



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC APPEAL NO. 32 OF 2019**

**KIPLAGAT KOTUT.....APPELLANT**

**VERSUS**

**ROSE JEBOR KIPNGOK.....RESPONDENT**

**STANDARD CHARTERED BANK LTD.....GARNISHEE**

**RULING**

**[NOTICE OF MOTION DATED 10<sup>TH</sup> SEPTEMBER, 2019 BY THE APPELLANT]**

1. **Kiplagat Kotut**, the Appellant moved the Court through the Motion dated 10<sup>th</sup> September 2019, seeking for an order to preserve all balances in the Standard Chartered Bank, Garnishee's account No. 0100342888900, pending the hearing of the appeal. The application is supported by the affidavit sworn by **Jonah Kimutai Korir**, the Advocate for the Appellant, on the 10<sup>th</sup> September, 2019 and that of the Appellant sworn on the 13<sup>th</sup> March, 2020.

2. The application is opposed by **Rose Jebor Kipngok**, the Respondent through her undated replying affidavit filed on the 16<sup>th</sup> September, 2019.

3. The learned Counsel for Appellant and Respondent filed their written submissions dated the 13<sup>th</sup> March, 2020 and 18<sup>th</sup> May, 2020 respectively.

4. That the Appellant's case is that he was awarded costs of Kshs.390,425 in **C.A.C.A. No. 31 of 2015**, and that he applied for execution against the Respondent in **Eldoret High Court Misc. Application No. 145 of 2019**. That the Respondent raised objection and the Deputy Registrar struck out the application vide the ruling of 10<sup>th</sup> September, 2019. That the Appellant was aggrieved and filed this appeal and the application. That during the hearing of the execution proceedings before the Deputy Registrar, an order was issued on the 21<sup>st</sup> August, 2019 to the Garnishee to freeze the Respondent's account. That the Garnishee had furnished the Court with the statement on the Respondent's account showing account No. 010034288890 had Kshs.390,425 which is sufficient to settle the decretal sum. That the amount in the account should be preserved pending the determination of the appeal. That the learned Counsel for the Appellant further submitted that **Order 40 Rule (2) of Civil Procedure Rules** that provides for issuance of injunction order is relevant for preservatory orders. The Counsel also referred the court to the decision in the case of **International Air Transport Association & Another Vs Akarim Agencies Company Ltd & 2 Others (2014) eKLR** in support of their application.

5. That the Respondent's case is that the Appellant has attached other assets belonging to her and has not disclosed whether or not that execution was successful. That the application is aimed at causing her hardship. That the Appellant needed to approach the Court through a reference and not an appeal, and therefore the appeal is misplaced. The learned counsel for the Respondent submitted that the supplementary affidavit sworn by the Appellant dated the 13<sup>th</sup> March, 2019 was only attached to Counsel's submissions dated 13<sup>th</sup> March, 2020 and was never formally filed. That the said affidavit was filed without leave of the court. That the said affidavit was only certified before **Mr. Bernard Lagat** and not sworn before a Commissioner of Oaths. That the attachment to the supporting affidavit is not certified as required by **Section 80 of the Evidence Act**. That the Decree had been passed in **Eldoret ELC No. 691 of 2012** where it should be executed. That there was no need to file **Miscellaneous Application No. 145 of 2019**. That the Miscellaneous Application should be struck out.

6. That the learned Counsel for the Appellant filed a supplementary submission dated the 27<sup>th</sup> July, 2020 submitting that the garnishee proceedings are guided by **Order 23 of the Civil Procedure Rules**. That the rules do not required an Applicant to disclose the source of information. The learned Counsel referred to the case of **David Kimaiyo Vs Mercy Jebet Baswony & Another [2015] eKLR**, where G. W. Ngenye Macharia J, cited with approval **International Transport Association & Another Vs Akarim Agencies Company Ltd**. on the grounds guiding issuing of freezing orders. The Counsel further submitted that the Appellant supplementary affidavit was filed

electronically.

