



Archdiocese of Kisumu Catholic Church v Makodiembo (Environment and Land Appeal E008 of 2023) [2024] KEELC 4448 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4448 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

E ASATI, J

MAY 30, 2024

BETWEEN

THE ARCHDIOCESE OF KISUMU CATHOLIC CHURCH APPELLANT

AND

EUSEBIUS RAMOGY MAKODIEMBO RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 14th August, 2023 brought by the Appellant pursuant to the provisions of Section 79G and 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 42 Rule 6, Order 10 Rule (11) of the [Civil Procedure Rules](#) and Article 159 of the [Constitution](#) of Kenya 2010. The application seeks for orders that;
 - a. this application be certified urgent and heard *ex-parte* in the first instance.
 - b. there be a stay of execution of the ruling and orders issued on 11th August, 2023 in the lower court civil case No.426/2018 Eusebius Ramogy Makodiembo Vs The Archdiocese Of Kisumu Catholic Church by Honourable D.O. Onyango – Chief Magistrate and any other subsequent orders pending the hearing and determination of the High Court Civil Appeal No. ELCA.E008/2023.
 - c. that there be a stay of execution of the ruling and orders of Honourable D.O Onyango – Chief Magistrate delivered in the lower court civil case number 426/2028 on 29th June, 2023 pending the hearing and determination of this application interpartes.
 - d. this honourable court be pleased to set aside the orders of Hon. D.O. Onyango – CM of 11th August, 2023 in Civil case number 426/2018 on 29th June, 2023 pending the hearing and determination by a different Magistrate of competent jurisdiction.



- e. Or in the alternative, this honourable court be pleased to hear, and review the application of the judgement creditor/respondent dated 25th July, 2023 and make its own finding thereto.
 - f. The costs of this application go to the applicant in any event.
2. The grounds upon which the application was brought are that Hon. Onkunya (Senior Resident Magistrate) delivered a ruling wherein she ordered for the Judgement Creditor/Respondent herein to Garnishee the Judgement Debtor's account number 00xxxx1001 with the garnishee bank. That on 25th July, 2023 the judgement creditor's advocates filed an application under Certificate of Urgency to review, set aside and allow all accounts held by the judgement-debtor in the garnishee bank to be attached to settle the decretal sum. That the judgement-debtor was not served with the application. That the trial court heard the application *ex-parte* and delivered its ruling on 11th August, 2023 setting aside the orders of Hon. Onkunya and substituted them with the orders that all known and unknown accounts of the Judgement Debtor with the garnishee bank be attached to settle the decretal sum. That on 12th August, 2023, the firm of Owiti, Otieno and Ragot advocates wrote to the garnishee bank demanding the garnishee amount plus untaxed costs of Kshs.50,000/= and unawarded interest of kshs.508,668.20 within 12 hours. That execution may take place any time. That the Judgement Debtor has filed a Memorandum of Appeal.
 3. The application was supported by the contents of the Supporting Affidavit sworn by Rev. Father Vincent Ouma Odundo on 14th August, 2023 and the annexures thereto.
 4. The application was opposed *vide* the contents of the Replying Affidavit sworn by Jude Ragot Advocate on 19th September 2023. The Respondent's case is that there is so far no appeal against the Judgement and Decree in the lower court case. That the Garnishee Order Absolute dated 29th June, 2023 and as reviewed on 11th August, 2023 has been settled by the garnishee bank save for the sums of Kshs.50,000/- and Kshs.508,668.20 whose payment was stayed by order of this court on 15th August, 2023. That the only outstanding issue is computation of the figures of Kshs.50,000 and Kshs.508.668.20 as set out in the Respondent's letter to the garnishee bank dated 12th August, 2023 and whether the said amounts are legitimately executable under the Decree and the Garnishee Order Absolute within the meaning of the provisions of Order 22 and Order 23 of the [Civil Procedure Rules](#) and Section 34 of the [Civil Procedure Act](#).
 5. Further that the court as an Appellant court lacks jurisdiction to hear and determine the dispute on the amounts. That similarly, the court will not have jurisdiction to hear and review the Judgement Creditor's application dated 25th July, 2023 as prayed in the alternative prayer of the application. That the decree awarded interest on the principle sum from the date of filing the suit to the date of payment of the same together with costs of the proceedings as awarded in the decree and the Garnishee Order Nisi and Garnishee order Absolute computed at 14%.
 6. The application was argued by way of written submissions. Written submissions dated 16th October, 2023 were filed by the firm of N.A. Owino and Company Advocates for the Applicant. Counsel submitted that this is an application for stay of execution pending appeal for which the applicant, under Order 42 Rule 6(1) and (2) [Civil Procedure Rules](#), only needs to prove that substantial loss will occur if stay is not granted, that the application has been filed timeously and that the appeal is arguable. That the appellant is challenging the procedure adopted by the Decree Holder in obtaining and executing the Decree Nisi.
 7. Counsel submitted that the other issue is whether the Decree Holder has a right to personally and individually award himself additional monies not provided for in the Decree and to proceed to execute



the Decree Nisi for the same. That there is need to stay the proceedings. That if the stay order is not granted, the decree holder will proceed to execute against the garnishee on the colossal sum of Kshs.550,000/-. Counsel relied on the cases of *Ena Investment Limited -vs- Benard Ocham Moses and Jane Bosibori Ocham* [2022]eKLR and *Peter Nakupang Lower-v- Nautu Lower* [2022]eKLR to submit that the subject matter had to be preserved to avoid the Appellant suffering losses and damages in case the appeal succeeded.

That the Appellant has met the conditions in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*.

8. Relying on the provisions of Section 13(1) and (4) of the *Environment and Land Court Act* and the case of *Samuel Kamau Macharia & Arthur -vs- Kenya Commercial Bank Limited and 2 others* (2012)eKLR, Counsel submitted that the court has jurisdiction to hear the appeal and the application and discretion to grant the orders of stay of execution pending appeal.
9. *Vide* the further written submissions dated 6th February, 2024 Counsel for the Applicant submitted further that the authorities cited by the Respondent on jurisdiction are quoted out of context. That the Appellant did not need leave to file the appeal under Section 75(1) of the *Civil Procedure Act*. That the Applicant has complied with Order 42 Rule 6 of the *Civil Procedure Rules*. That order 43 Rule 1 quoted by Counsel for the Respondent is irrelevant. That under Order XXII Rule 7, proceedings and orders made to a Garnishee in execution of decree can be set aside or varied and the decree reversed despite the Garnishee making the payments.
10. On behalf of the Respondent, written submissions dated 30th January, 2024 were filed by the firm of Owiti Otieno & Ragot Advocates. Counsel submitted that the application for stay of execution was not against the Judgement/Decree of the subordinate, that the application seeks stay of execution of an order of Garnishee Absolute issued on 11th August, 2023.
That there is no appeal against the judgement and decree.
11. Counsel submitted that both the appeal and the application have challenged the manner in which the Respondent in executing Garnishee Order Absolute reviewed on 11th August, 2023 has computed interest on the decree from the initial sum of Kshs.10,900,032.67. That additional interest thereon expressed to be for 4 months at 14% per annum arising from the period between 14th April, 2023 when the Garnishee Order Nisi had been issued and to the date of issuance of the Garnishee Order Absolute on 11th August, 2023 at a sum of Kshs.508,668.20 and an estimated sum of Kshs.50,000/- on costs of the Garnishee proceedings.
12. Counsel submitted further that before the court entertains an application for stay of execution under Order 42 Rule 6, there must be an appeal in relation to which the order of stay is sought. That the only outstanding prayer worthy being considered is prayer 2 of the application. That the applicant has not satisfied the test in Order 42 Rule 6(2) of the *Civil Procedure Rules*. That for a party to demonstrate substantial loss and proof of sufficient cause for grant of the order for stay of execution, the party must demonstrate that it has a genuine and automatic right of appeal. That there has been no leave granted to the applicant to file the instant appeal. That hence the application ought to be dismissed as there is no appeal which can constitute the basis of considering the application for stay of execution.
13. I have considered the application and the Replying Affidavit. I have also considered the rival submissions filed by the parties herein and the authorities cited. The substantive prayers in the application is for an order of stay of execution of the orders of the trial court dated 11th August, 2023.
The copy of Memorandum of Appeal attached to the Supporting Affidavit shows that the appeal is against the same orders and ruling dated 11th August, 2023.



A copy of the order dated 11th August, 2023 by Hon. D.O. Onyango – Chief Magistrate attached to the Supporting Affidavit reads;

“ that the ruling of this Honourable Court delivered on 29th June, 2023 is hereby reviewed, set aside and varied by correcting the error apparent on the face of the record in the portion of the Ruling in which the court directed that execution to issue against the Garnishee account No.0010061001 and in its place, the Garnishee Order Nisi issued on 14th April, 2023 is made absolute and execution to issue against the Garnishee on that account along with any other accounts held by the Judgement Debtor as set out in the Decree- Holder’s Notice of Motion application dated 13th April, 2023. That the Decree Holder shall have the costs of the application.”

14. It is clear that all that the order of 11th August, 2023 did was to include other accounts held by the Judgement Debtor with the garnishee bank to be accounts against which the execution could take place or account from which the decretal sum was recoverable. Whether this was erroneous or not is the subject of the appeal.
15. There is no dispute that there is no appeal against the judgement/decreed the subject of the execution. There is also no appeal against the orders of 29th June, 2023 that allowed the garnishee application and issued the Garnishee Order Nisi.
16. The grounds for issuance of an order of stay of execution as provided for in O.42 Rule 6(2) of the *Civil Procedure Rules* are; prove that the applicant will suffer substantial loss if the order of stay of execution is not granted, that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given, and that the application is brought without unreasonable delay. Order 42 Rule 6(2) provides that:
 - “No order for stay of execution may be made under sub rule (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.”
17. The first ground is that substantial loss will result to the applicant if the order sought is not granted. This has not been demonstrated herein. The decision whose execution is sought to be stayed is the order of 11th August, 2023 as already stated. It has not been demonstrated that garnishee proceedings can only apply to one bank account. It has not been denied that the execution has already taken place. It is the Respondent’s case that save for the sums of Kshs.508,000 and Kshs.50,000/- being interest and costs whose payment was stayed by this court at the first instance, the decree has been settled. No security or undertaking to provide security has been given. I find that the grounds set out in order 42 Rule 6 for grant of orders of stay of execution have not been demonstrated.
18. This court was approached by way of an appeal. Computation of further interest on the decretal sum and costs of the garnishee proceedings are matters in the original jurisdiction of the trial court. No decision has been made by the trial court on the same for consideration on appeal. The applicant stated that the amounts complained of were contained in a letter by the Respondent’s advocates to the applicant. The same applies to prayers 4 and the alternative prayer in the application.



19. In conclusion this court finds that the application has no merit. The application is dismissed. Costs to abide the appeal.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 30TH DAY OF MAY, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

N. Owino for AppellantApplicant.

Atieno h/b for Ragot for the Respondent.

