



Diamond Trust Bank Kenya Ltd v Patrick Otieno Oyoo t/a Otieno Oyoo & Co. Advocates & another (Miscellaneous Civil Application E006 of 2020) [2023] KEHC 2071 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL APPLICATION E006 OF 2020
KW KIARIE, J
MARCH 22, 2023**

BETWEEN

DIAMOND TRUST BANK KENYA LTD APPLICANT

AND

**PATRICK OTIENO OYOO T/A OTIENO OYOO & CO.
ADVOCATES 1ST RESPONDENT**

OSCAR ODONGO T/A ODONGO INVESTMENTS 2ND RESPONDENT

RULING

1. The applicant moved the court by way of Chamber Summons dated April 25, 2022. It was brought under Order 2 (2) of the *Supreme Court of England* & section 5(1) of the *Judicature Act* Cap 8 laws of Kenya. The applicant is seeking the following orders:
 - a) That this application be certified urgent and the same be heard ex-parte.
 - b) That the Honorable court be pleased to grant leave to Diamond Trust Bank Kenya Limited, the applicant herein to apply for the following orders:
 - i. An order that the honorable court be pleased to find that Messrs Patrick Otieno Oyoo t/a Otieno Oyoo & Co Advocates and Oscar Odongo t/a Odongo Investment Auctioneers are in contempt of court for disobeying the order issued but this honorable court on 31st April 2022.
 - ii. An order summoning the respondents Messrs Patrick Otieno Oyoo t/a Otieno Oyoo & Co Advocates and Oscar Odongo t/a Odongo Investment Auctioneers to appear in court to explain to this honorable court why they ignored a lawful order of the High Court;



- iii. An order that Messrs Patrick Otieno Oyoo t/a Otieno Oyoo & Company advocates and Oscar Odongo t/a Odongo Investment Auctioneers be fined ksh 2,000,000/- and/or such sum as the Honorable court may order and that the same be paid into court forthwith;
 - iv. An order that property belonging to Messrs Patrick Otieno Oyoo t/a Otieno Oyoo & Company Advocates and Oscar Odongo t/a Odongo Investment Auctioneers be attached to the extent of such value as this honorable court may direct; and
 - v. An order that Messrs Patrick Otieno Oyoo t/a Otieno Oyoo and Company advocates and Oscar Odongo t/a Odongo Investment Auctioneers be committed to and/or detained in prison for a term of six (6) months.
- c) That the costs of an incidental to the application be provided for.
 - d) That the court do grant such further and other reliefs as the honorable court may deem just and expedient to grant.
2. The application was premised on the following grounds:
- a. On 29/3/2022, pursuant to a Garnishee Application dated 2/11/2021, the court issue a Garnishee Order Absolute compelling the applicant to settle the 1st Respondent's decretal sum of kshs 1,151,212/- out of Fixed Deposit Account No FDLC 20175xxxx allegedly operated by African Merchant Assurance Company Limited.
 - b. Aggrieved with the Garnishee order Absolute, the applicant filed an application dated 31/3/2022 seeking leave to appeal and a stay of execution of the Garnishee Order Absolute dated 29/3/2022.
 - c. Upon consideration, the court allowed the applicant's foregoing application dated 31/3/2022 on the following terms;
 - i. The applicant was granted leave to appeal;
 - ii. The applicant shall file a Notice of Appeal within 14 days;
 - iii. That there be a stay of execution;
 - iv. Should the Bank fail to file a Notice of Appeal within 14 days, execution may issue.
 - d. The applicant served the foregoing orders upon the 1st respondent on 31/3/2022. Hence the 1st respondent is fully aware of its effect and consequences of breach and in compliance with the terms of the court order dated 31/3/2022, the applicant filed its Notice of Appeal on 14/4/2022.
 - e. Despite compliance by the applicant, the 1st respondent served the applicant with Warrants of Attachment and sale together with a Proclamation Notice dated April 19, 2022 by the 2nd respondent in execution of the Garnishee Order absolute in full breach of the court order dated 31/3/2022.
 - f. The applicant served its Notice of Appeal upon the 1st Respondent on April 21, 2022 by email to wit otienooyooadv@yahoo.com together with proof of payment of the requisite filing fees of kshs 450/-, indicated that the proclamation was premature hence sought a written undertaking that the same would not proceed and that the 2nd respondent would withdraw the proclamation Notice dated April 19, 2022.



