



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT MISC. CIVIL APPLICATION NO. 119 OF 2018

SPIRE BANK LIMITED.....APPELLANT/APPLICANT

VERSUS

KINYANJUI NJUGUNA & CO. ADVOCATES.....1ST RESPONDENT/DECREE HOLDER

RUTH KARAGO NDUNGU T/A KINGPIN AUCTIONEERS.....2ND RESPONDENT

R U L I N G

1. Before this court are twin applications dated 25th May, 2021 and another one dated 26th May, 2021. The former application has been lodged by Ruth Karago Ndungu, the auctioneer acting on directions of decree holder in whose favour a garnishee order was made on 14th March, 2019. The applicant is seeking the following relief namely: -

i. That this court do order, the officer commanding Muthangari Police Station and Capitol Hill Police Station or the Area Officer in charge of administration police to offer security to the auctioneer Ruth Karago Ndungu T/A Kingpin Auctioneers for the purpose of maintaining peace and order which the said auctioneer is breaking into the premises of the Garnishee/Judgement Debtor (Spire Bank) to attach the proclaimed goods at their houses located at Cysuites Apartment, Toyota Kenya (K) Ltd, Waiyaki Way, Westlands opposite Safaricom House and Mwalimu Towers, Hill Lane, Upper Hill Nairobi.

2. The latter application dated 26th May, 2021 is seeking a stay of execution of the warrants of attachment and sale issued on 3rd May, 2021 pending determination of the appeal.

3. The two applications are intertwined and a determination of one will affect the other hence the reason this court decided to entertain both applications simultaneously.

4. I will begin with the application dated 26th May, 2021 lodged by Garnishee, Spire Bank Ltd, the Applicant in the application. As indicated above, the applicant is seeking a stay of execution pending determination of an appeal which it claims is dated 26th May, 2021. It is also seeking costs of this application.

5. The grounds upon which the applicant is seeking stay are listed on the face of the said application as follows: -

i. That the Appellant has by chance learned that there are warrant of attachment and sale that were issued on 3rd May, 2021.

ii. That the auctioneer (the 2nd Respondent) has lied on oath to have attempted execution against the applicant's goods.

iii. That warrants were issued when there was an order of stay issued by Hon. Justice Odunga.

iv. That the Deputy Registrar exceeded her jurisdiction by issuing the warrants of attachment and sale.

v. That the appeal has a high chance of success.

vi. That unless restrained by this court, the Respondents will attach the Appellant's assets rendering the appeal nugatory.

6. The application is being supported by an affidavit sworn by Antony Mugo Gichuki on date that is not clear from the record, but filed on

27th May, 2021. The Applicant's Counsel avers that, his unnamed colleague was in the process of fixing some application for hearing when they learned of the application for execution dated 25th May, 2021.

7. The Applicant avers that, there is an order of stay of execution issued by Hon. Justice Odunga though he has failed to exhibit a copy of the order in evidence in this application.

8. The Applicant further claims to have filed an appeal but the copy exhibited in the affidavit is a draft memorandum of appeal headed Misc. Application Number 119 of 2018, which in itself is misleading as an appeal will ordinarily have appeal number upon which it was registered with rather than a miscellaneous cause herein. Despite the anomaly, the applicant feels that its appeal has high chance of success.

9. The Applicant further avers that it had been given a hearing date on 24.08.2020 by Hon. Justice Odunga but that it was unable to be heard on that date because the file went missing and that, efforts to trace were futile. It claims to have written several letters but it has not exhibited any to demonstrate that fact.

10. In its written submissions dated 26th May, 2021 filed on 7th June, 2021, the Applicant contends that, it has an arguable appeal.

11. It avers that, the Deputy Registrar acted without jurisdiction and in defiance of orders issued by Justice Odunga and to that extent, the decision by DR is a nullity.

12. The Applicants submits that, the Deputy Registrar should have down her tools, once objection to the attachment was made. The Applicant contends that, an objection existed by virtue of an application dated 8th July, 2020. According to the Applicant, the application dated 8th July, 2020 is an objection within the meaning of **Order 49 Rule 5 of the Civil Procedure Rule**. It further contends that, there was a formal order of stay issued on 10th July 2020, which was in force when the warrant of attachment was issued.

