



**Gerald Kimanga t/a Kimanga & Company Advocates v Invesco Assurance Company Limited;  
Diamond Trust Bank Kenya Limited (Garnishee); Omoke (Interested Party) (Miscellaneous  
Civil Application 245 of 2018) [2023] KEHC 18003 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18003 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION 245 OF 2018  
RE ABURILI, J  
MAY 31, 2023**

**BETWEEN**

**GERALD KIMANGA T/A KIMANGA & COMPANY ADVOCATES . PLAINTIFF**

**AND**

**INVESCO ASSURANCE COMPANY LIMITED ..... DEFENDANT**

**AND**

**DIAMOND TRUST BANK KENYA LIMITED ..... GARNISHEE**

**AND**

**JOSEPH MORARA OMOKE ..... INTERESTED PARTY**

**RULING**

1. This file concerns Advocate-Client Bill of Costs. It was opened on December 7, 2018 vide advocate/client Bill of Costs dated November 30, 2018. The Advocate/Applicant is Gerald D O Kimanga T/A Kimanga & Company Advocates while the Respondent is Invesco Assurance Company Limited.
2. The Bills of Costs are in respect of legal representation by the advocate for the client in various files namely Vihiga PMCC Nos 125 of 2016, 125 of 2016, 127 of 2016, 128 of 2016, 129 of 2016, 130 of 2016, 131 of 2016, 132 of 2016, 133 of 2016, 135 of 2016, 136 of 2016, 137 of 2016, 138 of 2016, 13 of 2017, 122 of 2016, 123 of 2016, 124 of 2016, 14 and 15 of 2017.
3. The Bills of Costs in question were taxed on December 18, 2018 under Certificate of Urgency by Hon Mbulikah, Deputy Registrar. The taxed amount was Kshs 1,389,825 upon which the advocate filed an application dated December 19, 2018 for entry of Judgment in respect of the taxed costs and on January 22, 2019, the Judge entered Judgment for Kshs 1,389,825 as prayed as per the Certificate of



- taxation, with interest at court rates from the date of Judgment in question until payment in full. The court also awarded the advocate costs of the application dated December 19, 2018.
4. Immediately thereafter, vide an application dated February 5, 2019 under Certificate of Urgency, which application was on February 6, 2019 certified as urgent, the court (Judge) ordered for attachment of funds in the joint Account No 52xxxx at Diamond Trust Bank (Kisumu main Branch) and fixed the application dated February 5, 2019 for interpartes hearing on February 12, 2019.
  5. The Advocate/Applicant was ordered to serve the Respondent Invesco Assurance Company Limited and the Garnishee (the Bank herein – Diamond Trust Bank, Kisumu main Branch).
  6. On February 12, 2019, the Advocate Mr Kimanga appeared and informed the court that he had served the Respondent and the Garnishee but that they had not responded. He urged the court to make the order nisi absolute.
  7. Vide Ruling of the court of February 12, 2019, the Order Nisi was made absolute and the amount held in the joint account were ordered release to the advocate, Mr Kimanga.
  8. Meanwhile, the Applicant herein Joseph Morara Omoke was the Plaintiff in proceedings initiated against Invesco Assurance Company Limited wherein he was awarded general damages for defamation of character and malicious prosecution. The Insurance Company then appealed to the High Court, which appeal was dismissed. An appeal to the Court of Appeal was also dismissed.
  9. The Court of Appeal vide Ruling dated April 25, 2016 vide COA at Eldoret Civil Application No 31 of 2016 ordered for the deposit of security of Kshs 1,100,000 in a joint interest account held by the parties' advocates that money was deposited in the Diamond Trust Bank Kisumu Main Branch.
  10. Following the Garnishee orders issued on February 12, 2022, the said monies were released to Mr Gerald Kimanga Advocate, the Applicant/Decree holder in this file.
  11. It is that release of the monies which had been deposited as security on appeal that prompted the applicant herein, being an Interested party, to file the Notice of Motion dated February 13, 2023 seeking several declarations among them, that the money in the joint account No 52xxxx with Diamond Trust Bank Kisumu Branch in the joint names of Kimanga & Company Advocates and Momanyi Aunga & Company Advocates belonged to the applicant herein; that the withdrawal of the money from the said account by Kimanga & Company Advocates was unlawful, improper and or invalid; that the Interested Party/Applicant herein is entitled to be paid Kshs 1.1 million plus accrued interest as per the orders issued in Kisumu COA No 31 of 2016; that this court directs the Diamond Trust Bank (Kisumu Branch); Invesco Insurance Company Limited, the Deputy Registrar Kisumu and or the legal representative of the estate of Gerald Kimanga Omori (deceased) to pay the applicant Kshs 1.1 million plus accrued interest as ordered by the Court of Appeal in Kisumu Court of Appeal Civil Appeal No 31 of 2016, severally ad or jointly as the Hon Court may apportion culpability. The Applicant also prays for costs of the application.
  12. The grounds upon which the application is predicated gives the history of the matter from Kisii CMCC No 235 of 2012 culminating in the Kisumu COA No 31 of 2016 and lamenting that Mr Kimanga secretly and unlawfully applied for and obtained a garnishee order and garnished the money in the joint account as his professional fee as against his client, namely, Invesco Assurance Company Limited yet the money in question belonged to the applicant herein.
  13. The Notice of Motion is supported by the Supporting Affidavit sworn by the applicant on February 13, 2023 together with annexures including the complaint filed with the Chief Justice and the Bank Statement for the account in issue showing Kshs 1,100,000 was deposited on June 3, 2016.



