Diamond Trust Bank Kenya Limited v Kanda & another (Civil Appeal 41 of 2021) [2022] KEHC 15554 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15554 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 41 OF 2021

SM GITHINJI, J

NOVEMBER 21, 2022

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED ..... APPELLANT

AND

PATRICK MWATATI KANDA ..... 1ST RESPONDENT

INVESCO ASSURANCE CO. LIMITED ..... 2ND RESPONDENT

(An appeal from the Ruling of Hon. Kituku SPM at Kilifi, made in SRMC 156 of 2017 delivered on 13th May, 2020)

JUDGMENT

1. This appeal arises from the ruling of Hon. Kituku SRM in Senior Resident Magistrate Case No. 156 of 2017 delivered on 13th May 2020. The Appellant raised the following grounds in their memorandum of appeal dated 14th April 2021;

    1. That the Learned Magistrate erred in law in failing to consider the provisions of Order 23 of the Civil Procedure Rules 2010 and hence arrived at an erroneous conclusion.

    2. That the Learned Magistrate erred in fact and in law in finding that the 2nd Respondent's account No. xxxx operated at the time with the Appellant had sufficient funds to satisfy the 1st Respondent's decree despite overwhelming evidence to the contrary.

    3. That the Learned Magistrate erred in law and in fact in failing to properly consider the provisions of section 176 and 177 of the *Evidence Act*, Cap 80, Laws of Kenya and all the uncontroverted accounts statements produced in court under oath.

4. That the Learned Magistrate erred in law in issuing a Garnishee Order Absolute against the Appellant despite its clear and uncontested evidence that it did not hold monies in favour of the 2nd Respondent that could be attached to settle the 1st Respondent's decretal sum of Kshs. 248,208.00/=.

5. That the Learned Magistrate erred in law and in fact by failing to properly consider the Appellant's Replying Affidavit dated 7th February 2020 and in doing so arrived at a wrong decision.

2. The Appellant urged this court to set aside the ruling and garnishee order absolute of the subordinate court delivered on 13th May 2020 and replace the same with an order dismissing the 1st Respondent's Garnishee application dated 19th December 2019.

3. The brief facts of the case is that, the 1st Respondent applied for garnishee order absolute for a judgment sum of Kshs. 248, 208 plus interest in Kilifi Civil Suit No. 156 of 2017 against the appellant. The Appellant opposed the Application via a Replying Affidavit sworn by its Legal Officer Francis Kariuki on 7th February 2020. Francis Kariuki explained that Account No. xxxx did not have any funds to satisfy the 1st Respondent's claim and that it only had Kshs 43,032/-.

4. The trial court in the impugned ruling held that the Appellant ought to have supplied a true statement of account as at the time of showing cause and not when the garnishee order nisi was issued. That the Appellant was withholding material and essential information from the court. Consequently, the trial court confirmed the Garnishee Order Nisi and issued a Garnishee Order Absolute.

5. The Record of Appeal and Supplementary Record of Appeal were filed on May 13, 2021 and 25th June 2021 respectively. On May 9, 2022, the Court issued directions for the appeal to be canvassed by way of written submissions.

6. As at the time of writing this judgment, only the 1st respondent had filed his submissions on September 19, 2022.

7. The 1st Respondent submitted that order 23 rule 1{1} of the *Civil Procedure Rules* requires the garnishee, once served with an order nisi, to show cause why an order absolute should not issue. And under rule 4 thereon, the court is empowered to order execution against a garnishee who fails to dispute liability or attend court.

8. To the 1st respondent, the garnishee, appellant herein, provided a single entry statement as opposed to a detailed statement for the period from when the decree nisi was issued on January 8, 2020 until February 7, 2020 when the garnishee showed cause as provided under Order 23 above.

9. The 1st respondent added that the garnishee failed to discharge the burden placed upon it under section 176 and 177 of the *Evidence Act*, and the Learned Magistrate correctly rejected the garnishee's evidence.