- g. Despite the foregoing, the respondents have not withdrawn the Proclamation Notice and are intent on proceeding with execution upon expiry of the said Proclamation that is from April 26, 2022.
 - h. The 1st respondent is an advocate of the High Court and the 2nd respondent is a court licensed auctioneer. As officers of this honorable court, their actions and/or omissions have brought this honorable court into ridicule, odium and disrepute and has painted the court as weak, powerless and ineffective.
 - i. The 1st respondent's contempt if compounded by the fact that the 1st respondent is an unqualified person within the meaning of Section 9(c) of the *Advocates Act* (Cap 16 Laws of Kenya) for failure to obtain a practicing license for the years 2019, 2020, 2021 and 2022.
 - j. The honorable court ought to move with speed to uphold its dignity and assert its authority so as to enforce obedience to its orders.
 - k. Parties who willfully disobey court orders must be punished.
 - l. It is the interest of justice that the applicant be granted leave to commence contempt of court proceedings against the respondents:
 - m. Other grounds and reasons to be adduced at the hearing thereof.
3. The respondents opposed the application on the following grounds:
- a. That the application is scandalous, frivolous and vexatious as it is solely based on the misconceived interpretation of this honorable court's order dated March 31, 2022 as having granted the applicant a perpetual stay of execution order pending the hearing and final determination of an appeal which is yet to be properly filed before the Court of Appeal.
 - b. That I have perused the court file and have noted that the system generated receipt for kshs 450/- evidencing payment for the Notice of Appeal was received and stamped on April 20, 2022 by this honorable court's registry. Similarly, the Notice of Appeal was also received and stamped April 21, 2022. Annexed hereto and marked "PLO 1" are copies of the Receipt and Notice of Appeal dated stamped 20th and April 21, 2022 respectively.
 - c. That in the circumstances the Notice of Appeal was filed out of time and the applicant's only recourse in law is to file a suitable application seeking this honorable court's leave or extension of time and to deem the Notice of Appeal filed on April 20, 2022 as duly filed. The current application is therefore misconceived and a waste of judicial time.
4. Section 5 of the *Judicature Act* Cap 8 laws of Kenya was repealed by Act No 46 of 2016. In the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR which the applicant filed it is stated:

"This provision subjects the proceedings of contempt of court in Kenya to the current law governing the High Court of Justice in England. The law governing the justices in England previously was subject to common law and Order 52 of the Supreme Court Rules. However, England enacted the Contempt of Court Act of 1981 which supplements its common law contempt of court offences. The prevailing law of contempt in England is now found in the Contempt of Court Act of 1981 and Part 81 of the procedure in the Civil Procedure (Amendment No 2) Rules, 2012 that replaced Order 52 of the Supreme Court Rules for contempt proceedings in the Supreme Court of England."



5. The applicant therefore relied on obsolete legal provisions.
6. When the applicant came to court on March 31, 2022 conditional stay of execution was given. The applicant was to file an appeal within 14 days or else execution was to proceed. The order to be effective ought to have been served. The applicant says that the same was served but the respondents have vehemently opposed this averment.
7. I have seen a copy of email addressed to Patrick Otieno from the applicant's advocate dated March 31, 2022 at 3:48 p.m. I am therefore satisfied that the 1st respondent was served with the order.
8. The applicant had up to April 14, 2022 to file and serve the appeal. The applicant has indicated that the Notice of Appeal was served upon the 1st respondent on April 21, 2022. This confirms the averments of the 1st respondent that the Notice of Appeal was paid for on April 20, 2022 as evidenced by the receipt issued.
9. The applicant cannot therefore argue that there was disobedience of the court orders when they failed to file the appeal within the 14 days window granted to them.
10. I agree that this application is frivolous. The same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

