



Mark Properties Limited (in Administration) v Globe Developers Limited; Diamond Trust Bank & another (Garnishee); Maalim & 2 others (Objector) (Arbitration Cause E001 of 2022) [2023] KEHC 21374 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E001 OF 2022
JWW MONG'ARE, J
AUGUST 15, 2023**

BETWEEN

MARK PROPERTIES LIMITED (IN ADMINISTRATION) ... DECREE HOLDER

AND

GLOBE DEVELOPERS LIMITED JUDGMENT DEBTOR

AND

DIAMOND TRUST BANK GARNISHEE

GUARDIAN BANK LIMITED GARNISHEE

AND

AHMED NASSIR MAALIM OBJECTOR

MOHAMED SALIM SHAMSUDIN OBJECTOR

ABDUL SHAKUR ASGERALI KASMANI OBJECTOR

RULING

1. The Decree-Holder moved this court by a Notice of Motion Application dated 19/5/2023 seeking to garnishee the judgment-debtor's funds held in Bank Accounts maintained by the 1st and 2nd garnishees herein, pursuant to order of this court issued on May 17, 2023 that recognised and adopted the final arbitral award issued by Engineer Oliver C.W Khabure, FCIArb in respect of arbitral proceedings between the two.



2. Subsequently, this court on 30/5/2023 issued an order of garnishee nisi against the two Banks herein. Soon thereafter three objections proceedings were filed by the three objectors seeking to vacate the said garnishee nisi and urging the court not to make the garnishee orders absolute.
3. It is important to note that by way of background that when the court granted the order for recognition and adoption of the final arbitral award, the court simultaneously dismissed the judgment-debtor's application that had sought to set aside the arbitral award. Subsequently and on 19/5/2023 the judgment-debtor moved the court seeking to stay the execution of the decree herein and the said application was heard and determined in favour of the decree-holder.
4. The first objection application has been filed by Ahmed Nassir Maalim advocate on his behalf and it seeks to have released from the garnisheed funds the sum of Kshs.76,000,000/- in which the objector claims to be due and owing to him from the judgment debtor on account of a sale and purchase agreement for an apartment on the suit premises. To support his claim, the objector has annexed as evidence and proof of the said debt a sale agreement drawn by the firm of Wandabwa & Company Advocates, which is the firm that represented the judgment debtor at the arbitral proceedings and in these proceedings.
5. The second objection proceedings have been filed by and on behalf of Mohamed Salim Shamsudin, a shareholder and original subscriber to the judgment debtor herein. The objector has brought objection to the garnishing and release of the funds held in the account of the 2nd garnishee, Guardian Bank Limited. According to the 2nd objector, his claim is premised upon a share transfer agreement that guaranteed to him a repayment of a shareholder loan advanced to the judgment debtor to be utilised in the development of several parcels of land including the suit property. The objector avers that before the decree herein can be settled, the shareholder loan advanced by him to the judgment debtor has to be repaid first and thereafter, other debts of the company can thereafter be settled. In support of his objection the objector annexed to the objection application the Memorandum and Article of Association of Globe Developers Limited, dated 15/2/2009 indicating that he was indeed a shareholder with 200 shares of the company. The objector also attached a shareholder loan agreement and a share transfer agreement dated 15/10/2021 among other documents.
6. The third objection to the garnishee proceedings has been filed by Abdulshakur Asgarali Kasmani, who just like the 2nd objector, claims to be entitled to the funds held in the Garnished Bank Accounts of 1st and 2nd garnishee banks, as a founder and shareholder to the judgment debtor. The objector as proof of his claim annexed a copy of title document for LR. 3734/5/161 and medical records. He also annexed Minutes and resolutions of the Board of the Judgment debtor dated 11th November 2021 confirming indeed he was owed the sum of Kshs.150,000,000/- as a result of a shareholder loan advanced to the judgment debtor and that the company did resolve to pay him the said shareholder loan from the sale of apartments in Rumaisa. The objector urged the court to lift the garnishee nisi and allow the judgment debtor to access the funds and refund to him the funds so advanced to the company.
7. The decree-holder filed grounds of objection to the three objections and a replying affidavit sworn by Khusbhu Kerai, the manager of the decree-holder, opposing the three objections seeking to stop the court from making the garnishee nisi absolute and allow the payment of the judgment debt herein.

Analysis and Determination

8. I have carefully considered the three objection applications filed in response to the garnishee proceedings herein. I have also carefully considered the response and grounds of opposition filed by the decree-holder and the submissions by the judgment debtor herein. To my mind, the only issue for



determination is “whether the order garnishee nisi should be made absolute in light of the objections filed thereto”.

9. From the onset it is important to bear in mind that the garnishee applications are execution proceedings per se and are brought under Order 23 of the *Civil Procedure Rules*. Order 23 Rule 1 provides as follows:-

“A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, Rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree-holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.”

10. Subsequently to an order of garnishee nisi, the court before confirming the same and making it absolute is mandated by virtue of Order 22 Rule 6 to hear any objections by 3rd parties that may be laying a claim to the garnished funds. Rule 6 therein provides as follows:-

“Whenever in any proceedings to obtain an attachment of debts it is suggested by the Garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court may order such third person to appear, and state the nature and particulars of his claim upon such debt.”

11. It is important to bear in mind that objection proceedings are provided for under Order 22 Rule 51(1) of the *Civil Procedure Rules* which provides as follows:-

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.”

This provision invites objectors to make submissions before the court handling the execution proceeding to lay a basis as to why they are entitled to the property attached in execution thereto. Courts have held therefore that the objector has the burden to prove his or her claim to the said property as against the judgment creditor pursuing execution after a judgement and a decree of the court.

