



Diamond Trust Bank Kenya Limited v Oyoo & Sinda (Suing as the personal representatives of the Estate of the Late Dickson Anyango Okoth) & another (Miscellaneous Civil Application E293 of 2022) [2023] KEHC 18027 (KLR) (Civ) (3 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18027 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E293 OF 2022
DO CHEPKWONY, J
MAY 3, 2023

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPLICANT

AND

GEORGE ONYANGO OYOO & ROSE RHOKE SINDA (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE DICKSON ANYANGO OKOTH) 1ST RESPONDENT

XPLICO INSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

1. The Applicant brought this application by a Notice of Motion application dated 19th May, 2022 under the provisions of Sections 3A and 25 of the *Civil Procedure Act*, Order 42 Rule 6, Order 22 Rule 22 and Order 51 of the *Civil Procedure Rules*, 2010 and Article 165 (6) of *the Constitution* of Kenya, 2010, seeking for the following Orders:
 - a. Spent;
 - b. Spent;
 - c. That pending hearing and determination of the Notice of Motion application dated 12th May, 2022 filed in Nairobi CMCC No.E2408 of 2021 - Onyango Oloo & Rose Rhoke Sinda (Suing as the personal representatives of the estate of the late Dickson Anyango Okoth) –vs- Xplico Insurance Company Limited & Diamond Trust Bank Limited, this Honourable Court be pleased to exercise its supervisory jurisdiction and grant stay of execution of the Garnishee Order Absolute dated 9th May, 2022 issued in Nairobi CMCC No.E2408 of 2021 - George



Onyango Oloo & Rose Rhoke Sinda (Suing as the Personal Representatives of the Estate of the late Dickson Anyango Okoth) –vs- Xplico Insurance Company Limited & Diamond Trust Bank Limited.

- d. That the Honourable Court be pleased to order that the Executive Officer of the Milimani Magistrate’s Court appear before this Honourable Court to explain the whereabouts of the court file being Nairobi CMCC No.E2408 of 2021 - George Onyango Oloo & Rose Rhoke Sinda (Suing as the personal representatives of the estate of the late Dickson Anyango Okoth) – vs- Xplico Insurance Company Limited & Diamond Trust Bank Limited and prepare a report for the Honourable Court.
 - e. That this Honourable Court be pleased to order that the report be submitted to the Judicial Service Commission for institution of appropriate disciplinary action against any party found to have been negligent and/or culpable.
 - f. That the costs of this application be in the cause.
2. The grounds in support of the application are contained on the face of the application and supported by the affidavit deposited by Jennifer Thiga. In summary, she has deposed that:-
- a. Via Garnishee application dated 23rd March, 2022 filed in Nairobi CMCC No. E2408 of 2021- George Onyango Oloo & Rose Rhoke Sinda (Suing as the personal representatives of the estate of the late Dickson Anyango Okoth) –vs- Xplico Insurance Company Limited & Diamond Trust Bank Limited, the 1st Respondent filed a Garnishee application seeking Garnishee Order Absolute for the sum of Kshs.2,300,000/=.
 - b. The Applicant contended that the application was opposed and a Supplementary Affidavit filed indicating that the Account No.xxxx belonging to the 2nd Respondent did not have sufficient funds to pay the decretal sum and as at the 28th March, 2022 the account was overdrawn to the tune of Kshs.649,076.90/=.
 - c. She states that the court reserved a ruling for the application on 9th May, 2022 wherein it allowed the Garnishee application and issued Garnishee Order absolute for the sum of Kshs.2,300,000/=.
 - d. The Applicant being aggrieved by the ruling filed an application dated 12th May, 2022 seeking leave to appeal and a stay of execution pending hearing and determination of the intended appeal.
 - e. Upon filing of the application, the court certified the matter urgent and directed the application to be heard on 20th May, 2022. But before then, the 1st Respondent proceeded to proclaim the Applicant’s assets on 13th May, 2022 which proclamation period was to lapse on 20th May, 2022.
 - f. The Applicant filed another application dated 16th May, 2022 which was considered by the court on 17th May, 2022 and was scheduled for hearing on 19th May, 2022 but the same could not proceed on that day as the Magistrate indicated that the physical file was missing. She deposed that her advocate consulted with the registry however the court file was not traced.
 - g. The Applicant is constrained to approach this court to seek its intervention under its supervisory jurisdiction and seek stay of execution of the Garnishee Order Absolute dated 9th May, 2022 until the file in Nairobi CMCC No.E2408 of 2021 is traced and the application dated 12th May, 2022 is determined on merit.



- h. The Applicant avers that the Judgment Debtor's (2nd Respondent's) Account No.xxxx has insufficient funds to settle the decree as it was overdrawn as at the time of service of the Garnishee Order Nisi hence the Applicant does not hold any funds on behalf of the 2nd Respondent and would be greatly prejudiced if they are forced to pay the decretal sum from their own funds.
 - i. That, if the execution commences and the Applicant's assets attached, the application dated 12th May, 2022 shall have been overtaken by events.
 - j. She deposed that it is in the interest of justice that this court issues a stay of execution of the Proclamation Notice and warrants if attachment in Nairobi CMCC No.E2408 of 2021.
3. There is no response on record by the 1st Respondent though in their written submissions have mentioned a Replying Affidavit which is not on record.
 4. On 25th July, 2022 parties agreed to canvass the application by way of written submissions. Both parties complied with the directions and the Applicant's submissions are dated 27th September, 2022 whereas the 1st Respondent's submissions are dated 9th September, 2022.

