REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 89 OF 2020

DIAMOND TRUST BANK LIMITED.....APPLICANT

VERSUS

INVESCO ASSURANCE CO. LTD.....1ST RESPONDENT

KENNEDY MASESE NYAIGOTI.....2nd RESPONDENT

RULING

1. Through a Notice of Motion application dated 26th May, 2020 brought under the provisions of Order 22 rule 22, Order 42 rule 6, Order 51 rule 1 of the Civil Procedures Rules, Sections 75(1), 3A of the Civil Procedure Act and all other enabling provisions of the law, the applicant prays for the following orders-

(i) Spent;

(ii) That this Honourable Court be pleased to grant a stay of execution of the ruling and subsequent Garnishee Order Absolute issued on the 13th May, 2020, pursuant to the garnishee application dated 19th December, 2020 in Kilifi CMCC No. 153 of 2017: Kennedy Masese Nyaigoti vs Invesco Assurance Company Limited & Another, pending the hearing and determination of the applicant's intended appeal;

(iii) That this Honourable Court be pleased to grant leave to the applicant herein to appeal the ruling and Garnishee Order Absolute issued on the 13th May, 2020 pursuant to the garnishee application dated 19th December, 2020 in Kilifi CMCC No. 153 of 2017: Kennedy Masese Nyaigoti vs Invesco Assurance Company Limited & Another;

(iv) That this Honorable Court be pleased to give any such other and/or further order(s) as it may deem fit; and

(v) That the costs of this application be in the cause.

2. The application is supported by the affidavit of Francis Kariuki, a Legal Officer of the applicant, sworn on 26th May, 2020. On 14th July, 2020, the 2nd respondent filed a replying affidavit, sworn on 6th July, 2020. The applicant thereafter filed a supplementary affidavit on 21st October, 2020 sworn on 12th October, 2020 by Jennifer Thiga, a Legal Officer with the applicant.

3. In written submissions filed on 21st October, 2020 on behalf of the applicant, it was submitted that the 1st respondent failed to settle its Judgment debt and that in execution of his decree, the 2nd respondent filed a garnishee application dated 19th December, 2020 seeking orders compelling the applicant to settle his decretal sum from the 1st respondent's account No. 0002291014. It was

stated that the applicant duly responded to the said application through a replying affidavit filed on 12th February, 2020 after which parties were directed to file their respective submissions and the court scheduled its ruling for 8th April, 2020. It was further stated that the ruling was not delivered on the said date due to restrictions on open court proceedings as a result of the outbreak of covid-19.

4. It was indicated that neither the applicant nor its Advocates on record were served with the 2nd respondent's submissions or notified of the new date for delivery of the ruling. It was submitted that through an email dated 19th May, 2020 from Kilifi Law Courts, the applicant's Advocates were notified of the ruling which had been delivered on 13th May, 2020 allowing the 2nd respondent's garnishee application dated 19th December, 2019.

5. The applicant's Counsel contended that the submissions in support of the garnishee application dated 19th December, 2019 filed in the lower court were not served upon them as provided under the provisions of Order 5 rule 3 of the Civil Procedure Rules, which provide for the manner in which service should be effected on corporations. It was indicated that the said submissions should have been served on the applicant's Secretary, director or other Principal Officer of the Corporation. Further, that it is only when a Process Server is unable to find any of the officers mentioned herebefore that the other modes of service can be resorted to.

6. The case of **Omar Shalo v Jubilee Party of Kenya & Another** [2017] eKLR was relied on, to demonstrate that personal service remains the best form of service. It was submitted that the 2nd respondent should have effected service of their submissions on the applicant at its registered offices or the offices of its Advocates on record, unless by an application filed under Order 5 rule 17 of the Civil Procedure Rules he was able to demonstrate that personal service could not be effected.

7. It was stated that the physical address of the applicant's Advocate was clearly indicated on the pleadings filed by them for ease of location and service. It was further stated that no evidence was adduced to show that personal service could not be effected before resorting to substituted service via registered post.

