



**SBM Bank (K) Ltd v Misky General Ltd & another (Commercial Appeal E010 of 2021)  
[2023] KEHC 17316 (KLR) (Commercial and Tax) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17316 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E010 OF 2021  
DO CHEPKWONY, J  
APRIL 25, 2023**

**BETWEEN**

**SBM BANK (K) LTD ..... APPELLANT**

**AND**

**MISKY GENERAL LTD ..... 1<sup>ST</sup> RESPONDENT**

**INVESTEQ CAPITAL LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The 1<sup>st</sup> Respondent instituted a suit against the 2<sup>nd</sup> Respondent in Nairobi CMCC NO.7035 of 2017 seeking Judgment for the sum of Kshs.517,762/= deposited as security for a construction tender together with interest and costs, as well as damages for breach of the contract. And on 14<sup>th</sup> February, 2022, the trial court entered Judgment in favour of the 1<sup>st</sup> Respondent in the sum of Kshs.517,762/= plus costs and interests.
2. In execution the Judgment and Decree, on 31<sup>st</sup> January 2020, the 1<sup>st</sup> Respondent obtained a garnishee order absolute seeking the attachment of the 2<sup>nd</sup> Respondent's monies held in Account No.0052018946208 with SBM Bank ("The Appellant herein") to satisfy the decree. The Appellant (Garnishee Bank) then filed an application dated 12<sup>th</sup> January, 2020 in which it sought the setting aside or review of the garnishee proceedings and orders issued on 31<sup>st</sup> January, 2020. And in its ruling dated 29<sup>th</sup> January 2021, the court dismissed the Appellant's application for lack of merit.



3. Aggrieved by the decision of the trial Magistrate, the Appellant filed the Memorandum of Appeal dated 11<sup>th</sup> March, 2022, citing the following grounds:-

- a. That the learned trial Magistrate erred in law and in fact in failing to find that the Appellant was not accorded sufficient time to respond to the garnishee application as stipulated by the *Civil Procedure Rules*.
- b. That the learned Magistrate erred in law and in fact by dismissing the Appellant's application seeking to set aside Garnishee order absolute and leave to defend the garnishee application thus infringing the Appellant's right to a fair hearing as stipulated in Article 50(1) of *the constitution*.
- c. The learned magistrate erred in law and in fact by failing to appreciate the settled principle that the Garnishee does not assume the liabilities of the Judgment-Debtor and that the garnishee's liability is limited only to extent of releasing the total amount they are holding on behalf of a Judgment-Debtor.
- d. The learned Magistrate erred in law and in fact in failing to find that there were no funds in the 2<sup>nd</sup> Respondent's account to satisfy the 1<sup>st</sup> Respondent's decree.
- e. That the learned Magistrate erred in law and in fact in failing to appreciate past judicial authorities which held that where there are several Garnishee Order Nisi, the one that was issued first takes precedent over all the other subsequent orders.
- f. That the learned Magistrate erred in law and in fact by failing to take into consideration the ruling delivered by Honourable Justice Ochieng' on 15<sup>th</sup> April 2020 with respect to funds held in the 2<sup>nd</sup> Respondent's Accounts.
- g. The learned Magistrate erred in law and in fact in victimizing the Appellant because of lack of the statement of accounts yet the Ruling delivered by Honourable Justice Ochieng' in Kisumu was enough evidence that he 2<sup>nd</sup> Respondent's account has Kshs. 6,108,138/= and the same had been attached and there was therefore no need for statement of accounts.
- h. The Magistrate erred in law and in fact by ignoring all the evidence presented to court by the Garnishee in support of its application seeking to set aside the Garnishee order absolute.

It was proposed to seek the following prayers:

- i. the appeal be allowed.
- ii. set aside the entire ruling by the Chief Magistrate court and substitute it with a decision of this court.
- iii. The court to discharge the appellant from the Garnishee proceedings.
- iv. Costs of appeal be awarded to the Appellant.

4. On 9<sup>th</sup> June, 2022, the court admitted the appeal for hearing and directed parties to dispose of the appeal by way of written submissions. The Appellant's submissions are dated 1<sup>st</sup> September, 2022



while the 1<sup>st</sup> Respondent's are dated 7<sup>th</sup> October, 2022. Their respective arguments will be taken into consideration in the determination of the appeal.

