



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Midas Oil Limited (Insolvency Cause E004 of 2020)
[2021] KEHC 82 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 82 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E004 OF 2020
MW MUIGAI, J
SEPTEMBER 23, 2021**

RULING

NOTICE OF MOTION

1. The Applicant/Decree Holder filed a Notice of Motion Application dated 15th March 2021 for orders that; -
 1. The court issues ORDER NISI against the garnishee directing that all money owing by the garnishee towards the judgment debtor be attached to clear the decretal sum herein of Kshs.5, 496, 000.
 2. The court issues order absolute against the garnishee directing that money owing to the judgement debtor be attached to fully satisfy the decree.
2. Which Application was supported by the sworn Affidavit of PEDRO ALEXANDRE DUARTE DA SILVA dated and based on the grounds that; -
 - a. Judgment was entered in favour of the judgment creditor against the judgment debtor for Kshs.5, 496, 000 and the decretal sum remains unsettled to a tune of Kshs.5, 496, 000.
 - b. The garnishee holds monies belonging to the judgement debtor to the tune of Kshs. 72 Million.
 - c. It is only through the attachment of the money held by the garnishee that the debt will be satisfied.
 - d. The garnishee is indebted to the judgment debtor and is within the jurisdiction of the court.



- e. It is only through the attachment of the money held by the garnishee that the debt will be satisfied.
- f. If the Application is not granted, the garnishee may pay the sums of money due to the judgment debtor, who may dispose of it, making it impossible for the decree holder to satisfy the decree.

NOTICE OF MOTION

3. The Applicant/Judgment debtor filed a Notice of Motion Application dated 22nd April 2021 for orders that; -
 1. The Court do set aside the Order Nisi issued on 15th March 2021 pending the hearing and determination of this Application.
4. Which Application was supported by the sworn Affidavit of Sammy Mwatha Njoroge dated 22nd April 2021 and based on the grounds that; -
 - a. The judgment debtor has not refused to settle the decretal sum of Kshs.5, 496, 000 and has offered Kshs.1, 000, 000 and is praying for more time to pay the balance which the Judgment Creditor has refused.
 - b. The Application by the Judgment Creditor is invalid because it is premised on illegally obtained information.
 - c. Order 23 Rule 1 of CPR provides that the Judgment Debtor should be orally examined before or after granting of the garnishee order nisi, it therefore cannot be made absolute until the Judgment Debtor is orally examined.
 - d. If the orders subsist, the Judgment Debtor will not be able to meet its contractual obligations and other decrees against it from other creditors.
 - e. The Covid-19 pandemic has had a major impact on the Judgment Debtor's revenue streams which has resulted in massive employee layoffs.

GROUND OF OPPOSITION

5. The Respondent responded to the Application vide the Grounds of Opposition as follows; -
 - a. The Applicant lacks audience before the Court.
 - b. The Application before the Court is brought in bad faith.
 - c. The Application is frivolous, vexatious and a blatant abuse of the process of the Court.

DECREE HOLDER'S SUBMISSIONS

6. The Decree Holder submitted that the Garnishee does not oppose the present Application and does not deny being in possession of the necessary funds to satisfy the decree. The Order of the court and a hearing Notice dated 16th March 2021, were duly served upon the Judgment Debtor and the Garnishee on 23rd March 2021 and a return of service duly lodged with the court. The matter came up for hearing twice in court on 26th April 2021 and 5th May 2021 and in both occasions the Garnishee failed to attend court. The non-appearance of the Garnishee is deemed to be an admission of its



possession of the funds as was stated in *Ngaywa Ngigi & Kibet Advocates versus Invesco Assurance Company Limited; Diamond Trust Bank* [2020] eKLR

“ I agree with the contention of counsel for the applicant that in terms of Order 23 Rule 4 of the Civil Procedure Rules, 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 court to question them and cross examine them as they did not have any objections in relation to the attachment.”

7. Further, the Decree Holder submitted that the grounds upon which the Judgment Debtor’s Application is based lacked substance. In the Ruling delivered on 2nd December 2020 it was noted that it had been conceded that the company was not a going concern and the sum of its assets are held by the Garnishee.
8. It was also the Decree Holder’s submission that the Application dated 22nd April 2021 is fatally defective as the directors lacked locus standi to lodge the said application.

JUDGMENT DEBTOR’S SUBMISSIONS

9. The Judgment Debtor submitted that it should not be condemned unheard and that the applicability of principles of natural justice is not dependent upon any statutory provision. Pursuant to Order 23 of CPR nothing bars the judgment debtor from bringing an application before the court. In the case of *Cecilio Murango Mwenda t/a Murango Mwenda & Co Advocates versus Isiolo County Government & another* [2017] eKLR the court stated that;

“Accordingly, my view is that although the garnishee proceedings are as between the decree-holder and the garnishee, there is nothing in Order 23 that bars the judgment-debtor from being heard. In any event, it is the cardinal principal of the rule of law that unless expressly provided, no adverse orders should be made against a party without such party being heard.”

10. The Judgment Debtor urged the court to set aside the decree nisi pursuant to Order 51 Rule 15 of CPR which grants the court the power to set aside the said order. In addition, the Application by the Judgment Creditor is fatally defective for being premised on privileged information obtained illegally. The order nisi be set aside and the application to make the order nisi absolute dismissed until the judgment debtor is orally examined.
11. It was the Judgment Debtor’s submission that it has raised sufficient grounds for setting aside the order nisi issued on 15th March 2021 and asked the court to find that it has audience to the court.

