



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 171 OF 2020

DIAMOND TRUST BANK KENYA LIMITED.....APPLICANT

-VERSUS-

1. KAZUNGU GOGO MWANZELE

2. INVESCO ASSURANCE CO. LTD.....RESPONDENTS

RULING

1. By its Notice of Motion dated the 19/08/2020 the applicants seeks from the court an order that leave be granted to it to appeal against the decision by the trial court dated the 24.04.2020 by which order an order of garnishee absolute was issued against the applicant. The application also seeks an order for stay pending the hearing and determination of the intended appeal.

2. The reasons advanced to ground the application were that the ruling having been reserved for the 7/4/2020, the same was never delivered on the due date owing to the COVID 19 pandemic disruption of court processes but was so delivered on the 24/4/2020 without any notice being given to the applicant and that it took upto the 13/8/2020 for the applicant to get knowledge of the delivery of the ruling when the 1st respondent sought to enforce the ruling by serving a notice upon the applicant's managing director to show cause why he should not be arrested and committed to civil jail for failure to satisfy the Garnishee Order Absolute.

3. In the intended appeal the applicant seeks to challenge the order absolute on the basis that it has been ordered to meet the decree yet it was never a defendant not judgment-debtor and that in the account it held on behalf of the 2nd respondent there were no funds to meet the 1st Respondent's decree yet the other account quoted did not exist.

4. Upon being served with the application, the 1st respondent did file a Replying Affidavit sworn by, MR. MANASE ANANDA CALLEB, the advocate on record. That affidavit exhibited a decree and certificate of costs giving an aggregate decretal debt in the sum of Kshs.230,649.70 as well as a garnishee order absolute in the said sum and the ruling yielding the said order.

5. On the issue of lack of notice for the delivery of the ruling, counsel asserted that the ruling delivered on the 24/4/2020 was delivered and communicated through the parties availed email addresses and that the duly extracted order absolute was indeed served and acknowledged by the Applicant on the 11/5/2020 the evidence of such service being the stamp impression of the applicant on the order but the applicant took no steps till August to bring the current application. It was then contended that the applicant is hell-bent at delaying the respondent from accessing his fruits of litigation in that even the proposed appeal has no arguable points.

6. On stay pending the intended appeal the counsel contended that no loss has been demonstrated to merit stay being granted and that an intended appeal is not an appeal under the law to attract stay of execution. With some admirable speed, and I consider this to be the new normal and norm that must be encouraged, the respondent also filed a written submissions one day after the Replying Affidavit.

7. There was also a statement of grounds of opposition filed whose gist was that the court lacks jurisdiction to entertain the application because the same ought to have been lodged before the trial court, and that this being an application for leave without one for extension of time the same was untenable in law and therefore the same was an abuse of the process of the court and deserved dismissal for lack of merits.

8. When the matter came up for hearing, counsel urged the court to consider the papers on record and submissions by the respondent as well as those by the applicant to be filed within 7 days thereafter and to come with a determination of the application without the need for any oral arguments. Despite that consent, the applicants seems not to have filed such submissions because by the time of preparing this ruling none was in the court file.

9. That default notwithstanding, I am bound and obligated to analyze the material available and avail to me by the parties and determine the

application on the basis of such material when juxtaposed against the law.

10. In his written submissions, the respondent has taken reliance upon Order 43 Rule 3 mandating that leave to appeal shall in the first instance be sought before the trial court either by being made orally at the time of delivery of the ruling or within 14 days after the date of such order. He cited to court the decision in *Serephen Nyasani Menge vs Rispa Onsare [2018] eKLR* in which judge Mutungi interpreted the provision to mandate that on application for leave be presented before the trial court and not the appellate court.

11. It was additionally submitted that there being no application for extension of time, when time for lodging the appeal has lapsed, the current application is untenable because even if the leave is granted there would still be need to have time extended.

12. Counsel then stressed the fact that there had been undue delay which had not been explained being the period between May 11th and August when the application was lodged. The submissions then delved into the merits of the proposed appeal and asserted that the fact of the two accounts being held by the judgment debtor with the garnishee was confirmed by the legal manager of the garnishee, one Paul Gichui.

Analysis considerations and Rendition

13. When to grant leave to appeal is also a matter at the discretion of the court intended, as it were, to bolster access to justice and meet ends of it but care and caution is always urged so that no frivolous appeal go to the appellate court without being sieved and in order that finality to litigation may be achieved.

14. The Court of Appeal has established this to be the bench mark in innumerable decision and one only needs to cite *Joyce Bochere Nyamweya vs Jemima Nyaboke [2016] eKLR* in which the Court of Appeal cited *Rhoda Wairimu Kioi vs Mary Wangui CA Civil Appl. NBI 69 of 2004* and said:-

“Leave to appeal will normally be granted where prima facie, it appear that there are ground which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition...”

