



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS APPLICATION NO. 14 OF 2019

MAINA NJUGUNA & ASSOCIATES.....DECREE HOLDER/APPLICANT

VERSUS

INVESCO ASSURANCE CO. LIMITED.....JUDGMENT DEBTOR/RESPONDENT

AND

FAMILY BANK KENYA LIMITED.....1ST GARNISHEE

CO-OPERATIVE BANK OF KENYA LIMITED.....2ND GARNISHEE

FAULU MICROFINANCE BANK LIMITED.....3RD GARNISHEE

SPIRE BANK LIMITED.....4TH GARNISHEE

TRANS NATIONAL BANK LIMITED.....5TH GARNISHEE

RULING

Brief facts

1. This application dated 20th January 2020 is brought under **Section 1A, 1B and 3A of the Civil Procedure Act, Order 23 Rule 1, 2, 8 and 9, Order 50 Rule 1 of the Civil Procedure Rules** seeking for orders for freezing operations in the judgment debtor's accounts namely:- Family Bank of Kenya Ltd Kikuyu Branch Account No. [...]; Co-operative Bank of Kenya Ltd Account Nos. [...], [...], [...]; Faulu Microfinance Bank Limited Account No. [...]; Spire Bank Limited Bank Account No. [...]; Transnational Bank Limited Account No. [...]. Further, the applicant seeks for orders for the garnishees to attend court and show cause why they should not pay the decretal amount of Kshs. 1,758,819.92 and to make the garnishee order absolute on the said sum against the garnishees who hold the money on behalf of the judgment debtor to answer the decree passed herein together with the costs of the garnishee proceedings.

2. In opposition of the said application, parties filed their respective replying affidavits as follows: the 1st garnishee, dated 6th February 2020, the 3rd garnishee, dated 10th February 2020 and the 4th garnishee, dated 29th January 2021. The 1st garnishee also filed a Supplementary Affidavit dated 8th April 2021.

The Applicant's Case

3. The applicant states that certificates of taxation in the sum of Kshs. 1,758,819.92 were adopted as a decree of this Honourable Court on 15th January 2020 in the following matters:-

- a. HC Misc. 82/18 Kshs 122, 457.72
- b. HC Misc. 83/18 Kshs. 129,487.32
- c. HC Misc. 14/19 Kshs. 121,560.00

d. HC Misc. 15/19 Kshs. 167,902.60

e. HC Misc. 16/19 Kshs. 167,902.60

f. HC Misc. 17/19 Kshs. 1,049,509.68

4. The applicant contends that he knows for a fact that the judgment debtor holds accounts in Family Bank of Kenya Ltd, Kikuyu Branch Account No. [...]; Co-operative Bank of Kenya Ltd Account Nos. [...],[...] and [...]; Faulu Microfinance Bank Limited Account No. [...]; Spire Bank Limited Bank Account No. [...] and Transnational Bank Limited Account No. [...]. Further, the judgment debtor does not dispute that the applicant is aware of the funds held in the said bank accounts. Despite the applicant serving the judgment debtor with the certificates of taxation, the judgment debtor has refused to settle the amount and therefore it is only just and fair that a garnishee order attaching the judgment debtor's accounts be issued.

5. The 2nd and 5th garnishee were served with this application and the nisi orders issued by this court on 21/1/2020 but did not file any responses in opposition. The 1st, 3rd and 4th garnishees filed their replying affidavits opposing the application.

The 1st Garnishee's Case

6. According to the 1st garnishee, the order nisi issued on 21st January 2020 by the applicant was against Account No. [...] which account does not belong to the 1st garnishee. The judgment debtor holds account no. [...] which holds Kenya Shillings One Million, Seven Hundred and Twenty Two Thousand, Eight Hundred and Sixty One and Thirty Eights Cents (Kshs. 1,722,861.38) as of 22nd January 2020. These funds have been attached pursuant to an order by the court dated 1st October 2019 in Nairobi Misc. Application No. E181 of 2019 between Robson Harris Advocates vs Invesco Assurance Company Limited & 3 Others and court order dated 20th December 2019 in Nairobi Misc. Application No. E196 & E197 of 2019 respectively between Robson Harris Advocates vs Invesco Assurance Company Limited & 3 Others.

