



**Njoroge v Presbyterian Foundation; KCB Bank Kenya Limited (Garnishee);
 Presbyterian Church of East Africa (PCEA Church) (Objector) (Civil
 Suit 111 of 2016) [2022] KEHC 311 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 311 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT MOMBASA
 CIVIL SUIT 111 OF 2016
 JM MATIVO, J
 APRIL 22, 2022**

BETWEEN

REHEMA W. NJOROGE APPLICANT

AND

PRESBYTERIAN FOUNDATION RESPONDENT

AND

KCB BANK KENYA LIMITED GARNISHEE

AND

PRESBYTERIAN CHURCH OF EAST AFRICA (PCEA CHURCH) .. OBJECTOR

RULING

1. Before me are two applications seeking diametrically opposed orders, namely, the application dated 29th September 2021 filed by Rehema W. Njoroge, the Judgement Creditor (the JC) (herein after referred to as the first application) and an application dated 29th October 2021 filed by The Presbyterian Church of East Africa (PCEA Church), describing itself as an objector, (herein after referred to as the second application). I will later in this ruling spare some ink and paper and address my mind to the question whether this second application is properly before this court. This is a pertinent legal question, but none of the parties before me addressed it.
2. Whereas the Judgement Creditor seeks to enforce a decree issued in its favour against the Presbyterian Foundation (herein after referred to at the Judgment Debtor) by seeking to garnish money held in Kenya Commercial Bank Limited, Moi Avenue Branch in account numbers 120xxxxxxx, 110xxxxxxx, 123xxxxxxx and 110xxxxxxx, the objector seeks to discharge/ set aside the Garnishee order nisi issued



on 4th October 2021 on grounds that the said order relates to accounts whose holders are not parties to this suit. For the sake of brevity, I will here below briefly summarize the two applications separately.

3. In the first application, the Judgment Creditor prays for orders that this court orders execution of the decree against the funds held by the Garnishee in the Judgment Debtor's Bank Accounts numbers 120xxxxxxx, 110xxxxxxx, 123xxxxxxx and 110xxxxxxx held at the Garnishee's Moi Avenue Branch in satisfaction of the judgment and decree and the garnishee order be made absolute. She also prays that the Garnishee be directed to appear before this court and show cause why the sum of Kshs. 32,491,266/= should not be released from the Judgment Debtor's Bank account numbers 120xxxxxxx, 110xxxxxxx, 123xxxxxxx and 110xxxxxxx held at the Garnishee's Moi Avenue Branch in satisfaction of the judgment and decree in this matter. Lastly, she prays for costs of the application be paid by the Judgment Debtor. Prayers (1) and (2) of the application are spent.
4. The Judgment Creditor's core grounds are that there is a final and binding decree issued by this court which has been duly served upon the Judgment Debtor but despite being served with the decree, it failed and or refused to satisfy the same prompting the Judgment Creditor to execute the same by way of Attachment and Sale, but before the sale, the Judgment Debtor paid Kshs. 500,000/= being partial payment, so, the Judgment Creditor withheld the proclamation on the agreement that the Judgment Debtor will settle the debt. The Judgment Creditor states that the Judgment Debtor subsequently disposed its assets to evade the execution. The Judgment Debtor states that to date the Judgment Creditor is indebted to the applicant to the tune of Kshs. 32,491,266/= and despite various demands, the Judgment Debtor has failed to settle the same. She states that she has learnt that the amounts held in the said accounts are sufficient to satisfy the decree, and that the Respondent will not suffer any prejudice if the orders are granted.
5. The Judgment Debtor's response to the first application is contained in the Replying affidavit of Samuel Gatheru Kanyoro, its Property Manager dated 11th October 2021. The key ground as I glean it from the said affidavit is that the application is defective because it is premised on the assumption that the said bank accounts belong to the Judgment Debtor. Further, the sum claimed is incorrect because it includes untaxed auctioneer's fees. It also states it has made efforts to settle the same where it not for effects of COVID 19.
6. The objector in the second application seeks an order that the garnishee order nisi issued herein be discharged/set aside. The core ground in support of the application is that the cited accounts belong to the Presbyterian Church of East Africa (the PCEA Church) which is not a party to this case. Similar same grounds also replicated in the objector's Notice of Objection 29th October 2021 in opposition to the first application.
7. The Garnishees response to the first application is explicated in the Relying affidavit of a one Gordon Winani dated 3rd November 2021, its Corporate Services Manager, Moi Avenue Branch. The essence of his averments is that the Judgment Debtor does not operate account numbers 120xxxxxxx, 110xxxxxxx, 123xxxxxxx and 110xxxxxxx as alleged by the Judgment Creditor, but the said accounts are held by the following :- Account Number 120xxxxxx- Kairete Limited; Account Number 110xxxxxx- PCEA Ministry Maintenance Fund; Account Number 123xxxxxxx- PCEA Head Office Group Account and Account Number 110xxxxxxx-PCEA Donations Earmarked Funds.
8. It states that based on the account opening documents, PCEA is a registered organization and it is not the same as the Presbyterian Foundation. Further, Kairete Limited is a limited liability company. Additionally, the garnishee owes a duty of confidentiality to its customers, so it would be a breach of its duty to customers were it to disclose their details. Lastly, the objector urged the court to exercise



