



**Njirati v Diamond Trust Bank (Civil Appeal E086 of 2022)  
[2024] KEHC 16978 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16978 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E086 OF 2022  
F WANGARI, J  
OCTOBER 24, 2024**

**BETWEEN**

**IRENE MUTHONI NJIRATI ..... APPELLANT**

**AND**

**DIAMOND TRUST BANK ..... RESPONDENT**

**RULING**

1. For ruling is the Respondent's (hereinafter 'Applicant's') Notice of Motion Application dated 10<sup>th</sup> January, 2024. The application is brought pursuant to the provisions of section 7 of the [Appellate Jurisdiction Act](#), Orders 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the [Civil Procedure Act](#), section 432 (2) of the [Insolvency Act](#), No. 18 of 2015 and all other enabling provisions of the law. It seeks the following orders: -
  - a. Spent;
  - b. That pending the inter partes hearing of this application, the Honourable Court be pleased to grant an interim stay of execution of the judgement and decree dated 27<sup>th</sup> October, 2023, issuing a garnishee order absolute against the Respondent;
  - c. That pending the hearing of this application, the Honourable Court be pleased to grant an interim stay of execution of the judgement and decree dated 27<sup>th</sup> October, 2023, issuing a garnishee order absolute against the Respondent;
  - d. That this Honourable Court be pleased to extend time within which the Respondent should file its Notice of Appeal against the judgement delivered on 27<sup>th</sup> October, 2023;
  - e. That this Honourable Court be pleased to grant the Respondent leave to appeal the judgement and decree dated 27<sup>th</sup> October, 2023 out of time;



- f. That pending the hearing and determination of the Appellant's intended appeal to the Court of Appeal, the Honourable Court be pleased to grant a stay of execution of the judgement and decree dated 27<sup>th</sup> October, 2023;
  - g. That this Honourable Court be pleased to grant any and/or further orders as it may deem fit in the circumstances;
  - h. That the costs of this application be provided for.
2. The grounds in support of the application are briefly that the Appellant proclaimed the Applicant's assets on 14<sup>th</sup> December, 2023. Upon receipt of the proclamation notice, it perused the court file and realized that judgement on the appeal had been delivered on 27<sup>th</sup> October, 2023 in its absence. The judgement was scheduled for delivery on 4<sup>th</sup> October, 2023 on which date parties were advised that the same was not ready and would be delivered on notice.
  3. The Applicant and its advocates on record were unaware of the judgement date of 27<sup>th</sup> October, 2023 as they were not notified of the same. The Appellant (Respondent to this application) is blamed for acting in bad faith by failing to inform the Applicant of the judgement date and took the same ex parte despite being aware of the ramifications to the Applicant, failed to inform it of the judgement and proceeded for execution.
  4. The Applicant being aggrieved with the entire judgement wishes to appeal to the Court of Appeal but it is out of time and thus this court's leave is required. The delay in filing a Notice of Appeal was inadvertent since the Applicant was unaware of the judgement. It is contended that the Applicant has an arguable appeal which it seeks to ventilate failure to which it stands to be forever driven from the seat of justice.
  5. It is additionally stated that the Judgement Debtor is insolvent and no longer operates any account with the Applicant and thus the Applicant may be compelled to settle the judgement sum from its own funds. The Applicant is a stranger to the Respondent's financial capability and since the Judgement Debtor is insolvent, it is apprehensive that should its intended appeal succeed, it may be unable to recover the colossal amount paid to the Respondent.
  6. On the other hand, the Respondent has a valid judgement against the Judgement Debtor and can pursue the same through the Office of the Official Receiver. The Applicant is ready to deposit the decretal sum in a joint interest earning account or in court pending the hearing and determination of the intended appeal. The Applicant has explained the delay in filing the application.
  7. The application is further supported by the affidavit sworn by one Jennifer Nthiga, the Applicant's Legal Officer. The affidavit reiterates the grounds in support of the application. Other than the annexures, I do not deem it useful to rehash the same.
  8. The application is opposed. The Respondent filed its response dated 15<sup>th</sup> February, 2024 on even date. The Respondent avers that on 16<sup>th</sup> January, 2024, the Applicant fully paid the decretal sum and thus the application serves no purpose and a waste of judicial time. She contended that warrants were issued as there was no stay of execution of the judgement delivered on 27<sup>th</sup> October, 2023. It is further contended that on the date judgement was delivered, due notice had been given to parties.
  9. The Respondent states that the Applicant has not shown any intention to appeal as there is no request for certified copies of the proceedings and judgement. There is no appeal filed in the Court of Appeal to show the intention of the Applicant to appeal. Further, it is stated that the Applicant has admitted



already having paid the decretal sum and there is no substratum to warrant the court to grant leave to appeal. The alleged appeal shall only be academic and a waste of judicial time.

10. On the orders issued on 25<sup>th</sup> May, 2022, the Respondent states that they were vacated on 21<sup>st</sup> December, 2023 when the court lifted the liquidation order against the Judgement Debtor and the same is now a going concern and thus the Applicant has recourse against the Judgement Debtor. In any event, the judgement is being executed against the Applicant (Garnishee) and not the Judgement Debtor.
11. In conclusion, the Respondent states that the application is clearly misconceived, overtaken by events, an abuse of court process and lacks merit and the same should be dismissed with costs.
12. Directions were taken to have the appeal disposed off by way of written submissions. It is only the Respondent who filed her submissions. They are dated 27<sup>th</sup> May, 2024. I have given due consideration to the same.