DETERMINATION

12. There are two applications for determination and the will be determined together. In the first Application dated 15th March 2021 the Applicant seeks the following orders: - Order Nisi against the garnishee directing that all money owing by the garnishee towards the judgment debtor be attached to clear the decretal sum herein of Kshs.5, 496, 000.; and order absolute against the garnishee directing that money owing to the judgement debtor be attached to fully satisfy the decree.
13. The second Application dated 22nd April 2021 the Applicant (Judgment Debtor) seeks to set aside the order nisi issued on 15th March 2021.
14. The main issue for determination from the two Applications is whether the Order Nisi should be made an Order Absolute.



15. Having considered the pleadings and submissions filed by the parties, there is no dispute that the court granted garnishee order nisi against the Garnishee National Land Commission on 15th March 2021. It is also not in dispute that the Garnishee despite service has not opposed the application to make the garnishee order absolute. The issues for determination are:
- a) Whether the Application is incompetent because it is founded on illegally obtained privileged and confidential information.
 - b) Whether the Judgment Debtor must be examined orally before the garnishee order is made absolute.
 - c) Whether the Application by the Decree Holder should be granted.

Whether the Application is incompetent because it is founded on illegally obtained privileged and confidential information.

16. The Judgment Debtor argued that the Application by the Decree Holder was defective for being premised on confidential and privileged information obtained illegally and unethically. 17. The burden of proof is upon the Judgment Debtor to prove on a balance of probability that the said information was obtained illegally in breach of confidentiality.
17. The Decree Holder deposed that the information of funds held by the garnishee was given by Judgment Debtor in an Affidavit dated 4th March 2020 filed in Court where it stated that its owed money by the National Land Commission for the compulsory acquisition of its land. Further, in the Grounds of Opposition dated 16th June 2020, the Judgment Debtor also mentioned the Kshs.70 Million from the National Lands Commission. The same was reiterated by the Judgment Debtor in its submissions to the Notice of Motion dated 27th March 2020 where it stated that it expected to receive over Kshs.72 Million from the National Land Commission. Therefore, it cannot be said that the information was obtained illegally and the Judgment Debtor has not provided any information to support its allegations.

Whether the Judgment Debtor must be examined orally before the garnishee order is made absolute.

18. It was the Judgment Debtor's contention that Order 23 Rule 1 of CPR provides that the Judgment Debtor should be orally examined before or after granting of the garnishee order nisi and that it therefore cannot be made absolute until the Judgment Debtor is orally examined.
19. Order 23 Rule 1 CPR provides that:
- (1) A court may, upon the ex parte application of the 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 salary or allowances 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 costs of the garnishee proceedings; and by the same or subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay the decree-holder the debt due from him to the judgement-debtor or so much thereof as may be sufficient to satisfy the decree together with costs aforesaid.
20. The import of the above mentioned provision is that the order nisi can be issued before the oral examination of the Judgment Debtor.



21. In the case of *Francis Kaiga versus Institute for Security Studies; ECO Bank (K) Limited (Garnishee)* [2019] eKLR

“It is clear from the foregoing rule that a garnishee order nisi can be made either before or after an oral examination of the judgment-debtor. I believe such oral examination is meant to verify the existence of attachable debts from third parties and alert him of execution through garnishee proceedings. In this case the claimant was not examined by the court which granted the garnishee order nisi. However, after the order was made, the judgment-debtor was served and appeared in court through counsel on 13.6.2019 and 20.6.2019. The counsel was heard in opposition to the application herein and did not dispute the existence of the attached bank accounts and the fact that the funds therein was held to the credit of the judgment-debtor. Although the counsel contended that the order should not be made absolute before oral examination of the judgment-debtor, he did not specify on what matters was the oral examination necessary in assisting the court decide whether or not to make the garnishee order nisi absolute. Consequently, I return that in this case the judgment-debtor need not be orally examined before the garnishee order nisi is made absolute.”

22. Similarly, in this case the Judgment Debtor objected that the order nisi should not be made absolute and did not specify how the oral examination would assist the court in deciding whether or not to make the order nisi absolute. The Judgment Debtor based its objection on the allegation that information was acquired illegally a fact that has been discounted as set out above. However, the Judgment Debtor did not dispute the existence of the attachable debt by the Garnishee the National Land Commission.

Whether the Application by the Decree Holder should be granted.

23. The garnishee did not file any response to the application either acknowledging or disputing the debt neither did it attend court to dispute the same. The Decree Holder filed Return of service dated 25th March 2021 sworn by Martin Mutua proving that the Garnishee was served but did not attend court being well aware of the proceedings. In that respect, I find that the Garnishee acknowledged that it owed the judgment debtor held the necessary funds to satisfy the decree; and thus, they did not have any objection in relation to attaching the debt.

24. Order 23 Rule 4 of the CPR 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.

DISPOSITION

25. The upshot of the above is that the Application dated 15th March 2021 is granted and garnishee order nisi issued herein is made absolute. Subsequently the Application dated 22nd April 2021 fails.

DELIVERED SIGNED & DATED IN OPEN COURT ON 23rd SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI



JUDGE

E.KINYANJUI & CO ADV- CREDITOR

OGWOKA NDEGE & CO- DEBTOR

COURT ASSISTANT - TUPET

