



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 91 OF 2019

CO-OPERATIVE BANK OF KENYA.....APPELLANT/APPLICANT

VERSUS

EUNICE MWIKALI NYAMAI

(Suing as the legal representative of the estate of) **STANLEY MWANIKI NYAMAI....1ST RESPONDENT**

INVESCO ASSURANCE CO. LTD.....2ND RESPONDENT

CO-OPERATIVE BANK OF KENYA.....GARNISHEE/APPLICANT

RULING

1. The application for determination is dated 09/12/2019. It was filed under certificate of urgency and is brought under, Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. It seeks the following orders;

a) Spent.

b) Spent.

c) That this Honorable court be pleased to grant a stay of proceedings of the decree absolute and the ruling of the trial court delivered on 04/12/2019 until the hearing and determination of this appeal.

d) That costs of the application be provided for.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Philip Musya advocate sworn on the same day. The principle ground is that there is a decree absolute from the trial court requiring the Applicant to satisfy the decretal amount of Kshs.3,538,559/= from account No. [...] which is a collateral account. The Applicant deposed that the trial court proceeded to issue the order despite being informed of the position and evidence having been adduced to confirm the same. The Applicant exhibited a personal current account statement as **PM-2** to show that the account has secured financial facilities advanced to the 2nd Respondent's (INVESCO) insured motor vehicle proprietors.

3. The Applicant also exhibited Insurance confirmation forms as **PM-3** to show that INVESCO had insured several motor vehicles through it. The Applicant is apprehensive that the decree holder will commence execution against it. The decree absolute and copy of memorandum of Appeal were exhibited as **PM-4** and **PM-5** respectively.

4. The application is opposed through the 1st Respondent's replying affidavit sworn on 17/01/2020 by Bernard Musembi advocate. The gist of the opposition is that that the application does not meet the conditions for grant of stay particularly the one requiring establishment of substantial loss if the orders are not granted.

5. It is also deposed that the Applicant has not approached this court in good faith for failing to disclose **Makueni high court judicial review No. 3 of 2019** where this court directed the parties to fix a date after declining to issue the orders. The 1st Respondent contends that no action has been taken to date and as such, the current application has been brought maliciously with the intention of frustrating her.

6. Directions were given that the Application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

7. On substantial loss, the Applicant submits that the accounts subject of these proceedings are [...] and [...] which are collateral accounts securing the bank's facilities advanced to motor vehicles insured by INVESCO. It contends that if the decree holder executes against it, the pending appeal will be rendered nugatory and in the event that the appeal succeeds, the Applicant will be greatly prejudiced.

8. The Applicant submits that this application was filed on 10/12/2019, six days after the ruling of the trial court and such, the application was filed without unreasonable delay. It submits that although the Respondents have not threatened any execution, it deemed it fit to file the application in order to preserve the status quo.

9. As for security, it submits that it does not bear any liability on the substratum of the trial because it was not a party in the trial court. It contends that its involvement in these proceedings is to illustrate to court the correct status of the subject accounts. Further, it contends that no evidence has been adduced to show that the Respondents are capable of refunding the monies. On the other hand, it submits that it is a reputable banking institution capable of complying with court orders if ordered to do so.

10. The 1st Respondent submits that real and cogent evidence must be placed before court to show how substantial loss will be occasioned. She submits that this court cannot know for a fact that the subject accounts are collateral and contends that they could be a decoy to aid in delaying payment. She relies *inter alia* on **Bungoma HC Misc Application No. 42 of 2011; James Wangalwa & Anor –vs- Agnes Naliaka Cheseto** where the Court held that;

“The Applicant must establish other factors which show that 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. This is what substantial loss would entail.”

11. She also cited the case of **Lesinko Njoroge Gathogo Advocates –vs- Invesco Insurance Company Ltd & Co-operative Bank of Kenya (Garnishee) (2019) eKLR** where this Court expressed itself as follows;

“What then is a collateral? Collateral is an asset pledged by a borrower to a lender, usually in return for a loan. The lender has the right to seize the collateral if the borrower defaults the obligation. Obvious forms of collateral include houses, cars, stock bonds and cash- all things that are readily convertible into cash to repay the loan.

