



Fitidis Group of Companies Limited & another v Civicon Company Limited; Equity Bank (K) Limited Lavington Branch (Garnishee) (Civil Suit 56 of 2015) [2022] KEHC 10863 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 56 OF 2015
GV ODUNGA, J
JUNE 27, 2022**

BETWEEN

FITIDIS GROUP OF COMPANIES LIMITED 1ST PLAINTIFF

LIGHT STEEL BUILDING KENYA LIMITED 2ND PLAINTIFF

AND

CIVICON COMPANY LIMITED DEFENDANT

AND

EQUITY BANK (K) LIMITED LAVINGTON BRANCH GARNISHEE

RULING

1. By a Notice of Motion dated 13th September, 2021, the Garnishee herein seeks the following orders:
 - 1) Spent;
 - 2) Spent;
 - 3) That an Order be granted discharging the Applicant upon remitting to the Decree Holder all the monies collectively held by the Applicant on behalf of the Judgment Debtor.
 - 4) That the costs of this Application be provided for.
2. According to the applicant, this Court issued an Order dated 2nd September 2021 declaring the *Order Nisi* issued on 22nd December 2020 absolute and the Applicant to release to the Decree Holder all monies held in deposit for the benefit of the Judgment Debtor on account numbers-
 - a) Account Number 0470299xxxxxx- Civicon Limited Main Amount
 - b) Account Number 1410260xxxxxx- Civicon Limited



- c) Account Number 1410163xxxxxx- Civicon Limited –cash Margin
 - d) Account Number 1410163xxxxxx- Civicon Limited – Cash Margin
 - e) Account Number 1410278xxxxxx- Civicon Limited
 - F) Account Number 1410278xxxxxx- Civicon Limited
3. However, the Decree Holder instructed Joseph Kahoro Mundia t/a Upstate Kenya Auctioneers to proclaim and attach the equipment wholly owned by the Applicant in realization of Kshs. 46,270,732.51/- being the amount of the Decree. As a result, the Auctioneer issued a proclamation notice dated 7th September 2021 which seeks to attach the Applicant’s equipment in order to recover the sum of Kshs. 46, 270,732.51/-.
4. It is contended that the Decree Holder grossly misinterpreted the Ruling dated 1st September 2021 in seeking to have the Applicant settle the entire amount of the decretal sum whereas the Order issued by this Court directs the Applicant to release all monies it collectively holds on behalf of the Judgment Debtor.
5. In this application, reliance is placed on Order 23 Rule 1 of the Civil Procedure Rules which 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 judgement 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 judgement debtor and is within jurisdiction order that all debts (other than salary or allowances within the provisions of Order 22 rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgement debtor shall be attached to answer the decree together with costs of the garnishee proceedings...”

6. According to the applicant, from Order 23 the Garnishee is not the Judgment Debtor and that the attachment levied is against the judgment debtor’s property in the custody of the Garnishee which includes all monies held in the said accounts. Therefore, upon payment of the monies held by the Garnishee to Decree Holder the Garnishee shall remain discharged from its obligations to the Judgment Debtor to the extent of the amount garnished since the Garnishee is merely the agent of the principal debtor who is the Judgment Debtor hence would not ordinarily bear any personal responsibility for the principal debtor unless it can be shown that the Garnishee has acted outside its mandate as an agent which the Decree Holder has failed to prove.
7. It was contended that a literal meaning of Order 23 would mean that attachment shall be to answer the decree together with costs thereto. However, the Order does not offer an interpretation that the garnishee would dig up its own resources to pay for the costs where the amount owed to the judgment debtor cannot fully satisfy a decretal amount. In this regard the applicant relied on the case of Societe Eram Shipping Co Ltd & Others vs. Compagnie Internationale De Navigation [2003] All ER 465 where it is stated in the material part that:

“...The order took effect against the property of the judgement debtor. The property of the third party was is no way involved, save by the diminution of its debt to the judgement debtor. If the effect of an order in the ...case would be to compel the third party to disburse



its own funds, that would be a very clear indication that the order was one which should never have been made.”

8. In this case it was submitted that the order issued on 2nd September 2021 stated in material part as follows: -

The *order nisi* issued on 22nd December 2020 be and is hereby made absolute ordering the Garnishee herein to release all monies (or such monies as sufficiently to answer to the decree issued on 5th August 2020) held in deposit for the benefit of Civicon Limited.

The Applicant herein is awarded costs of the instant application to be borne by the Judgment debtor.

