



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISC. CIVIL APPLICATION NO. 73 OF 2018

LESINKO NJOROGÉ &

GATHOGO ADVOCATES.....APPLICANT/DECREE HOLDER

VERSUS

INVESCO ASSURANCE CO...RESPONDENT/JUDGEMENT DEBTOR

AND

CO-OPERATIVE BANK OF KENYA.....GARNISHEE

RULING

A. Introduction

1. This is a ruling for the application dated 16th July 2019 in which the applicant seeks for orders of attachment of deposits and funds held by the judgement debtor in the garnishee's bank account numbers [xxxx] and [xxx] in satisfaction of the decree amounting to Kshs. 1,302,798/= as well as costs of this suit.
2. It is the applicant's case that he has since established that the judgement debtor has deposits held in credit garnishee's bank account numbers [xxxx] and [xxxx] and unless the said deposits are attached by a garnishee order, they may be withdrawn or transferred rendering these proceedings nugatory.
3. In rejoinder, the garnishee through one Rachael Kungu admitted to the judgement debtor operating the aforementioned bank account in their Kimathi Street Branch, however it was her case that the garnishee could not satisfy the decretal sum as the aforementioned accounts held no funds to satisfy the debt.
4. The applicant subsequently filed a supplementary affidavit in which he deposed that the garnishee through one Rachael Kungu had deposed facts falsely and deliberately tried to mislead court.
5. The applicant further stated that the garnishee had failed to prove that there existed a lien to underwrite IPF/Asset Finance Business duly executed by the garnishee and judgement debtor.
6. The applicant further stated that in a similar application involving the same parties and same subject account in Kilungu SPMCC 8 of 2018, the garnishee deponed the availability of funds in account number [xxxx] and this means that the current allegations by the garnishee are an afterthought.
7. The applicant further states that the same allegations were made by the garnishee in Makueni HCC Misc. App 70 of 2019 on the 17th July 2019 on the same bank account numbers however the court proceeded to direct payment of the decree against subject account number [xxxx].
8. The applicant further states that the garnishee made similar false allegations in Kiambu Misc. Application No. 183 of 2019 and Kerugoya Misc. Application No. 64 of 2018 against account numbers [xxxx] and [xxxx] however the same account numbers were successfully attached.
9. It is the applicant's case that under Order 23 of the Civil Procedure Rules, the role of a garnishee is only to provide details of the holder of the account and whether the amount therein is sufficient to satisfy the decree and not act in the manner as exhibited by the garnishee herein.

10. In rejoinder, the garnishee through one Judy Nyawira deposed that it is under an agreement with the judgement debtor to underwrite IPF/Asset Finance Business secured by the subject account herein a transaction which was done prior to the garnishee being served with the present application on the 19th July 2019.

11. It is the garnishee's case that it would be unjust for the applicant to insist on attaching the subject accounts as the funds therein re held for security purposes as this would expose the garnishee to loss and further that the funds in the subject account are insufficient to satisfy the applicant's claim.

12. The parties filed submissions to dispose of the matter.

B. Applicant's Submissions

13. It is submitted that there is no single document to demonstrate existence of IPF/Asset Finance Business duly executed by the garnishee and judgement debtor neither is there any information to show any IPF/Asset Finance arrangement.

14. The applicant further submits that the garnishee confirms and acknowledges that the subject account numbers [xxxx] and [xxxx] hold credit balances of Kshs. 5,117,966.10 and 5,155,561.65 respectively.

15. It is submitted that the aforementioned Rachael Kungu in Kilungu SPMCC 8 of 2018, in May 2018 listed account number [xxxx] as current business accounts managed by the judgement debtor and available however the position changed three months later at the filing of the instant application depicting that allegations by the garnishee are false and meant to mislead the court.

