



Diamond Trust Bank (K) Limited v Muriithi & another (Civil Miscellaneous Application E007 of 2023) [2025] KEHC 9850 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 9850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL MISCELLANEOUS APPLICATION E007 OF 2023
DO CHEPKWONY, J
MARCH 28, 2025**

BETWEEN

DIAMOND TRUST BANK (K) LIMITED APPLICANT

AND

PETER MBAKA MURIITHI 1ST RESPONDENT

XPLICO INSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

1. This is a ruling to determine the Notice of Motion application dated 4th December, 2023 filed pursuant to Order 42 Rule 6, Order 50 Rule 5 of the Civil Procedure Rules, Sections 1A & 3A of the [Civil Procedure Act](#) in which the Applicant seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That this Honourable Court be pleased to grant the Applicant leave to appeal the ruling dated 7th June, 2023, dismissing its application dated 21st July, 2022 out of time.
 - e. That pending hearing and determination of the Applicant's intended appeal, the Honourable Court be pleased to stay the execution of the dated 10th February, 2022 issued against the Applicant pursuant to the 1st Respondent's garnishee application dated 29th January, 2020 filed in Kiambu CMCC No. 526 of 2019.



- f. That the costs of this application be provided for
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Jennifer Thiga the Legal officer of the Applicant sworn on the instant date as follows:-
- a. “The 1st Respondent served the Applicant with a Notice to Show Cause dated 19th October, 2023 in execution of the garnishee order absolute of Kshs. 1,659,888.00.
- b. Upon receipt, the Bank perused the court file and noted that vide a ruling delivered on 7th June, 2023, the court dismissed the Applicant’s application dated 21 July 2022, seeking to set aside the garnishee order absolute dated 10th February, 2022 issued against it vide the garnishee application dated 29th January, 2020.
- c. After inter parties hearing, the court scheduled its ruling for 15th February, 2023 but was not delivered on the said date and parties were informed that the ruling would be delivered on notice.
- d. The Applicant remained unaware of the ruling as no notice was served until 20th October, 2023 when served with the Notice to Show Cause dated 30th October, 2023 which was scheduled for hearing on 13th December 2023.
- e. As it was absent on 7th June, 2023, it did not seek a stay of execution and as a result, the 1st Respondent is at liberty to proceed with execution of the garnishee order absolute dated 10th February, 2022.
- f. The Applicant is aggrieved and wishes to appeal the ruling to the High Court with leave as it is out of time, albeit not as a result of any fault of its own or that of its advocates on record.
- g. The Applicant has an arguable appeal which it seeks an opportunity to ventilate, failure to which it shall forever have been driven away from the seat of justice.
- h. The Applicant is ready and willing to comply with any conditions this Court will give in the circumstances.
- i. As such, to protect the subject matter of this application and the Applicant’s right to fair hearing, it is in the interest of justice that this court certifies the application filed herewith urgent and grants the preservative orders sought therein.”
3. Essentially, the Applicant has averred that it was not aware of the delivery of the Ruling and being aggrieved, it has raised several grounds of appeal which it holds are arguable and thus requires leave to appeal out of time. It is the Applicant’s case that if the Respondent is allowed to proceed with execution it will be irreparably prejudiced for the reasons that:-
- a. Its intended appeal which contests its liability to settle the garnishee order absolute dated 10th February, 2020 shall be rendered nugatory and a mere academic exercise;