13. The Applicant claims that, it was not holding any funds for the judgement debtor which was attachable and that the Deputy Registrar ought to have satisfied herself that the Garnishee held any debt due to the Judgement Debtor before issuing warrants of attachment. It has cited the provisions of **Order 23 (1) and (2)** of the Civil Procedure Rule to support its contention.

14. The Applicant further argues that **Order 49 Rule 3 of the Civil Procedure Rule** though a debt due to a Judgement Debtor is liable to be attached, it has relied on the case of **Societe Eram Shipping Co. Ltd versus Compagnie Internationale de Navigation [2003]UKHL30**, which in its contention held the property of a Garnishee should not be attached to answer the decree. It further adds that, it is improper to compel a third party to disburse its own funds to satisfy a decree and has relied on the decision in **Maurice M. Munya & 148 Others versus CFC Stanbic Bank Ltd.**

15. The Applicant further submits that, its appeal will be rendered nugatory unless stay is granted. It adds that it is likely to suffer substantial loss as it will not be able to recover the money if it is paid out. It contends that, the Judgement Debtor has many insolvency proceedings and submits that, the Respondent should seek remedy at the insolvency court.

16. The 1st Respondent has opposed this application vide a replying affidavit sworn on 2nd January, 2021 by Seth Khisa.

The Respondent contends that this application is misconceived and should be struck out because the prayers sought are not founded on any provision of law and that the grounds listed do not support the prayers sought.

17. The Respondent contends that; this application is based on a misconceived appeal that is strange in law.

18. The Respondent avers that the Applicant was enjoined in these proceedings as a garnishee and that it was duly served with garnishee proceedings as evidenced by numerous notices and affidavit of services but the Applicant chose not to participate.

19. It submit that, this court gave decree nisi on 25th March, 2019 on funds held by the Applicant on behalf of Judgement Debtor (Invesco Assurance Company Limited) and has exhibited a copy of the order dated 25th June, 2019. The 1st Respondent avers that, the Garnishee Order absolute was regularly and procedurally granted.

20. The 1st Respondent faults the Applicant for colluding with the Judgement Debtor to impede the cause of justice by frustrating execution process. The 1st Respondent avers that the Applicant has filed numerous application for stay and abandoning them once it obtained interim order of stay. It points out that a similar application dated 9th July, 2019, seeking same reliefs with this application has never been prosecuted and that subsequent applications dated 26th February, 2020 and 8th July 2020 were also filed and are still pending for prosecution.

21. They aver that the warrants of attachment and sale obtained on 3rd May, 2021 were lawful, regular and procedurally issued/obtained.

22. The 1st Respondent submits that the orders given by Justice Odunga on 10th July, 2020 automatically lapsed because the Applicant failed to prosecute its application or exercise due diligence in having the file transferred from Machakos High Court to this Court. They fault the Applicant for indolence towards the garnishee proceedings.

23. The Respondent submits that, the Applicant can only be granted stay, if sufficient security of depositing of entire decretal amount either in court or joint account held in a different bank is given..

24. The 1st Respondent in their written submissions have faulted the Applicant for inaction and contend that failure to expeditiously prosecute, means that the same abated and the orders expired. They rely on the case of ***Ochola Kamili Holdings Ltd versus Guardian Bank Ltd. [2018] eKLR*** where the court held inter alia that a court would not condone a party, who upon getting an injunction order, sits on the matter using the orders to prejudice the opponent.

25. They further submit that the Applicants have not set out grounds that meet the threshold for grant of stay, pending appeal. They further aver that the provision of **Order 42 Rule 6** have not been met and relied on the case of ***Phoebian R ebeina Kalenga versus Ronald Wanje Sembe [2021]eKLR*** to buttress their contention.

26. This court has considered this application for stay of execution and the response made by the 1st Respondent.

The Applicant herein, is seeking a stay of execution pending determination of appeal. The Applicant has not cited the relevant order in its application either in advertently or deliberately but that notwithstanding the relevant order is **Order 42 Rule 6** which provide as follows: -

“.....6. (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.

(2) No order for stay of execution shall be made under sub rule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.....”

