



**Karanga v Jamii Bora Bank Ltd & another; Bank of Baroda (Kenya) Limited (Garnishee)  
(Environment & Land Case 49 of 2020) [2023] KEELC 17909 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17909 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 49 OF 2020  
CA OCHIENG, J  
JUNE 12, 2023**

**BETWEEN**

**EDWIN MUCHUGYA KARANGA ..... DECREE HOLDER**

**AND**

**MUSEUM VIEW OFFICE SUITES LTD ..... 1<sup>ST</sup> JUDGMENT DEBTOR**

**JAMII BORA BANK LTD ..... 2<sup>ND</sup> JUDGMENT DEBTOR**

**AND**

**BANK OF BARODA (KENYA) LIMITED ..... GARNISHEE**

**RULING**

1 What is before Court for determination is the Decree holder's Application dated the February 17, 2023 brought pursuant to Order 23 Rule 1 of the [Civil Procedure Rules](#). The Applicant seeks the following orders:

1. Spent.
2. That all debts owing from the Garnishee to the 2<sup>nd</sup> Judgement debtor be attached to answer the Decree together with costs of the garnishee proceedings.
3. That the Garnishee appear before this court to show cause why it should not pay to the Decreeholder the sum of Kshs. 12, 500,000 plus interest at 6 per cent per annum from the date of the Decree to date translating to Kshs. 666,667.00 due from it to the 2<sup>nd</sup> Judgement Debtor or so much thereof as may be sufficient to satisfy the Decree together with costs of the garnishee proceedings.
4. That the costs of this application be provided for.



- 2 The Application is premised on the grounds on the face of it and the Supporting Affidavit of Philip S. Kisaka advocate, where he deposes that he is in conduct of this matter on behalf of the Decree holder. He explains that on March 28, 2022 Judgment was entered by consent against the 2<sup>nd</sup> Judgment Debtor/Respondent for Kshs. 12,500,000.00. Further, a Decree was issued on 8<sup>th</sup> June, 2022 and has not been satisfied in full or even partially. He contends that the 2<sup>nd</sup> Judgment Debtor despite disposing most if not all its known assets has failed, neglected and or refused to satisfy the Decree herein in full or any part thereof. He confirms that the Decree holder has established that the 2<sup>nd</sup> Judgment Debtor has sold the only known asset remaining and the Garnishee as the financier of the purchase is in the process of releasing the balance of the purchase price being Kshs. 24,500,000 to the 2<sup>nd</sup> Judgment Debtor. He reiterates that the Decree holder is apprehensive that if the aforementioned amount held by the Garnishee is released to the 2<sup>nd</sup> Judgment Debtor, the said Judgment Debtor will likely not settle the decretal sum thus denying him the opportunity to fully enjoy the fruits of the Judgment.
- 3 The 1<sup>st</sup> Judgment Debtor opposed the Application and filed a Replying Affidavit sworn by Jackson Kimathi, its head of legal department where he explains that the 2<sup>nd</sup> Judgment Debtor was advanced a loan facility amounting to Kshs. 570,000,000 with the 1<sup>st</sup> Defendant Bank, that was secured by LR No. 16115 Mavoko and which the 2<sup>nd</sup> Judgment Debtor has defaulted in its repayment. He explains that in a bid to service the defaulted loan facility, the bank consented to subdivision of LR No. 16115 Mavoko into various plots, which the 2<sup>nd</sup> Judgment Debtor would sell and the proceeds therefrom applied to repay the outstanding facility loan. Further, as a result of the subdivision, several plots have been sold through private treaty and the proceeds of the said sale have been applied to settle the outstanding loan facility that had been advanced to the 2<sup>nd</sup> Judgment Debtor who is still indebted to the bank to the tune of Kshs. 31,499,703.21. He states that LR No. 16115/14 (Original Number 16115/16/4) is one of the resultant plots and the funds the Decree Holder seeks to attach is an anticipated deposit for the purchase price of said plot, which funds the Garnishee is financing the purchaser. Further, that parcels of land being sold by the 2<sup>nd</sup> Judgment Debtor are all Charged to the 1<sup>st</sup> Defendant Bank and consequently proceeds of the said sale are not available for attachment by the Decree Holder or any third party. He insists that the funds do not belong to the 2<sup>nd</sup> Judgment Debtor and the firm of Messrs Wambugu & Kariuki Advocates are only acting for the 2<sup>nd</sup> Judgment Debtor in the said transaction. He argues that pursuant to the consent Decree dated the June 8, 2022, it is the 2<sup>nd</sup> Judgment Debtor who was solely obligated to pay the Decree holder herein a total of Kshs. 12,500,000 and the obligation for the Bank was to remove the Decree holder from CRB which the bank has already done. He reiterates that the monies the Applicant is purporting to attach through the current Application do not belong to the 2<sup>nd</sup> Defendant and are completely not available for attachment. He avers that the Applicant is acting in bad faith as it has failed to disclose that the 1<sup>st</sup> Defendant Bank does not owe any monies to the Applicant herein and any execution as regards the payment of the decretal sum can only be as against the 2<sup>nd</sup> Defendant. Further, the transaction is pending due to delay from the lands' registry. He argues that should the financed amounts by the Garnishee be attached, the 1<sup>st</sup> Defendant's security will be compromised and consequently cause it irreparable loss. Further, that the 1<sup>st</sup> Defendant is a secured creditor as against the 2<sup>nd</sup> Defendant and consequently the Applicant's claim as against the 2<sup>nd</sup> Defendant over proceeds of a sale of a Charged property cannot rank *pari pasu*.
- 4 The 2<sup>nd</sup> Judgment Debtor opposed the instant Application by filing a Replying Affidavit sworn by John Wambugu its Director where he insists that the Application is made in bad faith. He confirms that the Decree Holder was an investor in the 2<sup>nd</sup> Judgment Debtor for the purchase of a parcel of land which resulted in the 2<sup>nd</sup> Judgment Debtor guaranteeing a loan of Kshs. 40,000,000 owed to the 1<sup>st</sup> Judgment Debtor. He contends that the Decree Holder failed to pay the loan which accrued to Kshs.



