



REPUBLIC OF KENYA



KENYA LAW
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**Diamond Trust Bank Kenya Limited v Dzito & another (Civil Appeal
52 of 2021) [2024] KEHC 9723 (KLR) (2 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 52 OF 2021
SM GITHINJI, J
AUGUST 2, 2024**

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPELLANT

AND

GETRUDE KAINGU DZITO 1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED 2ND RESPONDENT

*(Being an Appeal from the Ruling and Garnishee Order Absolute issued by
J.M.Kituku – Senior Principal Magistrate on 13th May, 2020 pursuant
to the 1st Respondent’s Garnishee Application dated 19th December, 2019)*

RULING

1. For determination is the Appellant’s notice of motion dated 27/7/2023 and filed on 9/8/2023 for orders: -
 1. Spent.
 2. That for purposes of this application, this honourable court be pleased to consolidate this appeal with the following:
 - a. Malindi HCCA No. 50 of 2021: Diamond Trust Bank Kenya Limited v Kennedy Masese Nyaigoti & another and
 - b. Malindi HCCA No. 51 of 2021: Diamond Trust Bank Kenya Limited v Gertrude Kaingu Dzito & another.
 3. Spent.
 4. Spent.



5. That pending the hearing and determination of the Appellant's appeal to the Court of Appeal, the honourable court be pleased to grant an interim stay of execution of the garnishee orders absolute dated 13 May 2020 issued against the Appellant pursuant to the Garnishee Applications dated 19 December 2019 in Kilifi CMCC No. 154 of 2017, Kilifi CMCC No. 157 of 2017 and Kilifi CMCC No. 153 of 2017.
 6. That this honourable court be pleased to grant and/or issue further orders as it may deem fit in the circumstances.
 7. That the costs of this application be provided for.
2. The application which is brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 42 rule 6 of the Civil Procedure Rules, is supported by an affidavit sworn by one Jennifer Thiga, the Appellant's Legal Manager, and the grounds found on the face of the motion. The facts leading to this application as deposed by Ms. Thiga are that on 13/5/2020 the trial court in Kilifi CMCC No. 153 of 2017, 154 of 2017 and 157 of 2017 issued garnishee orders absolute against the Appellant for Kshs. 224,555/-, Kshs. 249, 368, and Kshs. 224, 418/- respectively. The Appellant appealed to this court vide Malindi HCCA No. 52 of 2021, 50 of 2021 and 51 of 2021, appeals which were dismissed pursuant to a judgment delivered on 18/7/2023.
 3. Aggrieved by the decision of this court, the Appellant filed notices of appeal on 26/7/2023 intending to appeal the aforementioned judgment at the appellate court. The Appellant is apprehensive that the 1st Respondent may commence execution against it thus risking irreparable prejudice. Ms. Thiga further deposed that there is also need to consolidate the appeals since they emanate from a series.
 4. The 1st Respondent opposed the application. She filed a Replying Affidavit dated 1/8/2023 wherein she deposed that the court has become functus officio and is not seized of jurisdiction to order consolidation of suits that were heard and determined separately.
 5. The 1st Respondent added that the Appellant has approached the court with unclean hands by failing to disclose the monies held in the 2nd Respondent's account during the subsistence of the garnishee proceedings. She further deposed that the Appellant has not demonstrated that she will be unable to refund the decretal sum should the intended appeal succeed. That no security has been tendered and that the Appellant has failed to demonstrate that it has an arguable appeal that will be rendered nugatory in the event that stay is not granted.
 6. Despite taking directions that the application be canvassed by way of written submissions, none of the parties filed written submissions. I will nonetheless determine the application on merit based on the affidavits filed.

Analysis and Determination

7. Having carefully considered the application and affidavits filed by both parties, the two issues for determination are:
 - i. Whether this appeal should be consolidated with Malindi HCCA No. 50 of 2021: *Diamond Trust Bank Kenya Limited v Kennedy Masese Nyaigoti & another and Malindi HCCA No. 51 of 2021*: *Diamond Trust Bank Kenya Limited v Gertrude Kaingu Dzito & another*.
 - ii. whether the Appellant has met the threshold for granting an order for stay of execution of the garnishee order absolute dated 13/5/2020.



Issue i

8. The principles applied in the consideration for consolidation were stated and applied by Maraga, J. (as he then was) in *Nyati Security Guards & Services LTD =versus= Municipal Council of Mombasa* [2004] eKLR as follows:

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: - 1. some common question of law or fact arises in both or all of them; or 2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or 3. for some other reason it is desirable to make an order for consolidating them.”

9. The matters sought to be consolidated were determined and are no longer pending before this court. I therefore agree with the 1st Respondent that the court has become functus officio at this point to entertain such an application. In any event, I think it is too late in the day to have the already determined appeals consolidated. Doing so will be akin to this court giving orders in vain. I therefore decline to grant that order.

Issue ii

10. Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides as follows:

1. No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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 subrule (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.

11. In *Vishram Ravji Halai =versus= Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely; - establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. The application must be made without unreasonable delay. In addition, stay may be granted for sufficient cause and that the Court in deciding whether or not to grant stay must be guided by the overriding objectives enshrined under section 1A and 1B of the *Civil Procedure Act*.



12. It must be noted that in this case, the Appellant is not specifically seeking stay of execution of this court's judgment delivered on 18/7/2023 but a stay of the garnishee absolute orders delivered by the trial court on 13/5/2020. The orders sought are framed as such. Seeing that the present application was filed on 9/8/2023, I am of the view that this delay is extremely unreasonable and unexplained. Be that as it may, I will consider the application on merit, assuming that the same was filed timeously.
13. It is trite that the whole 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. And in doing so, the court should weigh this right against that of a successful litigant who should not be deprived of the fruits of his/her judgment and ensure that no party suffers prejudice.
14. As to what substantial loss is, it was observed in *James Wangalwa & Another =versus= Agnes Naliaka Cheseto [2012] eKLR*, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
15. In this case, the Appellant has not given any demonstration of substantial loss, neither has it offered any security as stipulated under Order 42 rule 6 above. In the absence of such, I am inclined to find that the Appellant has failed to meet the threshold for granting an order for stay of execution pending appeal.
16. The outcome is that the application dated 27/7/2023 is unmerited. It is hereby dismissed with costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 2ND DAY OF AUGUST, 2024.

.....
S.M. GITHINJI

JUDGE

In the Presence of; -

Ms Osimo for the Respondent

Firm of Madhani for the Appellant – (absent)

2/8/2024