8. It was contended that even after the submissions were sent by registered post, neither the 2nd respondent nor his Advocate informed the applicant of the same and that the service was so faulty that the submissions were received on 26th June, 2020 after the ruling had been delivered by the lower court.

9. The applicant claimed that the Counsel for the 2nd respondent was aware of the notices rescheduling delivery of the ruling at Kilifi Law Courts but did not inform the applicant of the same. It was stated that the ruling was sent to them on 19th May, 2020 which was 5 days after the ruling was delivered. It was further stated that as such, the applicant did not seek leave to appeal or for stay of execution pending appeal and it cannot be said that it is guilty of laches or that it slept on its rights as alleged by the 2nd respondent. The applicant claimed to be a victim of the 2nd respondent's breach of rules of procedure.

10. On the issue of whether the applicant should be granted leave to appeal, the provisions of Section 75(1) of the Civil Procedure Act were cited to illustrate that it requires leave of the court before it can file an appeal. It was submitted that this court is clothed with original jurisdiction under Article 165(3)(a) of the Constitution of Kenya, to grant leave to the applicant to appeal the decision of the lower court.

11. The case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others** [2012] eKLR, was cited to show that this court has jurisdiction conferred on it under Article 165(3)(a) of the Constitution, to grant leave to the applicant to appeal. The case of **East African Railways Corporation v Anthony Sefu** [1973] EA 327, was relied on to demonstrate that this court has unlimited original jurisdiction granted by the Constitution of Kenya, which cannot be limited by statute. The case of **PIO v JKM** [2016] eKLR, was also relied on, in support of the said proposition.

12. It was submitted by the applicant's Counsel that from the above decisions, this court has jurisdiction to grant leave to the applicant to appeal the ruling and consequential Garnishee Order Absolute dated 13th May, 2020.

13. With regard to the issue of stay of execution, it was submitted that the provisions of Order 42 rule 6 of the Civil Procedure Rules were interpreted by the High Court in the case of **Tabro Transporters Ltd v Absalom Dova Lumbasi** [2012] eKLR and the case of **Butt v Rent Restriction Tribunal** [1982] KLR 417.

14. The applicant argued that courts have on numerous occasions considered applications for stay of execution pending intended appeals on merits. He relied on the decisions in **Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 Others** [2013] eKLR, where an applicant filed an application seeking stay of execution pending an intended appeal and attached a draft memorandum of appeal to his application to show that his intended appeal was arguable. The case of **Nairobi Women's Hospital v Purity Kemunto** [2018] eKLR, was also relied on to demonstrate the same argument as in the case of **Munga N. Bichange** (supra). Counsel for the applicant submitted that from the above 2 decisions, orders for stay pending appeal can be granted to an applicant who intends to appeal, provided that a draft memorandum of appeal is annexed to the affidavit or if an appeal has been filed.

15. As to whether the intended appeal is an arguable one, the applicant's Counsel outlined the grounds of appeal and stated that they raise substantive issues, whose merits can only be determined upon fresh evaluation of the lower court record. The case of **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others** [2013] eKLR, was relied on to demonstrate what constitutes an arguable appeal. It was asserted that the applicant's intended appeal is arguable.

16. On what should be considered on the issue of substantial loss, the applicant's Counsel relied on the case of **Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited** [2014] eKLR and **James Wangalwa & Another v Agnes Naliaka Cheseto** [2012] eKLR. In defining what substantial loss is, he relied on the case of **Antoine Ndiaye v African Virtual University** [2015] eKLR.

17. He argued that since the applicant was not a party in the primary suit between the 1st and 2nd respondents, its inclusion in these proceedings was occasioned by the 1st respondent's failure to settle the 2nd respondent's Judgment sum and that the applicant has no intention to delay his enjoyment of the same.