15. The court then concluded by saying:-

“...in the circumstances we find this application is incompetent for reasons that it was filed outside the stipulated time. The same is hereby dismissed with costs...”

16. When one applies the above principles to the current matter the object must remain the establishment of whether or not the intended appeal will be arguable, on a prima facie basis. That determination would turn on whether or not the garnishee held any sums to the credit of the judgment debtor. The contention by the applicant is that the effect of the garnishee order absolute is to compel it to meet the 1st Respondent's decree when it was neither a co-defendant nor the holder of any sums on behalf of the judgment debtor/2nd respondent.

17. I do not take the applicant serious when it fronts not being a codefendant/judgment debtor in the suit as a reason to premise its intended appeal and by wholly ignoring the fact that it is cited herein as a garnishee. I think the law is clear that garnishee proceedings being execution proceedings, once a garnishee order nisi issues and no cause is shown to the satisfaction of the court and culminating in an order absolute, the garnishee become a judgment debtor not for having been a party to the suit but purely as garnishee qua garnishee. That is a ground that I do not consider to merit a serious judicial consideration by way of an appeal. I consider it merely tenuous.

18. The second point is that the garnishee only held one account on behalf of the judgment debtor which account had nil balance on the material date and that the other account did not exist. I am not in doubt that the garnishee did all he could to discharge the burden of proving that account No. 0002291014 had no funds to meet the decree. However, it is difficult to believe that account No. 01050919221 did not exist. In the replying Affidavit, there was an averment that the existence of this account had been confirmed by the legal manager of the judgment debtor in a Replying Affidavit sworn on the 26/9/2019 in SRMCC No. 799 of 2018. That averment was never disputed nor controverted by the applicant at all. When not controverted, it is on a balance of probabilities established that indeed the account existed.

19. It may be of interest to go to that affidavit and capture what it says about the account. At paragraphs 3, 4, & 9, MR. PAUL GICHUI, the legal manager, INVESCO ASSURANCE CO. LTD deponed:-

3. “THAT I am aware that this honourable court on 17th September, 2019 issued on *ex parte order nissi* freezing the following accounts; 0002291014 & 01050919221 all held at Diamond Trust Bank Limited in the Garnishee bank. (Annexed hereto and marked as PG1 is a copy of the said order).

4. THAT the said order was issued without according the Defendant herein an opportunity to be heard which I am informed by my advocates is contrary to the rules of fairness and justice.

9. THAT the company accounts now fettered are servicing numerous other decrees and financial commitments due to the other creditors, which are likely to be dishonored, opening a flood gate of litigation and unprecedented financial chaos in the going concern status of the company which I am informed by my advocates is contrary to the rules of procedure and could lead to abuse of the court process and procedure”.

20. I read the excerpts of the Affidavit by such a high ranking officer of the judgment debtor to be unassailable by the meak assertion that the account did not exist. I consider it unassailable on the appreciation that officer may be highest legal mind within the judgment debtors establishment and one to be taken to appreciate what it means to state facts on oath and have same filed in court.

21. I am in no doubt that the account is confirmed to have been existent, continues to be in existence and existence or otherwise itself presents no serious argument to warrant a serious judicial consideration by way of an appeal.

22. On the foregoing findings, I do find that there is no serious matter meriting a serious judicial consideration and pronouncement to merit grant of leave to appeal. I consider it the duty of a court upon which an application is made to sieve and be satisfied of the arguability of an appeal before leave is granted. That goes to the merits of the intended appeal.

23. Besides the merits of the proposed appeal there is also the established principle of law that it is the duty of every litigant to work towards the promotion of the expeditious and proportionate determination of legal disputes so that justice is not deemed denied by delay. In an application of this nature one would have expected that having not acted within the time stipulated by Order 43 Rule 3, the first prayer, even if the consideration was to be limited to leave to appeal, should have been extension of time to apply for leave to appeal. That was not done and therefore the application is left to hang loosely having been itself filed out of time and without the time being extended.

24. The third reason the orders sought cannot be granted in the fact that even if the leave was to be granted, the time within which to lodge the appeal is long past and any order granting leave would be of no efficacy in that any appeal filed pursuant to any leave given in this application would be out of time and would amount to nothing. It would have been different if there was a concomitant prayer for the extension of time to lodge the appeal out of time.

25. As presented and left to the court to determine, it would be an action in superfluity. For that tag, I see no merit on it and I therefore order it dismissed with costs.

26. Having so dismissed the mainstay, request for leave to appeal, it follows that no appeal exists to premise a grant for stay pending appeal and it therefore follows that it would be equally futile to consider the anomalous application for stay pending an intended appeal.

Dated, signed and delivered on line this 23rd day of **October 2020**.

P J O OTIENO

JUDGE