9. It was contended that it is clear from the order that the decretal sum and the costs of the garnishee proceedings were to be paid from an identified source and there was therefore no need for the Decree Holder to attach the Garnishee’s property. According to the applicant, it can be inferred from the above that the Garnishee is not a Judgment Debtor and certainly, the decree was not issued against the Garnishee hence the actions by the Decree Holder to execute the Decree against the Garnishee is unlawful for attaching the Garnishee’s personal property.
10. According to the Applicant, by releasing to the Decree holder all monies held on behalf of the Judgment Debtor the Applicant stands released from its obligation as Garnishee and the remission herein discharges the Applicant as a Garnishee.
11. It was therefore submitted that the Proclamation Notice dated 7th September 2021 and Warrant of Attachment served upon the Applicant to recover the sum of Kshs. 46, 271,731.51/- evidently prejudices the Applicant who stands discharged and free from any obligation appurtenant to the recovery of the decretal amount from the Judgement Debtor. This Court was therefore urge to discharge the Applicant from its obligations as Garnishee upon remittance of the monies held collectively by the Applicant on behalf of the Judgement Debtor.
12. In response to the application, the decree holder filed grounds of opposition.

Determination

13. I have considered the application, the supporting affidavit and the grounds of opposition to the application and the submissions filed.
14. In order to determine this application is necessary to set out the order that provoked the application and the relevant legal provisions. In his ruling delivered on 1st September, 2021, the learned Deputy Registrar found that the garnishee had not approached the Court with clean hands. He proceeded to express himself, inter alia, as follows:

“The upshot of the foregoing is that the court hereby do make the *order nisi* issued on 22nd December 2020 absolute and for avoidance of doubt, an order absolute is hereby issued ordering the garnishee herein to release to the decree holder herein all monies (or such monies as sufficiently to answer to the decree issued on 5th August 2020) held in deposit for the benefit of Civicon Company Limited an (sic) account number (the numbers indicated) ...The Applicant herein is further awarded costs of the instant application and the same to be borne by the Judgment debtor.”

15. Order 23 Rule 1 of the [Civil Procedure Rules](#) provides as follows: -



1.
 - (1) 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.
 - (2) At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.
 - (3) Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or place of business or in such manner as the court may direct.
 - (4) An *order nisi* shall be in Form No. 16 of Appendix A.
2. A credit in a deposit account with a bank or other financial institution shall for the purposes of this Order be a sum due or accruing and shall be attachable accordingly notwithstanding that any of the following requirements is applicable to the account and has not been complied with:
 - (a) that notice is required before any money is withdrawn;
 - (b) that a personal application must be made before any money is withdrawn;
 - (c) that a deposit book must be produced before any money is withdrawn; or
 - (d) that a receipt for money deposited in the account must be produced before any money is withdrawn.
3. Service of an order that debts due to a judgment-debtor liable under a decree shall be attached, or notice thereof to the garnishee in such manner, as the court may direct, shall bind such debts in his hands.
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
5. If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined.



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. 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.
 8. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment-debtor to the amount paid or levied, although such proceeding or order may be set aside or the decree reversed.
16. This provision has been expounded in *Mengich t/a Mengich & Co Advocates & another vs. Joseph Mabwai & 10 others* [2018] eKLR as follows;

“Generally, Garnishee proceedings is done in two different stages. The first stage is for the Garnishee order nisi, while the second stage is for the Garnishee order absolute. At the first stage, the judgment creditor makes an application ex parte to the Court that the judgment debt in the hands of the third party, the Garnishee, be paid directly to the judgment creditor unless there is explanation from the Garnishee why the order nisi should not be made absolute. If the judgment creditor satisfies the Court on the existence of the Garnishee who is holding money due to the Judgment Debtor, such third party (Garnishee) will be called upon to show cause why the Judgment Debtor’s money in its hands should not be paid over to the judgment creditor, and if the Court is satisfied that the judgment creditor is entitled to attach the debt, the Court will make a Garnishee order nisi attaching the debt.

The essence of the order nisi is to direct the Garnishee to appear in Court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the Judgment Debtor. It is a requirement that a copy of the order nisi must be served on the Garnishee and Judgment Debtor at least 7 days before the adjourned date for hearing. The second stage is for the Garnishee order absolute, where on the adjourned date, the Garnishee fails to attend Court or show good cause why the order nisi attaching the debt should not be made absolute, the Court may subject to certain limitations make the Garnishee order absolute. The Garnishee, where necessary also have an option of disputing liability to pay the debt.

The primary object of a Garnishee order is to make the debt due by the debtor of the Judgment Debtor available to the decree holder in execution without driving him to the suit. The Court may, in the case of debt (other than a debt secured by a mortgage or charge), upon the application of the attaching creditor, issue a notice to Garnishee liable to pay such debt, calling upon him either to pay into Court the debt due from him to the Judgment Debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.”