12. The above position was reiterated by the court in the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR where the court held as follows:-

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree? ”



13. Similarly the court in the case of *Precast Portal Structures v Kenya Pencil Company Ltd & 2 others* [1993] eKLR held as follows:-

“The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.

- (1) that the property was not, when attached, held by the judgement-debtor for himself, or by some other person in trust for the judgement-debtor; or
- (2) that the objector holds that property on his own account.”

14. From the authorities above it can be concluded that the objector had the burden of proving his/her legal or equitable interest over the proclaimed goods. Having said so, I have carefully considered the various objections brought by the objectors and note that Mr. Ahmed Nassir Maalim, the 1st objector claims to be entitled to the sum of Kshs.76,000,000/- from the garnished funds. Mr. Ahmed Nassir Maalim avers that these funds are as a result of an aborted sale agreement over one unit being Apartment D1 on L.R. No. 209/22528, the suit premises herein. The objector further stated that subsequently he executed a rescission agreement on 30/11/2022 which contained a clause assigning him the proceeds of sale of Rumaisa Apartments to the tune of Kshs.76,000,000/- and as a result therefore, he has a claim to the funds held by the 1st and 2nd garnishees and which the court issued order of garnishee nisi on 30/5/2023.

15. In considering whether the 1st objector has proved his claim on a balance of probabilities as per law required in civil matters, I have considered the evidence tendered in support. I note that the objector has availed as his evidence a sale agreement executed between himself and the judgment debtor dated 15/1/2020 and a rescission agreement dated 30/11/2020. I note that despite these two documents having been executed in 2020 during the pendency of the arbitral proceedings, no claim was brought as against the judgment debtor by the objector in the said arbitral proceedings and neither was any attention drawn to the arbitrator of the said claim. I also note that there is no evidence of a court order or decree emanating from any court issued prior to the garnishee nisi order in favour of the objector to support his claim for refund. The rescission agreement makes reference to a refund from sales of the apartment as known as Rumaisa, I note that no sale agreements have been made available to the court in order to satisfy itself that the source of the garnished funds are from the sale of the apartments to which the refunds were to be made. It is therefore not possible for the court, without sighting any evidential material to conclude that the funds under the garnishee orders are from the sale of the apartments. I also further note the agreement between the objector and the judgments do not bear any stamp duty as required under the *Stamp duty act* and neither are they registered. To my mind, the agreements are only good as contract and evidence between the two parties and cannot be used as evidence in a claim involving 3rd parties, like the decree holder and the two garnishees herein who are not privy to the said agreement. I am therefore satisfied, that the objector herein has not laid a proper basis to warrant the court herein rescinding or vacating the garnishee orders issued by the court on 30/5/2023. The objection by the 1st objector is therefore dismissed for want of merit.

16. The 2nd and 3rd objectors' are shareholders of the judgment debtor. Their arguments and claim to entitlement of the garnished funds emanate from the fact that they were founders of the judgment debtor. They both allege to have contributed funds as shareholders of the judgment debtor to set it up and provide capital for the development of various properties including the suit property known Rumaisa apartment. The 2nd objector claims to have advanced the judgment debtor a loan and is entitled to refund of Kshs.130,000,000/- while the 3rd objector claims the sum of



Kshs.150,000,000/-. Both objectors allege that these were shareholder loans that were to be repaid with the sale proceeds of the apartments. The objectors provided several documents in support of their claims. On his part, the 2nd objector provided in evidence the memorandum and articles of association showing that he was a founding subscriber and director and also a shareholder loan agreement for Kshs 55,000,000/-. The objector also provided a share transfer agreement between the 2nd objector and 3rd objector. On his part, the 3rd objector made available a Board Resolution approving his refund of the shareholder loan agreement.

17. As stated above, objection proceedings under Order 22 Rule 51 require that the objector provide adequate evidence to satisfy the court that they are entitled to the attached property (in this case, the garnished funds) in priority to the decree holder. Upon considering the claims by the two objectors, I note that the two are shareholders and claim to be the founders of the judgment debtor. To my mind, there are no insolvency proceedings against the judgment debtor as a company to warrant shareholders moving in to claim their equitable contribution to the company. No decrees whatsoever emanating from any courts have been tendered in evidence to confirm that the objectors claim had crystallised prior to the orders of this court. I am therefore satisfied that the objections applications by the two shareholders have not been proved to the required standard.
18. Having found that the three objections have not been established as required by law and considering that this court on April 27, 2023 recognised and adopted the arbitral award as an order of the court and noting that the said court order has not been set aside or vacated by the court of appeal or an order of this court, I am therefore satisfied that the garnishee proceedings herein are merited and I will allow the same. The garnishee application filed in this court on 19/5/2023 is hereby allowed and the order of garnishee nisi of 30/5/2023 to the accounts held by the 1st and 2nd garnishees herein is made absolute. The court orders that the funds held in the two accounts are to be released to the decree holder to satisfy the judgment debt herein.
19. Costs of these application are to be borne by the applicant/ objectors in favour of the decree holder. The costs of the garnishee application shall be paid from the garnished funds upon assessment by the court. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF AUGUST 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

- 1. Mr. Mutuku for the decree-holder.**
- 2. Ms. Mweseli holding brief for Wandabwa Kisinga for the 1st Garnishee – Diamond Trust Bank.**
- 3. Mr. Mutua for the 2nd Garnishee.**
- 4. Ms. Khadija holding brief for Ahmed Abdulahi for the 1st Objector.**
- 5. No appearance for the 2nd Objector.**
- 6. Mr. Danstan Omari for the 3rd Objector**
- 7. Sylvia- Court Assistant**