16. It is submitted that the garnishee has not met the threshold required to prove that the funds in the subject accounts are held as lien and in any case in the existence of the alleged lien on deposit in the subject accounts, the insurance premium is renewable every year meaning the availability of the exhibited funds at the start of every new year. Reliance was placed on the case of **Otieno Ragot & Co Advocates v City Council of Nairobi [2015] eKLR.**

C. Garnishee's Submissions

17. It is submitted that the applicant has not established a proper case for the making of the garnishee order for attachment of the funds held by the garnishee in the subject accounts. It is further submitted that although the applicant was able to identify some funds in the subject account, he has failed to prove that the said funds are held on a general business account or that the funds are available for attachment to satisfy the decree.

18. It is submitted that as a general rule, funds in a collateral account are never available for attachment as its purpose is always to secure the intended business or financial obligations for whose purpose the said collateral account is opened. It is submitted that the applicant has not tendered any evidence to contradict the arguments raised by the garnishee.

D. Analysis & Determination

19. I have considered the pleadings herein; the submissions as well as the authorities relied on by the parties herein. It is my considered view that the issue for determination is whether the applicant has established a proper case for the making of the garnishee order.

20. The starting point in deciding this matter are the provisions of **Order 23 Rule 1(1) of the Civil Procedure Rules**: -

“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”.

21. The object of Garnishee Proceedings is to enable a Decree Holder to reach a debt due to the Judgment Debtor from the Garnishee as may be sufficient to satisfy a Decree. Crucial thereof is that the Garnishee is indebted to the Judgement Debtor.

22. In the instant case, there is no dispute that there is a decree in favour of the applicant that has not been settled. The applicant avers that the subject account numbers [xxxx] and [xxxx] hold credit balances of Kshs. 5,117,966.10 and Kshs. 5,155,561.65 respectively which are sufficient funds to settle the decretal sum of Kshs. 1,302,798/=.

23. On its part, the garnishee's case is that it is under an agreement with the judgement debtor to underwrite IPF/Asset Finance Business secured by the subject accounts herein a transaction which was done prior to the garnishee being served with the present application on the 19th July 2019 and as such the subject account cannot be used to settle the decretal amount as they hold lien over the same.

24. Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the garnishee's indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has

to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.

25. In this case, the garnishee produced copies of insurance confirmation forms for various motor vehicles insured from the Bungoma Branch. The garnishee contends it is under an agreement with the judgement debtor to underwrite IPF/Asset Finance Business. That consequently it has a lien over the subject account numbers

26. In my considered view, the funds in the said bank accounts belong to no one but the judgement debtor. The garnishee has not produced any evidence to the contrary.

27. The question that arises herein is whether the said funds are held as security or lien? A lien is a legal right or interest that a creditor has in another's property which lasts until a debt or duty that it secures is satisfied. A property under a lien cannot be seized by a creditor. In this regard, for a lien to arise, the party claiming the same must establish circumstances under which the same arises – i.e. must establish the existence of a debt or duty in respect of which it secures.

28. In the present case, the garnishee proffered no evidence to show that it had advanced any of its monies to the judgement debtor for which the funds in the Accounts can act as security. Even the IPF/Asset Finance Business Agreement that the garnishee alleges to have entered into with the judgement debtor has not been provided. The garnishee only annexed an inter branch/departement memorandum which in my considered view is not a contractual agreement binding the judgement debtor and the garnishee but a notice of the status of relations regarding the garnishee and the judgement debtor addressed to the garnishee's employees. To my mind, I am satisfied that the funds in the accounts belong to the judgement debtor and are being held by the garnishee at the direction of the judgement debtor.

29. To this end, there is nothing to show that the garnishee is anything than a manager of the judgement debtor's funds that lie in the subject accounts. That does not give the garnishee any right whatsoever over the said funds save only as a manager thereof answerable to the judgement debtor.

30. In the premises, I allow the application. The garnishee order nisi is hereby made absolute whereby the garnishee is to pay forthwith to the applicant's advocates, a sum of Kshs. 1,302,798/= to satisfy the decree herein from monies attached and held in account numbers [xxxx] and [xxxx], respectively.

31. The garnishee will also pay the costs of this application.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the absence of all the parties