its powers under Order 23 Rule 10 of the Civil Procedure Rules, 2010 and order that a sum of Kshs. 25,000/= be paid to it by the Judgment Creditor as costs of these proceedings.

9. The Judgment Creditor swore the Replying affidavit dated 16th November 2021 essentially reiterating the contents of her affidavit dated 29th September 2021. Additionally, she deposed that the Judgment Debtor and the entities said to own the said accounts are related/connected since they are all managed and controlled by the church. She averred that in order to ensure smooth operations of its functions, the church incorporated various entities to manage its different activities. She averred that the church has opened various bank accounts registered under different entities for specific purposes and collection of funds, and that the Judgment Debtor does not have a board of management but it's managed by the church through its General Assembly. Further, that in the past the Judgment has been sued on behalf of the Church.
10. M/S Njoroge also deposed that upon being served with a proclamation, the PCEA Investment Fund in acknowledgement of the debt issued a cheque in the name of her advocates for Kshs. 500,000/= being part payment of the debt, hence, the Judgment Debtor and the church are connected just like the church is connected with its other institutions. She urged the court to lift the corporate.
11. The Judgment Debtor filed the further affidavit of Francis Gatimu Mathea dated 25th November 2021 essentially disputing the contents of the Judgment Creditor's Replying affidavit and accusing her of not being candid.
12. The Judgment Creditor filed the supplementary affidavit dated 28th February 2022 contending that the Judgment Debtor has not disputed that the church, just like the objectors are also entities of the church and that by virtue of having a single source of management and control, the foundation, the church and the objectors are deemed to be identical and that their relationship is demonstrated by various correspondence exchanged between the various entities. She averred that she believes that the church maintains its funds in various accounts operated by related entities and in a bid to unlawfully evade the debt, the church has been moving funds from its accounts into other accounts held by its related entities. Further, the officials of the church are the same persons who sit in various entities. Additionally, she deposed that the church is the sole beneficiary of the Judgment Debtor's activities and the objectors.
13. The applications were canvassed by way of oral submissions.
14. The Judgment Creditor's counsel essentially replicated the affidavits filed. Firmly premising the application on order 23 of the Civil Procedure Rules, 2010, she submitted that the decree is not disputed, and, that the Judgment Creditor seeks to attach the 4 bank accounts linked to the Judgment Debtor. She submitted that the said accounts which are held by different entities are connected to and belong to the Judgment Debtor. She argued that the objector's have not disputed that the account holders are entities of the PCEA, and that the said entities are controlled by a single body. To fortify her argument, she relied on the correspondence annexed to the Judgments Debtor's affidavits and argued that the various entities answer to the same body and that the funds in the various accounts are controlled by the church.
15. Counsel for the Judgment Debtor relied on the replying affidavit filed on 21st October 2021. The crux of the affidavit is that the garnished accounts do not belong to the Judgment Debtor and the mere fact that some amount was paid does not warrant issuance of the orders. He argued that the Judgment Debtor is registered under the [Companies Act](#),¹ so it is a separate legal entity. He also submitted that

¹ Cap 486, Laws of Kenya. - Repealed by Act No 17 of 2015.



the church is registered under the *Societies Act*,² so, there is a difference between the Presbyterian foundation and the PCEA Church. He argued that as demonstrated by the Garnishee's Replying Affidavit, the 4 accounts are held by different entities and the working relationship between the said entities does not translate to ownership of the accounts.

