



REPUBLIC OF KENYA



KENYA LAW
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Diamond Trust Bank Kenya Limited v Nzengula & another (Civil Appeal E200 of 2022) [2023] KEHC 17437 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 17437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E200 OF 2022
DKN MAGARE, J
APRIL 25, 2023**

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPELLANT

AND

SAMUEL WAMBUA NZENGULA 1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED 2ND RESPONDENT

*(an appeal from the court's ruling and order given in
Mombasa CMCC 225 of 2016, by Hon. Nyariki on 27/11/2022)*

JUDGMENT

1. I had to burn the midnight oil to write this judgment. We had taken a date for judgment and parties were to file submissions. They argued before me. However, the submissions were not placed in the file till recently.
2. This is an appeal from the court's ruling and order given in Mombasa CMCC 225 of 2016, by Hon Nyariki on November 27, 2022.
3. There is no dispute between the original parties to the suit. The dispute is between the decree holder who was the plaintiff and the appellant who were the bankers of the defendant.
4. The appellant filed 11 odd (no pun intended) grounds of appeal. The grounds upon which the appeal is based were partly in the original response and partly part of the developed. The issues as I understand them are as follows: -
 - i. Whether, a garnishee order can issue against a debt held on behalf of a company under liquidation under section 431(2), 432, 430 of the *Insolvency Act*.
 - ii. Whether order 23 of the *CPR* override the *Insolvency Act*.



- iii. Whether garnishee order nisi can override another garnishee order.
 - iv. The place of the bankers books pursuant to section 176 and 177 of the *Evidence Act*.
 - v. The burden of proof and the role of place of terminated contract relationship.
5. A notice of motion was filed under certificate for stay of execution dated December 2, 2022, which is allowed and fast tracked this appeal. This is because the record of appeal was read.

Duty Of The Appellate Court

6. 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, keep at the back of its 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.
7. This was aptly stated in the cases of *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. In *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Appellant’s Submissions

9. The appellant filed submissions on March 16, 2023. They gave backgrounds related to notice of motion dated July 21, 2022, August 5, 2022 and November 19, 2019. True to my earlier postulation, the appellant now consolidated the grounds of appeal into a few clusters. This is a guise to cure the defect and on compliance with order 42 rule 1 which provides as follows: -

- “1. Form of appeal [order 42, rule 1]
 - 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively”

10. I therefore suggest that, instead of clustering the parties should be filing concise grounds of appeal. They explain the pages *Law of Banking* 10th Edition by Mark Hapgood, where it is observed that the



garnishee order can be re-issued as and when money is available. If there are sufficient cause, then payment cannot be made. If for example payment to a creditor was preferential to other creditors. (They refer to the authority of *Pritchard v Westminster Bank Ltd* and the celebrated case of *Rambond v Noor Yate Properties Ltd*.)

11. Their view is that a garnishee is an injunction stopping the bank from paying till the garnishee nisi, is set aside, confirmed by being made absolute or discharged.
12. They thus argue, that since garnishee proceedings are a part of execution, there are subject to section 430, 431 and 432 of the *Insolvency Act*. The three sections are set out herein verbatim.
 430. Attachments and other forms of execution against company in liquidation to be void if a company is being liquidated by the court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void.
 431. When liquidation of company by the court commences
 - (1) If, before the making of an application for the liquidation of a company by the court, a resolution has been passed by the company for liquidating the company voluntarily—
 - (a) the liquidation commences at the time of the passing of the resolution; and
 - (b) unless the court, on proof of fraud or mistake, directs otherwise, all proceedings taken in the voluntary liquidation are to be regarded as having have been validly taken.
 - (2) If the court makes a liquidation order under section 534, the liquidation commences on the making of the order.
 - (3) In any other case, the liquidation of a company by the court commences when the application for liquidation order is made.
 432. Consequences of liquidation order
 - (1) Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the registrar for registration and also lodge a copy of it with the official receiver.
 - (2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the court and subject to such conditions as the court considers appropriate.
 - (3) An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them.
13. The appellant was of the view that the incident stopped the process. Thus had been done in Malindi Insolvency Cause No 1 of 2018. The judgment debtor had been placed under interim liquidation on May 25, 2022 before the decision of November, 2022.
14. They challenge the garnishee since attachment cannot take place during interim liquidation. They rely on the decisions of Ndane Construction. They also state that they were not indebted to the respondent. They had closed accounts on January 20, 2020. The consequence, according to the appellant was that judgment was entered for a sum of Kshs 5,443,795.60 and costs to of 154,604.50 totally totaling to Kshs 5,5098,400.10.