83,997,632.90 as at the time of closing the account. He argues that the Decree Holder was at all times aware that the payment promised in the consent was to be paid contingent to completing sale of various parcels of land in the said business venture. Further, that the delay in concluding the transactions was occasioned by the complexities and delays occasioned by the Ardhi Sasa platform which is in public domain. He denies that the Garnishee owes it any money and explains that the Garnishee is merely a financier of a purchaser for one of the parcels of land known as 16115/14 in Mavoko. He contends that attaching the funds financed by the Garnishee herein is premature at this stage since the agreement has not materialized yet and as such, an attachment will be detrimental to the transaction as it will cause the financier to withdraw funding. Further, the said amounts sought to be attached are equally payable to Messrs. Wambugu & Muriuki Advocates to hold as stakeholders pending conclusion of the sale. He argues that Messrs. Wambugu & Muriuki Advocates is a separate legal entity from the 2<sup>nd</sup> Judgment Debtor herein and as such funds owing to it, cannot be attached to fulfill the debts of the 2<sup>nd</sup> Judgment Debtor. He commits that once the sale transaction has materialized, the Decree holder will be paid his funds.

- 5 The Garnishee in opposition to the instant Application filed a Replying Affidavit sworn by Martin Karanu its Legal Manager where he confirms that the Bank undertook to stand surety on behalf of the Garnishee's Customer Greensquare Properties Limited as indicated in their letter dated the 1 July 3, 2022 to make payment of Kshs. 24,500,000 to the 2<sup>nd</sup> Judgment Debtor being balance of the purchase price due in pursuance of a Sale Agreement dated the June 13, 2022 between the 2<sup>nd</sup> Judgment Debtor and Greensquare Properties Limited, with the consent of the 1<sup>st</sup> Judgment Debtor. He contends that the Kshs. 24,500,000 does not belong to the Garnishee as these are monies in the account of Greensquare Properties Limited on which the Garnishee simply placed a lien for the purposes of issuing the aforementioned Letter of Guarantee. He avers that the Garnishee has no interest in the dispute herein and has never had any knowledge of the same prior to the service of the instant Application. He explains that the terms of the Letter of Guarantee read together with the Sale Agreement, required *inter alia*, that the subject property of sale to be transferred and registered in the name of Greensquare Properties Limited and physical possession of the said property be handed over to it. Further, the Garnishee has also covenanted to indemnify the beneficiaries of the said payment in the event that the same is not made as per the terms of the aforementioned Letter of Guarantee. He insists that the Garnishee cannot rightly release any payment to any other party without fulfillment of the aforementioned conditions and discharge from its obligations/release of indemnity.
- 6 I note the 2<sup>nd</sup> Judgment Debtor filed a Supplementary Affidavit on 23<sup>rd</sup> March, 2023 without leave of this Court.
- 7 The Application was canvassed by way of written submissions but Garnishee opted not to file one.

