



**Njirati v Diamond Trust Bank (Civil Appeal E086 of 2022)
[2023] KEHC 27601 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 27601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E086 OF 2022
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

IRENE MUTHONI NJIRATI APPELLANT

AND

DIAMOND TRUST BANK RESPONDENT

(Being an Appeal against the entire Ruling/Order dated 3rd June, 2022 in Mombasa Chief Magistrate's Case No. 110 of 2020 by Learned Magistrate Honourable Gideon Kiage)

JUDGMENT

1. This is an appeal from the ruling of the Learned Senior Resident Magistrate Hon. Gideon Kiage in Mombasa CMCC 110 of 2020 given on 3rd June, 2022.
2. The Appellant raised ten (10) grounds of appeal among them that the Learned Magistrate erred in Law and in fact by dismissing the Appellant's application dated 18th March, 2020.
3. The appeal emanates from a ruling delivered by the Lower Court wherein the Appellant had sought to garnish the accounts of the judgement debtor held by the Respondent. The said accounts were specified as 01050XXXXXX and 0002XXXXXX.
4. In its ruling, the Trial Court stated that the burden was on the Appellant to establish that the garnishee operated account number 010509199221 in favour of the judgement debtor and that as at the date of issuance of the garnishee order nisi, there were funds held in account number 0002XXXXXX to the judgement debtor's credit. It concluded that the Appellant failed to prove any of the facts and as such, the application dated 18th March, 2020 failed and was thus dismissed accordingly.
5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate



court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

8. I have looked at the Appellant’s grounds of appeal, the application dated 18th March, 2020, the Trial Court’s ruling delivered on 3rd June, 2022 and the detailed written submissions filed by both parties.
9. The application subject of this appeal sought for a raft of orders but for the purposes of this appeal, the relevant one is whether the Trial Court ought to have issued a decree absolute as against the Judgement Debtor’s accounts held with the Respondent in respect to account numbers 0002XXXXXX and 01050XXXXXX. It is not in dispute that the garnishee’s representative one Jennifer Nthiga attended court and was cross examined on these accounts.
10. Directions were taken that the appeal be canvassed by way of written submissions. As already alluded above, both parties duly complied with the directions and filed detailed submissions together with authorities in urging their rival positions.

Appellant’s Submissions

11. They are dated 11th January, 2023 and filed on the same date. The Appellant quoted at length the decision of Justice P.J. Otieno in Mombasa High Court Case No 171 of 2018 wherein the court had considered the accounts in issue. The Appellant submitted that despite the Respondent’s contention that account number 01050XXXXXX did not exist, the witness called did not controvert the issues as raised by the court in Mombasa HCC No 171 of 2018. In fact, it was pointed out that the witness lied.
12. On the issue of whether the accounts had been closed by the garnishee through a letter dated 20th January, 2020, it was submitted that the said letter was merely a notice to the Judgement Debtor giving



them fourteen (14) days to comply with some conditions before the accounts were closed. It did not specifically close any account.

13. The notice did not equally mention account numbers 0002XXXXXXX and 01050XXXXXXX which were subject of the application. It was equally submitted that despite the alleged closure, the Respondent continued to pay from the same accounts as per a letter dated 28th January, 2021 and a bankers' cheque dated 29th January, 2021. The Appellant therefore prayed that the appeal be allowed as prayed.

Respondent's Submissions

14. They are dated 24th January 2023 and filed on 2nd February, 2023. At the onset, the Respondent submitted that the Appellant did not serve the Order Nisi but only the Garnishee Application dated 27th October, 2020. It therefore contended that at all material times, there was no order attaching any funds in any account.
15. It denied the existence of account number 01050XXXXXXX and in any event, the Judgement Debtor's accounts had been closed through a closure notice dated 20th January, 2020. As such, it did not operate any accounts of the Judgement Debtor as at the date of service of the garnishee application. It further submitted that 01050XXXXXXX was not an account number but the Respondent's Bank reference.
16. The Respondent submitted in detail on what garnishee proceedings are. The Nigerian Court of Appeal case of *Citizens International Bank Limited v Scoa Nigeria Limited & another* [2006] quoted with approval in *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishee)* [2020] eKLR was cited. Order 23 Rule 1 of the *Civil Procedure Rules* which governs garnishee proceedings was quoted verbatim. The case of *Mengich t/a Mengich & Co. Advocates & another v Joseph Mabwai & 10 others* [2018] eKLR was cited for the proposition that garnishee proceedings are done in two different stages, that is, the first stage for garnishee order nisi and the second stage for garnishee order absolute.
17. The Respondent further submitted that the burden of proof in garnishee proceedings was upon the Appellant as per the provisions of section 107 and 108 of the *Evidence Act*. As per the Respondent, the burden only shifts once the Appellant shows that there is an existing debt to be attached. The case of *Ngaywa Kibet* (above) was cited to augment this proposition.
18. The Respondent equally submitted on what constitutes attachable debts in garnishee proceedings. As per the Respondent, an Applicant has to establish that as at the date of service of the garnishee order nisi, there was an existing debt owed by the garnishee to the Judgement Debtor. The case of *Merchant International Company Limited v Natsionalna Atsionerna Kompania Noftgaz Ukrainy & another* (England & Wales High Court) (Commercial Court) (Feb 26 2014) was cited on the definition of what constituted attachable debt. Order 23 Rule 2 of the *CPR* was equally to buttress what happens when the garnishee is a bank.
19. Based on the foregoing, the Respondent submits that for the Appellant to succeed, she needed to have proved that the alleged accounts numbers 0002XXXXXXX and 01050XXXXXXX existed as at the time of filing the garnishee application dated 18th March, 2020 and that the said accounts had credit balances to enable the Appellant attach. In totality, the Respondent prayed that the appeal be dismissed with costs.



