



Diamond Trust Bank Kenya Limited v Kanda & another (Civil Appeal 41 of 2021) [2023] KEHC 23712 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 41 OF 2021
SM GITHINJI, J
OCTOBER 16, 2023**

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPELLANT

AND

PATRICK MWATATI KANDA 1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED 2ND RESPONDENT

(Being an Appeal from the Ruling and Garnishee Order Absolute of Honourable Mr J.M.Kituku – Senior Principal Magistrate delivered on 13th May, 2020 pursuant to the 1st Respondent’s Garnishee Application dated 19th December, 2019)

RULING

CORAM: Hon. Justice S. M. Githinji

Kisinga Advocate for the Appellants

Mr Osino Advocate for the Respondent

1. For determination is the application dated 29th November, 2022 by the Appellant seeking the following orders;
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this Application, the Honourable Court be pleased to grant a stay of execution of the Garnishee Order Absolute dated 13th May, 2020 issued pursuant to the Garnishee Application dated 19th December, 2019 in Kilifi CMCC No 156 of 2017.



4. That pending the hearing and determination of the Appellant’s application datedfor stay of execution pending appeal filed at the court of appeal vide.....this Honourable Court be pleased to stay execution of the Garnishee Order Absolute dated 13th May 2020 issued pursuant to the Garnishee Application dated 19th December 2019 in Kilifi CMCC No 156 of 2017.
 5. That this Honourable Court be pleased to grant any further orders as it may deem fit in the circumstances.
 6. That the costs of this Application be provided for.
2. The application is premised on the grounds set out on the face of it and the supporting affidavit sworn by Jennifer Thiga on the same day. She deponed that pursuant to a judgment delivered on 21 November, 2022 this Honourable Court dismissed the Bank’s instant appeal confirming the Garnishee order absolute issued against it on 13 May 2020. That there is no stay of execution of the garnishee order absolute dated 13 May 2020 and the 1st Respondent is at liberty to commence execution against the Bank for recovery of the decretal sum of Kshs. 248, 208.00. According to her, unless this Court stays the execution of the garnishee order absolute dated 13 May 2020, the bank risks irreparable prejudice.
3. In Response to the said application, the 1st Respondent filed a Replying Affidavit sworn on the 25th day of January, 2023. He asserted that the applicant has frustrated the efforts to recover any sum from the decretal amount and that the garnishee is not candid as it has failed to disclose the monies held in the account during the subsistence of the garnishee proceedings. Further, that the application is only meant to deny him the enjoyment of the fruits of his judgment and that the applicant has not tendered any security nor produced any evidence to show that his financial position and that of the 2nd Respondent is stable as no sums have been released to him since delivery of the judgment.
 4. The application was canvassed via written submissions but this court has only had the benefit of analyzing those by the 1st Respondent filed on 7th July, 2023. The applicant filed no submissions.

Disposition

5. This court has considered the application as has been drafted by the applicant, the response as well as the submissions by the Respondent. In my view, the only issue for determination is whether stay of execution pending appeal is warranted.
6. This Application seeks to invoke the discretionary powers of the court. It is brought under Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010* which empowers this Court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal.
7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

“ No order for stay of execution shall be made under subrule (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.
8. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
 9. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
 10. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
 11. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, 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 applicant 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 applicant 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.”
 12. In the present case, the applicant has merely stated that if stay of execution of the garnishee order absolute dated 13 May 2020 is not granted, the 1st Respondent will commence execution against the appellant for recovery of the decretal sum and the appellant shall suffer irreparable loss as its appeal shall be rendered nugatory for lack of substratum. The Respondent on the other hand has rightly pointed out that the applicant has failed to show that it shall suffer any substantial loss and urged the court to disallow the application. I am not persuaded that substantial loss has been proved satisfactorily.



13. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. Under the heading for security, the applicant has failed to offer any in its application and in my view, allowing the present application as is would be putting the respondent at a disadvantage while giving an undeserved advantage to the applicant. Having said so, I am of the position that the application dated 29th November 2022 fails in its entirety for want of merit and the same is hereby dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF OCTOBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Mrs Osiro for the 1st Respondent
2. Mr Airo is present for the Applicant/Appellant

