



**Mistry Jadv Parbat & Company Limited v Golden Jubilee
Limited; Diamond Trust Bank (Garnishee) (Civil Suit 608 of 2014)
[2021] KEHC 261 (KLR) (Commercial and Tax) (23 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 608 OF 2014
A MABEYA, J
NOVEMBER 23, 2021**

BETWEEN

MISTRY JADVA PARBAT & COMPANY LIMITED PLAINTIFF

AND

GOLDEN JUBILEE LIMITED DEFENDANT

AND

DIAMOND TRUST BANK GARNISHEE

RULING

1. On 8/6/2016, Ochieng J entered judgment in favour of the plaintiff against the defendant for KShs. 31,913,396/84 together with interest at 16% per annum. About five (5) years later, the same had not been settled.
2. On 23/9/2021, the plaintiff took out a Motion on Notice under Order 23 Rules 1(1), (2) & (4), 2 & 4 of the Civil Procedure Rules. In it, it sought to garnishee Account No. 010xxxxxxx held by the defendant at Diamond Trust Bank Ltd, Nation Centre Branch for purposes of satisfying the said decree by then standing at Kshs. 61,261,857.19.
3. A decree nisi was issued on 25/10/2021 and the matter was directed for hearing of the order for decree absolute at a later date.
4. The grounds for the application were that the defendant was indebted to the plaintiff to the tune of Kshs. 61,261,857.19 plus further interest on the principal sum until payment in full. That the Garnishee held monies to the credit of the defendant and was obliged to pay to the plaintiff the decretal amount to satisfy the decree and certificate of costs. That that the defendant had failed to pay what



was due to the plaintiff and if the monies held by the Garnishee was not paid over to the plaintiff, it shall continue to suffer irreparable loss.

5. In opposition to the application, the Garnishee filed a replying affidavit sworn by Karima Nathani, its legal officer on 19/10/2021. He averred that the defendant was indebted to the Garnishee to the tune of KShs. 86,981,827.45 due to various credit and banking facilities extended to it. That in the premises, the defendant's accounts are not available to satisfy the decretal amount.
6. In answer to the plaintiff's Garnishee application, the defendant filed a Motion on Notice dated 5/10/2021. It sought a stay of execution of the judgment and decree in this matter until a Notice to Show Cause is issued to the defendant as provided for in the Civil Procedure Rules.
7. The basis for the application was that the plaintiff was in the process of executing the decree against the defendant without taking out the mandatory Notice to Show Cause as required by the Law. That the plaintiff was no longer trading and was therefore insolvent.
8. That application was opposed by the plaintiff vide a replying affidavit sworn on 15/10/2021 by Shivji Varsani. He averred that the plaintiff was actively trading and was not insolvent as claimed by the defendant. That the defendant had failed to settle the decretal debt which had remained due for over 5 years and was intent on frustrating the recovery process.
9. The record shows that the defendant had applied for a stay of execution of the decree pending appeal but the same was dismissed vide a ruling made on 15/11/2017. In the premises, the plaintiff contended that the stay of execution application should be struck out for being res judicata.
10. On the other hand, the defendant submitted that the application was not res judicata as the application had only sought a stay until a Notice to Show Cause is issued.
11. The Court has considered the contestations by the parties. In the said ruling of 15/11/2017, the court dismissed the defendant's stay application due to the fact that it had failed to demonstrate that it would suffer substantial loss if execution was not stayed.
12. Section 7 of the Civil Procedure Rules states: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.
13. What was determined in the previous ruling was a stay pending appeal. The present application also seeks a similar order for stay though pending the issuance of a Notice to Show Cause. The reason for seeking the stay of execution in the present application may be different but the intention is to have the same outcome. In this regard, I hold that the issue of stay of execution has been directly and substantially before this Court and it has already been determined.
14. On that ground alone, I find that the application dated 5/10/2021 to be without merit and dismiss the same with costs.
15. That leads me to the second application as to whether a garnishee order absolute should be issued. A garnishee order nisi was made on 25/9/2021. The defendant objected to the application on the ground that the application was premature as no Notice to Show Cause had been issued. On the other hand, the Garnishee opposed the application on the basis that the sums garnisheed were being held as security for some facilities that had been extended to the defendant.



