Diamond Trust Bank Limited v Nyanyi & another (Civil Appeal E142 of 2023) [2024] KEHC 13602 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E142 OF 2023

RE ABURILI, J

OCTOBER 31, 2024

BETWEEN

DIAMOND TRUST BANK LIMITED ..... APPELLANT

AND

BEN NYANYI ..... 1ST RESPONDENT

AFRICA MERCHANT ASSURANCE COMPANY LIMITED (AMACO LTD) ..... 2ND RESPONDENT

(An appeal arising out of the Ruling of the Honourable J. Wambiliyanga in the Chief Magistrate's Court at Kisumu delivered on the 27th July 2023 in Kisumu CMCC No. 25 of 2017)

JUDGMENT

1. In the lower court, the 1st respondent moved the court vide a Notice of Motion dated 6th December 2021 seeking to have a garnishee order nisi issued to the effect that funds held in a fixed deposit account by the appellant be attached and paid out to the 1st respondent in satisfaction of the decretal sum of Kshs. 2,281,545.12 due to the 1st respondent by the 2nd respondent Bank.

2. The lower court heard the application inter partes and vide a ruling rendered on the 14th December 2022, the trial court allowed the 1st respondent's aforementioned application and ordered that the appellant show cause why it should not pay the 1st respondent the decretal amount held by it.

3. Consequently, on the 6th July 2021 the trial court considered the notice to show cause as to whether the appellant should be held liable to settle the decretal sum and the trial court held that despite the fact that the appellant's deposition vide a replying affidavit dated 20th December 2022 that it had closed all accounts which it held for the 2nd respondent. According to the trial court, that this explanation was not sufficient evidence that the appellant had closed the 2nd respondent's account.

4. Aggrieved by the trial court's ruling, the appellant filed this appeal vide memorandum of appeal dated 22nd August, 2023 raising the following grounds:

    a. That the trial magistrate erred in law and fact in issuing a garnishee order absolute against the appellant who no longer holds an account for the 2nd respondent.

    b. The trial magistrate erred in law and in fact in holding that the appellant failed to prove that thee account had been closed despite the appellant furnishing evidence of closure of the accounts.

    c. The trial magistrate erred in law in failing to appreciate the principles governing garnishee applications.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that in her ruling dated 27th July 2023 and the garnishee order absolute dated 16th August 2023, the trial court erred in law and in fact in failing to consider matters it should have taken into consideration thereby arriving at a decision that was clearly wrong, unfounded and unconscionable contrary to the decisions held in the case of *Diamond Trust Bank Kenya Limited v Juba & Another* (Civil Appeal 164 of 2022) [2023] KEHC 19107 (KLR) (15 May 2023) (Judgement).

7. The appellant further submitted that there was sufficient reason to justify its position that it should not have been ordered to settle the judgement amount as it had proved that there was no bank-customer relationship between itself and the 2nd respondent. Reliance was placed on the case of *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishee)* [2020] eKLR.

The 1st Respondent's Submissions

8. The 1st respondent submitted that the court was not convinced that the appellant provided sufficient evidence to demonstrate that it did not for a fact hold money for the 2nd respondent in its accounts.

9. It was submitted that the appeal was filed out of time and there was no indication that there was an inexcusable delay by the appellant to file the appeal on time and thus there was nothing to say that the instant appeal was not frivolous.

10. The 1st respondent further submitted that the appellant's appeal was an indication that the appellant was using due process to deny the 1st respondent their regularly obtained judgement.

11. This Court was urged to dismiss the appeal with costs to the 1st respondent and that the appellant be ordered to pay costs of the lower court together with interest where applicable together with the decretal sum.

Analysis and Determination

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok*

James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

13. The appeal is against a ruling of the lower court in a matter which was heard by way of affidavits. No oral evidence was taken and neither was any of the deponents cross examined in court.

14. Garnishee proceedings, otherwise known as attachment of debts is governed by Order 23, Rule 1 of the *Civil Procedure Rules*, 2010 on attachment of debts as follows:

> 1 (1) A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

15. The above Rule contemplates the existence of a decree for the amount claimed. Generally, Garnishee proceedings are conducted in two different stages. The first stage is for the garnishee order nisi, while the second stage is for the garnishee order absolute. At the first stage, the judgment creditor makes an application ex parte to the Court that the judgment debt in the hands of the third party, the Garnishee, be paid directly to the judgment creditor unless there is an explanation from the Garnishee why the order nisi should not be made absolute.

16. If the judgment creditor satisfies the Court on the existence of the Garnishee who is holding money due to the judgment debtor, such third party (Garnishee) will be called upon to show cause why the judgment debtor's money in its hands should not be paid over to the judgment creditor, and if the Court is satisfied that the judgment creditor is entitled to attach the debt, the Court will make a garnishee order nisi attaching the debt.

17. The essence of the order nisi is to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the judgment debtor. It is a requirement that a copy of the order nisi must be served on the Garnishee and judgment Debtor at least 7 days before the adjourned date for hearing.

18. The second stage is for the garnishee order absolute, where on the adjourned date, the Garnishee fails to attend court or show good cause why the order nisi attaching the debt should not be made absolute and at that moment, the Court may, subject to certain limitations, make the garnishee order absolute. The Garnishee has an opportunity of disputing liability to pay the debt.

19. The primary object of a garnishee order is thus to make the debt due by the debtor of the judgment debtor available to the decree holder in execution without driving the garnishee to the suit.

