



**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 24529 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 245 OF 2018
RE ABURILI, J
OCTOBER 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. The Applicant is Joseph Morara Omoke. In his application dated 15th August 2023 supported by his sworn affidavit and filed in court on 16th August 2023, which application was not responded to or opposed despite service of the same upon the rest of the parties, he seeks orders to set aside orders of 5th February 2019 and 12th February 2019 and to be enjoined to these proceedings as an interested party. He also intends to enjoin the Receiver Manager for Invesco Assurance Company Limited and the Law Society of Kenya as parties to these proceedings.
2. The main suit herein was between Gerald Kimanga (now deceased) T/A Kimanga & Company Advocates and its client Invesco Assurance Company Limited which was an advocate/client bill of costs claim.
3. The advocate then attached monies held by the garnishee Diamond Trust Bank Limited which monies had been deposited in a joint interest earning account opened by the firm of Kimanga & Company Advocates and the applicant's advocates Momanyi Aunga & Co. Advocates, in respect of a totally



- different case being Kisii CMCC No 235 of 2012 culminating in Eldoret Court of Appeal Civil Appeal No 31 of 2016 wherein the applicant herein was the successful party with the Court of Appeal ordering that the said monies deposited in a joint interest earning account be released to him.
4. Regrettably, the undisputed facts are that the funds which were garnished and paid out to the advocate by the Bank were funds which had been deposited in a joint interest earning account as security for due performance of decree in favour of the Applicant herein Mr. Joseph Morara Omoke in Kisii CMCC 245 of 2012 and Eldoret Court of Appeal Civil Appeal No 31 of 2016. They were not funds held by the Garnishee on the account of the judgment debtor Invesco Assurance Company Limited.
 5. Vide the Ruling delivered by this court on 31st May 2023, I found that albeit the Applicant had established a prima facie case that the monies paid out to Gerald Kimanga advocate by the Bank Garnishee herein was irregularly paid as the monies belonged to the applicant herein, regrettably, the applicant had not applied for the setting aside of the orders which enabled the advocate to irregularly receive the funds from the bank and that neither had he applied to be formally enjoined to these proceedings as a party.
 6. The Applicant has now filed the application for joinder and for orders that the money which was deposited in the joint interest earning account No 533xxxxxxx between Kimanga & Company Advocates and Momanyi Aunga & Company Advocates belonged to him; that an order or declaration be made that the release of the said monies to the firm of Kimanga & Company Advocates was unlawful, improper, irregular and or invalid; that he be paid the said money of Kshs.1.1 million plus accrued interest and that the Garnishee be held liable for the release of the said monies to Kimanga & Company Advocates hence the Garnishee be ordered to indemnify the Applicant herein.
 7. The facts of this case are well set out in the Applicant's supporting affidavit and in my ruling dated 31st May 2023 which is on record and which has never been appealed against.
 8. Despite service of the application upon the parties named herein, there was no affidavit filed in opposition thereto.
 9. The court did direct for hearing of the application orally on 13th October 2023 and only the Garnishee did appear vide its counsel Mr. Kavata who simply stated that although they had not filed any response, they intended to oppose the application.
 10. I have considered the application as filed and argued by the Applicant. It is trite that in my ruling of 31st May 2023, I made findings which the applicant has leveraged on and sought the prayers in his application wherein he now seeks to be enjoined to these proceedings as a party in order for him to ventilate his grievances.
 11. My findings were clear that it was improper for the Bank to have paid out money deposited with it in a joint interest earning account of two advocates yet it released the money to one advocate without the order of the court on the release of the said monies which were for a different case all together and further that the Bank having been served with the Garnishee Nisi, it had the opportunity to challenge the same in court before the order was made absolute.
 12. For the above reasons, I am satisfied that the Applicant herein who was the lawful owner of the money which was irregularly released to Gerald Kimanga Advocate has an identifiable interest in this matter and that he ought to be enjoined to enable him agitate for his rights.
 13. On whether the Official Receiver for Invesco Assurance Company Limited and LSK should be enjoined to these proceedings or not, I find that it will serve no purpose to enjoin them as they will add no value to the proceedings since the Bank Garnishee is the one that released the money to Gerald



Kimanga Advocate unprocedurally, knowing very well that the money did not belong to Invesco Assurance Company Limited and in failing to challenge the Garnishee Order Nisi before it was made absolute.

14. On whether the Orders nisi and absolute should be set aside, I find that the court was misled by Kimanga & Company advocates into believing that the monies held in the joint interest earning account belonged to the judgment debtor client of Mr Gerald Kimanga and that had the court known that the funds which were being attached belonged to the applicant herein and in totally different proceedings, it would not have issued the order nisi or even the order absolute. For the above reasons, I find and hold that the orders nisi and absolute were made through misrepresentation and non-disclosure of true facts to the court and for that reason, they are amenable for setting aside. I hereby set aside those orders.
15. On whether Diamond Trust Bank should be ordered to indemnify the Applicant herein for unprocedurally releasing the money deposited with it for a totally different case unrelated to the claim by Kimanga & Company Advocates, I find that the Garnishee Bank acted on the Order absolute and released the money and did not challenge the order nisi served upon the Bank on 7th February 2019 as per the date stamp on the said order as per my earlier findings in the ruling of 31/5/2023, knowing very well that the money in question did not belong to the Insurance company, judgment debtor herein, which monies were deposited in a joint interest earning account held by two advocates and yet the Garnishee released the money to one advocate without recourse to the other advocate in the matter which was totally unrelated to the advocate client advocate bill of costs. For that reason, I order that the Garnishee is liable to indemnify the applicant herein in the sum released to Kimanga & Company Advocates, which is Kshs. 1,100,000 together with accrued interest on the fixed deposit account No 523xxxxxxx as at the time the said monies were being released to Gerald Kimanga Advocate.
16. Consequently, I find the application dated 15th August, 2023 merited to the extent that I have stated above and allow prayers Nos 2, 3, 6 and 7 of the said application as stated herein. I order that each party bear their own costs of the application dated 15th August, 2023. Mention on 23/11/2023 to confirm settlement by the Garnishee Bank.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2023.

R. E. ABURILI

JUDGE