18. It was submitted that the applicant's liability in settling the 2nd respondent's Judgment debt was conditional on availability of funds in the 1st respondent's attached bank account, which did not have funds to settle the decretal sum. It was contended that if the applicant was compelled to settle the 1st respondent's liability, it would defeat the substratum of the appeal.

19. The applicant's Counsel expressed doubt that with a salary of Kshs. 21,325.00, the 2nd respondent would be able to refund the applicant the decretal sum, if he was to be paid. That was bearing in mind that he has young children and he had not exhibited any other means of income apart from his salary.

20. The decision in **Amal Hauliers Limited v Abdulnasir Abukar Hassan** [2017] eKLR, was cited to support the submission that the applicant was apprehensive that the 2nd respondent might fail to refund the decretal sum if the appeal was successful.

21. It was asserted that the 1st respondent had through a Notice dated 20th January, 2020 addressed to the applicant terminated its banker – customer relationship, and as such, it held no accounts in favour of the 1st respondent from which recovery could be made of the sums to be paid to the 2nd respondent. It was stated that recovery of the said money would entail the applicant filing a case against the 1st respondent to recover the money paid to the 2nd respondent, which would be a lengthy and expensive process. The case of **Afritrack Investments (E.A Limited) v Wambua & Maseno Advocates** [2016] eKLR, was relied on to support the said submission.

22. The applicant offered to deposit the decretal sum in court or in a joint interest earning account as security for the intended appeal. The applicant's Counsel stated that the present application was filed only 9 days after the 2nd respondent had served them with a copy of the ruling of the lower court. It was indicated that the doctrine of laches did not come into play as the present application was filed timeously.

23. In written submissions filed on 30th October, 2020, the 2nd respondent's Counsel stated that the present application was incompetent as no appeal had been filed in court, thus the application for stay pending appeal was superfluous. It was stated that the respondent had not been served with a letter requesting for proceedings and ruling by the applicant's Advocates and therefore there was no intention to prosecute the appeal. It was submitted that parties appeared before the lower court on 12th February, 2020 and directions were given for the filing of written submissions and a ruling date was given for 8th April, 2020.

24. It was stated that the 2nd respondent's Counsel filed submissions in the lower court but the applicant's Counsel did not. It was indicated that the submissions were served on the applicant as per its address of service provided in the notice of appointment of the

applicant's Counsel. It was further indicated that submissions were served as per the provisions of Order 6 Rule 6 of the Civil Procedure Rules, which state that documents may either be delivered by hand or by a licensed courier service provider approved by the court to the address for service or may be posted to it. It was submitted that Order 6 Rule 6(2) of the Civil Procedure Rules provides that where delivery is disputed, a certificate of posting or other evidence of delivery shall be filed. Counsel for the 2nd respondent relied on the certificate of posting attached to the 2nd respondent's replying affidavit.

25. The Counsel for the 2nd respondent submitted that the provisions of Order 5 Rule 3 and 17 of the Civil Procedure Rules were not applicable in this application as they address the issue of service of summons on a corporation. It was further submitted that the service by way of registered post was proper and it was the applicant which failed to comply with orders of the lower court by not filing written submissions. It was pointed out that the Hon. Magistrate considered the contents of the replying affidavit in support of the application seeking the orders which form the subject of this application, thus no prejudice was occasioned to the applicant.

26. It was stated that the allegation that submissions were received after delivery of the ruling was an afterthought as there was no proof to establish when the applicant's Counsel received the said document.

27. It was submitted that the ruling of the lower court was served upon all the parties as admitted by the applicant and that no reasons had been given as to why the applicant did not lodge its appeal on time as required by law.

28. It was stated that the 2nd respondent's Advocates received both the ruling and the order via email and served the applicant directly as the order was directed upon it and that its Advocate was also served.

29. It was contended that the applicant had frustrated the efforts to recover any sum from the decretal amount and that it was not being candid, as it failed to disclose the monies held in the account during the subsistence of the garnishee proceedings. It was stated that the 2nd respondent shall be able to refund the decretal sum if the appeal will be successful.

