



Choli v Sang (Civil Appeal 52 of 2007) [2024] KEHC 16224 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA**

CIVIL APPEAL 52 OF 2007

AC BETT, J

DECEMBER 19, 2024

BETWEEN

ANTHONY ETABALE CHOLI APPELLANT

AND

CLEOPAS KIRWA SANG RESPONDENT

RULING

1. This is an application for attachment of salary and allowances. It is filed in person. The Applicant has cited the wrong provisions of the law. However, that is not an impediment to the court which is alive to the provisions of Article 159(2) of the Constitution.
2. The Applicant secured a judgement in the sum of Kshs. 132,000/= in a judgement delivered on 13th December 2012 by Hon. Said J. Chitembwe J (as he then was). It appears that after the judgement, the Appeal file was misplaced for in an application dated 14th July 2021, the Applicant filed an application for reconstruction of the file because he had unsuccessfully attempted to execute the decree after filing an application for execution on 19th November 2015 on account of the file missing.
3. Be that as it may, the file was eventually reconstructed in October 2021 whereupon the Applicant embarked on the execution process. The record shows a frustrating process where there were no assets belonging to the Respondent that could be attached. Additionally, the several notices to show cause that were duly served upon the Respondent did not bear fruit.
4. The Applicant has now prayed that this court do issue orders to attach two-thirds ($\frac{2}{3}$) of the Respondent/Judgement Debtor's salary or allowances in order to satisfy the decree. As at 20th April 2023 when a warrant of arrest in execution was last issued, the decretal amount stood at Kshs. 291,855/=.
5. I am satisfied from the record that the Respondent has been duly served with Notice to show cause why execution should not issue. Such execution in the case of a money decree can be by way of attachment and sale of moveable or immovable property, committal to civil jail, or by way of attachment of the



Judgment Debtor's salary. The need for Notice to show cause was explained in the case of Reuben Nyanginja Ndolo vs Dickson Wathika Mwangi & 3 Others Petition No. 11 of 2008 by Odunga J as cited in Rift Valley Agricultural Contractors Limited (RVACL) & Another vs Harm Gakinya t/a Hari Gakinya & Company Advocates [2021] eKLR where the learned Judge said:-

“The requirement for Notice To Show Cause serves two purposes in my view: First, it serves to give notice to the Judgment- debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice.”

6. The process of execution of a decree by ordering the attachment of the Judgment Debtor's salary is governed by Order 22 rule 42 of the *Civil Procedure Rules* which stipulates:-

“1. Where the property to be attached is any salary or periodical allowance payable to the judgment-debtor by any person, the court, whether the judgment-debtor or the person by whom such salary or allowance is payable is or is not within the local limits of the court's jurisdiction, may order that the amount shall, subject to the provisions of section 44 of the *Act*, be withheld from such salary or allowance either in one payment or by monthly instalments as the court may direct; and upon notice of the order to the person by whom such salary or allowance is payable such person shall withhold and remit to the court or, if the court by the order so directs, to the advocate for the judgment-creditor, the amount due under the order or each or any monthly instalment, as the case may be.

(2) Where the attachable proportion of such salary or allowance is already being withheld and remitted in pursuance of a previous and unsatisfied order of attachment the person by whom such salary or allowance is payable shall retain every subsequent order and, upon satisfaction of such previous and unsatisfied order, shall withhold and remit the attachable proportion of the salary or allowance in accordance with the terms of the order next received by him.

(3) Subject to sub-rule (2), every order made under this rule shall, without further notice or other process, be binding on the person by whom such salary or allowance is payable while the judgment-debtor is in Kenya and also while the judgment-debtor is outside Kenya if he is in receipt of any such salary or allowance payable by such person; and the person by whom such salary or allowance is payable shall be liable for any sum paid in contravention of this rule.”

7. I am satisfied that the application is merited. Under Section 44 of the *Civil Procedure Act*, two thirds of the salary of a public officer or other person in employment is not liable to attachment. The Judgment Debtor falls within the category of persons whose salary can be attached only upto one-thirds.

8. In the circumstances, this court hereby allows the application dated 23rd August 2023 subject to the proviso in Section 44 of the *Civil Procedure Act*.

9. An order is hereby issued that one third ($\frac{1}{3}$) of the Respondent/Judgment Debtor's monthly salary and allowances be deducted and withheld and that the same be remitted to the Applicant/Decree



Holder's Bank Account whose details are on the face of the application and such deductions to continue until full and final settlement of the decretal sum, interest and costs.

10. Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

The Applicant/Decree Holder in person

No appearance for Respondent/Judgement Debtor

Court Assistant: Polycap

