



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 154 OF 2019

SBM BANK KENYA LIMITED.....APPELLANT

VERSUS

SASAH CONTRACTORS LIMITED.....1ST RESPONDENT

INVESTEQ CAPITAL LIMITED.....2ND RESPONDENT

RULING

The application dated 27th December 2019 was brought by **SBM BANK LIMITED**, seeking stay of execution pending the hearing and determination of the Appeal emanating from the Garnishee Order Absolute, in **KISUMU CMCC NO. 460 OF 2016**.

1. It is common ground that on 13th December 2019 the learned trial magistrate made an Order in the following terms;

“IT IS HEREBY ORDERED THAT M/S SBM Bank Kenya Limited (“the Garnishee”) do forthwith pay to the Decree Holder’s Advocates M/S OWITI, OTIENO & RAGOT ADVOCATES, the sum of Kshs 8,295,054.50 with any further interest that may accrue in accordance with the decree until payment in full, as well as costs of the garnishee proceedings, and that in default thereof execution may issue for the same against the Garnishee.”

2. The Applicant, **SBM Bank Limited**, purchased **CHASE BANK (K) LIMITED**.

3. It is the Applicant’s case that it is ready and willing to comply with the terms gazetted by the **CENTRAL BANK OF KENYA** and the **KENYA DEPOSIT INSURANCE CORPORATION**, which spelt out how the deposits previously held by Chase Bank (K) Limited were to be transferred to the Garnishee.

4. Secondly, it is the Applicant’s case that it does not hold, and has never held the sums sufficient to cover the decretal amount.

5. As and when all the money being held by the Garnishee, to the order of the Judgment-Debtor, will have been paid out, the Garnishee says that the amount will not exceed Kshs 6,108,138/=.

6. In principle, a Garnishee does not literally assume the liability of the Judgment-Debtor.

7. Ordinarily, a Garnishee is under an obligation to hand over to the Decree-Holder, the funds which the said Garnishee is holding to the order of the Judgment-Debtor.

8. The Decree in this case is said to be for sum of Kshs 8,295,054.50.

9. According to the Garnishee, it would be wrong to compel it to pay that sum, when it does not hold such an amount to the order of the Judgment-Debtor. As I understand it, that is the basis upon which the Garnishee has decided to challenge the decision of the learned trial magistrate, through an appeal.

10. And whilst awaiting the outcome of the said appeal, the Garnishee has asked this court to order that there be a stay of execution.

11. However, the Decree-Holder is of the considered view that this court lacks the jurisdiction to deal with this case.

12. The attention of the court was drawn to the fact that the Orders against which the Applicant intends to appeal was made under **Order 23 Rule 4** of the **Civil Procedure Rules**.
13. The Respondent submitted that an appeal could only lie to the High Court, if the Applicant herein had obtained leave to appeal.
14. But the Applicant was of the view that it did not require leave to appeal.
15. Whereas the Court is clothed with the requisite mandate to stay execution pending appeal, the said mandate is exercisable in accordance with the rules.
16. **Order 43** of the **Civil Procedure Rules** specifies that an appeal shall lie as of right from the Orders and Rules set out thereunder.
17. Bearing in mind that the Applicant's appeal arises from an order made under **Order 23 Rule 4** of the **Civil Procedure Rules**, the test for ascertaining whether or not the Applicant required leave to appeal is determined by looking through **Order 43 Rule 1**.
18. Having carefully perused **Order 43 Rule 1**, I found that appeals do not lie as of right from **Order 23 Rule 4** of the **Civil Procedure Rules**.
19. In this case there is a Memorandum of Appeal which bears a date stamp of 31st December 2019, as the date when it was lodged at the High Court.
20. If the said Memorandum of Appeal were to be struck out, there would be no pending appeal. However, for as long as the said Memorandum of Appeal remains on record, it is deemed to be the foundation upon which the appeal would be advanced.
21. Accordingly, although there is a possibility that the Memorandum of Appeal could be struck out in due course, the court cannot wish it away, at the moment.
22. I hold the considered view that the appeal is arguable, in relation to the difference between the decretal amount of Kshs 8,2295,054/= and the sum which the Garnishee acknowledges to be holding to the order of the Judgment-Debtor, (which is Kshs 6,108,138/=).
23. The Applicant expressed the readiness to deposit the sum of Kshs, 6,108,138/= within 30 days.
24. As there is no dispute about the right of the Decree-Holder to that amount of money, I find no reason why the garnishee ought not to settle it forthwith.
25. And whilst there may be an arguable appeal in relation to the sum of Kshs 2,186,916/=, **Order 41 Rule 4 (2)** of the **Civil Procedure Rules** stipulates that no order for stay of execution, pending appeal, shall be made unless security is provided for the due performance of the Decree.
26. As the Decree is for Kshs 8,295,054, security would, ideally, have to be provided for that sum.
27. But as I have already held, the Applicant is only appealing against a portion of the Decree.
28. Therefore, in the interests of Justice I now grant the following orders;

a. The Applicant shall pay to the Decree-Holder the sum of Kshs 6,108,138/= unconditionally, within the next SEVEN (7) DAYS.

b. The Applicant shall deposit the sum of Kshs 2,186,916/= in a Joint Interest- Earning Account within the next 10 DAYS.

The said Joint Account will be opened in the names of the Law Firms representing the respective parties herein.

c. In default, execution may issue.

d. Costs of the application dated 27th December, 2019 shall be in the cause, in the appeal. If the appeal succeeds, the Applicant shall also have the costs of the application.

But if the appeal is unsuccessful, for whatever reason, the Applicant herein will pay to the Respondents, the costs of the application.

DATED, SIGNED and DELIVERED at KISUMU This 15th day of April 2020

FRED A. OCHIENG

JUDGE