

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 57 OF 2020

FAMILY BANK.....APPELLANT

VERSUS

RAJ (minor suing thru' her mother and next friend)

MK.....1ST RESPONDENT

AFRICAN MERCHANT INSURANCE CO LTD.....2ND RESPONDENT

COOPERATIVE BANK OF KENYA LTD.....3RD RESPONDENT

RULING

1. Before the court for determination is a notice of motion by the appellant/ applicant seeking an order that the court be pleased to order the stay of execution of the ruling by the trial court dated and delivered to the parties on the 13.05.2020 by which the court issued a garnishee order absolute against the appellant.

2. That decision aggrieved the appellant who then filed the current appeal and set out some six ground of appeal to challenge the impugned decision. The reasons advanced in both the application and the affidavit in support thereof to ground the application is that the appellant /applicant stands to suffer the hearing of the appeal being rendered futile if the order is enforced yet it was demonstrated before the trial court that the sums held by the appellant had been attached by other court orders before the garnishee order herein was issued.

3. In the affidavit in support sworn by the advocate, one Mr Vincent Mulondo, there were exhibited the garnishee application and the orders issued pursuant thereto, the replying affidavit and a statement of accounts as well as the bank statement of the account operated by the 3rd respondent as a judgment debtor in the suit and some four garnishee orders nisi issued by other courts between 21st August 2019 and 6th February 2020 and attaching all the sums held by the garnishee on account of the judgment debtor. In his arguments for the grant of orders sought Mr Mulondo stressed the point that it should not be seen to be a duty of the garnishee to settle a judgment debt of its customers beyond what it holds to their credit.

4. For the 1st respondent, Mr Kalimbo advocate filed an affidavit sworn by his client. The affidavit opposes the application on two broad ground; that the affidavit sworn in support is by a counsel who has no locus to depone to the matters deboned therein and that there was no proof by the appellant before the trial court that the sums in the account had been attached by other previous court orders. In his argument before the court the same grounds were highlighted in opposition to the application with dual alternative proposals that, in the even the court was minded to grant stay, the decretal sum could be deposited with him upon his undertaking to refund should the appeal fail and a second proposal that the sum could be kept in an escrow account pending the outcome of the appeal.

5. Being an application for stay, the main consideration is the need to balance the competing interests of the parties in the litigation. The decree holder has a crystalized interest in the property in the decree which ought not to be disregarded as to pass for an arbitrary deprivation of property while the judgment debtor has the very important right to have access to justice unhindered and upon conclusion of the process not to be left with a worthless paper judgment only serving academic purposes. That is the balance the court has to strike and I take the view that the test to be applied is an Adjective one. It is thus a question of coming to a conclusion that secures the two completing interests by preserving the interests of both parties in the most just way possible.

6. I give regard to the appreciation that there is indeed no judgment against the appellant and that the appellants inclusion in the suit and liability flows from its relationship with the judgment debtor as its banker. The appellant's

liability as such would be founded on it being in possession of moneys belonging to the judgment debtor and limited to the extent of the money so held. It is in that capacity that the appellant resisted the garnishee application by alleging that it indeed held money but that such moneys had been attached by court order issued prior to the garnishee order subject of this matter.

7. On the facts disclosed in this matter, I entertain no doubt that the appeal is not the kind to be viewed as frivolous but I consider it arguable. Being arguable, I consider it is only just that it gets its day in court and that the outcome there be preserved and not rendered worthless or futile. I consider that unless I grant stay, execution shall ensue against the appellant, the money will be put beyond its reach without any assurance that in the event the appeal succeeds, it may be possible to get restituted. I consider that if execution proceeds, it shall be difficult if not just impossible to make a recovery. That would have made any pursuit of the appeal nugatory and of no meaningful purpose. Such would not be fair nor just. The court shall itself have spent its resources in vain and in most undesirable manner. That should not be the attribute of a court of law.

8. I do find that in order that the substratum of the appeal be preserved and not rendered nugatory, I grant stay pending appeal but on terms that the appellant shall avail and have deposited into an escrow account in the joint name of the counsel for the appellant and that of the 1st respondent within 21 days from today. In default the stay hereby granted shall stand lapsed and the 1st respondent will then be at liberty to take out execution proceedings in accordance with the law.

9. On costs I direct that the same be to the appellant in all events of the appeal.

Dated, signed and delivered at Mombasa this 26th day of June 2020

P J O Otieno

Judge