



**Aswa Developers & Contractors Ltd & 2 others v Synergy Industrial Credit Limited  
& another; Bank of Africa-Kenya Ltd & 3 others (Garnishee) (Commercial Suit  
E808 of 2021) [2024] KEHC 10553 (KLR) (Commercial and Tax) (27 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E808 OF 2021**

**A MABEYA, J  
AUGUST 27, 2024**

**BETWEEN**

**ASWA DEVELOPERS & CONTRACTORS LTD ..... 1<sup>ST</sup> PLAINTIFF  
STEPHEN WANGOMBE KINUTHIA ..... 2<sup>ND</sup> PLAINTIFF  
IRENE NJOKI WANGOMBE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**SYNERGY INDUSTRIAL CREDIT LIMITED ..... 1<sup>ST</sup> DEFENDANT  
PHILIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**BANK OF AFRICA-KENYA LTD ..... GARNISHEE  
ABSA BANK KENYA PLC ..... GARNISHEE  
NCBA BANK KENYA PLC ..... GARNISHEE  
KENYA COMMERCIAL BANK LIMITED ..... GARNISHEE**

**RULING**

1. The application before Court is by the 1<sup>st</sup> defendant and is dated 13/9/2023. It is brought under the provisions of Order 23 rule 1 of the Civil Procedure Rules. It seeks for the garnishee order nisi to be made absolute against the 4 Garnishees on various accounts held on behalf of the plaintiffs.
2. The application was based on the grounds set out on the face thereof and the affidavit of Jacob Mbae Meeme sworn on even date. These were that; the applicant has a decree for Kshs 45,526,583/= with



interest at 18% per annum which remains unsatisfied. That the plaintiffs were directed to settle the same in installments but only Kshs 2 million had been paid as at 31/8/2023.

3. That the applicant has information that the plaintiffs maintain accounts with the Garnishees. That the decretal sum is likely to be satisfied if the accounts were attached. That there were no other assets to be attached and the plaintiffs have means of settling the decree through moneys held in the said accounts.
4. The application was opposed by the 2<sup>nd</sup> plaintiff vide his replying affidavit sworn on 19/9/2023 on behalf of the plaintiffs. They contended that judgment was entered on 20/6/2023 for Kshs. 45,526,583/-. That the decree was extracted and issued on 13/7/2023. That as at that time, the plaintiffs had paid Kshs.24,800,00/=.
5. That the accrued amount was from a hire purchase agreement between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant and is the subject matter of a separate suit to wit HCCC E294/2023 between the plaintiff, the defendant and Capital Square Ltd That in the said suit, the plaintiff is seeking to set off the decretal sum against the amounts owed to it as per prior agreements between parties.
6. That the plaintiffs were willing to surrender the motor vehicles the subject of the hire purchase agreements for valuation and release to the defendant's custody. That this is without prejudice to the plaintiff's legal rights in this case and in HCCC E294/2023 aforesaid.
7. The garnishees filed various replying affidavits to the application as follows: -
  - a. The 1<sup>st</sup> garnishee filed an affidavit by George Kinyua sworn on 19/9/2023. It admitted holding Acc. No. 01014060007 with Kshs.2,134,318/38.as at 14/9/2023. That however, the said sum were subject to an Agency Notice by the Kenya Revenue
  - b. The 2<sup>nd</sup> garnishee filed an affidavit by Michael Massawa sworn on 2/10/2023. He denied the existence of any account as Ac No. 2045687623. That the other account numbers 2043113737 and 2043456130 were incorrect and did not exist.
  - c. The 3<sup>rd</sup> garnishee filed a replying and supplementary affidavit by Jackson Nyaga and Christine Wahome dated 21/9/2023 and 8/11/2023. It admitted holding 2 accounts holding a total of Kshs.28,035.12. That any debits made in the accounts were before the order nisi was served.
  - d. The 4<sup>th</sup> garnishee filed a replying affidavit by Mathew Kipngetch sworn on 6/10/2023. It admitted holding the subject account with Kshs.98.78 only.
8. The parties filed their respective submissions which I have considered together with the authorities relied on. From the outset, it must be noted that garnishee proceedings are usually secondary and not primary execution proceeding. The primary execution proceeding is as between the decree-holder against the judgment/debtor.
9. In Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225 at page 227, the court stated that: -

“ There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see Pritchard v Westminster Bank Ltd [1969] 1 All ER 999, [1969] 1 WLR 547 and Rainbow v Moorgate Properties Ltd [1975] 2 All ER 821, [1975] 1 WLR 788. If



no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate.”

10. In *CG Waithima & Company Advocate vs Africa Merchant Assurance Company Limited; UBA Bank Kenya Limited & 2 others* [2023] KEHC 2344 (KLR), the court held that: -

“... in law, the onus placed on a Garnishee would only be discharged where it successfully establishes that the account or accounts covered by the Garnishee Order nisi do not exist in its system or if it exists, it is in debt and not in credit or that it has a right of set off or lien which are due effective against the customer.”

11. Finally, in *Brookside Dairy Limited v Adoncan Njagi & 2 others; Cooperative Bank of Kenya & another (Garnishee)* [2021] eKLR, the court held that: -

“This Court is mindful that it cannot confirm a garnishee order where the account from which a debt is sought to be attached is non-existence. Court orders cannot be made in vain.”

12. In the present case, the defendant’s principal claim is as against the plaintiffs. The plaintiffs made a spirited defence claiming that the amount due was not Kshs.45m odd but that they had paid in excess of Kshs.26m. A statement of payment was produced to that effect. The plaintiffs also deposed that they were willing to surrender for valuation and subsequent sale of all the securities created to secure the decretal sum.

13. Although the said offer was made on without prejudice to other claims being asserted by the plaintiffs, the decree-holder did not respond to the said assertions. This is so notwithstanding that the decree-holder filed a supplementary affidavit in which it could have responded to those claims.

14. The question therefore that begs is, what is the amount due that any of the garnishees can be called upon to answer? Is it Kshs. 45m plus 18% or that amount less Kshs.26m? Further, in view of the paltry sum due in the acknowledged accounts, should the garnishees be pursued when the securities are being offered by the judgment-debtor to realize the decretal sum? I think in the circumstances of this case, it is better to pursue the judgment-debtor before pursuing the garnishees. In any event, the amounts due in the admitted accounts are paltry.

15. In view of the foregoing, I find the application to be unmeritorious and the same is dismissed. I will not make any order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF AUGUST, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