15. The respondent on the other hand maintains that there were transactions done after the said date, payment of humongous amounts of money to the judgment debtor. The payment were made pursuant to the application of July 27, 2023 to reveal payment.
16. Upon considering the application noting that the dispute was basically a garnishee order one, I allow the application for stay, unconditionally. The respondent's Submission in the lower court captures the spirit of the garnishee order. Order 23 rule (10 (1) provides as doth. The respondent states further that order 22, rule (2) provides: -
17. The effect of garnishee under order 23(3) is to bind such debts in the hands of the garnishee.
18. Accordingly, when the order of November 29, 2019 was given all sums which accrued on the said date are denied attached.
19. The garnishee order related to a specific account, that is 0xxxxxx4. It was not an order at argue. The account as the time of attachment had Kshs 2,416,451.13.
20. The garnishee however withdrew money, after the order was given. Whereas it is true that a liquidation order, suspicious operations, these were two competitive orders. The appellant did not respect the liquidation. They withdrew money from the account while knowing there is an order garnishee, the amounts in the bank as at November 29, 2019.
21. The duty to pay Kshs 2,416,451.13 crystallization on the day the garnishee was served. The interim liquidation.
22. I take judicial notice that the interim liquidation was suspended. The duty to hold Kshs 2,416, 451.13 which was an amount standing in the account as at the time the garnishee order was served.
23. The garnishee order does not act in future. Meaning whether or not the amounts increased or decreased, it is not the issue for the judgment debtor to be worried about. The judgment debtor was able to prove that the said amount was in the account which the order was served. Whether the money was called for or not, it should never bother the respondent. Indeed, the debtor can spend that money.
24. It is the same case as an individual. At the time a garnishee order issued, it matters not how much money you have. It is debt to the appellant. If x has "y's debt of Kshs 200/= . It does not matter that he does not have the money. That debt is due and owing. The reason we balance for banks is because, it is a special type of debt.
25. The money stingingly in the account on the date the order was served, because due owing to the 1st respondent. The appellant could not release the same without a court order. The application dated July 22, 2022 was unnecessary. In the circumstances the court was not bound to proceed with the issues of withdrawal.
26. However, in allowing the garnishee order, the court proceeded and dealt with other amounts after November 29, 2019. The garnishee order is cross sectional in its nature. It is the debt as at the garnishee order freezes in time the debt. The appellant thus pay it out at their sole peril.
27. In the circumstances, the application to lift the garnishee order was bereft of merit and correctly dismissed.
28. The court however erred in burdening the garnishee with the entire judgment sum. The order was clear. It related to the debt. The debt was for a specific figure. To that extent the court below erred in awarding amounts over and the amount in the account.



Determination

29. The appeal will be partly allowed. The remainder of the prayer are dismissed in limine. Given that the respondents has already succeeded, cost of Kshs 200,000/= to the 1st respondent a garnishee order does not apply to future debts or other indebtedness. Otherwise parties will settle accounts and leave the garnishee without a remedy.
30. I don't find the plea for insolvency to be useful, in the circumstances as the appellant was never aware of it and acted contrary to the order in situ.
31. Further closure of the account or even spending months after November 29, 2019 is irrelevant as the Bank was constituted the holder of money in trust for the court, to fulfil the garnishee order as and when it became absolute.
32. The respondent was wrong in demanding more money than existed at the time of garnishee. The appellant to pay a sum of Kshs 416,451.13 together with interest from the date of the order of the court at court rates till payment in full.
33. The appellant to pay Kshs 30,000/= being garnishee costs in the lower court.
34. Stay for 30 days.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 25TH DAY OF APRIL, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kisinga for the Appellant

Mr. Tindika for the 1st Respondent

Wanjiku for the 2nd Respondent

Court Assistant - Firdaus

