



**I & M Bank Limited v Xplico Insurance Company Limited & 5  
others; Munge (Interested Party) (Commercial Case E804 of 2021)  
[2023] KEHC 18329 (KLR) (Commercial and Tax) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18329 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E804 OF 2021**

**A MABEYA, J**

**MAY 31, 2023**

**IN THE MATTER OF:SECTION 58 OF THE CIVIL PROCEDURE  
ACT & ORDER 34 OF THE CIVIL PROCEDURE RULES.**

**IN THE MATTER OF:INTERPLEADER, RELEASE FROM  
LIABILITY AND QUESTIONS ON LIABILITY OF A BANK**

**BETWEEN**

**I & M BANK LIMITED ..... PLAINTIFF**

**AND**

**XPLICO INSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**MUSILI MBITI AND ASSOCIATES ..... 3<sup>RD</sup> DEFENDANT**

**WAMBUA KILONZO & CO ADVOCATES ..... 4<sup>TH</sup> DEFENDANT**

**OGOWE & ASSOCIATES ..... 5<sup>TH</sup> DEFENDANT**

**NGAYWA & KIBET PARTNERS LLP ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**GEORGE NDINYE MUNGE ..... INTERESTED PARTY**



## RULING

1. This is an application brought by the plaintiff and dated September 23, 2022. It was brought under articles 10, 40 & 159 of the Constitution, sections 1B, 3A, 80, 99, 100 of the Civil Procedure Act, orders 21 rule 5, order 34 rule 8, order 45 rules 1& 5 of the Civil Procedure Rules.
2. It sought orders that the court clarifies and reviews paragraphs 43 and 44 of its ruling dated September 16, 2022 as regards the question of law raised in prayer 6 (b) of the Originating Summons dated September 17, 2022 on whether a decree absolute for attachment of monies in a debtor's account can extend to attachment of the bank's property in absence of court orders finding the bank in contempt for not complying with the garnishee order absolute.
3. The grounds for the application were set out on the face of the Motion and in the supporting affidavit sworn by Andrew Muchina on September 23, 2022. It was averred that the question of law raised in paragraph 6(b) of the Originating Summons was not addressed and it raised a fundamental point of law which required clarity and would affect all future garnishee applications. That the clarity would determine whether a garnishee was personally liable to have its property proclaimed pursuant to a garnishee order absolute.
4. The 3<sup>rd</sup> defendant opposed the application vide grounds of opposition dated October 11, 2022 on grounds that the application was in the nature of an appeal. The Court had pronounced itself on all the prayers sought and the grounds raised therein were suitable for appeal and not review. That the application was an attempt to re-open the suit and offended the court's power of review.
5. The parties disposed of the application by way of written submissions. The plaintiffs' submissions were dated October 31, 2022 whereas those of the 3<sup>rd</sup> defendant were dated February 22, 2023. This Court has considered those submissions.
6. It is now well settled that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act. This means that the Court has a power of review, but such power must be exercised within the framework of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010.
7. Under Order 45 Rule 1 of the Civil Procedure Rules, 2010 review is permitted on discovery of new and important matter or evidence which was not within the knowledge of an applicant or could not be produced by him at the time when the decree or the order was made or; on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. In addition, the application has to be made without unreasonable delay.
8. The plaintiff's case is that it based its application on the last ambit being any other sufficient reason. It submitted that this Court failed to address the question of law raised in its application dated September 17, 2021 on whether a decree absolute for attachment of monies in a debtor's account can extend to attachment of the bank's property in absence of court orders finding the bank in contempt for not complying with the garnishee order absolute. The plaintiff also sought a clarification and review of paragraphs 43 and 44 of the ruling dated September 16, 2022.
9. Though the applicant maintains that the question of law raised in its application was not addressed, the record reflects otherwise. At paragraph 43 of the ruling, the court addressed the issue of the proclamations issued by the 4<sup>th</sup> defendant against the plaintiff. Indeed, this was in relation to the



issue raised by the plaintiff on whether a decree holder could execute against the garnishees' personal property where there were no court orders for contempt.

10. The Court relied on Order 23 Rule 4 of the *Civil Procedure Rules* and found that in a situation where a garnishee failed to appear or attend the garnishee proceedings, the court is entitled to order the decree nisi be made absolute. Once a decree absolute is issued against the garnishee, then the garnishee is liable to settle the claim and execution shall issue as a matter of course.
11. The court further found that that was usually the effect of a garnishee order absolute and the garnishee became liable to settle the amount decreed in the garnishee order absolute.
12. It was the Court's finding in the impugned ruling that, the plaintiff having failed to defend the garnishee proceedings, it became liable to settle the garnishee order absolute and that the execution proceedings against it were lawful and regular. There arises no need to await the finding of contempt. The decree absolute is a decree against a garnishee which is to be executed like any other decree against a judgment-debtor.
13. In this regard, can it be said that the Court failed to address the issue of the proclamations issued against the plaintiff? I think not. It is only that the Court did not go as far as to rule whether an order for contempt as a second layer was necessary before execution can issue against the defaulting garnishee.
14. To answer the plaintiff's question 'whether a decree absolute for attachment of monies in a debtor's account can extend to attachment of the bank's property in absence of court orders finding the bank in contempt for not complying with the garnishee order absolute', the Court's finding was and still is in the affirmative. If a garnishee fails to attend the garnishee proceedings and show cause whether or not it/he holds funds belonging to a judgment-debtor, the Court will make the order nisi absolute and order execution against the garnishee and its property attached.
15. The plaintiff submitted that the above finding was in conflict with paragraph 46(b) of the ruling wherein the Court found that if there were no further funds in the accounts garnisheered, the proclamation notices were unprocedural and be set aside. This Court finds no conflict with the two paragraphs.
16. I hold as aforesaid because, garnishee proceedings are a process whereby the garnishee is called upon to own and disclose to court the funds in his hands that are due to the judgment-creditor. In the case of a bank, what ordinarily happens is that a specific account wherein funds belonging to the judgment-debtor is attached. The liability of the garnishee is to the extent of what it owes the judgment-debtor.
17. Though the court found that the proclamation notices against the plaintiff's property were procedural, the same were only procedural to the extent that there were funds in the garnisheered accounts. If no funds were remaining in the garnisheered accounts held by the plaintiff, then the plaintiff's liability to settle the amounts decreed extinguished and the proclamation notices became unprocedural and automatically set aside. This Court finds no conflict nor confusion in that finding.
18. This Court has carefully considered the arguments raised in the plaintiff's submissions. The plaintiff was not satisfied with the ruling and quoted cases to support its position that the correct procedure was for the decree holder to bring contempt proceedings against it for failure to release the garnisheered amount and not proceed to execute the plaintiff's property to realize the amount.
19. Having already found that this Court pronounced itself on the issue, re-opening and reconsidering the same will amount to an appeal as submitted by the 3<sup>rd</sup> defendant. The grounds raised by the plaintiff are best suited for an appeal.



20. In the end, the Court finds no merit in the plaintiff's application. The same is dismissed with costs to the 3<sup>rd</sup> defendant.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

