



Diamond Trust Bank v Fredester Logistics Limited & 2 others (Civil Appeal E005 of 2020) [2022] KEHC 17061 (KLR) (30 September 2022) (Judgment)

Neutral citation: [2022] KEHC 17061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E005 OF 2020
MN MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

DIAMOND TRUST BANK APPELLANT

AND

FREDESTER LOGISTICS LIMITED 1ST RESPONDENT

HABI AGENCIES LIMITED 2ND RESPONDENT

AWANAD ENTERPRISES LIMITED 3RD RESPONDENT

*(An Appeal from the ruling and orders of Hon. F. Kyambia,
Senior Resident Magistrate, delivered on 17th January, 2020, in
Mombasa Chief Magistrate's Court Civil Suit No. 2237 of 2016)*

JUDGMENT

1. The 1st respondent filed Civil Suit No. 2237 of 2016 at the Chief Magistrate's Court in Mombasa on 2nd December, 2016, seeking Kshs. 1,526,000/= together with interest at Court rates from 27th March, 2014 until payment in full, costs of and incidentals to the suit. The 2nd and 3rd respondents having been duly served, failed to enter appearance and file a statement of defence within the stipulated period of time. The Trial Court entered interlocutory judgment as prayed in the plaint.
2. It was stated that the sums due in terms of the decree amounting to Kshs. 2,061,350.00 less costs, remained outstanding, which prompted the 1st respondent to file an application dated 3rd October, 2017 in the subordinate Court, seeking a garnishee order nisi attaching the sum of Kshs. 2,273,115.00 being the decretal sum and costs in the suit before the Trial Court, which is sum is held to the credit of Diamond Trust Bank Kenya Ltd Account No. 0202xxxxxx at Diamond Trust House, next to Safaricom House, Moi Avenue, Mombasa. A garnishee order nisi was issued on 6th October, 2017 in favour of the 1st respondent.



3. The appellant opposed the application dated 3rd October, 2017 by filing a replying affidavit stating that upon perusal of the account statement for account number 02023xxxxxx held in the name of the judgment debtor, the 3rd respondent herein at the Mombasa Branch, it confirmed that as at 9th October, 2017, the same was overdrawn to the tune of Kshs. 73,445,084.68. It stated that it was clear that the 3rd respondent's account held with the garnishee had insufficient funds to meet the decretal sums being claimed from them, thus incapable of satisfying the decretal sum as sought by the 1st respondent. The garnishee order nisi issued on 6th October, 2017 was subsequently made absolute on 17th January, 2020. The Court also made further orders that the defendant/judgment debtor would bear the costs of the garnishee proceedings which were to be released from the 2nd defendant's (now the 3rd respondent's) account at the garnishee bank.
4. The appellant was dissatisfied by the decision of the Trial Magistrate and on 2nd October, 2020, it filed a Memorandum of Appeal raising the following grounds of appeal-
 - i. That the Learned Magistrate erred in law in failing to consider the provisions of Order 23 of the Civil Procedure Rules, 2010 and in so doing, arrived at an erroneous decision;
 - ii. That the Learned Magistrate erred in fact and law in finding that the 3rd respondent's account No. 0202xxxxxx operated at the appellant's Mombasa branch had sufficient funds to satisfy the 1st respondent's decretal sum despite overwhelming evidence to the contrary;
 - iii. That the Learned Magistrate erred in law and fact in failing to properly consider the provisions of Sections 176 and 177 of the *Evidence Act*, Cap 80 of the Laws of Kenya and the uncontroverted account statements produced by the appellant under oath;
 - iv. That the Learned Magistrate erred in law and fact in failing to hold that the appellant did not hold funds for the benefit of the 3rd respondent which could be attached in satisfaction of the 1st respondent's decree and that the 3rd respondent was in fact indebted to the appellant to the tune of Kshs. 73,445,084.68; and
 - v. That the Learned Magistrate erred in law and fact in failing to consider the appellant's replying affidavit, submissions and authorities cited which fortified the appellant's case and in doing so arrived at a wrong decision.
5. The appellant's prayer is for the ruling and garnishee order absolute issued by the learned Magistrate on 17th January, 2020 to be set aside and replaced with an order dismissing the 1st respondent's garnishee application dated 3rd October, 2017, with costs. The appellant also seeks costs of the appeal.
6. The appeal was canvassed by way of written submissions. On 3rd November, 2021, the law firm of Mohamed Madhani & Company Advocates filed written submissions on behalf of the appellant. The respondent's submissions were filed by the law firm of V. N. Okata & Company Advocates.
7. Mr. Janjo, learned Counsel for the appellant relied on the provisions of Order 23 Rule 1 of the Civil Procedure Rules, 2010 and cited the case of Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others [2018] eKLR, where the Court held that the garnishee where necessary, has an option of disputing liability to pay the debt. He also cited the case of Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishee) [2020] eKLR. He further relied on the provisions of Order 23 Rule 2 of the Civil Procedure Rules.
8. He submitted that it is not in dispute that there is a decree in the 1st respondent's favour issued against the 2nd and 3rd respondents but, the appellant disputes the garnishee order absolute issued against it.