### **Analysis and determination**

5. This being a first appeal, this court has a duty of re-evaluating and reanalyzing the evidence that was adduced before the trial court and to make its own conclusions, while bearing in mind that it did not hear or see the witnesses testify or observe their demeanor.
6. To determine this appeal, I have read through the record of proceedings before the trial court, re-evaluated and re-analyzed the same alongside the written submissions of the parties and find the issues for determination being:-

#### **a. Whether the Appellant's application seeking to set aside the Garnishee Order Absolute and eave to defend the garnishee proceedings had merit.**

In addressing this issue, this Court will consider the defence the Appellant was to raise in response to the application and whether it can interfere with the trial Court's findings.

7. It is the Appellant's case that the Garnishee and Decree Nisi application was served on 27<sup>th</sup> January, 2020 for interparties hearing on 31<sup>st</sup> January, 2020. That it was then misplaced in the Appellant's office and by the time it was found and instructions issued to their advocates to come on record, the application had been heard *ex parte* and the Order Nisi confirmed Absolute by the court. According to the Appellant, the Garnishee Order Nisi was served three days to the interparties hearing hence they were not accorded sufficient time to respond to the Respondent's Garnishee application as require by law.
8. In response, the 1<sup>st</sup> Respondent submitted that the Appellant did not set out sufficient cause to warrant the lower court's ruling issued on 29<sup>th</sup> January, 2021, to be set aside. It is the 1<sup>st</sup> Respondent's case that having been served with the application three (3) days prior to the hearing, nothing precluded the Appellant and or its representative from attending court in person and seek for extension of time to put their house in order. The 1<sup>st</sup> Respondent contends that the Appellant has not adduced any evidence to support its assertions and its failure to attend court is a deliberate more aimed at delaying it from enjoying the fruits of the Judgment.
9. The period within which Order Garnishee Nisi should be served is provided for under Order 23 Rule 1(2) of the *Civil Procedure Rules*, which stipulates that:-

“.....at least seven days before the day of hearing, the Order Garnishee Nisi shall be served on the garnishee and unless otherwise ordered, on the Judgment-Debtor”.

By the use of the word “shall”, the said provision is couched in mandatory terms, hence the garnishee having been served for hearing within three (3) days, the notice was insufficient for it to respond to the application.

10. Reliance is placed in the case of *Kabansora Limited v Ahmed Bahannan* [1995]eKLR,  
“Rule 1(2) of Order 22 of the *Civil Procedure rules* require at least seven days before the day of hearing the Garnishee Order Nisi shall be served on the garnishee. According to the affidavit on the Return of Service it is deponed that the Garnishee was served on October, 17, 1990. This is five days not seven days given and does not comply with the rule 1(2) of the said order.



It is clear that the Garnishee more or less complied with the requirement of the order that it must inform the court what sum was due from it to the Judgment-Debtor. The Garnishee is required to have done this within seven days of service on it of the order of Nisi. The order was served on October, 17, 1990 and was for hearing on October, 23 1990 and seven days within which to inform the court of any debt owing would have been done on October, 24, 1990 a day after the hearing and making of Garnishee Order absolute.

The Decree-Holder has put in issue the fact that the Garnishee had been given appropriate notice to appear in court on its application to show that it is not owing any money to the Judgment-Debtor. One must of course examine what is meant by Notice under the applicable Rule. I have already referred to rule 11(2) of the said Order 22 and found that it has not been complied with as five days instead of seven days were given.

I therefore must hold that the Garnishee was not given sufficient Notice to appeal in court on October, 23, 1990. I must therefore stay execution of the order as prayed and also set it aside. This is more so when the Garnishee swears that no debt is due from it to the Judgment-Debtor and that has not been contradicted by the Decree-Holder. The Garnishee to have the costs of the application against the Decree-Holder.

11. In the case of *Mengich T/A Mengich & Co. Advocates & Ano. v Joseph Mabwai & 10 Others* [2018]eKLR, Mativo J. (as he then was) had this to say of Garnishee proceedings:-

“Generally, Garnishee proceedings is done in two different stages. [2] 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 explanation from the Garnishee why the order Nisi should not be made absolute. 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.

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 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 of hearing. 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 Garnishee Order Absolute. The Garnishee, where necessary also have an option of disputing liability to pay the debt. The Applicants ignored these procedures”.