20. The court may, in the case of debt (other than a debt secured by a mortgage or charge), upon the application of the attaching creditor, issue a notice to the garnishee liable to pay such debt, calling upon him either to pay into court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.

21. Further, the order contemplated by Order 23 is discretionary and the court may refuse to make such order if it is inequitable. The discretion, however, must be exercised judiciously. Where the court finds that there is bona fide dispute against the claim and the dispute is not false or frivolous, it should not take action under this Rule.

22. In the instant case, the appellant vide a replying affidavit sworn on the 20th December 2022 by one Jennifer Thiga, the appellant's Legal Officer, deposed that on the 9th October 2021, it closed the accounts that it held on behalf of the 2nd respondent and was thus not in a position to settle the 2nd respondent's debts. A copy of the closure of accounts notification letter dated 9th October 2021 confirmed this position. However, the trial court held that copy of the closure of accounts notification letter was not sufficient evidence that the appellant garnishee had closed the 2nd respondent's account and that alternatively, the appellant ought to have produced bank statements to prove the same.

23. This court has been called upon to overturn that ruling by the trial court.

24. Section 107(1) of the *Evidence Act* provides that:

> " whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist."

25. Section 108 of the *Evidence Act* further provides that:

> " The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

26. The *Halsbury's Laws of England*, 4th Edition, Volume 17 at para 13 and 14 states that:

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.{16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

27. In *Evans Nyakwana v Cleophas Rwana ongaro* (2015) eKLR it was held that:

> "As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

28. In this case, the 1st respondent had earlier on deposed that the appellant held the 2nd respondent's money in account number 201750001. The appellant's legal officers swore affidavits denying that such an account ever existed with the appellant for the 2nd respondent.

29. The 1st respondent then filed submissions introducing new account numbers among them, two fixed deposit accounts and two current accounts. The appellant's counsel did respond that the garnishee had not been accorded an opportunity to respond to the new evidence introduced by way of submissions and it was then that the 1st respondent filed another application introducing the two fixed deposit accounts and two current accounts. In the replying affidavit, the appellant's legal office deposed annexing copy of a letter dated 9/10/2021 showing that the appellant had closed all accounts held by the 2nd respondent and the reasons provided were that the appellant was receiving numerous order nisi and order absolutes from courts despite its denial of having any funds held on behalf of the 2nd respondent. In that letter, the appellant made it clear that the presence of auctioneers and the order absolutes had costs it since it was compelled to use its own money to settle such decrees. Further, that this occasioned reputational risk to the appellant bank.

30. The appellant also made it clear that it had recalled the overdraft facility it had with the 2nd respondent and liquidated the two overdrafts and credited the overdraft account with proceeds.

31. The appellant had also annexed a statement on account No. A/C No. 0365537001 indicating a nil balance as at 4th February 2022 and later it produced a letter of closure of the account.

32. In my humble view, a bank statement can only be evidence of an existing account and the balance of funds held therein. Conversely, where an account has been closed as deposed and contended by the appellant, it is my view that a notification of closure as demonstrated by the appellant with reasons for closure, which make lots of economic sense vide letter dated 9th October 2021 which was nearly one year prior to the order nisi as annexed by the appellant is sufficient evidence on a balance of probabilities that the appellant was no longer liable as a garnishee to settle the 2nd respondent's debt. To do otherwise would be expecting too much from the appellant Bank.

33. I am fortified on this point by the holding in in *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishee)* [2020] eKLR, where it was stated that:

> "It is my considered opinion that the garnishee tendered sufficient evidence to the effect that it did not have any money held in favor of the judgment debtor and which could be attached in satisfaction of the decree. This was done by exhibiting the account statement of the judgment debtor, as at the relevant date indicated on the Garnishee Order Nisi and which disclosed the true status of the account of the judgment debtor."

34. On the contention that the appeal was filed out of time on 4/4/2024 therefore it was frivolous, that cannot be true because this is a 2023 appeal not a 2024 appeal. Further, I observe that this appeal was filed challenging the ruling by Hon, J, Wambilyanga delivered on 27th July 2023 dismissing the show cause affidavit by the Garnishee that it had closed the accounts held for the 2nd respondent. That ruling followed a garnishee nisi and garnishee absolute issued on 14th December, 2022. The memorandum of appeal is dated 22nd August 2023 and according to the court record with a date stamp, the appeal was filed on 23rd August, 2023, which was well within the 30 days stipulated under section 79 G of the *Civil Procedure Act*. Accordingly, the objection to the competency of this appeal is found to be devoid of any substance.

35. Furthermore, as earlier stated, Garnishee proceedings are conducted in stages of order nisi and order absolute then a notice to show cause. In my view, the appellant did not have to file several appeals challenging the garnishee proceedings at each stage since there was the opportunity to show cause and it did show cause which was dismissed by the lower court.

36. The upshot of the above is that I find that the trial court erred in its ruling delivered on the 27th July 2023 by making the garnishee nisi absolute. I hereby allow this appeal and set aside the garnishee absolute issued against the appellant and substitute it with an order dismissing the application dated 6th December 2022 and the Notice to show cause against the garnishee/ appellant herein.

37. I order that each party bear their own costs of the appeal.

38. On the deposited security for the due performance of decree deposited into this court as a conditional stay of execution of the order absolute pending the hearing and final determination of this appeal, I order that the same be refunded to the appellant by the court upon production of original deposit slip.

39. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE