



**I & M Bank Limited v Karatu & 4 others (Civil Appeal E031 of 2022)
[2023] KEHC 3116 (KLR) (Commercial and Tax) (6 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E031 OF 2022
DAS MAJANJA, J
APRIL 6, 2023**

BETWEEN

I & M BANK LIMITED APPELLANT

AND

EMMANUEL KURIA KARATU 1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED 2ND RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 3RD RESPONDENT

NCBA BANK KENYA LIMITED 4TH RESPONDENT

DIAMOND TRUST BANK KENYA LIMITED 5TH RESPONDENT

(Being an appeal from the Ruling and Order of Hon. G. Sogomo, PM dated 16th February 2022 at the Nairobi Magistrates Court, Milimani in CMCC No. 7865 of 2019)

JUDGMENT

1. This is an appeal against the ruling and order of the Subordinate Court declining to grant the Appellant, as the 4th Garnishee, leave to appeal against an order made on 20th August 2021 declining to set aside execution against it.
2. By way of a brief background, the 1st Respondent, as Plaintiff before the Subordinate Court, filed a declaratory suit under the *Insurance (Motor Vehicles Third Party Risks) Act* (Chapter 405 of the Laws of Kenya) seeking a declaration and that the 2nd Respondent was liable to satisfy a decree for Kshs. 217,741.98 issued against him by a third party. On March 12, 2020, the court entered judgment for the 1st Respondent against the 2nd Respondent.



3. Thereafter the 1st Respondent applied for attachment of the 2nd Respondent's accounts held by the Appellant, 3rd, 4th and 5th Respondents. The court issued a garnishee order nisi which was later made absolute following which the 1st Respondent commenced execution against the Appellant by way of attachment of the Appellant's moveable property thus precipitating an application by the Appellant dated February 2, 2021 seeking to stay execution and set aside the garnishee order absolute.
4. The application was dismissed on August 20, 2021 whereupon the Appellant filed an another application dated August 20, 2021 seeking, inter alia, leave to appeal against the ruling and order of August 20, 2021 and a stay of execution pending appeal to this court.
5. The court dismissed the application by the ruling dated February 16, 2022 thus triggering this appeal. In essence, the Appellant ultimately seeks leave to appeal. The grant of leave is discretionary hence the Appellant must demonstrate that in the exercise of its discretion the trial court misdirected itself in some matter for example by failing to take into account relevant facts or taking into account irrelevant factors and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of discretion and that as a result there has been an injustice (see *Mbogo v Shab* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).
6. In the ruling under consideration, it is clear that the trial magistrate failed to consider whether or not to grant leave to appeal. The court focused on the orders of injunction and stay yet these orders were merely interim in nature as what was sought was leave to appeal which if granted, would set the appellate process in motion. The trial magistrate therefore erred by failing to consider the issue of leave hence the decision cannot stand.
7. Since the right to appeal is circumscribed by the requirement for leave, it is not granted as a matter of right. In *Kenya Shell Limited v Kobil Petroleum Limited* NRB CA Civil Application No. 57 of 2006 [2006] eKLR, the Court of Appeal held that, "Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered." This means that an application has to present a factual or legal basis for the grant of such leave. In *Machira T/A Machira & Company Advocates v Mwangi & Another* [2002] 2 KLR 391, the Court of Appeal outlined the principles applicable in considering an application for leave to appeal. It stated as follows:

The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the Court considers should be in the public interest, be examined by this court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law is clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.

8. With the above principles in mind, I am of the view that the Appellant's intended appeal from the ruling dated August 20, 2021 cannot be said to be fanciful and without unrealistic chances of success. In order to buttress its case, the Appellant annexed to its application a draft memorandum of appeal raising several grounds of appeal. Among the grounds are that the trial court could not order execution



against it as a garnishee as it was not a judgment debtor and the Appellant as a bank could not be held liable for the act of the judgment debtor. These grounds, I hold, are arguable.

9. For the foregoing reasons, I allow the appeal, set aside the ruling and order of the Subordinate Court dated February 16, 2022 and allow the Notice of Motion dated August 20, 2021 to the extent that leave be and is hereby granted to the Appellant to appeal against the ruling delivered on August 20, 2021. Costs of this appeal shall be borne by the 1st Respondent and are assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Muhizi instructed by Wamae and Allen Advocates for the Appellant.

