



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMMERCIAL APPEAL NO. HCCOMM/E010 OF 2021

SBM BANK KENYA LIMITED.....APPLICANT

VERSUS

MISKY GENERAL LIMITED.....1ST RESPONDENT

INVESTEQ CAPITAL LIMITED.....2ND RESPONDENT

RULING

NOTICE OF MOTION

The Applicant filed a Notice of Motion Application dated **15th February 2021** for orders that; -

- a. A stay of execution of the garnishee order absolute issued on **31st January 2020** and decree in ***Nairobi CMCC No. 7035 of 2017; Misky General Limited Versus Investeq Capital Limited and SBM Bank limited*** be granted pending hearing and determination of this Application and appeal.
- b. A stay of execution of the garnishee order absolute issued on **31st January 2020** and decree in ***Nairobi CMCC No. 7035 of 2017; Misky General Limited Vs Investeq Capital Limited and SBM Bank Limited*** be granted pending hearing and determination of this Appeal.
- c. A stay of further proceeding in ***Nairobi CMCC No.7035 of 2017; Misky General Limited Vs Investeq Capital Limited and SBM Bank Limited*** be granted pending hearing and determination of this Appeal.

This Application is supported by the sworn affidavit of **Kevin Kimani** dated **15th February 2021** on the following grounds; -

- a. The impugned ruling was delivered by **Hon. E. Wanjala (PM)** on the **29th January 2021** wherein the court dismissed the Applicant's application seeking to set aside garnishee order absolute and leave to file the Applicant's response to the Garnishee application.
- b. The Applicant is unable to comply with garnishee order absolute since the Respondent's account has no funds to be attached in order to satisfy the decree. The funds that were available in the 2nd Respondent's account were attached by a Kisumu Court and the Kisumu orders preceded the Orders of **Hon. E. Wanjala**.
- c. The 1st Respondent has already filed a Contempt Application against the Applicant's officers and the Applicant is apprehensive that if the orders sought are not granted, its officers risk being held in contempt and committed to jail yet the Garnishee Application was not heard on merit.
- d. The 1st Respondent seeks attachment of the Applicant's properties in its Contempt Application and the Applicant is apprehensive that its properties and/or tools of trade might be attached to satisfy a decree yet it is not a Judgment Debtor.
- e. Unless the Court grants the Applicant the orders sought, the Applicant will suffer substantial loss since it will be ordered to assume the liability of the judgment debtor and pay monies which they are not holding on behalf of the former thus subjecting the

Applicant to an irreparable economic loss.

REPLYING AFFIDAVIT

The Application was opposed vide the sworn Replying Affidavit of **Abdi Maow Salat** dated **16th March 2021** and states that; -

- a. The 1st Respondent has a judgement against the 2nd Respondent dated **14th February 2019** in which judgment was entered for the 1st Respondent for the sum of **Kshs.517, 762** plus cost of the suit and interest at courts rates.
- b. The 1st Respondent sought to have the sums settled out of the 2nd Respondent's Account held by SBM Kenya Ltd formerly Chase Bank.
- c. Through a Notice of Motion dated **24th January 2020** the 1st Respondent moved the court to have Garnishee Order Nisi issued as against the Applicant, SBK Bank Kenya Limited, to attach the sums owed herein to satisfy the judgment of the Court. The Garnishee Order absolute was issued against the Applicant, SBM Bank Kenya Limited.
- d. The Applicant's actions are intended to disenfranchise the 1st Respondent against the Decree of the Court dated **7th February 2020** and in the circumstances the Applicant has no interest in the decretal sum and as such has no locus to preside over the allocation of the sums held in the judgment-debtors account.
- e. The Applicant, SBM Bank through Oundo Muiruki & Co. Advocates had intimated on several occasions and as latest as 3rd February 2020 the need to have an amicable settlement and persuaded the Plaintiff into entering a consent to have the matter settled and the decretal sum of Kshs.517, 762 remitted on 19th August 2020 upon maturity of the funds held on moratorium.
- f. The Trial court found the Applicant's statement to be insufficient and unsupported by facts as no bank statements were ever attached by the Applicants to confirm that indeed the said account did not hold any more money.
- g. The suit from which the Applicant wishes to appeal was filed back in 2017 and judgment was entered way back in February 2019. The 1st Respondent has a judgment which continues to be denied to it thus continued suffering and loss.
- h. Nonetheless, the 2nd Respondent had other known accounts held at the Applicant's Bank accounts that still hold funds the same to mature in August of this year as part of the funds held under moratorium.
- i. If the Applicant's Application is granted as prayed the same be on condition that parties do open an escrow account and the decretal amount be remitted in the said account and be held in abeyance as the Applicant pursues their Appeal.