Analysis and Determination

5. I have read through the application, the submissions in support and in opposition thereto as well as the authorities relied upon by both parties in consideration and determination of the application. Based on the material placed before this Court, I find the relevant issue for this Court's consideration being:-
 - a. Whether a stay of execution of the Garnishee Order Absolute dated 9th May, 2022 issued in Nairobi CMCC No.E2408 of 2021 can issue.
 - b. Whether the Executive Officer of Milimani Chief Magistrate Court can be ordered to appeal in this Court to explain the whereabouts of the court file Nairobi CMCC No.2408 of 2021.
 - c. Whether this Court can order that a report be submitted to the Judicial Service Commission for institution of appropriate disciplinary action against any party found to have been negligent and or culpable for the loss of the lower court file.
6. From the pleadings, it is clear that the Applicant's contention is that it was not heard before the trial court on 19th May, 2022 as the court file was missing and on consulting with the registry, the court file could not be traced. As a result, the Applicant was unable to seek an interim stay of execution and the 1st Respondent proceeded with execution compelling the bank to settle the decretal sum and the auctioneers' fees so as to avoid the removal of its movable assets.
7. In regard of the prayer by the Applicant for stay of execution of the Garnishee Order Absolute dated 9th May, 2022, it is the Applicant's contention that pursuant to a Garnishee Application dated 23rd March, 2022 filed in Nairobi CMCC No.E2408 of 2021, the 1st Respondent obtained a Garnishee Order Absolute for Kshs.2,300,000.00 as against the Bank. The Bank was unable to seek an interim stay of execution pursuant to its application for the same owing to imminent thereto of execution compelling the Bank to settle decretal sum and the auctioneers fees to avoid the removal of its movable assets.
8. In response, the 1st Respondent urged that the application seeking for stay of execution has been overtaken by events because the garnishee already complied with the Garnishee Orders on 20th May, 2022 and settled the claim and the Judgment sum was released to the deceased's estate on 24th May, 2022.



9. In response to the Respondent's response that the application had been overtaken by events, in its written submissions the Applicant urged that it be granted prayers Nos.(4) and (5) of the application dated 19th May, 2022 since what had been overtaken by events were prayers No.(2) and (3).

10. It is this Court's view that indeed the prayers for stay of execution cannot issue in this case as there is nothing before this Court to determine and stay since the Applicant (Bank) already settled the decretal sum and the Auctioneers fees, and it is not denied that the Judgment sum was already released to the deceased/s estate. This was the position in the case of *Neen Properties Limited –vs- Wells Fargo Limited* [2022]eKLR, where the Court held that:-

“The Plaintiff's application has been overtaken by events as the motor vehicles have already been sold to third parties. It would be futile to grant the orders sought in this application bearing in mind that the court shall not issue any orders in vain”.

11. This then takes this Court to the determination of prayers No.(4) and (5) of the application dated 19th May, 2022. By the two prayers, the Applicant is seeking this Court to exercise its supervisory jurisdiction under Article 165(5) and (6) of *the Constitution*. Article 165 (5) of *the Constitution* has clothed the High Court with supervisory jurisdiction over subordinate courts in the following manner:-

Sub Article (5) provides;

“The High Court shall not have jurisdiction in respect of matters—

- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b. falling within the jurisdiction of the courts contemplated in Article 162 (2).

Sub Article (6) provides;

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court”.

12. According to the Applicant, it seeks to have the Executive Officer of Milimani Magistrate's Court summoned to appear before the court and explain the whereabouts of the court file being Nairobi CMCC No.E2408 of 2021 and prepare a report, which should be submitted to the Judicial Service Commission for institution of disciplinary action against any party found negligent or culpable. The reason for this is that Applicant Bank had filed an application for stay of execution dated 12th May, 2022 when the 1st Respondent commenced execution against it. However, on the day of hearing of the application on 19th May, 2022, the file went missing and so it was denied an opportunity to be heard and obtain a temporary stay of execution. The Applicant went on to state that while they could not be heard for the reason that the court file could not be traced, the 1st Respondent managed to extract Warrants of Attachment against it.

13. The Respondent confirmed that indeed when the matter came up for hearing before the trial court on 19th May, 2022, the court file was missing, and parties were advised to follow up with the registry to trace the same. According to the Respondent, the issue of the missing court file was a matter of concern for all the parties and it was neither their fault nor that of their advocates. It argued that seeking the



court's intervention to exercise its supervisory jurisdiction was equally inviting it to issue orders which are incapable of being enforced.

14. This Court has considered the sentiments of both the Applicant and 1st Respondent, and I tis its understanding that the orders being sought in prayers No.(4) and (5) of the application are administrative in nature. And as duly directed by the trial Court on 19th May, 2023, the parties ought to follow up the issue of the missing file with the Chief Magistrate, Milimani Commercial Court, and if the same is not traced, follow up on the same along the Administrative Structure of the Judiciary. It is not necessary for this Court to be invoked to issue an order to this effect as this would be in vain and may end up ridiculing court when it comes to enforcing the same. In the case of *B -vs- Attorney general* [2004] 1KLR, 431 Ojwang J (as he then was) stated that:-

“The court does not, and ought not to be seen to, make orders in vain, otherwise the court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people”.

15. The upshot of the foregoing is that the application dated 19th May, 2022 is devoid of merits and is hereby struck out.

16. Each party to bear its own costs.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF MAY 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Janjo holding brief for Mr. Kisinga for the Applicant

M/S Aluodo holding brief for Mr. Kulecho for the 1st Respondent

Court Assistant – Mwenda/Simon

