



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT CIVIL MISC APPLICATION NO. 70 OF 2019

LESINKO NJOROGE & GATHOGO

ADVOCATES.....DECREE HOLDER/RESPONDENT

-VERSUS-

INVESCO ASSURANCE CO. LTD.....JUDGMENT DEBTOR

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

RULING

1. The application for determination is dated 22/08/2019. It was filed under certificate of urgency and is brought under, Order 51 Rule 1 of the Civil Procedure Rules, Rule 3(1) & (2) of the High Court (Practice & Procedure) Rules of the Judicature Act, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. It seeks the following orders;

- a. That this Honorable court be pleased to set aside the garnishee order absolute dated 08/08/2019.
- b. That costs of the application be in the cause.

2. The application is supported by the grounds on its face, the supporting affidavit sworn on 15/08/2019 and a further affidavit sworn on 04/11/2019 by Judy Nyawira, the branch manager of the Applicant's Kimathi street branch. She deposes that account number [...] held by the Applicant on behalf of the judgment debtor (JD) does not qualify for garnishee order absolute because it is a collateral account. She has attached annexure **JN-1** showing various collateral accounts.

3. The application is vehemently opposed through a replying affidavit sworn on 04/10/2019 by Wilson. K. Gathogo. He deposed that the supporting affidavit contains falsehoods which have been deliberately calculated to mislead the court. He invites the court to determine whether account number [...] and the others mentioned in JN-1, are collateral accounts.

4. He deposed that in **Kilungu PMCC 8 of 2018** (*Kilungu case*), the garnishee through Rachel.N. Kung'u deposed that in May 2019, there were funds in account No.s [...] and [...] but two months later, they were alleged to be collateral. The application from the Kilungu case was attached and marked **G-1**. It was also his deposition that the two account numbers [...] and [...] now listed as collaterals were in May 2019 described as current business accounts.

5. He also deposed that in **Kiambu Misc. App 204 of 2019** (*Kiambu case 1*), Rachel Kung'u swore a replying affidavit on 29/07/2019 and stated that there were sufficient funds in account No. [...] to satisfy the decree. Accordingly, a decree absolute was issued on 07/08/2019. He deposed that 2 weeks later, the same account was alleged to be one of the collaterals for IPF/Asset Finance Business. The application from Kiambu case-1 and decree absolute were attached and marked **G-3** and **G-4** respectively.

6. He further deposed that in **Kiambu Misc. App 183 of 2019** (*Kiambu case 2*), account numbers [...] and [...] were said to have funds but the current allegation is that they are collateral accounts. It's also his deposition that a similar narrative applies to **Kerugoya Misc. App 64 of 2018** (*Kerugoya case*).

7. He goes on to depose that the garnishee has previously given false misleading information over two accounts which have now been listed as collaterals but it has been defeated and over Kshs.8,000,000/= has since been paid in Kiambu case 2 and the Kerugoya case. A payment receipt of more than Kshs.5 million with respect to Kiambu case-2 has been attached and marked **G-6**.

8. He deposed that the Decree Holder (DH) undertook an official search with Association of Kenya Insurers (AKI), at a cost of

Kshs.56,840/=, to verify whether the Judgment Debtor (JD) is the insurer of motor vehicles provided by the garnishee in the replying affidavit sworn by Rachel Kung'u on 06/08/2019. He annexed a copy of the search results marked **G-12** and receipt for Ksh.56,840/= marked **G-10**. He deposed that, out of 49 motor vehicles, only 4 were insured by the JD and other search results show 'no record' for a number of motor vehicles. The explanation given by AKI for 'no record' was that such registration numbers were non-existent or there was fraud.

9. He also deposed that in the spread sheet containing a list of 117 vehicles, motor vehicle No. 59 is a duplication and replica of motor vehicles listed as No. 60-117 He deposed that this was deliberately tailored to justify a non-existent liability of Kshs.370,733,277.14. He wonders how a financier's credit limit of Ksh.50 million would be exceeded 7 times upto Kshs.370 million.

10. It's also his deposition that the garnishee has not provided any information with respect to the aforesaid four (4) motor vehicles and that it (*garnishee*) can never provide Insurance Premium Finance (IPF) to an insurance company over motor vehicles that are not under their insurance cover and policy.

11. He deposed that if indeed there exists a lien to underwrite IPF/asset finance business, the garnishee would have been candid enough to exhibit asset finance security contracts, loan documents and clear policy showing commencement and expiry of the insurance.

12. It's also his deposition that the garnishee has not demonstrated the law under which it seeks to set aside a regular and proper judgment and that setting aside is limited to instances of default or *ex parte* judgments. That even if the garnishee seeks to set aside the regular ruling through review, it still has to meet the threshold for review under Order 45 of the Civil Procedure Rules.

13. In a rejoinder, the garnishee through Judy Nyawira deposed that it has never been a party to any garnishee proceedings in the Kilungu case. She has also deposed that the deponent who swore the affidavit in the Kilungu case made a typographical error in stating that account No. [...] was a current business account. She reiterates that it is a collateral account.