9. He stated that from the statement of account No. 0202xxxxxx produced by the appellant, as at 10th October, 2017, the said account had no credit balance but was in debt to the tune of Kshs. 73,821,170.58 due to an existing overdraft facility of Kshs. 70,000,000/=. It was submitted that there were no funds in the said account that could be attached to answer the 1st respondent's decree. Mr. Janjo further submitted that a look at the said statement of accounts reveals that as at 3rd October, 2017, which is prior to the service of the garnishee order nisi upon the appellant, which was done on 9th October, 2017, the attached account was still overdrawn to the tune of Kshs. 76,161,877.68.
10. He contended that the appellant had an automatic right to set-off the debt against any deposits into the said account until the overdraft of Kshs. 73,821,170.58 was fully paid. He referred to the case of Barclays Bank of Kenya v Kepha Nyabera & 191 others [2013] eKLR which cited Paget's Law of Banking, 6th Edition at page 135. He stated that the set-off supersedes the 1st respondent's decree. He also stated that a garnishee order can only issue if there is a debt due or accruing from the appellant to the 1st respondent at the time of service of the garnishee order nisi capable of being attached. To this end, he placed reliance on the English case of Merchant International Company Limited v Natsionalna Aktsionerna Kompania Naftogaz Ukrainy & another [2012] EWCA Civ 196, where the Court defined the term debt due or accruing. Mr. Janjo submitted that what is attachable is the credit in the attached account as at the date of service of the order nisi, and in the event that the 3rd respondent deposited enough funds such that it rectified the overdraft and made the account to be in credit, such funds could not be attached by the order nisi dated 9th October, 2017, as the debt arose after service.
11. He relied on the case of James G. K. Njoroge t/a Baraka Tools & Hardware v APA Insurance Company Limited & 3 others [2018] eKLR and submitted that it is in the interest of justice for this Court to allow the appeal herein.
12. Mrs. Okata, learned Counsel for the 1st respondent in making her submissions relied on the case of Odhiambo Owiti & Company Advocate v CFC Stanbic Bank Limited Nairobi CACA 232 OF 2009 and stated that the issuance of the garnishee order nisi moved the judgment debtor's funds into the hands of the appellant. She submitted that all the 1st respondent had to prove before the Trial Magistrate was that there was a decree which had been issued and was still unsatisfied to a certain amount and that there was a debt due from the garnishee appellant to the judgment debtors (2nd and 3rd respondents) capable of being attached to satisfy the decree.
13. She stated that it is not disputed that the 1st respondent obtained a judgment against the 2nd and 3rd respondents for the sum of Kshs. 1,526,000/= which amount has not been satisfied. She stated that the appellant testified to the fact that the 2nd respondent has an overdraft facility of Kshs. 70,000,000/= and that the 2nd respondent's account was overdrawn to the tune of Kshs. 74,481,415.00. Ms Okata contended that the appellant did not explain how the 2nd respondent could overdraw a facility by Kshs. 4,481,415.00 neither did its representative before the Trial Court have documents to show that the overdraft facility was granted. In addition, Mrs. Okata submitted that the account statement relied upon by the appellant was for October, 2017 whereas the appellant's representative testified on 28th May, 2018. She expressed the view that there was an obvious collusion between the appellant and the 2nd and 3rd respondents to deny the 1st respondent the fruits of its judgment.
14. She further submitted that by virtue of the fact that the 2nd respondent was allowed to overdraw the account, the same amounts to an admission that the appellant can pay the debt herein from account No. 0202xxxxxx DTB Trust Bank, Mombasa Branch upon the appellant receiving a Court order. She stated that the 2nd respondent had deposited a sum of Kshs. 207,304,846.00 in a period of eight months which was more than the overdrawn amount by Kshs. 132,883,431,00. She further submitted that



the appellant would not allow a facility to be overdrawn unless they had sufficient security, which was the building and yard with an approximate value of Kshs. 700,000,000/=. She contended that the appellant's representative seems to have suggested that the 2nd respondent had security with them for the sum of Kshs. 205,049,883.62.

