



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 497 OF 2018**

**BETWEEN**

**ABDUL KARIM KARGBO .....JUDGMENT DEBTOR/RESPONDENT**

**VERSUS**

**SUSAN MUTHONI MUKIRI .....DECREE HOLDER/APPLICANT**

**UNITED BANK FOR AFRICA .....GARNISHEE**

**RULING**

1. Susan Muthoni Mukiri, the Decree Holder/ Applicant herein, moved this Court by way of a Notice of Motion application dated 30<sup>th</sup> November 2020, seeking the following substantive orders:

**1. THAT a restraining order be placed on Account No. [Particulars Withheld] held and operated by the Garnishee, United Bank for Africa (UBA), Westlands Branch Nairobi on behalf of the Judgment-Debtor/Respondent herein barring him from carrying out any transaction on the said account pending the hearing and determination of this application.**

**2. THAT the monies held on Account No. [particulars Withheld] by the Garnishee, United Bank for Africa (UBA), Westlands Branch Nairobi on behalf of the Judgment-Debtor/Respondent herein, be and is hereby attached to answer the decree herein of the taxed costs of Kshs.158,640/=.**

**3. THAT the Garnishee order be made absolute at the inter parties hearing and the Garnishee, United Bank for Africa (UBA), Westlands Branch Nairobi be directed to release funds held in current Account No. [Particulars Withheld] to the total tune of the taxed costs of Kshs.158,640/= to satisfy the decree herein.**

**4. THAT the costs of these garnishee proceedings be provided for.**

2. The application is supported by an affidavit sworn on 30<sup>th</sup> November 2020 by the Pauline Muhanda, the Decree Holder/ Applicant's advocate. The Garnishee, which is the United Ban of Africa filed a replying affidavit sworn on 8<sup>th</sup> January 2021 by Mercy K. Wambugu, its Legal Officer; while the Judgment Debtor did not file any response nor participate in the hearing of the application.

3. The main ground for the application is that this court awarded the Applicant herein costs in this matter, which costs were taxed and a Certificate of Taxation for an amount of Kshs. 158,640/= issued on the 8<sup>th</sup> January 2020. However, that the Judgment Debtor/Respondent has deliberately neglected to pay the said costs despite several demands and the said amounts still remain outstanding. The Decree Holder/ Applicant attached a copy of the Certificate of Taxation and the Ruling of court, as well as of the demand letters. The Decree Holder/Applicant is aslo apprehensive that the Judgment Debtor/Respondent, who is a Diplomat at the Sierra Leone's High Commission, may be recalled back to his country, hence depriving her of the fruits of the certificate of Taxation.

4. The Garnishee on its part averred that it was aware that the Judgment Debtor has an account with it, and that as at 11<sup>th</sup> December 2020, the amount in the Judgment Debtor's account was Kshs. 2,700/= and consequently, cannot satisfy the decretal sum claimed by the Decree Holder/Applicant of Kshs. 158,640.00/= and the Garnishee's costs. The Garnishee therefore prayed that the Garnishee Order Nisi issued by this Court on 7<sup>th</sup> December 2020 be lifted, it be discharged, and the Decree Holder/Applicant be directed to pursue other avenues of executing his decree. The Garnishee also annexed a copy of the Judgment Debtor's bank statement.

**The Determination**

5. Mudeshi Muhanda & Company Advocates, the counsel for the Decree Holder/Applicant, filed submissions dated 1<sup>st</sup> February 2021.

Mwaniki Gachoka Company Advocates for the Garnishee also filed submissions dated 12<sup>th</sup> April 2021. The counsel for the relied on the provisions of Order 23 of the Civil Procedure Rules of 2010, and the decisions in the case of **Petro Sonko & Another vs H.A.D.B Patel & Another 20 EACA 99, Patrick L. Otieno-Oyoo t/a Otieno-Oyoo & Company Advocates vs African Merchant Assurance Company Limited; Diamond Trust Bank Kenya Limited (Garnishee) [2019] eKLR**, and **Bhupendra Somabhai Patel v Kingsway Tyres Limited & Another Diamond Trust Bank Limited;(Garnishee) [2020] eKLR** to urge that the Decree Holder/Applicant had proved that that the Respondent/Judgment Debtor was indebted to her, and that that the Garnishee was holding funds on behalf of the said Respondent /Judgment Debtor.