10. The 1st respondent relied on the case of *Diamond Trust Bank Kenya Limited v Invesco Assurance Company Limited & another* [2020] eKLR. He urged the court to dismiss the appeal and award costs to it in the main suit and this appeal.

Analysis and Determination

11. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination by this Court.

12. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court;

> " 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"

13. Similarly, in *Gitobu Imanyara & 2 others v Attorney General*[2016] eKLR, the Court of Appeal stated that;

> " An 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"

14. I have considered the memorandum of appeal and record of appeal and submissions filed. I find the following issues are for determination: -

    1. Whether the Learned Magistrate erred in law in failing to consider the provisions of order 23 of the *Civil Procedure Rules* 2010.
    2. Whether the Learned Magistrate erred in fact and in law in finding that the 2nd respondent's account No. xxxx had sufficient funds to satisfy the 1st respondent's decree.
    3. Whether the Learned Magistrate erred in law and in fact by failing to properly consider the appellant's replying affidavit dated February 7, 2020.

15. Order 23 of the *Civil Procedure Rules* provides for attachment of debt. Rule 1 (1) thereon 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 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."

16. In *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* [2020] eKLR the court 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"

17. A cursory perusal of the impugned ruling shows, the trial magistrate relied on the aforementioned provision to arrive at the decision he did. The appellant has indeed not demonstrated how the said provision was infringed by the trial magistrate.

18. As already established, in garnishee proceedings such as the present one, it is the duty of the garnishee to prove whether or not the garnishee is indebted to the judgment-debtor. To discharge this burden, the garnishee has to produce sufficient evidence in that regard and whether or not the funds in its hands are sufficient to satisfy the decree partly or fully.

19. In the present case, the appellant opposed the garnishee proceedings at the trial court through the affidavit of Francis Kariuki. He deposed that the appellant held the 2nd respondent's garnished account number xxxx. He added that the account did not have sufficient funds to satisfy the decree as at January 9, 2020 when the appellant was served with the garnishee Order Nisi. He attached a bank statement dated January 9, 2020 to that effect.

20. The 1st respondent's argument is that the appellant ought to have produced statements of the period from the time notice to show cause was issued on January 8, 2020 to February 7, 2020 when the replying affidavit was sworn.

21. I agree with the trial court's reasoning that the appellant was expected to produce a true statement of account as to the time of showing cause and not when the garnishee order nisi was issued. In my view, withholding or concealing such crucial information and disclosing only selected information, can rightly be presumed to mean that the garnished account held sufficient funds to settle the 1st respondent's claim.

22. It must not also be lost that the power of an appellate court in matters of discretion is limited. An appellate court will only interfere with findings of the trial court upon a demonstration that the trial court either misapprehended the evidence tendered before it or that it relied on the wrong principles in arriving at its findings. In *Child Welfare Society of Kenya –v- Republic, Exparte Child in Focus Kenya & AG & others* [2017] eKLR, the Court of Appeal held:

> " 37. Sir Clement De Lestang V-P in Mbogoh & Anor vs Shah [1968] EA 93 stated thus:
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> > " "I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters of which it should not have or taken into consideration matters it should not have and in doing so arrived at a wrong conclusion."

23. For his part, the court President, Sir Charles Newbold in the same case stated:

> " "For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

38. Subsequently, Madan JA (as he then was) in United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members for that of the trial court." He stated: -

> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

24. From the foregoing reasons, the Learned Magistrate did not err in fact and in law in finding that the 2nd respondent's Account No. xxxx had sufficient funds, he reached that finding while stating his reasons and properly considering the affidavit dated February 7, 2020.

25. The upshot is that the appeal is unmerited and is hereby dismissed with costs to the 1st respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 21st DAY OF NOVEMBER, 2022.

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S.M. GITHINJI

JUDGE

In the Presence of;-

1. Ms Osino for the Respondent,

2. Jackson Mutema Kisinga Advocate is for the Appellant – absent

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S.M. GITHINJI

JUDGE

21/11/2022