14. Further, she deposed that account No.s [...] and [...] are call deposit accounts and not collateral accounts.

15. With regard to the motor vehicles searched by the DH, she reiterates that the JD is the insurer and that the motor vehicles in question are subject of Asset Business Financing. She has attached copies of the insurance claim forms and marked them **JN-3**.

16. The application was canvassed orally.

The submissions

17. Ms. Muvindye for the garnishee/Applicant submitted that the account in issue was a collateral account securing credit facilities for the garnishee thus the amount therein cannot be released.

18. Mr. Botani for the D/H/Respondent relied fully on the replying affidavit and further stated that they were served with unclear forms which do not show any financial guarantee.

19. Having considered the application, the supporting affidavit, the replying affidavit and the submissions by both counsel, it is my considered view that the only issue for determination is whether the Applicant has laid sufficient ground for setting aside the garnishee order absolute.

20. In the proceedings leading to the issuance of decree absolute, the concerned accounts were [...] and [...]. The garnishee was ably represented and was given a chance to show cause why the credit deposits in the said accounts should not be paid to the DH in settlement and satisfaction of the decree of this court. Its argument in those proceedings, just like in this application, was that the said accounts are collateral. In dismissing the garnishee's argument, this court stated as follows;

“13. The Respondent and garnishee have not clearly come out to explain what the money has been secured for. It is not enough just to come and make claims that an account is a collateral. It is not the duty of this court to investigate the same. The replying affidavit has not been of any assistance as all it says is that because the accounts are collateral, the money therein cannot be touched.

14. There must be proof of the collateral and what the collateral is for. If it is a loan or overdraft, it is money deposited in the Respondent's account and is therefore it's money and is subject to attachment under Order 23 Rule 1 and 2 Civil Procedure Rules.”

21. Despite maintaining that the accounts are collateral, nothing new has been exhibited by the garnishee to warrant a change of mind by this court. In any case, the DH has gone to great lengths to demonstrate that the status of the concerned accounts has been fluctuating to suit the JD's convenience and garnishee's narrative. In the Kilungu case for instance, the deposition of Rachel Kung'u as at 21/05/2019 was that account No. [...] was a current business account and had Kshs.5,117,966.10/=. Two months later, the narrative was that the account was collateral.

22. In the current application, the garnishee deposed that it was not a party to any garnishee proceedings in the Kilungu case yet the name 'Co-operative Bank of Kenya' is prominently displayed at the heading. Further, the garnishee incredibly deposed that referring to account No. 012460689328 as a current business account was a typographical error in the Kilungu case. One wonders how the garnishee would know about 'typographical errors' if indeed it was not a party in the application.

23. I have also looked at the other cited cases *vis-a vis* the ‘collateral’ accounts shown in **JN-1** and it is evident that the garnishee has been giving conflicting and misleading information. Another example is account No. [...] which is included in JN-1 as a collateral account. JN-1 is dated 15/07/2019 and in Kiambu case-1, the deposition of Rachel Kung’u as at 29/07/2019 was that there were sufficient funds in the account to satisfy the decretal amounts. How come the garnishee had no issue releasing the amount in that account yet it had been listed as collateral?

24. Then there are the motor vehicles which were allegedly insured by the JD. Paragraph 3 of **JN-1** states as follows;

“On 15th March 2011 BOM credit approved a limit of Kshs.50m for Invesco Assurance Company to underwrite IPF/Asset Finance Business for selected customers. Find attached motor vehicles with outstanding balance that are currently insured by Invesco Insurance Company. Applicable insurance premiums are renewed every year. The current insurance will expire in 2020”

25. I have looked at the spreadsheet of 117 vehicles *vis-a vis* the search conducted by the DH (**G-12**) and to start with, vehicles No. 58-117 are a duplication of vehicles No. 1-57. This lends credence to the DH’s assertion that the duplication is intended to justify a non-existent liability of Kshs.370,733,277.14/=. In fact, I wonder how a financier’s credit limit of Ksh.50million would be exceeded seven (7) times up to Kshs.370million!

26. Further, out of the non duplicated motor vehicles, the DH conducted a search of 49 and only 4 are insured by the JD. In the further affidavit, the garnishee maintained that the JD is the insurer of the concerned motor vehicles and relied on annexure **JN-3**-the insurance claim forms which, in my view, have only made matters worse because none of the motor vehicles appearing in those forms is in the list of 117 vehicles and search results. The forms have zero relevance and it is probable that the garnishee attached them in the hope that the court lacks ‘*attention to detail*’.

27. The application dated 17th July, 2019 the subject of the orders sought to be set aside was heard interpartes with the Garnishee/Applicant fully participating. If anything, it ought to have appealed against those orders if aggrieved and not to take this court through a similar but disguised process.

28. From the foregoing, it is crystal clear that the garnishee has been working in cahoots with the JD and apart from totally abusing the court process; it has wasted precious judicial time and has been enjoying undeserved stay orders. For that, I do not see why it should not be condemned to pay the special damage of Kshs.56,840/= incurred by the DH.

29. The upshot is that the application lacks merit and is dismissed with costs. The Garnishee/Applicant condemned to pay the decree holder Kshs.56,840/= incurred as special damage.

Orders accordingly.

Delivered, signed and dated this 27th day of February, 2020 in open court at Makueni.

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H. I Ong’udi

Judge