16. Counsel for the Garnishee relied on the Replying affidavit dated 3rd November 2021.
17. The objector's advocate relied on the grounds in support of its application and submitted that the Judgment Debtor is a company limited by guarantee and its management is different from the church and the other entities. He submitted that the instant application is a ploy by the Judgment Debtor to lift the veil. He submitted that the mere fact that Kshs. 500,000/= was paid as claimed does not create link between the entities. He relied on *Salomon v A Salomon & Co Ltd*.³
18. First, I will address the question I alluded to earlier, that is the competence of the objector's application. Notably, the objector's application is premised on Order 22 Rule 51 (1) (2) & (3), Order 52 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*. Order 22 provides as follows: -

51. Objection to attachment [Order 22, rule 51.]

1. Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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 the parties and to the decree-holder of his objection to the attachment of such property.
2. Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
3. Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

52. Stay of execution [Order 22, rule 52.]

Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

53. Raising of attachment [Order 22, rule 53.]

Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment

² Cap 108, Laws of Kenya.

³ [1896] UKHL 1, [1897] AC 22.



as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.

54. Notice of intention to proceed [Order 22, rule 54.]

If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.

55. Power to order property attached to be sold and proceeds to be paid to person entitled [Order 22, rule 55.]

Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

19. The applicability of the above provisions to Garnishee proceedings is in doubt. The above provisions and the procedure stipulated therein (which was not followed in this case) only applies to execution of decrees and orders under Order 22. The *Civil Procedure Act*⁴ provides for the enforcement of judgments and orders. Specifically, Order 22 provides for Execution of Decrees and Orders while order 23 provides for Attachment of Debts. A reading of Order 23 shows that it comprises of self-contained provisions which are distinct and independent of Order 22, so is no need for a party challenging Attachment of Debts to invoke order 22.

20. The relevant provisions are Order 23 Rules 6 & 7 which provide: -

6. Claim of third person [Order 23, rule 6.]

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.

7. Trial of claim of third person [Order 23, rule 7.]

After hearing the allegations of any third person under such order, as in rule 6 mentioned, or of any other person who by the same or any subsequent order the court may order to appear, or in case of such third person not appearing when ordered, the court may order execution for levying the amount due from the garnishee, together with the costs of the garnishee proceedings, or order any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person or make such other order as the court shall think fit.

21. As the Supreme Court of India observed in *Ghanshyam Das v Anant Kumar Sinha*⁵ while dealing with provision of the code relating to execution of decree and orders, “so far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all aspects.” The numerous rules of the Civil Procedure take care

⁴ Cap 21, Laws of Kenya.

⁵ Ghanshyam Das v. Anant Kumar Sinha, AIR 1991 SC 2251.



of different situations providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors, as the case may be. In any event, in rare and exceptional cases, where provisions are rendered incapable of giving relief to an aggrieved party, the answer is a regular suit in the civil court.

22. The Garnishee has already in his affidavit clearly stated that the accounts in question are held by other entities. It disclosed the names of the entities. The objector's name is not among the 4 entities who own the said accounts nor was there any attempt to explain its relationship with the said entities. It was not suggested that the objector has a lien over the said accounts nor was the nature of its interest disclosed. In this regard, the objector's application is improperly before this court. The proper cause of action would have been for the 4 account holders whose names have been disclosed to approach this court under Order 23 Rules 6 & 7. This finding disposes the objector's application.

23. I now turn to the first application. The term execution has not been defined in the *Civil Procedure Act*.⁶ The expression "execution" means enforcement or implementation or giving an effect to the order or judgment passed by the court of justice.⁷ Simply execution means the process for enforcing or giving effect to the judgment of the court.⁸ Execution is the enforcement of decrees and orders by the process of the court, so as to enable the decree-holder to realize the fruits of the decree.⁹ The execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by the judgment, decree or order.