- b. Should this application succeed and the garnishee order absolute is set aside, the garnishee application dated 19th January, 2022 shall have been summarily dispensed, making it redundant to file a replying affidavit;
 - c. The Bank is a stranger to and unaware of the 1st Respondent's financial capability. As such, it is apprehensive that should its intended appeal succeed, he will be unable to refund the sums paid by the Bank.
4. The Applicant therefore urges the court to allow the application as prayed so that it is given a chance to prosecute the appeal on its merits.
5. The Application is opposed through the Replying Affidavit of Peter Mbaka, the Respondent herein sworn on 16th January, 2024 on the grounds that the same is frivolous, vexatious and abuse of court process, made as an afterthought. The Respondent holds that the Applicant was served with the Notice to Show Cause which was scheduled for hearing on 13th December, 2023 but there was no appearance of the Applicant, and thus the court proceeded to allow the same.
6. The 1st Respondent has also averred that although the Applicant claims that it was not aware of the delivery of the Ruling, the same was slated for 15th February, 2023 but was not delivered since the parties were absent and it was indicated that it would be delivered on notice. Therefore, the Applicant was required to follow up with the registry on the same and on this, the 1st Respondent has relied on the equity maxim that equity aids the vigilant and not the indolent.
7. The 1st Respondent further states that the Applicant cannot use the restructuring an overhaul of its firm's business as an excuse for the delay, and submits that the application is an afterthought and ought to be dismissed. He holds that the garnishee absolute was regularly issued since litigation must come to an end. It is the 1st Respondent's contention that although the power of the court to grant stay orders is discretionary, the same should not be used to obstruct or delay the course of justice. He has thus urged the court to dismiss the application dated 4th December, 2023 with costs.
8. The court directed the application to be disposed of by way of written submissions and it has confirmed the Applicant's submissions dated 7th March, 2024 and the Respondent's submissions dated 2nd July, 2024 as filed.

Determination

9. Having read the Notice of Motion application, the Replying Affidavit and the submissions, this court finds that the main issues for determination are:-
 - a. Whether the court should allow the application and grant the orders sought on leave to appeal out of time and stay of execution orders.
10. With regard to leave to appeal out of time, it is trite that an appeal to this court ought to be filed within thirty (30) days and such time may be enlarged as provided for under Section 79G of the [Civil Procedure Act](#) as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:



Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

11. The various factors which a court ought to consider in granting leave to appeal out of time were expounded in the case of *Edith Gichungu Koine –vs- Stephen Njagi Thoithi* [2014]eKLR as follows,

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
12. These factors were also discussed by the Court of Appeal in the case of *Thuita Mwangi –vs- Kenya Airways Ltd* [2003] eKLR. as follows:-
 - “ i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.”
13. In this instant case, it is the Applicants’ argument that it was not aware of the Ruling of the trial court delivered on 7th June, 2023 which dismissed the Applicant’s application dated 21st July, 2022. According to the Applicant, this ruling was not delivered on the day it was slated to be delivered on the court indicated that this would be done on notice which notice was never served upon them.
14. A reading of the application dated 21st July, 2022 by the Applicant which sought to have the garnishee absolute set aside, indicates that in the Ruling dated 7th June, 2023, the trial court points out that the argument of restructuring the firm business by the Applicant was inexcusable and dismissed the same. The Respondent then filed a Notice to show Cause dated 19th October, 2023 despite adequate notice issuing on the same, the Applicant failed to attend court on 13th December, 2023 when the matter was scheduled for hearing. The court then proceeded to allow the Notice to Show Cause upon considering the conduct of the Applicant which it found was indeed indolent in the matter.
15. In considering whether or not to grant the Applicant leave to appeal out of time, the grounds of the intended appeal and finds the same arguable as they are to the effect that the Applicant is unable to satisfy the decretal sum given that the balance of the Judgment Debtor is insufficient. Accordingly, the court finds that if execution is to proceed, it will render the appeal nugatory hence there is need to preserve the same.
16. For these reasons the court proceeds to allow the Notice of Motion application dated 4th December, 2024 in the following terms:-
 - a. The Applicant be and is hereby granted leave to appeal out of time.



- b. The Applicant to file and serve its appeal within thirty (30) days from the date hereof.
- c. Subsequently, in exercise of this court's discretion, there be a stay of execution pending the hearing and determination of the intended appeal.
- d. Mention on 6th May, 2025 for parties to confirm compliance and take further directions.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF MARCH 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Wambui holding brief for Mr. Njguna counsel for Respondent

Court Assistant - Martin