27. Going by the above provisions for an Applicant to be granted a stay of execution pending appeal, he/she must satisfy the following conditions;

- i. *The application for stay must be lodged without unreasonable delay.*
- ii. *The Applicant must show sufficient cause for stay.*
- iii. *The Applicant must satisfy court that he/she will suffer or likely to suffer substantial loss.*
- iv. *The Applicant must be ready to deposit security to satisfy the decree passed.*

28. The significant condition in the above, in my considered view is sufficient cause. This is because, the same relates to the interest of justice and the right to access justice either on appeal. A party should at all times where sufficient cause is shown should be given a chance to ventilate his case on appeal if he/she demonstrates serious desire to appeal. A party who is guilty of unreasonable delay or laches, in my view cannot be said to be serious in his/her pursuit to appeal.

29. In this instance, the applicant has stated that it has filed an appeal but as I have observed above, it has failed to demonstrate that it has filed any and the reason is simple. Had the Applicant actually filed an appeal against the decision of the Deputy Registrar, then it should have demonstrated on the appeal filed. What it has been exhibited here, is a draft memo of appeal headed “*Misc. Application*”. An appeal cannot be filed through a miscellaneous cause. This Misc. Cause is in respect to Advocate-client bill of costs dated 18th December, 2018. If the Applicant was aggrieved by the decision of Deputy Registrar in the taxation of advocate Client bill, then it ought to have filed a reference to this court as provided under Advocates Act (**Paragraph 11 of the Advocates Act (Remuneration) Order.**)

30. The Applicant in this matter is alleging that, the Hon. Deputy Registrar issued warrants of attachments in excess of her jurisdiction and they have cited the provisions of **Order 49 Rule 5**, which they have invoked in this application. **Order 49 Rule 5** gives the Deputy Registrar of this court to sign formal orders or execution proceedings in respect to matters in the High Court, where a decision or rendered itself. **Order 49 Rule 5** provides: -

“...Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge...”

The Deputy Registrar of this court is therefore, mandated by law to sign execution orders and issue them in accordance with the judgement of this court.

31. The Applicant contends that, it had filed an application dated 8th July, 2020 and that by virtue of the same, the execution should have been automatically stayed which in my considered view is a misconception. The provisions of Order 49 Rule 5 cited above do not provide for such proposition.

32. I have carefully looked at the proceedings in this matter and have noted the Applicant lodged an application by way of Notice of Motion dated 8th July, 2020, seeking inter alia a stay of execution and fixing of hearing of its application dated 26th February, 2020. The application

was accompanied with a Certificate of Urgency and the application was taken to Machakos High Court before the Hon. Judge, then sitting in this court was indisposed. The file was forwarded to Machakos High Court where Hon. Odunga J. Certified the matter urgent and fixed the application for *inter partes* on 28th July, 2020 and granted an interim order of stay.

On 28th January, 2020, the good Judge in Machakos, directed the said application dated 26.2.2020 be handled in this court on 24th August, 2020 and extended the interim order until then

The record does not show what transpired on 28th July, 2020 but what is certain is that the matter was not placed before Hon. Justice Mutende on that date. Consequently, the interim orders automatically lapsed because they were not extended.

33. The Applicant has now faulted the Hon. Deputy Registrar of this court for issuing warrants of attachment on 3rd May, 2021 stating that there were done in violation of existing orders of stay. However, the Applicant has not exhibited a copy of the order indicative of the fact that there were orders of stay in force at the time. In the absence of any order of stay of execution, the Respondent was at liberty to apply for execution and the Deputy Registrar was in order to issue warrants of execution because litigation must come to an end and where there are no orders barring execution, a decree holder is at liberty to execute.

34. The Applicant has also invoked the provisions of **Order 23 Rule 8 of the Civil Procedure Rule** in this application which I find not helpful to the reliefs sought.

The order provides:-

“...Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment-debtor to the amount paid or levied, although such proceeding or order may be set aside or the decree reversed.....”

35. The above rule provides for situations where a decree holder is forced to levy execution upon the garnishee under the provided proceedings under **Order 22** which is where the garnishee is holding funds for a judgement debtor garnished by through a court order. If the garnishee pays out money held on behalf of Judgement Debtor then it is discharged from further obligation in respect to sums paid out.

