

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**(CIVIL DIVISION)**  
**CIVIL APPEAL NO. E184 OF 2025**

**KCB BANK KENYA LTD**  
.....**APPELLANT/APPLICANT**

**VERSUS**

**AFRICA MERCHANT ASSURANCE CO. LTD.....1<sup>ST</sup>**  
**RESPONDENT**

**ARNOLD MUMBA DANDA .....2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

1. In a decision delivered on 17<sup>th</sup> June 2025, the learned trial magistrate made the garnishee order nisi in respect of the proceedings in the trial court absolute. The ruling was delivered in **Mombasa CMC Civil Case No. E1391 of 2024; Arnold Mumba Danda v Africa Merchant Assurance Co. Ltd & KCB Bank Kenya.**
2. Vide the said garnishee order absolute, the applicant was required to pay the 2<sup>nd</sup> respondent the sum of **Kes.466,662/-**. The appellant /applicant avers that it should not be its duty to pay the 2<sup>nd</sup> respondent, on behalf of the 1<sup>st</sup> respondent, “beyond what it holds to the credit of the 1<sup>st</sup> respondent/judgment debtor.” It was further urged that the trial court ought to have ordered that the question of payment

be tried and determined first before the order nisi could be made absolute.

3. The application for stay of execution pending appeal is opposed. The 2<sup>nd</sup> respondent filed a replying affidavit sworn on 4<sup>th</sup> July 2025, vide which it was averred that the appeal was incompetent as no leave to appeal was sought and obtained as required by Order 43 of the Civil Procedure Rules and section 75 of the Civil Procedure Act. The 2<sup>nd</sup> respondent also averred that the appellant/applicant hadn't met the test under Order 42 Rule 6 of the Civil Procedure Rules, as it had not given an undertaking for the due performance of the orders that may ultimately be binding on it, once the appeal is heard and determined.
4. I have perused the application, the response thereto, as well as the submissions of the parties. It would appear to me that the two issues for consideration by the court are:-
  - a. Whether leave to appeal against the decision of the court in garnishee proceedings is required; and
  - b. Whether a stay of execution should issue.
5. Is leave required? Order 43 rule 1 (1) (l) of the Civil Procedure Rules provides that: -

**“An appeal shall lie as of right from the following orders and rules under the provision of section 75 (1) (b) of the Act: -**

...

**(l) Order 23, rule 7 (trial of claim of third person in attachment of debt.”**

6. My understanding of the decision of the court below is that it was made in respect of an application to make a garnishee order nisi absolute. In my view, therefore, the decision fell within the ambit of Order 43 rule 1 (1) (l) of the Civil Procedure Rules. In such circumstances, no leave was required.

7. Order 42 Rule 6 (2) of the Civil Procedure Rules states that:-

**“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. My understanding of the said rule is that an applicant must show: -

- a. That it will suffer substantial loss unless a stay is granted;
- b. That the application was filed without undue delay; and
- c. Provide security for the due performance of any order/decreed that may ultimately be binding on it.

9. What amounts to a substantial loss has been defined in a number of cases. In **JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO [2012] KEHC 1094 (KLR)**, Gikonyo, J stated as follows: -

“11.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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

*“...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.”*

10. If a stay is not granted, the appellant/applicant will be required to pay **Kes.466,662/-** to the 2<sup>nd</sup> respondent. The means of the 2<sup>nd</sup> respondent, and his ability to repay the said amount if the appeal is successful, are not known. In my view, not staying execution exposes the appellant/applicant to substantial loss.
11. There is no doubt that the application was filed without undue delay. Further, this court has discretion to impose a condition for granting a stay.
12. In my view, the application has merit. I allow the application dated 25<sup>th</sup> June 2025 on condition that the decretal sum of **Kes.466,662/-** be deposited in a joint interest-earning account in the name of both parties' counsels within 30 days of the date thereof.
13. The costs of the application will be costs in the cause.
14. It's so ordered.

**Dated and signed in Mombasa, this 27<sup>th</sup> day of October 2025.**

**Delivered** virtually through **Microsoft TEAMS.**

**Gregory Mutai**

## JUDGE

In the presence of: -

No appearance for the Appellant/Applicant;

No appearance for the 1<sup>st</sup> Respondent;

Mr Akanga for the 2<sup>nd</sup> Respondent; and

**Arthur –Court Assistant.**

Original