14. There was no response from the law firm of Kimanga & Company Advocates.
15. The advocate from the Bank – Diamond Trust Bank filed a Replying Affidavit sworn by its legal officer, Jennipher Thiga on May 8, 2023 asserting in deposition that the Bank released the money deposited in the joint account upon being served with the Garnishee Order Absolute on February 13, 2019 directing it to release the said monies to the said Kimanga & Company Advocates.
16. That the Bank was never served with Order nisi hence it never had the opportunity to participate in the Garnishee proceedings. That the Bank received several Exparte Garnishee Orders Absolute and in order to protect its reputation, it settled the sums ordered in compliance with the court orders and that unless the said orders are set aside. That it discharged its obligation as per the court order hence it is not liable to the Interested party herein.
17. The application was argued orally with the applicant acting in person and reiterating his prayers while Mr Janjo Advocate appeared for the Garnishee – Bank and reiterated the depositions in the Replying Affidavit.
18. I have considered the application, the grounds, supporting affidavit and annexures. I have also considered the Replying affidavit as filed by the Bank and the oral submissions.
19. The issue for determination is whether the application has merit. The applicant as earlier stated, has sought various declarations from this court against the Respondent, the Advocate and the Bank. The Advocate and the Respondent Invesco Assurance Company Limited did not respond to the application. The Bank which was the Garnishee in defence contends that it simply obeyed the court order to avoid being in contempt of court.
20. As earlier stated, it is not in dispute that this court did issue Order Nisi on 06/2/2019 and subsequently, Order Absolute on 12<sup>th</sup> February, 2019 for the release of attached funds held with the Bank in the joint interest earning account by Kimanga & Company Advocates, and Momanyi Aunga & Associates.
21. Those monies, from the history of this matter, were deposited as security for due performance of decree in an Appeal in the matter between the Respondent Invesco Assurance Company Limited and the Applicant herein.
22. On the other hand, the advocate party to this suit which relates to advocate client bills of costs was Kimanga & Company Advocates against his client Invesco Assurance Company Limited. It follows that these two cases were unrelated such that the monies deposited by the Invesco Assurance Company Limited could only be security in the matter in which it was deposited and not in this case.
23. For that reason, Kimanga & Company Advocates could not under any circumstances, obtain an order for release of those monies to themselves without involving Momanyi, Aunga & Associates.
24. Furthermore, the firm of Kimanga & Company Advocates were aware that indeed, that money as deposited did not at that stage, and until after conclusion of the appeal was determined, was not money that belonged to Invesco Assurance Company Limited.
25. Although in the Garnishee proceedings, the firm of Kimanga & Company Advocates disclosed to the court that the money was deposited in the joint interest account, and although the Respondent Invesco Assurance Company Limited was served with the attachment of debts application on February 7, 2019, there was no appearance. On the part of the Bank/Garnishee DTB Limited, there is evidence that it was served with the Order Nisi dated February 5, 2019 on February 7, 2019 as per the date stamp dated February 7, 2019. It follows that the Garnishee is not truthful when it claims that it was not aware of the Garnishee proceedings until it was served with the Order Absolute. That Order Nisi, according to the



Affidavit of Gerald Kimanga sworn on February 12, 2019, was served by the said advocate personally upon Nikita Rehal, the Branch Manager, Kisumu Jomo Kenyatta Highway.

26. The bank knew that indeed it was holding the subject attached funds in joint names of two advocates in respect of security for costs in a totally different matter but it never challenged the Order Nisi (attachment order). As a result, on February 12, 2019, the court issued Order Absolute which led to the release of the money to Gerald Kimanga T/A Kimanga & Company Advocates.
27. In addition, I observe that Mr Kimanga in his affidavit in support did not disclose to this court that the monies held in the joint interest earning account were in respect of totally different court proceedings and not Advocate/Client Bill of Costs. The court was therefore misled into issuing the orders that it did for the release of monies which did not belong to the Invesco Assurance Company as at that time.
28. In addition, Mr Kimanga and his law firm knew very well that vide Ruling of the Court of Appeal delivered on June 7, 2018, vide Court of Appeal Civil Application No 31 of 2016, the 3 Judges of the Court of Appeal had ordered that in the event that Respondent Invesco Assurance Company Limited files the intended appeal within 45 days of the date thereof and in default, the stay of execution granted would lapse and the Kshs 1,100,000 deposited in the joint bank account would be paid to the Applicant herein together with accrued interest.
29. There is no evidence disclosed to the effect that the intended appeal was filed as per the order extending time to file the same.
30. The above situation as described notwithstanding, the applicant herein has not sought for the setting aside of the Order Absolute which gave Mr Gerald Kimanga the mandate to collect and or receive monies held in the joint interest account at the Garnishee's Bank. The order was issued by F A Ochieng J (as he then was) based on the information placed before him on oath although as I have stated above, the information was half-truth and other critical information on who owned the funds and in respect of which case was not disclosed to the court.
31. In addition, it is also true that the Garnishee and the Respondent Invesco Assurance Company Limited were served with Order Nisi but they never responded to the application hence the Order Absolute.
32. This court has not been asked to set aside or review those orders issued by F A Ochieng J (as he then was). It follows that this court cannot issue the Declarations sought when the orders complained of are still insitu. Neither can this court make adverse orders against a firm which, from the affidavit of Paul Otieno Ado dated May 4, 2023, is under receivership.
33. The applicant ought to have sought legal advice before filing this application dated May 2, 2023 and especially where some of the Respondents like Invesco Assurance Company Limited is under Receivership and the advocate Gerald Kimanga who received the money is now deceased, so that the applicant first seeks leave of court to enjoin the Receiver Manager and or legal representative of the estate of the deceased Gerald Kimanga Omori before initiating these proceedings.
34. In addition, the Applicant herein was never the original party to these proceedings and for his cause to be advanced, it was important that he files an application seeking to be enjoined as an Interested Party first before the court can consider the merits of his complaint.
35. As matters stand now, the Applicant herein is not a party to these proceedings. He never sought in any of his prayers, to be enjoined as an Interested Party. In other words, he is non suited.
36. For the above reasons, albeit the Applicant has a prima facie case against all the Respondents – Gerald Kimanga Omori T/A Kimanga & Company Advocates, Invesco Assurance Company Limited and



Diamond Trust Bank Kisumu Branch, he never sought for the setting aside of the orders of February 12, 2019 and neither did he seek to be enjoined as an Interested Party.

37. Accordingly, I find and hold that the orders sought are not available to the Applicant/Interested Party. The application dated May 2, 2023 is therefore declined and struck out for being fatally incompetent. The applicant can seek other available remedies against those who misapplied his funds.
38. Each party to bear their own costs of the application dated May 2, 2023.
39. This file is closed.
40. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF MAY, 2023**

**R. E. ABURILI**

**JUDGE**