30. It was submitted that the application herein was meant to deny him the enjoyment of the fruits of the Judgment and he would be greatly prejudiced by being kept away from enjoying the use of the monies awarded to him. It was indicated that the said sum is also for the benefit of his minor children who have been suffering since he had an accident.

31. It was further stated that if the money was released to him, he intended to invest the same and he would be able to refund it, if the appeal would be successful.

32. On the issue of stay of execution under Order 42 rule 6 of the Civil Procedure Rules, the 2nd respondent's Counsel relied on the case of **Peter Njuguna Njoroge v Zipporah Wangui Njuguna** [2013] eKLR, where the court stated that an applicant is required to satisfy to the court that the intended appeal is arguable or is an appeal that is not frivolous and that if it ultimately succeeds, it will be rendered nugatory in the absence of an order for stay.

33. It was submitted that the applicant failed to file a memorandum of appeal on time despite having been served with the ruling of the lower court through email and that no explanation was given for failing to file it as required. It was indicated that no request had been made by the applicant, for the lower court proceedings to give an indication that it intended to appeal.

34. The Counsel for the 2nd respondent submitted that the applicant filed a Notice of Appeal (sic) on 28th May, 2020 and served it to the 2nd respondent via email on 8th June, 2020 and personally to them on 16th June, 2020. That the said Notice of Appeal (sic) was filed outside the prescribed time.

35. She relied on the case of **Wambua Nyamai v Ufanisi Freighters (K) Ltd** Mombasa ELRC No. 857 of 2015, to support the submission that an order for stay of execution cannot be granted in an instance where no appeal has been filed. This court was urged to strike out the application herein for being incompetent.

36. It was submitted that the applicant had not established that it has an arguable appeal. The case of **R.F.S v J.D.S** [2013] eKLR was cited to illustrate what constitutes an arguable appeal.

37. It was contended that the draft memorandum of appeal does not disclose that the applicant has an arguable appeal because it failed to disclose the monies held in the 1st respondent's bank account during the subsistence of the garnishee proceedings.

38. It was submitted that the allegation that the applicant no longer held an account in the applicant's bank was not placed before the lower court and that the document which was tendered before the said court was a notice to close the bank account. It was asserted that the applicant had continued to hide the 1st respondent's statement of accounts from the time the decree nisi was issued to date. It was stated that the only statement availed was for a day yet 3rd parties were depositing monies into the said bank accounts.

39. On the issue of substantial loss, it was stated that none would be occasioned on the applicant as the 2nd respondent would be able to refund the decretal amount if the instant application and the intended appeal were to be allowed, as he intends to invest the same. It was stated that the applicant had failed to show that it would suffer substantial loss and that it had failed to tender any security save for submissions from the bar.

40. It was contended that the applicant should have sought leave before the lower court upon receiving a copy of the ruling. It was submitted that the application dated 26th May, 2020 lacked merit, that it was frivolous, vexatious, bad in law or otherwise an abuse of the court process and ought to be struck out or dismissed with costs.

ANALYSIS AND DETERMINATION

41. The issues for determination are-

(i) If this court should grant leave to the applicant herein to appeal against the ruling of 13th May, 2020; and

(ii) If this court should grant stay of execution of the ruling and subsequent garnishee order absolute dated 13th May, 2020 pending the hearing and determination of the intended appeal.

If this court should grant leave to the applicant to file an appeal against the ruling of 13th May, 2020.

42. The applicant submitted at length on the issue of service of the 2nd respondent's written submissions which they filed in the lower court. This court is at a loss of what value addition the said issue has on the application before me. I therefore find it to be of no relevance to the application herein.

43. On the issue of leave to appeal, the applicant relied on the provisions of Section 75(1) of the Civil Procedure Act. It provides as follows-

"An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted –

(a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) An order on an award stated in the form of a special case;

(c) An order modifying or correcting an award;

(d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) An order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) An order under Section 64:

(g) An order under any of the provisions of this act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) Any order made under rules from which an appeal is expressly allowed by rules."