24. At this point, I find it useful to refer to the definition of a garnishee in the *Black's Law Dictionary*¹⁰ which is: -

“a statutory proceeding whereby a person's property, or credit in possession or under control of, or owing by, another are applied to payment of former debt to third person by proper statutory process against debtor and garnishee.”

25. The Nigerian Supreme Court in *C.B.N. v Auto Import Export*¹¹ offered an explanatory yet concise definition of garnishee proceedings in the following words: -

“Garnishee proceedings are special specie of process by which a judgment creditor may attach (or garnishee) debts due in satisfaction of the judgment debt. The debt owed by the third party to the judgment debtor, on being attached, shall ultimately be paid by him to the judgment creditor on the order of court. Thus, garnishee proceedings involve the attachment of debt due from a third party to the judgment debtor, and the use of the amount of that debt in liquidating the judgment debt. In garnishee proceedings, the third party indebted to the judgment debtor is called the garnishee. The judgment creditor, on the other hand, is referred to as the garnishor.”

⁶ Cap 21, Laws of Kenya.

⁷ *Halsbury's Laws of England (4th ed.) Vol. 17* at p. 232.

⁸ *Overseas Aviation Engineering, In re*, (1962) 3 All ER 12.

⁹ *Ghanshyam Das v. Anant Kumar Sinha*, AIR 1991 SC 2251.

¹⁰ Bryan Garner, 5th Edition, p. 612.

¹¹ {2013} 2 NWLR (Pt. 1337) 80 p. 126 paras. E – F



26. The court in *STB Ltd v Contract Resources (NIG) Ltd* defined a Garnishee as a third party who is indebted to a judgment debtor or having custody of his money and who at the instance of the judgment creditor is being called upon to pay the judgment debt. It can also be defined as, "a judicial proceeding in which a creditor asks the court to order a third party who is indebted to a debtor to turnover to the creditor any of the debtor's property in possession of that third party."
27. A reading of Order 23 prescribes two steps in Garnishee proceedings. The first is a Garnishee Order nisi. *Nisi* is Norman-French. It means 'unless.' It is an order to the bank communicating that unless there is some sufficient reason why the bank should not pay the decree, it will be required to pay money held in the Judgment Debtor's account. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to the creditor might be unfair by preferring him to other creditors.¹² If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if the Judgment Debtor directed the bank to pay it.
28. As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor.¹³ The money at the bank is then said to be 'attached,' but the 'attachment' is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay.
29. Simply put, a garnishee order nisi binds the debt in the hands of the garnishee. The rule operates as soon as the garnishee order nisi is served on the garnishee. By the same order or the subsequent order, the court may order the garnishee to appear before the court to show cause why he or she shall not pay to the decree holder the debt due from him or her to the judgment debtor or so much of the debt as may be sufficient to satisfy the decree with costs. The garnishee order nisi is also served on the judgment debtor. Where the garnishee does not dispute the debt due or claimed to be due from him or her to the judgment debtor or if he or she does not appear upon the day of hearing named in the garnishee order nisi, the court may order execution against the goods of the garnishee together with the costs of the garnishee proceedings. Where the garnishee disputes his or her liability, the court, instead of making an order that execution be levied, may order that the issue or question necessary for determining his or her indebtedness should be tried and determined. The garnishee may suggest or advance the argument that the debt sought to be attached belongs to a third party. Subsequent to that, the court may order the third-party to appear and be heard.
30. Garnishee proceedings serve to facilitate the satisfaction of judgment debts. Garnishees, in this regard, often have no objections to garnishee orders being made final, so long as there is a discernible debt due and owing to the judgment debtor; once such indebtedness is established, it is inconsequential to the garnishee who the debt is paid to. However, garnishee orders are premised on indebtedness – without such indebtedness to the judgment debtor, it would be plainly unjust to order a party to pay a sum to the judgment creditor.
31. One ground for setting aside a garnishee order is to avoid exposing the garnishee to a debt which he/it may not even owe, a position well stated by the English Court of Appeal in *Hale v Victoria Plumbing*

¹² see *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788.

¹³ see *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ.



