it is only fair that the applicant be granted leave to file an appeal against the ruling of the trial court in **CMCC NO 156 OF 2017**. I find no evidence that the respondent would suffer irremediable loss if the applicant is allowed to proceed with the appeal.

In respect to stay of execution under 42 Rule of the CPR the fulcrum of the application is whether the applicant has advanced substantial reasons to necessitate the grant of the orders. It needs to be stressed that the power given to the court under order 42 Rule 6 of the CPR is discretionary to be exercised in favor of the applicant. In consonance with the following conditions:

(a) That the application has been filed without undue delay

(b) That the applicant would suffer substantial loss if the court fails to grant stay of execution

(b) Finally, the court must not lose sight of the fact on an existing valid judgment and certain rights have already accrued in favor of the respondent. Corollary to this therefore, precisely is the need to order for deposit of security for due performance of the decree.

(c) Based on this legal requirement is for the court to strike a balance that in filing an appeal the same should not be rendered nugatory.

On the question of stay it is a well-known fact that the objective is to preserve the subject matter pending an appeal as illustrated in the case of **RWW V EK (2019) Eklr**, **“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.**

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent”

From the relevant facts in the affidavits evidence and the well-known principles as illustrated in the cases of **Tabro Transporters Lts Butt v Rent Restriction Tribunal (1982) KLR, Chris Munga v. Richard Tomgi (supra)** the order of stay of execution for enforcement of enforcement of the decretal sum is contentious on the strength of sufficient cause and substantial loss on the part of the garnishee, for purposes of the intended appeal. The right to be heard by the intended appellant ought not to be taken away looking at the facts and litigation

history on the dispute conceivable from the record.

In light of the above and applying the laid down principles to the facts of the instant application the conditions for grant of stay of execution, being substantial loss, arguable appeal that should not be rendered nugatory and the applicant filed without undue delay are aspects to be resolved in favor of the applicant which comes to security for due performance of the decree. I reckon that the applicant is a financial institution and this amounts to special and strong reason not to order for security at this stage of the proceedings. Furthermore, garnishee proceedings or attachment of debts is a method ancillary to that of execution of the enforcement of a judgment or order for the payment of money, it is not for payment of money into court enabling the judgment creditor to attach money due to the judgment debtor from a third person called the garnishee who must be within jurisdiction. (See learned authors of **Atkins Court Form Volume 19 2nd Edition paragraph 21 on page 47**).

Result

This application is therefore allowed and the following orders are binding to the parties.

- (1) Leave to extend time to file an appeal is hereby allowed.**
- (2) The record of appeal be filed and served within 21 days from today's date.**
- (3) A stay of execution against the garnishee absolute herein is hereby issued**
- (4) Costs of the application to the respondent in any event.**

These are the orders of the court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JANUARY, 2021

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R. NYAKUNDI

JUDGE

This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.

(madhani.office@madhanilaw.com and paulineawino953@gmail.com)