44. The provisions of Order 43 rule 3 of the Civil Procedure Rules state as follows: -

"An applications (sic) for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order was made, or within fourteen days from the date of such order." (emphasis added).

45. The applicant cited the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others** (supra), to demonstrate that this court has jurisdiction under Article 163(5)(a) of the Constitution to address the matter at hand. The above decision is not applicable to this case as the provisions of Order 43 rule (3) of the Civil Procedure Rules are very clear on the procedure to be followed in a case of this nature. The said provisions are also in mandatory terms.

46. The case cited by the applicant's Counsel in **East African Railways Corporation v Anthony Sefu** (supra) would only be applicable if the language of Order 43 rule 3 of the Civil Procedure Rules was unclear and ambiguous.

47. The decision in **Multi-Serve Oasis Company Limited v Kenya Ports Authority & Another** (supra) and **PTO v JKM** (supra) were made by courts of concurrent jurisdiction to this one and are not binding on this court.

48. In the ***Speaker of the National Assembly v James Njenga Karume*** *[1992] eKLR*, the Court of Appeal stated as follows-

"… ***there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed***."

49. This court holds that the applicant should have followed the procedure laid out under Order 43 rule 3 of the Civil Procedure Rules. If each and every litigant was allowed to blatantly ignore the laid down procedures, the Civil Procedure Rules would be rendered worthless because parties who should have approached the lower court at the 1st instance would move to the High Court citing the unlimited jurisdiction of the High Court. No explanation was proffered by the applicant on why it preferred to move to the High Court instead of seeking leave from Hon. Kituku, Senior Principal Magistrate (SPM), who delivered the ruling dated 13th May, 2020.

50. Due to the outbreak of the covid-19 pandemic, the said Hon. Magistrate had on 30th April, 2020 given clear guidelines on the upscaling of court operations in Kilifi Law Courts. Even if the applicant's Advocate for any reason did not have a copy of the said guidelines, nothing stopped him from moving to the Kilifi Magistrate's Court before Hon. Kituku, SPM, to seek leave to appeal.

51. In the case of **Stephen Nyasani Menge v Rispan Onase** [2018] eKLR, the Court stated thus-

"Under Order 43 rule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain leave is fatal and consequently, no competent appeal can be lodged against such an order."

52. An email attached to the 2nd respondent's affidavit shows that the ruling of 13th May, 2020 was sent to the Advocate for the applicant and the one for the 2nd respondent by the Court Administrator, Kilifi Law Courts on behalf of the Senior Principal Magistrate. From the date the said ruling was sent through email, there was still adequate time left before the elapse of 14 days for the applicant's Advocate to seek leave from the said court, but it opted to move to this court instead.

53. In **Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR,** where while making reference on failure to seek leave to appeal from an order, the Court of Appeal expressed itself thus-

"Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules; the procurement of leave to appeal is *sine qua non* ***to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water."***

54. In **Nyutu Agrovet Limited v Airtel Networks Ltd** [2015] eKLR, the Court of Appeal in a 5 Judge bench held that-

"Where there was no automatic right of appeal stipulated under Section 75 of the Civil Procedure Act and order 43 of the Civil Procedure Rules, then the appellate court has no jurisdiction to hear and determine an appeal unless leave of the court from which the order was made is sought and obtained. (emphasis added).

55. I hold the same position as Ms Osino for the 2nd respondent that the applicant's application for leave to appeal should have been made in the Magistrate's court at the first instance and not in the High Court. Bearing in mind the doctrine of *stare decisis*, I hold that I have no jurisdiction to determine the application dated 26th May, 2020. The said application is hereby struck out for incompetence. The costs of the application are awarded to the 2nd respondent.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **29th** day of **January, 2021. Ruling delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Janjo for the applicant

No appearance for the 1st respondent

Ms Osino for the 2nd respondent

Mr. Oliver Musundi - Court Assistant.