17. There is no doubt that the garnishee does not become a judgement debtor by virtue of garnishee proceedings. It was therefore held in *Petro Sonko & Another vs. H A D B Patel & Another* [1953] 1 EACA 99 that:

“A garnishee cannot accelerate the time for payment of a debt. Where the debt is not due there is nothing to be attached. A judgement creditor cannot by means of attachment stand in a better position as regards the garnishee than the judgement debtor did, he can only obtain what the judgement debtor could honestly give him.”

18. As explained by the Court of Appeal in *James G. K. Njoroge t/a Baraka Tools & Hardware v APA Insurance Company Limited & 3 others* [2018] eKLR: -

“As regards the Garnishee order, the provisions of Order XX11 Rule 1(1) reproduced above, shows that the order is for an attachment of a debt. Therefore, for the court to issue a garnishee order, the appellant had to satisfy the court that the 1st respondent was holding money belonging to or due to the judgment-debtor which monies should be attached to meet the decree or part of the decree that had been issued in favour of the appellant.”

19. The garnishee proceedings were explained in detail by Lord Denning MR. in the case of *Choice Investments Ltd vs. Jeromimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225 at page 227 where he said:

“The word ‘Garnishee’ is derived from the Norman-French. It denotes one who is required to ‘garnish’, that is, to furnish, a creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. The creditor can get a ‘Garnishee’ order against the bank by which the bank is required to pay into Court or direct to the creditor, out of its customer’s £150, the £100 which he owes to the creditor.

There are two steps in the process. The first is a garnishee *order nisi*. *Nisi* is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: 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. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days’ notice, the *order nisi* operates as the notice.

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: see *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be ‘attached’, again derived from Norman-French. 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.”

20. It was therefore held in *Citizens International Bank Ltd. –vs- SCOA Nigeria Ltd. & Anor.* (2006) LPELR-5509 (CA), that: -

“The primary duty of a Garnishee in garnishee proceedings is for the garnishee to appear in Court upon receipt of the *order nisi*, and show cause why the funds in the judgment debtor's account should not be paid over to the Judgment Creditor in satisfaction of the judgment debt. This is done by filing an affidavit to show cause with all the relevant documents, disclosing the true picture, status or standing of the judgment debtor's accounts at the time of the service of the Garnishee *order nisi* on it.”

21. What comes out from the foregoing is that in the first instance a *decree nisi* is issued to the garnishee requiring him to appear and show cause why the sum due to the decree holder from the judgement debtor cannot be paid to the decree holder from the amount held by the garnishee in credit for the judgement debtor. Once served with the said notice, the garnishee can do either of two things: First, it can immediately pay the said sum to the decree holder or into court and secondly, it can, either by an affidavit or physically appear in court and dispute holding either the whole amount demanded or part of it. Where he proves to the satisfaction of the court that h does not hold any money in credit for the judgement debtor, he will be discharged from liability. Similarly, if he proves that he only holds a sum less than the amount in question, he will be discharged upon paying the same. However, if he fails to satisfy the court on either of those circumstances or fails to appear, a decree absolute will issue in which event he becomes liable to pay the whole amount in question.
22. In this case, the applicant was given an opportunity to show cause why a decree absolute could not be issued. It did not satisfy the Court that, at the time the *decree nisi* was served upon it, it did not hold the whole amount. In other words, where a *decree nisi* is served and the garnishee proceeds to release the sum held to the credit of the judgement or part thereof, he will still be held liable for the sum released after the service of the *order nisi*.
23. In this case the Court found that whereas the *order nisi* was issued on 22nd December, 2020, the garnishee only attached bank statement illustrating transactions from 24th February, 2020 up to 27th August, 2020 and that the various attached bank statements seemed not to have been up to date. The Court therefore found that the garnishee had not approached the court with clean hands.
24. Unless the said order is reviewed or set aside, the garnishee has no option but to pay the sum in question. The application before me is not seeking any such orders. The phrase “or such monies as are sufficient to answer the to the decree issued” only applies where the amount held by the garnishee to the credit of the judgement debtor is more than the amount claimed by the decree holder from the judgement debtor. It does not permit the garnishee, after a decree absolute has been issued to claim that it only has part of the same decreed. That is an issue that ought to be dealt with at the hearing of the proceedings to seeking to make *decree nisi* absolute.
25. In the premises, I find no merit in this application which I hereby dismiss with costs.
26. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JUNE, 2022.

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G. V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA - Susan

