



**City Council of Nairobi v Asistiba & another; Co-operative Bank of Kenya (Garnishee)
(Civil Application E268 of 2021) [2021] KECA 116 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 116 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E268 OF 2021
J MOHAMMED, A MBOGHOLI-MSAGHA & HA OMONDI, JJA
OCTOBER 22, 2021**

BETWEEN

CITY COUNCIL OF NAIROBI APPLICANT

AND

PATRICK ASISTIBA 1ST RESPONDENT

PHANICE ONDECHE ASTHIBA 2ND RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA GARNISHEE

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the order of High Court of Kenya at Nairobi (Sergon J.) dated 22nd day of July, 2021 in H.C.C.C. No. 1115 of 2003)

RULING

1. The respondent's property was sold by way of public auction at the instance of the applicant. The respondents then sued the applicant claiming damages following that auction. By a judgment dated 17th October, 2017 the High Court (Sergon, J.) found in favour of the respondents by declaring that the sale was unlawful and that the applicant should pay the sum of Ksh. 12,000,000/- to the respondents being the estimated value of the said property. The respondents were also granted the costs of the suit.
2. Following that judgment, the respondents moved the court by way of Judicial Review and obtained an order of mandamus on 7th December, 2018. This was followed by notices to show cause against officers of the applicant upon which warrants of arrests were issued. The said officers were to be arrested for contempt of court and that led to some negotiations between the parties with a view to settling the matter. In the meantime, the applicant lodged an appeal contesting the amount of money which the



respondents were claiming. It was contended that the decree was limited to Kshs.12,000,000/= yet the respondents were claiming Kshs.17,262,904.11.

3. While the execution proceedings were going on against the officers of the applicant as set out above, the respondents filed an application against the applicant seeking to attach the accounts held by Co-operative Bank of Kenya and National Bank of Kenya. On 22nd July, 2021, Serгон J. made an Order Nisi in favour of the respondents against the applicant's account held by Co-operative Bank of Kenya while at the same time discharging National Bank of Kenya.
4. The applicant then moved the court to ask for stay of execution under Rule 5 (2) (b) of the Court of Appeal Rules and Sections 3A and 3B of the *Civil Procedure Act* while at the same time asking for injunction orders to restrain the respondents from garnishing the account as set out above. The application is opposed and interim stay was granted by this Court on 7th September, 2021 pending the delivery of this ruling.
5. The applicant must present an arguable appeal and also establish that the appeal shall be rendered nugatory if the order sought is not given. In addressing the issue, the Court has to consider the positions of both sides. The contention in our view is whether, the respondents are entitled to the amount claimed or only what was set out in the decree. In our view that is an arguable point. There is also the contention that has been raised by the applicant to the effect that no execution may be levied against the applicant on the basis that a County Government is equivalent to the National Government upon which such step may not be taken. – see *Kennedy Wainaina Nganga vs. County Government of Nairobi and Another (2019) eKLR* and *Kilimanjaro Safari Club Limited vs. Governor of Kajiado County (2014) eKLR*. If not restrained, the amount will be paid and there is no guarantee that the respondents have the capacity to refund the same if the appeal succeeds. In that case the appeal will be rendered nugatory. See – *Stanley Kangethe Kinyajui vs. Tony Ketter & Others (2013) eKLR*.
6. We are therefore inclined to allow the application and order that there shall be a stay of execution of the order nisi of the High Court given on 22nd July, 2021 directed to the garnishee (the Co-operative Bank of Kenya Limited) while at the same time observing that, parties should not initiate parallel execution proceedings, like in the instant case, where there are running and live execution proceedings against the same applicant.
7. The costs of this application shall abide by the outcome of the appeal.

DATED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

**I certify that this is a true
copy of the original.**



Signed

DEPUTY REGISTRAR

