



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISCELLANEOUS CIVIL CASE NO. E006 OF 2020

**PATRICK L. OTIENO**

**T/A OTIENO OYOO & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**AFRICA MERCHANT ASSURANCE CO. LTD.....RESPONDENT /JUGMENT DEBTOR**

**DIAMOND TRUST BANK KENYA LTD.....GARNISHEE**

**RULING**

1. The applicant moved the court by way of exparte Notice of Motion dated 2<sup>nd</sup> November, 2021. It was brought under sections 1A, 3A and section 38 (c) of the Civil Procedure Act, CAP. 21 Laws of Kenya, Order 23 Rules 1(1), 2, 9 & 10 & Order 51 Civil Procedure Rules. He is seeking the following orders:

- a) That the monies held by the garnishee, Diamond Trust Bank Kenya Limited – on behalf of the judgment debtor M/s Africa Merchant Assurance Company limited, in fixed Deposit Account No.FDLCxxxxxx Garnishee’s Capital Center Branch, Nairobi be and are hereby attached to answer the decree herein, the amount unsatisfied being kshs.1,151,212.00 plus costs of these garnishee proceedings.
- b) That the garnishee herein do appear before the honourable court to show cause why it should not pay to the decree holder the debt due from it to the judgment debtor, being monies/funds held in Fixed Deposit Account NO.FDLCxxxxxx garnishee’s Capital Center Branch, Nairobi or so much thereof as may be sufficient to satisfy the decree herein together with the auctioneer’s costs, plus the costs of these garnishee proceedings.
- c) That the costs of this application be provided for.

2. The application was premised on the following grounds:

- a) A certificate of costs/judgment was issued herein in favour of the decree holder against the judgment debtor for a sum of kshs.1, 151,212/- together with interest.
- b) The judgment debtor has failed to settle the said sum.
- c) The certificate of costs/judgment remains unsatisfied to the tune of kshs.1, 151,212/- and now costs of this garnishee.
- d) The /garnishee is indebted to the judgment debtor vide a credit balance in Fixed Deposit Account No.FDLxxxxxxx at the Garnishee’s Capital Center Branch, Nairobi of an amount capable of satisfying the decree herein, the auctioneer’s costs plus costs of this application.
- e) The Garnishee is within the jurisdiction of this honourable court.
- f) It is in the interest of justice that the orders sought herein be granted.

3. The garnishee opposed the application on the following grounds:

- a) Account number 071FDICxxxxxxx was a fixed Deposit Account opened on 23<sup>rd</sup> June 2021 where Kshs.42, 899,968.56 was

deposited. The fixed deposit had a Maturity date of 8<sup>th</sup> October, 2021.

b) The funds in the fixed deposit account No. xxxxxxxxxx were security for an overdraft facility cum bank guarantee facility of kshs.180, 000,000/- advanced by the garnishee to the respondent vide a Letter of Offer dated 14<sup>th</sup> April 2021. The overdraft facility was in respect to current account No.xxxxxxx.

c) The respondent did not regularize the overdraft facility and as at the date of maturity of the FDR account, the respondent had still overdrawn its account No. xxxxxx to the tune of kshs.100,307,839.45/- as at 9<sup>th</sup> October, 2021.

4. Ordinarily, garnishee proceedings are not supposed to be protracted. It is simply establishing if the garnishee is holding any fund belonging to the judgment debtor. In the instant case however, the garnishee has been accused of not being candid in respect of this matter.

5. Through the legal officer with the garnishee has averred that Kshs.42, 899,968.56 which was deposited in a fixed deposit account and with maturity date of 8<sup>th</sup> October, 2021 was to be security for an overdraft facility. There is nothing in the document she attached to her affidavit and marked **JT1** that support this contention.

6. Interestingly, she attached another document for enhancement of the mortgage which is incomplete. It could have inadvertent or deliberate and the court cannot be able to tell its probative value.

7. In the instant case, the garnishee ought to have attached the bank statement of the accounts of the judgment debtor which have been allegedly closed, for the court to ascertain that they no longer hold any funds for the judgment debtor. Without such a statement, the garnishee appears not candid in the matters in issue.

8. In the circumstances of this case, I must allow the application and make the garnishee order herein absolute.

9. Each party to meet own costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 29TH DAY OF MARCH, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE.**