15. Mrs. Okata submitted that production of correspondence between the appellant and the 2nd and 3rd respondents would have shed light on the true extent of the facility hence the appellant's attempt to hide information from the Court gives an adverse inference that the information would have assisted the Court to make an adverse finding against the appellant. She further submitted that the 1st respondent had identified monies held on behalf of the 2nd and 3rd respondents by the appellant which should be attached to satisfy the decree herein. She contended that the 2nd respondent's director admitted that the appellant holds security for the overdraft facility of Kshs. 200,000,000/= hence any cause of action by the appellant with respect to any sums withdrawn from the overdraft facility in satisfaction of the decree would only be against its customers, the judgment debtors (2nd and 3rd respondents) and that the appellant in order to recover its money from the 2nd and 3rd respondents can dispose of their asset held as security.
16. Mrs. Okata relied on the case of Charterhouse Bank Limited v Frank N. Kamau CA No. 87 of 2014 and submitted that the appellant failed to prove before the Trial Magistrate that the 2nd and 3rd respondents do not hold sufficient funds with them to satisfy the debt owed.

Analysis And Determination.

17. This being a first appeal, the duty of the 1st appellate Court is to analyze and re-evaluate the evidence adduced before the lower Court and reach its own independent decision, while bearing in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. This was re-stated in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR as hereunder-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

18. An appellate Court will not interfere with the finding of fact by a Trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the Trial Court is shown demonstrably to have acted on wrong principles of fact or law in reaching his conclusion. See Nkuba v Nyamuro [1983] LLR, 403-415, AT 403.
19. The issue that arises for determination is whether the appeal herein is merited. Before I delve into the merits and demerits of the appeal herein, the 1st respondent contended that the appellant despite being given time to file a supplementary Record of Appeal, completely failed to do so. He relied on the case of Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR, where the Court held that Order 42 Rule 13(4) of the Civil Procedure Rules is also clear that the Record of Appeal will not be complete without the decree or order appealed against it. I have gone through the Record of Appeal filed on 4th December, 2020 and I note that the ruling and order appealed from are at pages 58-64 of the said Record of Appeal. This Court finds that the Record of Appeal and the supplementary Record of Appeal are complete in terms of containing the ruling and order appealed from.



20. Order 23 Rule 1 (1) of the Civil Procedure Rules, 2010 provides for garnishee proceedings. Order 23 Rule 5 of the said Rules provides for the procedure to be followed by a garnishee disputing liability. It states as follows-

“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.”

21. The Court in *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* [2020] eKLR stated as follows:

“Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable”

22. The appellant opposed the application before the Trial Court through a replying affidavit sworn by Lwanga Mwangi, who confirmed that the 3rd respondent held account number 0202xxxxxx with it and annexed a copy of an account statement for the period 1st October, 2017 to 31st October, 2017. The said account statement revealed that the account had been overdrawn to the tune of Kshs. 73,445,084.68.00 as at 9th October, 2017, which sum continued to accrue interest. The appellant deposed that it was clear that the said account had insufficient funds to meet the decretal sum and costs herein and that the 3rd respondent was indebted to the appellant.

23. This Court has noted that the garnishee witnesses testified before the Trial Court. Martin Nyhenge Mathi, a Senior Manager Corporate during examination-in-chief testified that the 3rd respondent’s account was overdrawn because it had an overdraft facility of Kshs. 70,000,000/= . During cross-examination, he stated that he could not tell when the overdraft facility was granted. He also stated that there are times when the account holder is allowed to overdraw over and above the facility granted and in this case, the 3rd respondent was allowed since there was money expected, and it had the capacity to pay. In addition, Mr. Mathi stated that the 3rd respondent did not have credit in the said account due to the current overdraft facility and that despite the fact that the 3rd respondent had been consistently depositing money in the said account, its money belongs to the bank. He averred during re-examination that the bank cannot give overdraft at the behest of a third party.

24. It is noteworthy that the 3rd respondent’s directors also testified before the Trial Court. Augustine Omondi Awiti, the 3rd respondent’s director confirmed that the 3rd respondent owes the garnishee money to the tune of Kshs. 90,000,000/=, and it did not have a credit balance with the bank. During cross-examination, he stated that the security in respect of the overdraft is the building and yard and the approximate value of the building is Kshs. 700,000,000/= and on average, there are monthly payments of Kshs. 2,500,000/= made to the account in issue. In re-examination he stated that in order for the 3rd respondent to be in a position to pay the 1st respondent through the account herein, it must apply for another loan.