7. After settling the said garnishee orders, the account stands at Kenya Shillings Twenty Eight Thousand, Six Hundred and Thirty One Thousand and Fifty Cents (Kshs. 28,631.50). The 1st garnishee contends that the said amount is very minimal to warrant a garnishee order absolute to be issued by the court or even to pay costs of the garnishee proceedings. Since there are no available funds to satisfy the decretal amount, the 1st garnishee prays that it be fully discharged from the proceedings herein.

The 3rd Garnishee's Case

8. According to the 3rd garnishee, it does not hold any monies in account no. 10060549295 to satisfy the decretal amount as stated by the applicant. The only monies available in the said account were dispended towards satisfying the decree in Nairobi CMCC No. 3003 of 2019 Agnes Mutinda Ndolo & David Muthuku Ndolo vs Invesco Assurance Company Limited. The 3rd garnishee prays to be discharged from these proceedings since there is no money in the said account.

The 4th Garnishee's Case

9. The 4th garnishee confirms holding account no. [...] in the name of the judgment debtor which has a debit balance of Kshs. Two Thousand Three Hundred and Eight (Kshs. 2308). As such, the 4th garnishee seeks to be discharged from the proceedings on account that it has no money to settle the decretal sum.

10. The 1st and 3rd garnishee filed submissions to support their arguments in this application.

The 1st Garnishee's Submissions

11. The 1st garnishee submitted that it had filed a Replying Affidavit attaching a bank statement in respect to account no. [...] and thereafter filed a Supplementary Affidavit confirming that the judgment debtor's account no was [...] and not 102010001048 as indicated by the applicant in the order nisi.

12. The 1st garnishee relied on the case of **Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee) [2020] eKLR** and submitted on the procedure for attachment of debts. The 1st garnishee further submitted that it disputes the attachment of the account of the judgment debtor because the said account does not have sufficient funds to satisfy the debt. The 1st garnishee states that it has produced a statement of accounts to prove that the funds have been attached elsewhere.

13. The 1st garnishee contends that the applicant has not discharged the burden of proving that the account no. [...] exists and it is capable of attachment. The 1st garnishee adds that it willingly produced the statements of the account held by the judgment debtor with it, upon informing the applicant that account no. [...] does not exist.

14. The 1st garnishee prays that the court should exercise its discretion and award it costs. This is because had the applicant carried out due diligence in ascertaining which account belonged to the 1st garnishee, these proceedings would not have been instituted against the 1st garnishee. The provisions of **Order 23 Rule 10 of the Civil Procedure Rules** and the case of **David Kiptum Korir vs Kenya Commercial Bank & Another [2021] eKLR** were relied on by the 1st garnishee.

The 3rd Garnishee's Submissions

15. The 3rd garnishee submits that it has satisfied the procedure for attachment of debts as set out in the case of **Choice Investments Limited vs Jeronimom (Midland Bank Ltd, Garnishee) 1981 1 All ER 225**. The 3rd garnishee states that it produced a statement of account to demonstrate that it held no monies in favour of the judgment debtor. As such, compelling the 3rd garnishee to pay the decretal sum would amount to issuing orders in respect of monies that are non-existent. The 3rd garnishee relies on the case of **Blue Sea Shopping Mall Limited vs The City Council of Nairobi & 3 Others CA Civil Appeal No. 129 of 2013** and submits that in the event an order for garnishee nisi directing the 3rd garnishee to release moneys in the said account would be an order in vain.

16. The 3rd garnishee further explains that since the statement of account has not been challenged by the applicant, it confirms the assertions by the 3rd garnishee. Relying on the case of **Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Company Limited vs Diamond Trust Bank [2020] eKLR**.

17. The 3rd garnishee thus prays that the application against it be dismissed with costs based on the above reasons.

Issues for determination

18. After careful analysis, the main issue for determination is whether the garnishee order nisi should be made absolute.

The Law

Whether the garnishee order nisi should be made absolute.

19. The law governing garnishee proceedings is **Order 23 Rule 1(1) of the Civil Procedure Rules** which provides:-

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.