From what has been placed before this court, there is cash in the two named accounts. Whose money is it? The Respondent and Garnishee have not clearly come out to explain what the money has been secured for. It is not enough to just come and make claims that an account is a collateral. It is not the duty of this court to investigate the same. The replying affidavit has not been of any assistance as all it says is that because the accounts are collateral, the money therein cannot be touched.

There must be proof of the collateral and what the collateral is for. If it is a loan or overdraft, it is money deposited in the Respondent's account and is therefore its money and subject to attachment under Order 23 Rule 1 and 2 Civil Procedure Rules.”

12. She submits that the Applicant is appealing against the lower court decision in which it was not a party and as such, the application and appeal are incompetent and should fail in their entirety.

13. She also submits that there is no indication that the Applicant is willing to furnish security and relies *inter alia* on; **Mary Mwaki Masinde –vs- County Government of Vihiga & 2 Others (2015) eKLR** where it was held that;

“The requirement for furnishing security is aimed at cushioning the successful litigant that should the appeal fail, there would be no difficulty in enforcing the order or executing the decree. The Applicant has not offered any security and has not even stated that it is willing to provide security should the court order for provision of such security. The Applicant has come to court as though stay of execution will be granted as a matter of course...”

14. She submits that the Applicant should be ordered to issue a bank guarantee or insurance bond equivalent to the decretal sum since it is still obligated to furnish security for the application to succeed.

15. Having considered the application, the supporting affidavit, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether the temporary stay orders should be confirmed.

16. It is evident that both parties appreciate the conditions which must be satisfied before stay orders are granted. It is however important to point out that this court has had the privilege of interrogating the subject accounts in several other applications.

17. In the **Lesinko Njoroge case (supra)**, this court delivered a ruling on **27/02/2020** for the application dated 22/08/2019 and declined to set aside the decree absolute previously issued against account No.s [...] and [...] belonging to INVESCO and domiciled in the Applicant. In those proceedings, there was an affidavit sworn by Rachael Kung'u on 06/08/2019 in which she deposed that she was a service Manager working at Co-operative Bank of Kenya at Kimathi Street Branch. She then exhibited a spreadsheet of 117 vehicles which were allegedly insured by INVESCO.

18. There was another affidavit sworn by Judy Nyawira on 04/11/2019 in which she deposed that she was the Branch Manager of co-operative bank at Kimathi street branch. She confirmed that INVESCO was the insurer of motor vehicles KCJ 975Z belonging to Webuye SACCO and KCK 139T belonging to Webuye Shuttle SACCO. The Insurance confirmation forms (**PM-3**) exhibited herein are for the aforementioned motor vehicles but the motor vehicles do not appear in the spread sheet.

19. The decree holder in those proceedings (*Lesinko Njoroge & Gathogo Advocates*) undertook an official search with Association of Kenya

Insurers (AKI) to verify whether INVESCO was the insurer of the motor vehicles in the spread sheet. From the exhibited search results, only 4 motor vehicles were insured by INVESCO and they do not include the two in **PM-3**. Accordingly, the Applicant cannot use **PM-3** as a basis to say that account No. [...] is a collateral account.

20. While dismissing the application dated 22/08/2019 in **Lesinko Njoroge case (supra)**, this Court expressed itself as follows;

“20. In the proceedings leading to the issuance of decree absolute, the concerned accounts were [...] and [...]...

21. Despite maintaining that the accounts are collateral, nothing new has been exhibited by the garnishee to warrant a change of mind by this court. In any case, the DH has gone to great lengths to demonstrate that the status of the concerned accounts has been fluctuating to suit the JD’s convenience and garnishee’s narrative....

28. From the foregoing, it is crystal clear that the garnishee has been working in cahoots with the JD and apart from totally abusing the court process; it has wasted precious judicial time and has been enjoying undeserved stay orders. For that, I do not see why it should not be condemned to pay the special damage of Kshs.56,840/= incurred by the DH.

21. Similarly, in the current application, it is the same old story of collateral accounts and the Applicant should realize that the chicken have come home to roost. The Applicant’s conduct is enough to repulse any court from exercising any discretion in its favour.

I find the application to be lacking merit and I dismiss it with costs. The orders herein are applicable in Makueni HCCA 90, 92, 93 & 94 of 2019.

Delivered, signed & dated this 12th day of May 2020, in open court at Makueni.

.....

H. I. Ong’udi

Judge