



**Wondernut International (EPZ) Ltd v AIG Kenya Insurance Company Limited;
NCBA Bank Kenya PLC & another (Garnishee) (Civil Suit E047 of 2021)
[2023] KEHC 20013 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E047 OF 2021**

A MABEYA, J

JULY 17, 2023

BETWEEN

WONDERNUT INTERNATIONAL (EPZ) LTD PLAINTIFF

AND

AIG KENYA INSURANCE COMPANY LIMITED DEFENDANT

AND

NCBA BANK KENYA PLC GARNISHEE

STANBIC BANK KENYA LIMITED GARNISHEE

RULING

1. Before Court are two applications dated June 13, 2023 and June 14, 2023, respectively.
2. The application dated June 13, 2023 was brought by the defendant under sections 1A, 1B, 3A of the [Civil Procedure Act](#), Order 42 Rule 6(1), Rule 6(2) (a) and (b), Rule 6(3) and Rule 6(6) of the [Civil Procedure Rules](#).
3. That application sought to stay the execution of the judgment delivered on January 13, 2023 pending the hearing and determination of the appeal filed against that judgment.
4. The grounds for the application were set out on the face thereof and in the supporting affidavit of Ms Linda Kaniaru sworn on June 13, 2023. It was contended that the defendant was dissatisfied with the impugned judgment and had appealed against the same. That it had already applied for the typed proceedings and certified copies of the proceedings and judgment.



5. That the taxation ruling on the plaintiff's bill of costs had been delivered post working hours on June 12, 2023 at 22.49hrs in the absence of the parties giving the plaintiff leeway to institute execution proceedings against the defendant rendering the appeal nugatory. That due to the time of delivery of the ruling, the defendant was not able to seek a stay of execution and if execution is levied, the defendant would be prejudiced.
6. That the appeal was arguable and unless the stay was granted, the defendant would suffer substantial loss as the intended appeal would be rendered nugatory. That no prejudice would be suffered by the plaintiff as if the appeal is unsuccessful, the decretal sum would be then be payable. That the defendant was willing to comply with any conditions for the grant of stay.
7. The plaintiff opposed that application vide the replying affidavit of Bobby Thomas sworn on June 16, 2023. It was contended that the defendant had been granted a 30-day stay which lapsed on February 12, 2023. That party and party costs were later taxed on June 12, 2023 for a sum of Kshs 1,812,142.81.
8. That save for the notice of appeal dated February 23, 2023, no further steps had been taken towards lodging the intended appeal. That the defendant had taken 5 months to bring the application. That the defendant had failed to meet the conditions for granting an order for stay.
9. That the defendant had not demonstrated that the plaintiff would be unable to refund the decretal sum. That the plaintiff had substantial asset base and resources being the leading macadamia nuts processor in Kenya and had more than enough funds in its accounts to satisfy the decretal sum if required.
10. That it held substantial insurance in excess of Kshs 497,000,000/-. It had a fixed deposit of US \$1,500,000/-. That the defendant had therefore failed to demonstrate any substantial loss it would suffer if the stay is not granted.
11. That no security had been offered against the decretal amount and the defendant was undeserving of the orders sought.
12. The second application was dated 14/6/2023 and was brought by the plaintiff/decreed holder. It was brought under Order 23 Rule 1(1) and (2), 2, 4 and 10, Orders 51 Rules 1 of the Civil Procedure Rules and Section 1A, 1B and 63(e) of the *Civil Procedure Act*.
13. It sought to garnishee account no 6549xxx Mamlaka Branch and USD account no 65491xxx Mamlaka Branch held by the 1st garnishee, and account no 0100003403763 Chiromo Branch held by the 2nd garnishee in satisfaction of the decree against the defendant for the sum of Kshs 2,395,359.50 and USD 575,332.62 together with interest at court rates from December 18, 2019 till payment in full.
14. That the garnishees do, within 7 days after the service of the order nisi, disclose what account deposits and monies are available to them from the defendant.
15. The grounds for the application were set out on the face of it and in the supporting affidavit of Barnabas Boit sworn on June 14, 2023. It was contended that judgment was entered on January 13, 2023 against the defendant for the sum of Kshs 391,772.71 and USD 386,474.86 together with interest at court rate from December 18, 2019 till payment in full and a decree thereafter issued on February 2, 2023.
16. That despite demands, the defendant had since failed to settle the same. That costs were taxed on June 12, 2023 for Kshs 1,812,142.81. That no stay had been granted. That the garnishees were holding monies on account of the defendant sufficient to settle the decree.