SUPPLEMENTARY AFFIDAVIT

The Applicant filed a Supplementary Affidavit sworn by **Kevin Kimani** dated **22nd March 2021** stating that; -

- a. The impugned ruling which the Applicant has filed an appeal against was delivered on 29th January 2021 wherein the Trial court dismissed the Applicant's application seeking to set aside garnishee order absolute and leave to defend the garnishee application.
- b. It is not in dispute that the 1st Respondent has a valid decree against the 2nd Respondent in the sum of Kshs.517, 762 only that it is its contention that the same should not be executed against the Applicant since it is not the Judgment Debtor.
- c. The settlement of the Kisumu Garnishee order absolute was not meant to disenfranchise the 1st Respondent but it was in compliance with both the garnishee order absolute issued in 2019 by the Kisumu Chief Magistrates' Court and High Court's order of April 2020.
- d. The 1st Respondent's decree should not be executed against the Applicant since it is not the judgment debtor.
- e. The Kenya Deposit Insurance Corporation placed Chase Bank Kenya Limited (in receivership) under Moratorium on **7th April 2016** and it was agreed that 75% of Chase Bank's moratorium deposits shall be transferred to the Applicant and 25% remained with Chase Bank in receivership.
- f. In order for the Applicant to comply with the court order issued by the Kisumu High Court to release the admitted funds held in the 2nd Respondent's account and owing to the fact that the funds could not be accessed due to the moratorium being in place, the Applicant had to overdraw the 2nd Respondents account to comply with the order.
- g. The Kisumu High Court ruling by Justice Ochieng' delivered on **15th April 2020** is sufficient proof that the 2nd Respondent's account has no more funds since the 2nd Respondent's monies to a tune of **Kshs.6, 108, 138** held under moratorium was paid out to decree holder in the Kisumu matter.

APPLICANT’S SUBMISSIONS

The Applicant submitted that **Order 42 Rule 6 CPR 2010** empowers this Court to grant orders of stay of execution. The objective of a stay order is to preserve the subject matter pending hearing and determination of an appeal. In the case of ***Diamond Trust Bank Kenya Limited versus Patrick Mwataki Kanda & Another [2021] eKLR*** the court made reference to the case of ***RWW vs EK [2019] eKLR*** where the court held that; -

“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 if the appeal is successful, is not rendered nugatory.”

1. Substantial loss –It was the Applicant’s case that after paying Kshs.6, 108, 138 to the decree-holder in the Kisumu matter, there were no funds to pay the 1st Respondent. If the stay is not granted and the 1st Respondent attaches the Applicant’s property, the Applicant is apprehensive that the 1st Respondent may not be able to refund or compensate the loss the Applicant will have suffered.
2. Whether the Application was filed within a reasonable time – the Applicant submitted that the present Application was filed within reasonable time considering the impugned ruling was delivered on 29th January 2021 and the present Application was filed on 15th February 2021. After the delivery of the ruling, the trial court granted the Applicant 28 days within which to file an appeal and the present Application was filed within 28 days as such, the two weeks’ delay is reasonable but not inordinate.
3. Security for due performance - the Applicant submitted that it is ready and willing to offer security on whatever terms as may be imposed by the court in order to protect its interests.

Stay of Proceedings

The Applicant submitted that this court has discretionary powers to stay proceedings pending appeal and this discretion is derived from **Order 42 Rule 6 of Civil Procedure Rules** as well as the inherent jurisdiction reserved in **Section 3A of the Civil Procedure Act**

- a. Whether the Applicant has established a *prima facie* arguable case - the Applicant submitted that its grounds of appeal are clear that the issues raised in its Memorandum of Appeal are *prima facie* arguable.
- b. Whether the Application was filed expeditiously – the Applicant submitted that, the Application was filed without delay.
- c. Whether the Application has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought – the Applicant submitted that if the contempt proceedings are not stayed and its officers are found guilty of contempt yet the appeal succeeds the whole purpose of the appeal would be defeated.

1ST RESPONDENT’S SUBMISSIONS

The 1st Respondent filed submissions on the following issues.

Whether the Applicant has presented sufficient grounds to warrant granting of the orders for stay of execution - The Respondent submitted that it is clear from the Applicant’s attachments that the Kisumu Garnishee order absolute was satisfied from a totally different account thus the Applicant’s claim of suffering a substantial loss cannot be equated considering that they have failed to show the true positions of the accounts held by the 2nd Respondent.

In ***Robert Njiriri Mbugua –versus- Ersustus Makari Watila & 2 Others eKLR*** Boaz J. found as follows; -

“substantial loss is the cornerstone of the jurisdiction for granting stay pending appeal. If there is no evidence of such loss, the order will not be granted – Kenya Shell Ltd versus Benjamin K. Kibiru 1982 -88 1 KAR 1018. Similarly, in Machira t/a Machira & Co. Advocates versus East African Standard (No. 2)2002 KLR 63, the Court said: -

“in this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars..... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant stay.”