25. It is not disputed that there is a decree in favour of the 1st respondent as against the 2nd and 3rd respondents herein which has been issued and is yet to be satisfied hence the garnishee proceedings



were properly grounded on a valid Court decree. It is also not disputed that the 3rd respondent operates account No. 0202xxxxxx with the appellant. The appellant however contends that the 3rd respondent has an overdraft facility of Kshs. 70,000,000/= and the account was overdrawn to the tune of Kshs. 73,445,084.68 as at 9th October, 2017 hence there were no funds which can be attached to satisfy the decree in favour of the 1st respondent. In support of the said averment, the appellant submitted an account statement for account number 0202xxxxxx which shows that the said account was overdrawn to the tune of Kshs. 73,445,084.68 as at 9th October, 2017. In addition, the averment was supported and/or confirmed by the appellant's Senior Manager Corporate and the 3rd respondent's director in their testimony before the Trial Magistrate.

26. The Trial Magistrate in his ruling stated that what had not been clearly stated by the garnishee and the 3rd respondent's directors were the terms of the facility as no documentary evidence was exhibited to that effect hence he concluded that failure to demonstrate the terms of the overdraft facility, the judgment creditor who had secured a garnishee order ranked in priority.

27. This Court's considered view is that since garnishee proceedings are civil in nature, the standard of proof is on a balance of probabilities. Section 176 of the *Evidence Act* provides as follows-

“Subject to the provisions of this Chapter of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.”

28. Section 177(2) of the *Evidence Act* provides as follows-

“Such proof may be given by an officer of the bank, or, in the case of the proof required under paragraph (d) of subsection (1), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorised to take affidavits.”

29. It is therefore my finding that by virtue of the appellant having produced a statement of accounts that show that the account in question had no funds and was an overdraft facility, the appellant discharged its burden of proof on a balance of probability that the account it holds for the 3rd respondent does not have sufficient funds to satisfy the decree herein. In addition, the statement of accounts relied on by the appellant, was the appellant's own document. Mrs. Okata submitted that the appellant did not produce documentary evidence in support of the allegation that there exists an overdraft facility, if this Court was to require the bank to do so, it would be raising the standard of proof to one of beyond reasonable doubt.

30. The appellant's Senior Manager and the 3rd respondent's director in their evidence confirmed that indeed the account herein is still active and receives monthly payments of approximately Kshs. 2,500,000/=. The garnishee relied on the case of *Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others* [2013] eKLR, where the Court upheld a banker's right of consolidation and set off and held as follows-

“As we have stated above, the bank/customer relationship ceased between the appellant and the 2nd respondent upon issuance and service of the garnishee order nisi and at that point, the right to combine accounts crystallized automatically. We are also persuaded by Paget's Law of Banking, 6th edition at p. 115, which says-



“if at the date of the service of the order, the banker has any lien on or set off against the moneys attached, this should be represented to the Court and would certainly prevail against the garnishee order.”

31. In the Barclays’ case above, the banker had a right to consolidate and set-off due to the fact that there was a charge securing the loan amounts advanced to the borrower. In this instance, this Court has found that the garnishee is a secured creditor, hence it automatically follows that its rights override those of the judgment debtor. The overdraft facility therefore has to be fully paid, then the account in issue has to be credited before the judgment debtor can be paid from the said account.

32. Mrs Okata submitted that the account statement relied upon by the appellant was for October, 2017 whereas the appellant’s representative testified on 28th May, 2018. She contended that there was obvious collusion between the appellant and the 2nd and 3rd respondents to deny the 1st respondent the fruits of its judgment. The Record of Appeal does not disclose any evidence of collusion as alleged. In the law of evidence, he who asserts must prove his case and the burden of proof lies with whoever would want the Court to find in his favour in support of what he claims. Section 107 of *Evidence Act* stipulates thus-

“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

33. It was also submitted by Mrs Okata that by virtue of the fact that the 2nd respondent was allowed to overdraw the account, the same amounts to an admission that the appellant can pay the debt herein from account No. 0202xxxxxx. It is trite that a garnishee order is issued against funds held by a garnishee on behalf of a judgment debtor. In the case of *Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225 at page 227 Denning M.R. considered the procedure for attachment of debts in garnishee proceedings where he said-

“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.”

34. In this matter, by the time a garnishee order nisi was issued by the Trial Court, the 2nd and 3rd respondents’ account with the garnishee had been overdrawn. This Court holds that a garnishee cannot overdraw the judgment debtor’s account and pay the judgment creditor as it would amount to exposing itself to risk. The appellant’s Senior Manager corporate properly stated that the bank cannot give an overdraft at the behest of a third party.
35. In light of the reasons stated in this ruling, the Trial Magistrate erred in principle in his decision delivered on 17th January, 2020. The upshot is that the appeal herein is allowed with costs to the appellant. The garnishee order absolute issued by the Trial Court is hereby set aside. The garnishee is discharged from the garnishee order absolute.

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 30th day of September, 2022. Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Janjo David h/b for Mr. J. Kisinga for the appellant

Ms Nasimiyu h/b for Mrs. Okata for the 1st respondent

Mr. Oliver Musundi – Court Assistant.

