



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC CIVIL APPLICATION NO.16 OF 2018

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

KIHANGA & CO. ADVOCATES.....APPLICANT

VERSUS

XPLICO INSURANCE CO. LTD.....RESPONDENT

RULING

1. Before me is a notice of motion dated 04.05.2021 wherein the applicant seeks for orders of attachment of deposits and funds held by the judgement debtor in Safaricom PLC requiring the garnishee to freeze pesa Chama Account Pay Bill Number 800xx in satisfaction of a decree amounting to Kshs. 51,515.00 as well as costs of this suit.
2. The application is supported by the affidavit of Kihanga Mwangi sworn on 04.05.2021 in which he reiterates the grounds as set out on the face of the notice of motion application and further avers that owing to wilful neglect and/or refusal of the judgment-debtor to satisfy the decree, it is only fair and just to allow the application.
3. The applicant's case is that he obtained a judgment against the Respondent on 18.09.2019 for a decretal sum of Kshs. 51,515.00 but which the respondent has failed, neglected and/or refused to settle. As such, there are sufficient reasons to attach the judgment debtor accounts held by the garnishee so as to satisfy the decretal amount.
4. The respondent never filed any response to the application while the garnishee opposed the application vide a replying affidavit sworn by one Daniel Ndaba, the Garnishee's Senior Legal Officer and wherein it was deposed that after being served with Garnishee Order Nisi in relation to the above-mentioned accounts and upon checking their records for the said accounts as at the date of the Garnishee Order Nisi, it was discovered that the said Mpesa Pay Bill Number 800xx is not held and operated by the respondent/judgement debtor but by Billetera Limited, a Limited Liability Company with its head office in Nairobi. Further that, the said Mpesa Pay Bill number 800xx has a balance of Kshs.132, 460.00.
5. The garnishee further deposed that in furtherance to the Garnishee Order Nisi requiring them to provide any other Mpesa pay bill number held by the respondent/judgment debtor, Xplico Insurance, the said Mpesa Pay Bill numbers are 976xxx and 947xxx and that the accounts have a balance of Kshs. 137,797.00 and 637,490.12 respectively. That the said Mpesa accounts have been garnished following previous Garnishee Order Nisis issued in other matters and which rank in priority.
6. That Mpesa Pay Bill Nos. 976xxx and 947xxx despite having a credit balance have been garnished by previous Garnishee Orders which rank in priority and the applications giving rise to the garnishee Order Nisis are pending determination. That the garnishee is also entitled to costs on the Decree Holder's application and as such, they pray for costs. That the Garnishee is ready and willing to partially comply and release monies held in Mpesa Pay Bill 800xx only, which cannot sufficiently satisfy the entire Garnishee Nisis issued in the series of matters filed by the applicant less it's costs within 7 days upon issuance of the Garnishee Order Absolute.
7. The parties took directions on filing of submissions which I shall summarize as follows;

8. In support of the application, the applicant inter alia submitted that the application is unopposed by the respondent and partly admitted by the garnishee and that there is no dispute that there is a decree in their favour and which has never been settled or set aside or execution thereof stayed. Further that he has established to the court that there is a sum of money held by the garnishee which is recoverable and which would constitute a debt for the purposes of garnishee proceedings and further that the applicant has sufficient reason to believe that the accounts sought to be garnished indeed hold funds which may be sufficient to satisfy the decree. That Xplico Insurance Company Limited by way of public notice direct all policy holders to pay via pay bill 800xx owing to numerous garnishee orders admitted against the respondent; and that the previous garnishee orders against the respondent have been satisfied against Billetera pay bill without opposition from Billetera or the respondent. The applicant wondered why the respondent would avail payment instruction details to a third party who is not an insurance agent broker or insurance company to collect premiums on its behalf; they called upon the court to consider the garnishee's replying affidavit which they have admitted having satisfied decrees emanating from the Pay Bill Number 800xx with respect to the various cases indicated therein.

9. The garnishee on the other hand submitted that the Mpesa Pay Bill 800xx is not held by the judgment debtor but by Billetera, a limited liability Company. In the same breadth, they confirmed that the respondent holds two Mpesa pay bill numbers 976xxx and 947xxx with a balance of Kshs.137,797.00 and Kshs. 637,490.12 respectively as at 18.05.2021. That the order to execute was against the judgment debtor and so it would be unlawful to execute against Billetera Limited who are not even parties to these proceedings. They further submitted that the relationship between Billetera Limited and the judgment debtor should be ascertained to ensure that no loss is suffered by a third party with no interest in the suit and upon such ascertainment, the court guides on whether to release the said amounts.

10. I have considered the application, the replying affidavits and the submissions filed by the parties herein. As earlier noted, the instant application seeks garnishee orders to satisfy the decree issued in Misc. Application 17 of 2008. Order 23 Rule 1 of the Civil Procedure Rules provides that:-

“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.”

11. From the above provision, it is clear that a decree holder has a right to move the court vide an *ex parte* application seeking orders that a debt owing from a third person (“garnishee”) to the judgment-debtor be attached to answer the decree together with costs of the garnishee proceedings. However, the applicant in such an application has a duty to prove/ demonstrate by affidavit that:-

i. *There is a decree which has been issued and is still unsatisfied to a certain amount.*

ii. *There is a debt due from the Garnishee to the Judgment Debtor capable of being attached to answer the decree.*

12. Once the applicant has satisfied the above, the burden of proof then shifts to the garnishee to prove whether or not he is indebted to the judgment-debtor. Therefore in law, the onus placed on a Garnishee would only be discharged where it successfully establishes that the account or accounts covered by the Garnishee Order nisi do not exist in its system or if it exists, it is in debt and not in credit or that it has a right of set off or lien which are due against the customer. (See **Diamond Trust Bank Kenya Ltd (Garnishee) MKS HC Misc. Civil App. No. 405 of 2017 [2020] eKLR**).