On whether the Applicant has presented sufficient grounds to warrant granting of the orders for stay of proceedings. It was the Respondent’s submission that the Applicant has no arguable case. The Applicant was in no way denied an opportunity to a fair hearing, its Application was heard and found not to be meritorious based on a failure on its part.

Whether the Appeal will be rendered nugatory if the Application is not granted - The Respondent submitted that the Applicant has not met the threshold to affirm that the intended Appeal will be rendered nugatory if the proceedings in the lower court are not stayed. (***See Kenya Wildlife Service –versus- Joseph Musyoki Kalonzo [2017] eKLR***)

DETERMINATION

Having considered the pleadings and submissions filed in this Application the issue for determination is whether stay of execution and stay of proceedings pending appeal should be granted.

The Applicant's Application in the Trial Court was heard and found not to be meritorious based on a failure on their part to file and present statements of Account of 1st Respondent's A/C 0052018946208 with SBM Bank (formerly Chase Bank) or any other account with the Bank to show the funds and remittance of the same to confirm the depletion of funds to settle a lawful and legal decree.

This Application seeks to invoke the discretionary powers of the court. It is brought under **Order 42 Rule 6(1)** of the **Civil Procedure Rules, 2010** which empowers this Court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal.

In the case of ***Butt -versus- Rent Restriction Tribunal [1982] KLR 417*** the Court of Appeal held that;

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 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.***
5. ***The court in exercising its power under Order XLI Rule 4(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 of execution to lapse."***

The conditions to be met before stay of execution is granted are provided by the **Order 42 Rule 6(2)** of the **Civil Procedure Rules 2010**. The two (2) prerequisite conditions set out in the said **Order 42 Rule 6 of the CPR, 2010** must be met to warrant the Order of Stay.

1. Substantial loss.

Will the Applicant suffer substantial loss if the orders are not made? The Applicant has demonstrated that if the contempt proceedings are not stayed its officers will be found guilty of contempt and risk committal to civil jail. In addition, the attachment of the Applicant's properties (its tools of trade) in the Respondent's Contempt Application might be attached to satisfy a decree. The Applicant will be condemned as Garnishee and not Judgment Debtor or agent of principal debtor. It is the Judgment Debtor who should shoulder the responsibility.

2. Security for due performance.

The prerequisite condition to furnish security is provided under **Order 42 Rule 6 (2)(b) CPR**. The Applicant has indicated its readiness to furnish security for the due performance of the decree. This addresses the Respondent's concern that should the Application be allowed the Applicant should deposit the decretal amount.

Stay of Proceedings.

In ***Re Global Tours & Travel Ltd HCWC No. 43 of 2000*** Ringera J. (as he then was) held that;

"As I understand the law, whether or not to grant stay of proceedings on a decree or order appealed from this is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether or not to order a stay, the court should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

Also, in the case of ***Housing Finance Company of Kenya -versus- Shark Kher Mohammed Ali Hirji & Another [2015] eKLR***, it was held that the courts discretion in deciding whether or not to grant stay of proceedings must be guided by the three main principles.

- i. Whether the Applicant has established a prima facie arguable case.***
- ii. Whether the Application was filed expeditiously.***
- iii. Whether the Application has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.***

The Applicant argued that it will be condemned as the garnishee who should not assume the liabilities of a judgment debtor and that the

Garnishee's liability is limited only to the extent of releasing the total amount they are holding on behalf of a judgment debtor. Further, that there were no funds in the 2nd Respondent's account to satisfy the 1st Respondent's decree. It is therefore in the interest of justice that the Application be allowed.

The instant Application was filed within reasonable time. The impugned ruling was delivered on 29th January 2021 and the present Application was filed on 15th February 2021. After the delivery of the ruling, the trial court granted the Applicant 28 days within which to file an appeal. There is thus no inordinate delay on the part of the Applicant.

This Court shall exercise its judicial discretion and grant Stay of Execution and Stay of Proceedings only with regard to the execution. The Application, dated **15th February 2021**, is meritorious, and is hereby allowed on condition that the Applicant deposits the decretal sum to the in a joint interest earning account in the names of the advocates for the respective parties.

DISPOSITION

- 1. The Notice of Motion Application is allowed. Stay of execution and Stay of Proceedings with regard to the execution are granted on condition.**
- 2. Applicant deposits the decretal sum in a joint interest earning account in the names of the advocates for the respective parties.**
- 3. This condition to be complied with within 30 days from the date of receipt of this ruling and in default this Application shall be deemed to have been dismissed.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

M/S OUNDO, MURIUKI & CO. ADVOCATES - APPLICANT.

M/S ONDIEKI ORANGI & CO. ADVOCATES – 1ST RESPONDENT

COURT ASSISTANT: TUPET