Co Ltd and another.¹⁴ The Garnishee provided details of the account holders demonstrating clearly that they are totally different entities from the Judgment Debtor. The garnishee also argued that based on the account opening documents held by the Bank, the account holders in the targeted accounts are separate legal entities. On the other hand, the Judgment Creditor cites a sum of Khs. 500,000/= allegedly paid to her by one of the church entities and argues that the said payment demonstrates that the funds belong to the church and or the said entities and the church are one and the same and they are answerable to the same body. She argued that the account holders and the church are intricately connected. On these grounds, the Judgment Creditor urged the court to pierce the veil.

32. Piercing the corporate veil refers to a situation in which courts put aside limited liability and hold a corporates shareholders or directors personally liable for corporations' actions or debts. The invitation to this court to pierce the veil is hopelessly misguided and totally inapplicable. Before me is a totally different question, whether, the garnishee has established grounds for the court to decline making the garnishee order nisi absolute and or set aside the order nisi. Before be is not a company law question of whether directors and or shareholders are hiding behind the corporate veil to evade debts.
33. I now turn back to Order 23 Rule 4 which provides clearly the applicable consideration to allow or disallow Garnishee applications. It reads: -
[Order 23, rule 4.] Execution against garnishee.
4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.
34. The above provision is explicit that "if the debt is not disputed." It seems to me to be contrary to justice and sense to order that a garnishee should pay out money which it appears probably will not be due from him at all. It seems to me contrary to justice that an order should be made for payment of moneys which on the face of it appear not likely to be due. In the circumstances, it is plainly unjust to order the garnishee to pay the sum for a debt which it may not even owe. The onus placed on a Garnishee is only be discharged where it successfully establishes that the account referred to in the Garnishee Nisi does not exist in its system or if it exists it is heavily in debt and not in credit or that the accounts cited do not belong to the Judgment Debtor as has been established in this case or the account number stated on the order nisi does not exist.
35. The Judgment Creditor was unable to establish any nexus between the accounts provided and the Judgment Debtor and/or the accounts against which the Order Nisi was made. It is not enough to say the entities are intricately connected. The entities owning the accounts were said to be different legal entities, at least going by the account opening documents held by the Garnishee. The court is not expected to embark on speculations or logical deductions. Parties confronting the courts with facts must do so with certainty and some good measure of exactness. It bears emphasis that a Garnishee order nisi is usually obtained by way of an ex parte application. In such circumstances, I consider that the legal burden remains on the Judgment Creditor to prove the existence of such a debt if this is disputed by the garnishee. This conclusion is also borne out by the wording of Order 23 Rule 4 which reads: - "if the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor or..." which properly construed means that a garnishee has the right to dispute liability to pay the debt to the Judgment Creditor after being served the provisional garnishee order.

¹⁴ {1966} 2 QB 746.



36. I accept that after a Garnishee order nisi has been obtained the legal burden to show cause as to why the court should exercise its discretion not to make the order absolute lies with the Garnishee or the Judgment Debtor. However, once the Garnishee “shows cause” then the evidential burden shifts to the Judgment Creditor to demonstrate otherwise.
37. Because a garnishee order is a form of equitable remedy, the court may refuse to make the order absolute if it finds that the attachment of the debt would be inequitable (such as, if it would affect the interests of other persons, prejudice the rights of other creditors, or cause the judgment debtor to be liable for the debt twice). However, this must be contrasted with a situation, such as the present, where the Garnishee or the judgment debtor is disputing the liability of the garnishee as opposed to arguing that an attachment would be inequitable or unfair. In my judgment, where the primary liability that governs the intended garnishee proceedings is being disputed, the burden of proof remains on the judgment creditor to prove that a debt as against the garnishee exists.
38. Flowing from the above discussion, it is my finding that the garnishee has established that it does not hold funds in the account of the Judgment Debtor. It follows that the Garnishee has successfully disputed the debt. There is no basis at all upon which the court can grant an order making the garnishee order nisi absolute. The upshot is that the garnishee order nisi issued on 21st October 2021 is hereby set aside and the prayer seeking garnishee order absolute is refused. Consequently, the Judgment Creditor’s application dated 29th September 2021 is hereby dismissed. Each party shall bear its own costs.

Orders accordingly

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL 2022

JOHN M. MATIVO

JUDGE