13. **Lord Denning M.R in Choice Investments Ltd vs. Jerommimon (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225 at page 227** where he held as thus:-

There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see Pritchard v Westminster Bank Ltd [1969] 1 All ER 999, [1969] 1 WLR 547 and Rainbow v Moorgate Properties Ltd [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate....”

14. Ordinarily in garnishee proceedings, the judgment-creditor has a duty to prove the garnishee's indebtedness based on sound evidence. The Court of Appeal in **James G. K. Njoroge t/a Baraka Tools & Hardware v APA Insurance Company Limited & 3 others [2018] eKLR**, held:-

“..[28] With regard to the garnishee order, the appellant did not demonstrate or establish that the 1st respondent owed the 2nd respondent any debt upon which the order of garnishee could be pegged. It may well be that, there was some money due to the 2nd respondent from the 1st respondent on account of the Bond being discharged. However, this was neither alleged nor demonstrated. [29] As regards the Garnishee order, the provisions of Order XX11 Rule 1(1) reproduced above, shows that the order is for an attachment of a debt. Therefore, for the court to issue a garnishee order, the appellant had to satisfy the court that the 1st respondent was holding money belonging to or due to the judgment-debtor which monies should be attached to meet the decree or part of the decree that had been issued in favour of the appellant.

The Bond relied on by the appellant, merely demonstrated that the 1st respondent had guaranteed payment of the decretal sum

during the pendency of the application for stay of execution only. That guarantee did not amount to a debt that could be attached. The 1st respondent having specifically denied being indebted to the 2nd respondent, and there being no evidence to contradict the 1st respondent's denial, there was no basis upon which the court could issue a garnishee order. As was stated in Petro Sonko & another v H. A. D. B. Patel & another 20 EACA 99, the onus is on the Judgment Creditor to establish that there is a debt due and recoverable from the Garnishee to the Judgment Debtor."

15. The question which needs to be answered, therefore, is whether the applicant has satisfied the above conditions so as for the court to make the garnishee order?

16. As to there being a decree which has been issued and is still unsatisfied, it was the applicant's case that he obtained a judgment against the judgment debtor for a decretal sum of Kshs. 51,515.00 and which amount has not been satisfied. A copy of the said decree was annexed to the application (Annexure "KM 1"). These depositions were never opposed by the respondent herein; save for the garnishee in their replying affidavit deponing that they are not able to settle the same. It is my considered view therefore, that the issue as to the applicant being owned by the respondent to the tune of Kshs. 51,515.00 is not disputed.

17. As to whether there is a debt due from the Garnishee to the Judgment Debtor capable of being attached to answer the decree, the applicant herein sought the attachment of the deposits and funds held in Mpesa Pay Bill 800xx which he has sufficient reasons to believe is being operated by the respondent herein. The garnishee did confirm that Mpesa Number 800xx is not held and operated by the respondent and that the accounts operated by the respondent are Mpesa pay bill numbers 976xx and 947xxx with a balance of Kshs.137, 797 and Kshs. 637,490.12 respectively as at 18.05.2021.

18. Order 23 Rule 2 of the Civil Procedure Rules provides that:-

"A credit in a deposit account with a bank or other financial institution shall for the purposes of this Order be a sum due or accruing and shall be attachable accordingly....."

19. As such, it is my view that the deposits in the Mpesa pay bill numbers 976xxx and 947xxx is proper. The question which needs to be answered is whether the said accounts have credit of the sum due or accruing and thus attachable under Rule 2 (in satisfaction of the decree herein).

20. In response to this, the garnishee deposed to the fact that it is not in dispute that the Mpesa pay bill numbers 976xxx and 947xxx have credit balances but other Orders rank in priority that have occasioned Garnishee Order Absolute to be issued and so they prayed that the debt is unrecoverable and that garnishee costs do issue in favour of the garnishee.

21. The Garnishee produced Mpesa statements for the two accounts and which indeed confirmed that assertion. It was the garnishee's deposition further that the uncollected amount as at that time was an amount attached pursuant to earlier Garnishee Orders Nisi issued before Order Nisi herein and thus the same cannot be attached again to settle the decretal sum herein.

22. These annexures and evidence led by the garnishee in regard to Pay bill number 800xx belonging Billetera Limited were never controverted by the Applicant.

23. In my view, the garnishee was able to tender sufficient evidence to the effect that they did not have sufficient money owed to the judgment debtor which could be attached in satisfaction of the decree at that particular time. This was done by exhibiting the account statement of the judgment debtor, as at the relevant date together with other already attached decrees (with some already satisfied).However, in my view, money could still be progressively realized from the said accounts and the same be paid to the applicant herein since the said accounts are still active and capable of realizing some amounts to satisfy the decree.

24. In the foregoing, it is my considered view that the;

i. Garnishee nisi is hereby made absolute.

ii. Both applicant and garnishee are awarded the costs of the application to be borne by the respondent.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24THDAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Respondent

.....for the Applicant