12. And in the case of *Onsongo & Company Advocate v Africa Merchant Assurance Co. Ltd; Diamond Trust Bank Kenya Ltd (Garnishee)* {2021}eKLR, Justice Ochieng (as he then was) held as follows:-

“Pursuant to Order 23 Rule 1 (2) of the Civil Procedure Rules, the Garnishee Order Nisi ought to be served upon the Garnishee at least 7 days before the hearing of the application about whether or not to make the order absolute.

I therefore find that the notice was totally insufficient, and also in contravention of the rules.



Accordingly, I am in agreement with the Applicant that the issuance of the Garnishee Order Absolute on 17<sup>th</sup> November, 2020 was irregular.

As regards the merits of the Garnishee Order, I find that the bank has an arguable defence to the application. I so find because of the alleged discrepancies between the accounts cited in the order, and the Fixed Deposit Accounts that are maintained at the bank”.

13. In the instant case, it is not in dispute that the garnishee was served with the Order Nisi three (3) days to the interparties hearing which is contrary to the requirement that the same ought to be served “at least seven (7) days before the day of hearing of Garnishee Order Nisi”. In view of this, the notice was insufficient, hence the trial court ought to have allowed the Garnishee application which sought to have the execution of the Garnishee Absolute stayed, set aside and for the garnishee to be granted leave to file a response in defence of the application.
14. Having found that the Garnishee was not given sufficient notice to appear in court on 31<sup>st</sup> January, 2020 to defend the garnishee application, the next issue for determination is whether the garnishee had sufficient grounds to raise an arguable defence to the garnishee application.
15. According to the Appellant, there was another Garnishee Order Absolute against the Judgment-Debtor’s account with them issued vide a ruling delivered by Hon. Justice Ochieng on 15<sup>th</sup> April, 2020 in Kisumu, which order preceded the trial court’s ruling of 29<sup>th</sup> January, 2021 reinstating the Garnishee Order Absolute issued on 31<sup>st</sup> January, 2020. The other ground raised by the Appellant was that the Judgment-Debtors account lacked funds to satisfy the Garnishee Order Absolute as the same were being held in moratorium.
16. In response, the 1<sup>st</sup> Respondent submitted that the Appellant has misled the court as the Garnishee Order Absolute was issued on 31<sup>st</sup> January, 2020 when there was no order barring the 1<sup>st</sup> Respondent from receiving the payment. It dismissed the bank statement attached by the Appellant on the ground that the same had neither been verified or interrogated. According to the Respondent, the Appellant had not advanced cogent evidence or grounds to warrant this court disturb the findings of the trial court, hence has urged the court to dismiss the appeal.
17. In the case of *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee) [2020]* eKLR the Court stated as follows:

“Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable”
18. The appellant had the burden of proving the judgment Debtor’s account held with them lacked enough funds to satisfy the garnishee absolute. The appellant ought to have submitted to the trial court the bank statement of the Judgment-Debtor’s Account No.0052018946208 held with them, of which the appellant failed to do so and instead relied on the ruling of Honourable Justice Ochieng in Kisumu which proved the and Respondent’s account held with the appellant had a total of Kshs.6,108,138/= which was paid in satisfaction of a previous Garnishee Absolute. According to the Appellant’s counsel, the Appellant having honoured the said garnishee absolute, it was not in a position to honour the current garnishee absolute.



19. In this Court’s view, the Appellant has satisfied that it lacks the funds to honour the garnishee absolute and thus it cannot be condemned to pay the Judgment Holder monies it does not hold on behalf of the Judgment-Debtor as this would amount to substantial loss on its part. Having found that the Appellant has demonstrated the lack of funds held on behalf of the Judgment-Debtor, this Court finds the Appellant has not in any way breached the order of garnishee absolute.
20. The last issue to consider is whether this court should interfere with the trial courts findings. On this the general principles on when an appellate court may interfere with a discretionary power of a trial Court are now well settled. In the case of Mbogo & Another v Shah, [1968] EA, it was stated as follows:
- “An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
21. In view of the above decision having established that the Appellant sufficiently demonstrated it lacked the funds to honour the garnishee absolute, hence cannot be condemned to take responsibility or liability of the Judgment-Debtor, this Court finds that the trial court was right in its finding, in that it will not disturb award and upholds the same. Consequently, the Order of Garnishee Absolute against the Appellant is hereby set aside and the Appellant discharged from the garnishee proceedings.
22. In the resultant, the appeal is merited and thus allowed with costs to the Appellant.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25TH DAY OF APRIL, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**No appearance for and by either party**

**Court Assistant – Mwanda/Sakina**