17. The defendant opposed that application vide the replying affidavit of Linda Kaniaru sworn on June 26, 2023. It was averred that the defendant had filed an application dated June 13, 2023 for stay pending appeal and the appeal would be rendered nugatory if the plaintiff was allowed to pursue the garnishee proceedings. That the defendant would suffer substantial loss as the decretal sum was substantial and it would affect the defendant's daily operations. That no prejudice would be suffered by the plaintiff if the garnishee orders were not granted.
18. The 1st garnishee responded to the application vide the replying affidavit of Stephen Atenya sworn on June 26, 2023. It confirmed that the defendant held two bank accounts with the 1st garnishee bank being 6549190018 and 6549190036 holding Kshs 3,998,537.48 and USD 546,476,47, respectively as at July 20, 2023. That the amount could not satisfy the decree. That the garnishee had no claim on those amounts but for costs of the instant application for Kshs 20,000/-.
19. The Court has considered the entire record and the parties' contestations. I propose to begin with the stay application.
20. Order 42 Rule 6 (2) of the Civil Procedure Rules sets out the conditions for stay. That an applicant must demonstrate that he would suffer substantial loss if the stay is not granted, that he must give security for the performance of the decree or order that would ultimately be binding on him, and that the application should be made timeously.
21. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal held that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
22. It was of the view that the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. That a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Appellant at the end of the proceedings. And finally, that in exercising its discretion, the court will consider the special circumstances of the case and its unique requirements.
23. In the present case, the impugned judgment was delivered on January 13, 2023. The application was made on June 13, 2023. It was brought 5 months after delivery of the judgment. There was no reason that was advanced to explain the delay. The requirement that the application be brought timeously is to ensure that the status quo as at the time the judgment or order was made has not changed. In the present case, the status quo had changed as the plaintiff had even commenced the process of execution vide garnishee proceedings.
24. Accordingly, I find that a period of 5 months was long and unexplained. Thus, there was inordinate delay in bringing the application.
25. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, it was held 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 Appellant 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 Appellant 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.”

26. In the present case, the defendant did not demonstrate how it would suffer substantial loss if the stay was denied. The defendant only pleaded that execution would issue if the stay was not granted. It is trite that initiation of execution of a lawful decree and judgment does not amount to substantial loss. The defendant ought to have demonstrated circumstances which would have rendered the intended appeal nugatory amounting to substantial loss. No such circumstances were demonstrated.
27. This Court also notes that but for filing the Notice of Appeal dated February 23 2023 and requesting for typed proceedings and judgment, no further steps had been taken to lodge the intended appeal.
28. In any event, the plaintiff was able to demonstrate that it was not a company of straw. That it was a leading Macadamia processing company in Kenya. It had substantial assets which was insured in the sum of Kshs 497 million. That it held substantial monies in its accounts including an unencumbered fixed account for US\$ 1,500,000/-. Surely, that is not an entity that can fail to refund a mere sum of Kshs 3 million and slightly below US\$ 400,000/-. The defendant was able to demonstrate that, if the appeal is successful, it would be capable of refunding the decretal sum.
29. In the circumstances, the Court finds that the defendant had not met the conditions for granting any stay orders.
30. The 2nd application dated June 14, 2023 related to the attachment of the defendant’s bank accounts held by the garnishees for the amounts to satisfy the decree.
31. The word garnishee proceedings is described in the Black’s Law Dictionary, 10th Edn, to mean: -

“a statutory proceeding whereby a person’s property, or credit in possession or under control of, or owing by, another are applied to payment of former debt to third person by proper statutory process against debtor and garnishee.”
32. Order 23, rule 1 of the *Civil Procedure Rules*, provides for garnishee proceedings. There is no dispute that there is an unsatisfied decree for the plaintiff against the defendant. There is evidence of demand for settlement and that decree remains unsettled.
33. In *Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225, it was held: -

“There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788.

If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days’ notice, the order nisi operates as the notice.



As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: see *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be ‘attached’, again derived from Norman-French. But the ‘attachment’ is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay.”

34. It has already been established that the garnishee proceedings herein are based on an unsettled decree. The two garnishees are banks and are correctly named as the garnishees. There is no reason to deny the orders for garnishee nisi against the garnishees who will then be presented with an opportunity to show cause why they ought not to pay the decretal sum to the plaintiff.
35. Though the 1st garnishee pleaded that the amounts held in the defendant’s accounts were not enough to satisfy the decree herein, it confirmed that the defendant indeed held the two accounts with the 1st garnishee as alleged and that the accounts held monies.
36. In this regard, the Court finds that the application dated June 14, 2023 is merited.
37. In view of the foregoing, the Court makes the following orders: -
 - a. The application dated June 13, 2023 is unmerited and is dismissed with costs to the plaintiff.
 - b. The application dated June 14, 2023 is allowed with costs and an order of decree nisi hereby issues in terms of prayer nos 2, 3 and 4 of the Motion.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A MABEYA, FCI Arb

JUDGE