16. Order 22 Rule 18(1) of the *Civil Procedure Rules* provides that where an application for execution is made more than one year after the date of the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.
17. Rule 18(2) thereof provides: -

“Nothing in sub-rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice”.
18. It is clear from the foregoing that the proviso to sub-rule 1 allows a court to overlook the issuance of the Notice to Show Cause for good reason. The good reason is specified as being if the issuance of the Notice would cause unreasonable delay or would defeat the ends of justice.
19. In the present case, it is not in dispute that no notice to show cause was issued. The plaintiff only proceeded and applied for Garnishee orders. The Court has considered that the decree sought to be executed was made more than 5 years ago. The plaintiff has painfully waited all along for it to enjoy the fruits of its judgment without success.
20. On the other hand, the defendant has sat pretty without making any effort to pay or settle the decree. My view is that the purpose of Notice to show cause was meant to be a wake-up call for a party who may have forgotten that there was an obligation to be settled due to probably passage of time. It was to be a reminder of an obligation that might have been forgotten and was meant to avoid an element of surprise. This was to enable such a party to avoid the painful process of execution by making arrangements to settle the decree it may have forgotten.
21. However, the Garnishee proceedings by their very nature, they have no element of surprise. The Garnishee is usually notified that the debt owed to the judgment-debtor is about to be taken over and paid to the decree-holder by way of decree-nisi. It safeguards both the decree holder and the Garnishee. In this regard, I hold that although the garnishee proceedings are in the nature of execution process, they need not be subject to the process of the Notice to show cause.
22. In *Reuben Nyanginja Ndolo vs Dickson Wathika Mwangi & 3 Others*, Election Petition No. 11 of 2008, Odunga J. set out the rationale for the requirement of a notice being issued before execution, when a decree was more than one year old. He observed: -

“The requirement for Notice To Show Cause serves two purposes in my view: First, it serves to give notice to the Judgment- debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice”.
23. In any event, due to the time that has passed between 2016 when the decree was passed and now when the application was made, justice demanded that no time should be wasted. The issuance of the Notice to show cause would have led to unreasonable delay and highly prejudicial to the decree holder. This is a case that falls on all fours within the proviso in Rule 18(2) of the Civil Procedure Rules.



24. Having found that there was no requirement to issue a Notice to Show Cause, can the decree nisi be made absolute? The garnishee contended and submitted that upon consolidation of the defendant's bank accounts there was no credit balance available for purposes of attachment and that to the contrary the defendant owed the garnishee approximately Kshs. 86,981,827.45.

25. The garnishee relied on the case of *Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others & another* [2013] eKLR where the court upheld a banker's right of consolidation and set off and held: -

“ At paragraph 29.13 of Paget's Law of Banking, 13th Edition, it is stated that the banker may combine two current accounts at any time without notice to the customer even though the accounts are maintained at different branches.

We are also guided by the passage in Paget's Law of Banking, supra, paragraph 29.13 where it is stated thus: “Right of bankers of set-off which is right of combination or of consolidation of accounts is but the manifestation of a right analogous to the exercise of the banker's right of lien, a right which is of general application and not in principle limited to account or other similar accounts.

...

Thus, in circumstances where a bank has a loan account and also a current account in credit with the same customer and holds security for the ultimate balance, the banker is at liberty to combine and consolidate the accounts and set off the accounts. In the instant case, it is very clear that the 2nd respondent had given the right to the appellants to consolidate and set off any sum standing to the credit of any one or more of those accounts in or towards the satisfaction of any liabilities due to it”

26. In the *Barclays case*, the banker had a right to consolidate and set off due to the fact that there was a charge securing the loan amounts advanced to the borrower. In the present case, the garnishee has only provided statements of account and a copy of the Standard Lending Terms but did not provide an executed letter of offer nor a charge as evidence of that the facilities extended were secured by the monies held in the garnisheed account. There is no proof of security on the loan extended.

27. The Court is of the opinion that the *Barclays case* does not apply in the instant case as the garnishee in this case has not showed that there was any contract executed by the defendant offering the said monies as security for any advances. At best, this will be an attempt by the Garnishee to cushion the defendant from its lawful obligations and obstruct the cause of justice. There was no evidence that the facilities allegedly advanced to the defendant had become due and owing.

28. Accordingly, I hold that the Garnishee has not showed cause why it should not be liable to settle the decree on the basis of the funds it holds in favour of the defendant. The upshot is that there is nothing stopping the Court from issuing a garnishee order absolute.

29. The application dated 23/9/2021 is therefore allowed in terms of prayer 2. A garnishee order absolute is issued against Diamond Trust Bank Limited to pay to the decree holder a sum of Kshs. 61,261,857/19 together with interest thereon at 16% pa from 1/1/2020 until payment in full. The costs of the application to be borne by the Garnishee.

30. The application dated 5/10/2021 is dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021.



A. MABEYA, FCI Arb

JUDGE