### **Analysis**

13. This Court has carefully considered the application dated 10<sup>th</sup> January, 2024, the response, the Respondent's submissions, the authorities cited as well as the law and the following issues falls for this Court's determination: -
  - a. Whether the application dated 10<sup>th</sup> January, 2024 satisfies the requirements for grant of stay of execution pending appeal;
  - b. Whether the Applicant is deserving an order for extension of time to file an appeal out of time; and
  - c. Who bears the costs?
14. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 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 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.”
15. The three conditions to be fulfilled can therefore be summarized as follows: -
  - a. that substantial loss may result to the applicant unless the order is made;
  - b. application has been made without unreasonable delay; and



- c. security as the court orders for the due performance.
16. The above requirements were well enunciated by the Court of Appeal in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR. The three conditions must be fulfilled together for stay to be granted. On substantial loss, it is admitted that the full decretal sum was paid on 16<sup>th</sup> January, 2024 about six (6) days after the application was filed. Therefore, I do not foresee any substantial loss to the Applicant since what it sought to protect has been paid out to the Respondent and thus overtaken by events.
  17. On the application being filed without unreasonable delay, the judgement which is sought to be appealed was delivered on 27<sup>th</sup> October, 2023. The application herein was filed on 10<sup>th</sup> January, 2024, a period of slightly more than two (2) months. The reason for the delay is said to have been non notification of the judgement date.
  18. I have perused the court record and I note that on 28<sup>th</sup> July, 2023, judgement was slated for 6<sup>th</sup> October, 2023 in the presence of Mr. Ananda Advocate for the Respondent and later Mr. Janjo Advocate for the Respondent. Therefore, the averment that judgement was to be delivered on 4<sup>th</sup> October, 2023 is not entirely true. The practice of this court is that if judgement or ruling is not ready on the date initially fixed, it always notifies parties on the next date that the same shall be delivered.
  19. This explains why there was representation on the part of the Respondent when the judgement was delivered. I equally take notice of the fact that since the inception of judiciary's e-filing system, when any decision, order or direction is made by court, parties who are registered in the judiciary e-filing system receive instant message prompts notifying them of the action taken or the next date the matter shall be dealt with.
  20. Similarly, the Applicant being the Appellant was expected to be more vigilant as it was the mover of the appeal motion. This is an adversarial system and as such, each party must be vigilant when prosecuting or defending its matters. The court is simply but a neutral arbiter with no role in parties' rival positions but just decide the matter based on facts and the law. It is old hat that equity aids the vigilant and not the indolent.
  21. A period of over two (2) months since judgement was delivered in the current technologically advanced period to me is unexplained delay and one which this court is not ready to exercise its discretion in favour of the Applicant. I thus find the period of over two months was unreasonable and the delay was not satisfactorily explained.
  22. On the requirement to provide security for due performance, the same is closely related to the issue of substantial loss. Having found that the full decretal sum had been paid to the Respondent, this requirement stood to have been overtaken by events.
  23. Having made the payment, it was incumbent for the Applicant either to amend its application and only seek those prayers that were still pending or withdraw the entire application and file a new one. This was never done and as such, this court cannot issue orders in vain. I thus answer the first issue in the negative.
  24. On the prayer for extension of time and leave to lodge an appeal out of time, I note that on the face of the application, the Applicant relies on section 7 of the *Appellate Jurisdiction Act*. It provides as follows: -

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a



certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”

25. This provision is in pari materia with the proviso at section 79G of the *Civil Procedure Act* and states as follows: -

“...Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

26. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the Applicant must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR an Applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

27. In *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following: -

“...It is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal, the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted...”

28. Applying the above principles to the present case, the judgement herein was delivered on 27<sup>th</sup> October, 2023 and the Applicant filed the current application on 10<sup>th</sup> January, 2024, a period of one (1) month and fourteen (14) days outside the time limited to file an appeal and two (2) months outside the time limited to lodge a Notice of Appeal to the Court of Appeal. The Applicant has attributed the delay in lodging its appeal to non-notification of the delivery of judgement.

29. I have stated elsewhere in this ruling that a delay of more than two (2) months in the current dispensation of technological advancement in the justice system is inordinate and I thus find the reason for delay not a plausible reason. The appeal was a matter that had serious ramifications on the Applicant and as such, it was its duty to follow up on the status of the judgement.

30. I am therefore not convinced that the Applicant has made out a case to warrant this court to exercise its discretion in favour of the Applicant by granting it extension of time and leave to appeal this court’s judgement out of time. I thus return a negative finding on the second issue.

31. On costs, the same follows the event. The application having failed, I see no reason to deny the Respondent costs as it filed a response to the same and submissions. I therefore award costs of the application to the Respondent. The same to be agreed or taxed.

32. The upshot of the foregoing is that the court renders itself as hereunder: -

- a. The Notice of Motion Application dated 10<sup>th</sup> January, 2024 lacks merit and the same is hereby dismissed;
- b. Costs to the Respondent.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A for the Applicant

Mr. Njoroge Advocate h/b for Mr. Ananda Advocate for the Respondent

Ms. Salwa, Court Assistant