Analysis and Determination

20. I have considered the appeal lodged, the submissions filed both for and against, the authorities cited as well as the law and I discern the following issues for determination: -
- Whether account numbers 0002XXXXXXX and 01050XXXXXXX existed;
 - If the answer to (a) is in the affirmative, whether the same could be subject of garnishee proceedings;
 - Whether the Trial Court erred in dismissing the application dated 18th March, 2020;
 - Who bears the cost?

21. On the first issue, the Appellant referred the court to the pages 121 to 123 of the Record of Appeal. I have considered the pages referred and I note that at paragraphs 18, 19, 20 and 21, Justice P.J.O. Otieno found for a fact that these accounts existed. My Learned Brother Judge held as follows: -

“...I am in no doubt that the account is confirmed to have been existent, continues to be in existence and existence or otherwise itself presents no serious argument to warrant a serious judicial consideration by way of an appeal...”

I have not been referred to any appeal on this decision and I therefore return a finding that the accounts referred to in the application dated 18th March, 2020 indeed existed.

22. The Respondent has made so much heavy weather on the issue that 01050XXXXXXX was not an account number but the Respondent’s iBank reference. If indeed there was an error on the decision by Justice P.J.O. Otieno delivered on 23rd October, 2020, the Respondent had the recourse of either a review or an appeal. None was preferred and as such, the issue of whether 01050XXXXXXX was an account number or not does not arise. Though the Respondent’s witness confirmed that this was not an account number, I hold that the denial did not in any way disturb the holding by Justice P.J.O. Otieno. Therefore, nothing turns on this issue.
23. Having answered the first issue in the affirmative, the Respondent contends that the Judgement Debtor’s accounts were closed vide a letter dated 20th January, 2020. In response, the Appellant stated that despite this notice, the Respondent did make payments on 28th January, 2021. I have considered the letter dated 20th January, 2020 and I am satisfied that indeed, the Judgement Debtor was given a fourteen (14) days’ notice that its accounts with the Respondent would be closed.
24. The Appellant submitted that the notice did not refer to any accounts but paragraphs 1 and 2 of the said letter leaves no doubt as to what was being closed. It made reference to account (s). In the ordinary construction, this means whatever accounts were being held by the Judgement Debtor were going to be closed within fourteen (14) days.
25. Whether the same was done or not is not an issue. At the second last paragraph, the Respondent categorically indicated that it was not going to offer any new banking services prior to the closure of the accounts. Therefore, it does not matter whether the Judgement Debtor was notified of the actual closure of the account or not. Having so closed the accounts as per the letter dated 20th January, 2020, what was the basis of the Respondent making payments as late as 28th January, 2021? The Respondent submitted that since they were denied a chance to file an appeal out of time, they did not have a chance to ventilate their grievances. Is this argument tenable?



26. The ruling delivered on 23rd October, 2020 did not bar the Respondent from appealing to the Court of Appeal if indeed it deemed the decision to dismiss their application was not merited. The argument that it had no option but to pay is simply lame and cannot be countenanced by this court. It is a fact that banks such as the Respondent do not have their own money. Having made payments in favour of the Judgement Debtor way after it closed the Judgement Debtor's accounts, the Respondent is estopped from denying the fact that it still held funds for and on behalf of the Judgement Debtor

27. Section 120 of the *Evidence Act* provides as follows: -

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

28. The Court of Appeal in *Serab Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, it was held as follows:

“...The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person...”

29. Therefore, the Respondent is estopped from raising any other issues having made payments in respect of the Judgement Debtor having closed their account. Based on the foregoing, I answer the second issue in the affirmative and hold that the Appellant was entitled to garnish the Judgement Debtor's accounts held with the Respondent as it did.

30. On the third issue, having found as above, I am convinced the Learned Trial Magistrate was in error to dismiss the application dated 18th March, 2020 and I proceed to set aside the dismissal.

31. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is considered trite law that costs follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party. I see no such reasons disentitling the Appellant from being awarded costs which I so award.

32. Flowing from the above, I proceed to make the following disposition: -

- a. The appeal is hereby allowed on terms that the Ruling delivered on 3rd June, 2022 is set aside;
 - b. A Garnishee Order Absolute is hereby issued as against the Respondent and that the Garnishee/Respondent is ordered to satisfy the decretal sum of Kshs 3,425,381.75/= at an interest of 12% per annum;
 - c. The Appellant is awarded costs of the appeal;
 - d. For avoidance of doubt, interest shall accrue from 27th October, 2020
- It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 27TH DAY OF OCTOBER, 2023.

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F. WANGARI

JUDGE

In the presence of:

Wafula Advocate h/b for Ananda Advocate for the Appellant

N/A for the Respondent

Barile, Court Assistant