7. The following are the issues for the Court's determinations;

***(a) Whether the Appellant has made out a reasonable case for preservatory order to issue pending the hearing and determination of the appeal.***

***(b) Who pays the costs?***

8. The Court has carefully considered the affidavit evidence filed by both parties, the learned Counsel written submissions, the record, and come to the following determinations;

(a) That the record confirms that the Court delivered its ruling on the Respondent's preliminary objection dated the 16<sup>th</sup> September, 2019 on the 12<sup>th</sup> February, 2020 after which the Counsel for the Appellant applied for and was granted leave to file and serve a supplementary affidavit in seven days. That seven days from the 12<sup>th</sup> February, 2020 lapsed on or about 19<sup>th</sup> February, 2020. That there are two copies of the supplementary affidavit by Kiplagat Kotut, the Appellant, that are indicated to have been sworn on the 13<sup>th</sup> March, 2020. That the first copy is indicated to have been received by the Court on the 4<sup>th</sup> May, 2020, which is the same date the Appellant's submissions dated the 13<sup>th</sup> March, 2020 were received. The second copy was received on the 29<sup>th</sup> July, 2020 which is the same date the Appellant's supplementary submissions were received. That as the seven days granted on the 12<sup>th</sup> February, 2020 to file and serve the supplementary affidavit had lapsed on or about the 19<sup>th</sup> February 2020, and noting that no application for extension of the time was made or granted before or after the two copies of the supplementary affidavit described above were placed in the court file, then they were irregularly filed and improperly on record and should be struck out.

(b) That the Respondent's Counsel has also taken issue with the supplementary affidavit of the Appellant on the basis that they are merely attached or annexed to his learned Counsel's submissions and not formally filed. That the Appellant's Counsel has responded that the supplementary affidavit was electronically filed just like the Respondent's Counsel's submissions. That the court has again perused the court record and confirmed that the copies of the supplementary affidavit and Appellant's submissions dated, stamped by the registry on the 14<sup>th</sup> May, 2020 are not accompanied with any documentary evidence of payment of the requisite fees. That the copy of the supplementary affidavit, Appellant's submissions and Appellant's supplementary affidavit date stamped by the court on 29<sup>th</sup> July, 2020 are accompanied with a copy of an electronic acknowledgement of registry assessment of Kshs.75 for "***supplementary submissions***" and payment thereof through Mpesa. That out of the three documents date stamped 29<sup>th</sup> July, 2020, only the Appellant's supplementary submission was paid for and the other two documents should be struck out for being improperly and irregularly on record.

(c) That under paragraph 6 (c), of the ruling of the Court delivered on the 12<sup>th</sup> February 2020, paragraphs 5 and 8 of the supporting affidavit sworn by **Jonah Kimutai Korir**, Advocate on 10<sup>th</sup> September, 2019 were struck out. That the attempt by the Appellant's Counsel to address the gap left through the Appellant's supplementary affidavit has flopped in view of the findings above that it was not filed within the time given, and that the filing fee has not been made. That what was left of the supporting affidavit is evidently insufficient to base the application for the preservatory order sought under **Order 40 Rule 2 of Civil Procedure Rules.**

(d) That the court hopes that the Appellant will give serious consideration to the court's observation at paragraph 6(d) of the ruling of 12<sup>th</sup> February, 2020 that "***the Applicant should have moved the court through the record of the original suit, being Eldoret ELC No. 691 of 2012 to execute the decree on costs...***" as he takes the next step after this ruling.

(e) That the Respondent having filed their replying affidavit and written submissions in opposition to the Motion is entitled to costs of the application in terms of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya.**

9. That flowing from the foregoing, the Court finds that the Appellant's Motion dated the 10<sup>th</sup> September, 2019 has no merit and is dismissed with costs.

Orders accordingly.

**Delivered virtually and signed at Eldoret this 14<sup>th</sup> day of October, 2020**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Applicant: Absent.

Respondents: Absent.

Counsel: Dr. Chebii for Defendants/Respondents.

Court Assistant: Christine

and is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.