



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL E257 OF 2021

KCB BANK KENYA LIMITED.....APPELLANT/ APPLICANT

VERSUS

PRUDENCE SHAMBI MBOGHO(suing as

the legal representative of the estate of

JOSEPH MWAKIMA MBOGHO.....1ST RESPONDENT

AFRICAN MERCHANT ASSURANCE CO.

LTD (AMACO).....2ND RESPONDENT

NCBA BANK PLC.....3RD RESPONDENT

RULING

1. Before me is notice of motion dated 13/5/2021 and brought pursuant to sections 1A, 3A and section 63(e) and 79G of the Civil Procedure Act Cap 21 Laws of Kenya, order 22 rule 22, order 42 rule 6, order 43 rule 1 (x), order 45 rule 3, order 51 rule 1 of the civil procedure rules 2010;

a) Spent

b) Spent

c) This honorable court be pleased to stay the execution of the garnishee order absolute issued on 21/1/2020 ending the hearing and determination of the appeal

d) The costs of this application be in the appeal.

2. The application is based on the grounds stated on the face of the motion and the facts deposed in the supporting affidavit of Bonnie Okumu. He swore that on 4/12/2019, the appellant applicant filed a response by the 1st respondent stating clearly that the bank accounts sought to be attached that is, account number 111xxxxxxx and 120xxxxxxx had no funds owing to the fact that the said accounts had been attached by other garnishee orders. Despite that the trial court went ahead and issued on 21/1/2020 made the garnishee nisi absolute against the appellant/applicant and required the appellant to remit Kshs. 11,735,133.85.

3. The appellant/applicant being unable to pay the aforesaid amount filed an application dated 3/2/2020 seeking a review and the setting aside of the garnishee order absolute. The court in its ruling delivered on 6/5/2021 dismissed the application.

4. The appellant/applicant is therefore apprehensive that unless payment of the decretal sum of Ksh. 11,735,133.5 and the resultant order sought to be appealed against are stayed, the 1st respondent will levy execution of the decree and the appellant/ applicant is bound to suffer substantial loss and the intended appeal herein will be rendered nugatory in view of the uncertainty of the 1st respondent's ability to refund the decretal amount should the appeal be successful.

5. The appellant/applicant avers that it has arguable grounds of appeal and hence stands to suffer substantial prejudice if the orders sought are not granted. It is also stated that the appellant/applicant is willing to provide security.

6. The application is opposed by the 1st respondent which filed the replying affidavit dated of Prudence Shambi Mbogho who stated that she is the administratrix of the estate of Joseph Mwakima Mbogho. She claimed that the appellant's/applicant's averment that it had insufficient funds to satisfy the decree was false as the appellant/applicant had through their replying affidavit dated 13/12/2019 tendered into evidence true and certified copies of the statements of accounts indicating a balance of Ksh. 4,625,30.58 for account number 111xxxxxxx and Kshs. 2,075,334.94 for account number 120xxxxxxx.
7. She argued that levying an execution against the judgement debtor does not amount to substantial loss since execution is a lawful process and furthermore the appellant/applicant has not demonstrated how it would suffer irreparably if execution proceeds.
8. She indicated that she is a person of means and owns property located in Othaya Road Kileleshwa whose value is in excess of Ksh 20,000,000 and thus able to refund the decretal amount should the appeal succeed.
9. The 1st respondent also argued that in the event that the stay is granted she requests that the appellant/applicant should deposit half of the decretal sum in a joint interest earning account.
10. The application was heard on 15/6/2021 where learned counsel for the appellant relied on the grounds set out on the face of the motion sworn on 13/5/2021 and counsel for the respondent relied on the replying affidavit dated 7/6/2021.
11. The principles to be considered in determining an application for stay of execution of a decree or order pending appeal are set out under **Order 42 Rule 6** of the Civil Procedure Rules. **First** is that the application must be filed without unreasonable delay. In this case the application was filed on 18/5/2021 while the ruling sought to be stayed was delivered on 6/5/2021, therefore the application was filed without unreasonable delay.
12. The **second** principle is that the applicant must show that it would suffer substantial loss if the order for stay of execution of the decree is denied. It is the appellant/applicant's assertion that if an order of stay is not granted the 1st respondent will commence execution proceedings against it.
13. It is clear in my mind that execution is a lawful process underpinned by statute and cannot therefore be regarded as a substantial loss. However, there is an averment by the appellant that the 1st respondent may not be in a position to refund the money if the same is paid. The 1st respondent has clearly stated that she is a person of means hence capable of making a refund. I have looked at her averment and it is clear that she has assets worth ksh. 20 million. However, it may be extremely to recover the amount if the appellant were to initiate moves to sell the property. In my view, I think the appellant has shown the substantial loss it would suffer if the order for stay is denied.
14. In the end, I find the motion dated 13.5.2021 to be meritorious, it is allowed. There be a stay of execution of the order of garnishee absolute pending the hearing and determination of this appeal. Costs of the motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9TH DAY OF JULY, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent