



Hadi & another v Diamond Trust Bank Kenya Limited (Environment and Land Case 102 of 2019) [2024] KEELC 4617 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 102 OF 2019**

**SM KIBUNJA, J
JUNE 12, 2024**

BETWEEN

FATMA HASSAN HADI 1ST PLAINTIFF

DIAMOND TRUST BANK KENYA LIMITED 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED DEFENDANT

RULING

1. Vide the notice of motion dated 20th February 2024, brought under Order 42 Rule 6 of *Civil Procedure Rules*, and sections 1A, 1B 3A & 63(e) of *Civil Procedure Act*, Diamond Trust Bank Kenya Limited, the defendant in the main suit, and plaintiff in the counterclaim, hereinafter referred to as the plaintiff, sought for stay of further proceedings in this matter, pending the hearing and determination of CACA No. E161 of 2023; *Diamond Trust Bank Kenya Limited versus Godfrey Mutubia & Another*. The application is premised on the fourteen grounds on its face marked (a) to (n) respectively and supported by the supporting and supplementary affidavits of Joram Kilwanda, legal officer with the plaintiff, sworn on the 20th February 2024 and 2nd April 2024 respectively.
2. The application is opposed by Godfrey Mutubia, the 5th defendant in the counterclaim, hereinafter referred to as the defendant, through his replying affidavit sworn on the 13th March 2024.
3. On the 8th April 2024, the court issued directions on filing and exchanging submissions. Subsequently, the learned counsel for the plaintiff and defendant filed their submissions dated the 25th April 2024 and 2nd May 2024 respectively, which the court has considered.
4. The issues for the determinations by the court are as follows:
 - a. Whether the plaintiff has met the threshold for stay of proceedings in this matter pending the hearing and determination of the pending appeal.



- b. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel and come to the following conclusions:
- a. That it is not in dispute that this court's ruling of 25th July 2023 is the subject matter of Mombasa CACA No. E161 of 2023, that is evidently pending before the Court of Appeal.
 - b. It is also not disputed that after the ruling of 25th July 2023, the defendant filed Party to Party bill of costs dated the 6th December 2023, and notice of taxation dated 19th December 2023 for 28th February 2024 was issued.
 - c. After the instant application dated 20th February 2024 was filed, interim stay orders in terms of prayer 2 was granted on the 27th February 2024. When the bill of costs came up for taxation on the 28th February 2024 as earlier fixed, that fact was brought to the attention of the Deputy Registrar/Taxing Officer, and taxation was accordingly stayed.
 - d. That though the plaintiff's contention that their appeal has been admitted has not been challenged, Order 42 Rule 6(1) of *Civil Procedure Rules* is clear that "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order...." The proceedings pending before this court are the taxation of the defendant's Party to Party bill of costs before Deputy Registrar, and the anticipated execution thereof. That is what the plaintiff appears intent at staying.
 - e. That as the taxation is yet to take place, and the defendant cannot yet initiate any execution until after the taxation is done and certificate of taxation issued, I see no good cause to stay the proceedings herein. There is no harm or prejudice to be suffered by any party if the taxation is allowed to proceed as the parties pursue the pending appeal. However, it is only fair and just that there be no execution of the costs taxed before the pending appeal is heard and determined.
 - f. Section 27 of the *Civil Procedure Act* is clear that costs follow the events unless otherwise ordered by the court on good reasons. Considering the matter pending before the Court of Appeal has a bearing on the issue of costs between the two parties, I am of the view that costs in the application abide the outcome of the pending appeal.
6. That flowing from the above conclusions, the court finds and orders as follows:
- a. That the application dated the 20th February 2024 is without merit and is hereby dismissed.
 - b. The costs to abide the outcome of CACA No. E161 OF 2023 that is between the parties.
 - c. That for avoidance of doubt, the Deputy Registrar/Taxing Officer be at liberty to proceed with the taxation of the defendant's Party to Party bill of costs dated the 6th December 2023.
 - d. However, any execution thereof to be held in abeyance pending the hearing and determination of the aforementioned appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF JUNE 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of:



Plaintiff :Mr Janjo.

Defendant :Mr Ananda

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