6. The Garnishee's counsel reiterated that that the Decree Nisi issued against the Garnishee ought to be discharged as there are insufficient funds in the Judgment Debtor's account to settle the decretal sum and the costs of the Garnishee proceedings, and cited the decision in the case of **Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishee) [2020] eKLR** and **Mengich tla Mengich & Co Advocates & another v Joseph Mabwai & 10 others (2018) eKLR** to submit that it had illustrated the true status of the Judgment Debtor's account and the fact that that the Garnishee lacks funds capable of being attached to satisfy the decretal sum. Therefore that it is in the interest of justice and fairness that the application herein be dismissed with costs as the Garnishee herein has incurred costs necessitated unduly by the Decree Holder/Applicant.

7. The provisions of Order 23 Rule 1 of the Civil Procedure Rules provide as follows in this regard:

**(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 decreeholder 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..**

8. On 3<sup>rd</sup> December 2020 this Court made a restraining order on Account No. [Particulars Withheld] held and operated by the Garnishee, at United Bank for Africa (UBA), Westlands Branch Nairobi on behalf of the Judgment-Debtor/Respondent, and the Garnishee and Judgment-Debtor/Respondent were restrained from carrying out any transaction on the said account pending the said *inter partes* hearing. This order was essentially the Order Nisi envisaged by the provisions of Order 23 Rule 1 hereinabove, and its effect was to prohibit the Garnishee from releasing money from the said account until the order is discharged or made absolute to satisfy decree herein.

9. The effect and consequences of the said order were explained in **Choice Investments Ltd vs. Jerommimon (Midland Bank Ltd. Garnishee) (1981) 1 All ER 225 at page 227** as follows:

**“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.”**

10. After having been served with the order, the Judgment Debtor and Garnishee did not dispute that there is a decree in favour of the Decree Holder that has not been settled. The Garnishee has on its part confirmed that the Judgment Debtor operates the subject account in its bank, and that it holds funds on behalf of the Judgment Debtor in the said account. In addition, other than stating that the funds held in the subject account are not sufficient to satisfy the Decree, the Garnishee has not indicated that it has any claim over the funds.

11. A Garnishee can in this respect only dispute liability under Order 23 Rule 5 of the Civil Procedure Rules in circumstances where it has a lien on the judgment debtor's money, or where there are conditions depriving it from paying the judgment debtor the money. Since the Garnishee has not pleaded any of the above stated conditions, this court can proceed to make the decree nisi absolute and order execution against the funds it holds to satisfy the decree, and thereby discharge the liability of the Judgment Debtor to the extent of the amount paid.

### **The Disposition**

12. In the circumstances, the Decree Holder/ Applicant's Notice of Motion application dated 30<sup>th</sup> November 2020 succeeds to the extent of the following orders:

**I. The garnishee order nisi issued herein on 3rd December 2020 is hereby made absolute.**

**II. The monies held on Account No. [Particulars Withheld] by the Garnishee, United Bank for Africa (UBA), Westlands Branch Nairobi on behalf of the Judgment-Debtor/Respondent herein, be and are hereby attached to answer the decree herein of the taxed costs of Kshs.158,640/=.**

**III. The Garnishee, United Bank for Africa (UBA), Westlands Branch Nairobi be and is hereby directed to forthwith pay the Decree Holder/ Applicant herein the sum of Kshs 2,700/- held in current Account No. [Particulars Withheld] in United Bank for Africa (UBA), Westlands Branch Nairobi together with such other sums that have been paid into the said account number from the date of issue of the Order Nisi to date in partial satisfaction of the decree herein.**

**IV. The Garnishee is hereby ordered to produce in court updated statements of the Account No. [Particulars Withheld] in Garnishee, United Bank for Africa (UBA), Westlands Branch Nairobi for the period between the date of issue of the order nisi to the date of payment to the Decree Holder/ Applicant as ordered herein, within thirty (30) days from the date of this ruling.**

**V. The Judge seized of this matter shall give the parties mention date to confirm compliance and further orders.**

**VI. The Judgment-Debtor/Respondent shall bear the costs of these garnishee proceedings.**

13. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021**

**J. NGAAH**

**JUDGE**