### **Analysis and Determination**

- 8 Upon consideration of the Notice of Motion Application dated the 17<sup>th</sup> February, 2023 including the respective Affidavits, annexures and rivaling submissions, the only issue for determination is whether the Applicant is entitled to the orders as sought in the instant Application.
- 9 The Applicant has sought for the Garnishee to pay to him the sum of Kshs. 12,500,000 plus interest at 6 per cent per annum from the date of the Decree to date translating to Kshs. 666,667.00 due from it to the 2<sup>nd</sup> Judgment Debtor together with costs of the Garnishee proceedings. The Judgment Debtors including the Garnishee deny that the Garnishee holds any monies in favour of the 2<sup>nd</sup> Judgment Debtor.



10 On Garnishee proceedings, order 23 rule 1(1) of the *Civil Procedure Rules* provides that:

“(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.”

11 Further, where a party disputes that the monies belong to a third party Order 23 Rule 6 of the *Civil Procedure Rules*, stipulates that:-

“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.”

12 In this instance I note the 1<sup>st</sup> Judgment Debtor advanced a loan facility amounting to Kshs. 570,000,000 to the 2<sup>nd</sup> Judgment Debtor that used LR No. 16115 Mavoko as security. Further, since the 2<sup>nd</sup> Judgment Debtor defaulted in loan repayment, the Bank allowed it to subdivide as well as sell resultant subdivisions from the said LR No. 16115 Mavoko with the proceeds therefrom to be applied to repay the outstanding loan facility. The 1<sup>st</sup> Judgment Debtor insists that the 2<sup>nd</sup> Judgment Debtor is still indebted to it, to the tune of Kshs. 31,499,703.21. It argues that LR No. 16115/14 (Original Number 16115/16/4) is one of the resultant plot and the funds the Decree Holder seeks to attach is an anticipated deposit of the purchase price which funds the Garnishee is financing the purchase of the said land. Further, that parcels of land being sold by the 2<sup>nd</sup> Judgment Debtor are all Charged to the 1<sup>st</sup> Defendant Bank and consequently proceeds of the said sale are not available for attachment by the Decree Holder or any third party. The 1<sup>st</sup> Judgment Debtor denied that the Garnishee owes it any monies and admits that the monies sought to be attached are in respect to proceeds of sale which is yet to materialize. The Garnishee in its explanation contends that it undertook to stand surety on behalf of its customer Greensquare Properties Limited as indicated in their letter dated the July 13, 2022 to make payment of Kshs. 24,500,000 to the 2<sup>nd</sup> Judgment Debtor being balance of the purchase price due in pursuance of a Sale Agreement dated the June 13, 2022 between the 2<sup>nd</sup> Judgment Debtor and Greensquare Properties Limited. It insists that the Kshs. 24,500,000 does not belong to it but are in the account of Greensquare Properties Limited wherein it simply placed a lien for the purposes of issuing the aforementioned Letter of Guarantee. Further, that the terms of the Letter of Guarantee read together with the Sale Agreement, required inter alia, that the subject property of sale to be transferred and registered in the name of Greensquare Properties Limited and that physical possession of the said property be handed over to it.



13 In the case of *Patrick L. Otieno t/a Otieno Oyoo & Co. Advocates v Africa Merchant Assurance Co. Ltd; Diamond Trust Bank Kenya Ltd (Garnishee)* [2022] eKLR, it was observed that:-

“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.”

14 It is trite that garnishee proceedings are initiated to determine whether an alleged Garnishee has in its custody any monies belonging to a Judgment Debtor. However, in this instance, looking at the documents presented including the averments herein, I find that the Applicant has not provided sufficient proof that the Garnishee indeed has monies in its account belonging to the 2<sup>nd</sup> Judgment Debtor. I note that LR No. 16115/14 (Original Number 16115/16/4) is one of the resultant plots and the funds the Decree Holder seeks to attach is an anticipated deposit of the purchase price for the said plot, which funds the Garnishee is financing the purchaser. Further, that parcels of land being sold by the 2<sup>nd</sup> Judgment Debtor are all Charged to the 1<sup>st</sup> Defendant Bank and consequently proceeds of the said sale are not available for attachment by the Decree Holder or any third party. To my mind, I find that the Applicant has not provided sufficient proof to enable the Court grant the orders as sought. It is worth noting that the Garnishee has a guarantee and a lien over the funds to be paid to the 2<sup>nd</sup> Judgment Debtor and in that effect, I opine that the monies do not belong to it but the abovementioned company and hence I am unable to grant the orders as sought. On the issue of costs, at this juncture, I will not make any order to that effect, since the Decretal Sum is yet to be paid.

15 In the circumstances I find the Notice of Motion Application dated February 17, 2023 unmerited and will disallow it with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12<sup>TH</sup> DAY OF JUNE, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