36. The Applicant in this application is not challenging garnishee proceedings under Order 23 of the Civil Procedure Rule because if it was, it would have pursued its application dated 9th July, 2019 and/or pursue its application dated 26th February, 2020 which application appears to have been occasioned by misfortunes of its own making really but that was the viable option to seek redress in my view.

37. The reasons or basis for abandoning a legally viable option by the Applicant is difficult to understand. Furthermore, there is a decision made by the court on 25th June, 2019 which order has not been set aside or appealed against. This means that the garnishee order against the Applicant having been made absolute against them, the execution proceedings can only be challenged in my view, if the order marking the garnishee order absolute is either set aside or appealed from. The applicants have not challenged the basis of execution levied against them. The appeal as shown in the draft memorandum of appeal in this application is, in my view is a forlorn attempt to stop a train which has already left the station.

38. This court finds that the Applicant's attempt to blame the on purported disappearance of court file to explain its indolence and failure to prosecute its application dated 26th February, 2020 and subsequent application dated 26th February, 2020 and subsequent application dated 8th July, 2020 is not justified. The Applicants have not demonstrated through letters that it tried to locate the file in vain. Furthermore, even if the file had been misplaced, owing to its movement between this court and Machakos High Court, nothing could have stopped the Applicant to move the court through a certificate of urgency for reconstruction of a skeleton file and extension of orders or issuance of any remedial orders.

39. From the foregoing, it gets obvious that the Applicant has not really shown sufficient cause in terms of Order 42 Rule 6 to warrant a stay of execution pending an appeal.

As observed above, there is no proper appeal pending in the first place to warrant a stay of execution.

40. This court further finds that the objection contemplated under Order 49 rule 5 and for which the Applicant have invoked in this application is the objection in respect to objection proceedings provided under **Order 22 Rule 5 of the Civil Procedure Rules**.

It is misleading for the Applicant to assume that by virtue of the fact that it had filed an application dated 8th July, 2020, seeking a stay of execution, the same operated as a stay as contemplated under **Order 22 Rule 52 of the Civil Procedure Rule**. There was no formal order of stay or any stay by operation of any law when the Deputy Registrar issued warrant of attachment dated 7th July, 2020. The subsequent application dated 8th July, 2020 came after the warrants had been issued. The interim order given by court on 10th July, 2020 as I have observed above lapsed on 24th August, 2020. Therefore, if fresh warrants were issued on 3rd May 2021, as averred by the Applicant, the same were regular because there was no order of stay.

41. In the premises, this court finds no merit in the application dated 26th May, 2021. I also find the application incompetent for the reasons aforesated. The same cannot be sustained and is disallowed.

42. Having disallowed the application for stay of execution dated 26th May, 2021, and having in mind the order issued by this court on 4th July, 2019 which order has not been stayed, set aside, varied or appealed from, the application dated 25th May, 2021 can only be allowed

despite spirited opposition by the Respondent made vide a replying affidavit sworn by John Wageche on 5th June, 20 (it should be 2021). The Respondent claims that, they only became aware of the execution proceedings on 26th May 2021, which is a bit absurd because why would the same Respondent seek a stay of execution in its application dated 28th February, 2020 and the subsequent application dated 8th July, 2020 if it was unaware that the Applicant/Decree Holder had sought to execute against it.

The Respondent's contention that it does not hold any funds garnished is belated at this stage. It ought to have either properly moved this court during the garnishee proceedings or challenge the order made by this court on 25th June, 2019. The Garnishee Order was made absolute against the 5th Respondent herein, and that order remains valid as it has not been challenged, set aside or revised. As things stand, the Respondent can only have itself to blame for the woes it faces.

In the end, this court finds that the application dated 25th May, 2021 is merited and is hereby allowed in terms of prayer 1 thereof. I will however in the interest of justice grant the Respondent a stay of execution for 21 days from the date of this Ruling. For the aforesaid reasons, the application dated 26th May, 2021 is disallowed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 29TH DAY OF JULY, 2021.

HON. JUSTICE R. K. LIMO

JUDGE