20. **Order 23 Rule 4 of the Civil Procedure Rules** provides:-

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 costs of the garnishee proceedings; and the order absolute shall be in Form 17 or 18 of Appendix A, as the case may require.

21. In **Mengich t/a Mengich & Co. Advocates & Another vs Joseph Mabwai & 10 Others [2018]eKLR** the court laid out the procedure in garnishee proceedings as follows:-

"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 an 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 judgment debtor available to the decree holder in execution without driving him to the suit."

22. It is not in dispute that the applicant obtained the certificates of taxation in the six suits which total to Kshs. 1,758,819.92/- which has not been settled to date. The 1st garnishee in his Supplementary Affidavit acknowledged that the judgment debtor had an account with them. But it stated that the account had insufficient funds because the funds were already garnished pursuant to earlier court orders in Nairobi Misc. Application No. E181 of 2019 Robson Harris Advocates vs Invesco Assurance Company Ltd & 3 Others and Nairobi Misc. Application No.

E196 & E197 of 2019 respectively between Robson Harris Advocates vs Invesco Assurance Company Ltd. The book balance after the debt is Kshs. 28,631/- and attached a bank statement. The 4th garnishee stated that the judgment debtor had account no [...] with them but the account had Kshs. 2,308 as at 29th January 2021. The 4th garnishee attached a bank statement to that effect. In my view, I find that the 1st and 4th garnishee have tendered sufficient evidence to the effect that they do not have sufficient amount of money held in favour of the judgment debtor which could be attached to satisfy the debt certificates of taxation. This was done by way of exhibiting the statements of account of the judgment debtor which disclosed the true status of the said accounts.

23. Notably, the 1st garnishee upon being served with the order nisi informed the applicant that the judgment debtor's account number is [...] and not [...]. At this juncture, the applicant ought to have disputed this information by producing proof that account no. 102010001048 is held by the 1st garnishee in respect of the judgment debtor. Alternatively, the applicant ought to have discharged the 1st garnishee from these proceedings.

24. The 3rd garnishee stated that it did not have any monies to satisfy the debt because it dispensed the monies in the account to satisfy the debt in Nairobi CMCC No. 3003 of 2019 Agnes Mutinda Ndolo & David Muthuku Ndolo vs Invesco Assurance Company Limited. To support its averment, the 3rd garnishee attached the RTGS payment advice and a bank statement dated 17th November 2019, which documents were not disputed by the applicant.

25. As I have already stated, the 2nd and 5th garnishee did not file any response to the application either acknowledging or disputing the debt. In that respect, I find that they acknowledged that the judgment debtor held accounts with them and thus they did not have any objections in relation to attaching the debt. This principle was set out in **Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee) [2020] eKLR** where it was held:-

“It is the position of the law that in garnishee proceedings the garnishee banks are only required to appear before the court to acknowledge or dispute the debts. In the present case, the garnishee bank did not appear or file a response and in the absence of evidence to the contrary, I find that they acknowledged that the respondent held accounts with them and it was not necessary for the court to question them and cross examine them as they did not have any objections in relation to the attachment.”

26. The only conclusion that this court can draw is that the 2nd and 5th garnishee admitted the claim of the applicant and that the *nisi* orders issued on 21/1/2020 ought to be confirmed against them.

27. As for the 3rd and 4th garnishees, each of them has proved through documentary evidence that the accounts held by them in favour of the judgment debtor either have no sufficient funds or any funds at all for attachment for settlement of the decretal amount of Kshs. 1,758,819.92/- owed to the applicant by the judgment debtor. As for the 1st garnishee, the *nisi* orders were issued against the wrong account no. [...] that does not belong to the judgment debtor. As such, the applicant has failed to establish any basis for confirming the *nisi* orders issued on 21/1/2020 against the 1st garnishee.

Conclusion

28. In respect of the 2nd and the 5th garnishees, I find that the applicant's claim has not been challenged. The court therefore allows this application against the 2nd and 5th garnishees with costs to the applicant.

29. The claim against the 1st, 3rd and 4th garnishees in this application is dismissed with costs to the said garnishees.

30. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF AUGUST, 2021

F. MUCHEMI

JUDGE

Ruling delivered through video link this 25th day of August, 2021.