



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL CASE NO. 4 OF 2017

MARTIN MWANGI NDIRANGU.....PLAINTIFF

VERSUS

INVESCO ASSURANCE CO. LIMITED.....DEFENDANT

AND

CO-OPERATIVE BANK OF KENYA LTD.....1ST GARNISHEE

KCB BANK OF KENYA LTD.....2ND GARNISHEE

RULING

1. The Plaintiff herein filed an application seeking orders of garnishee as against the 1st Garnishee, to secure and recover the judgment debt amounting to Kshs.5,150,404/=. The 1st Garnishee filed a replying affidavit and thereafter a supplementary affidavit outlining its grounds of not honouring the Garnishee orders issued against it.
2. The 1st Garnishee was served with, and duly acknowledged service of, Garnishee Nisi orders in favour of the Plaintiff, on 6th May 2019. Evidence of service has been filed in court. The 1st Garnishee filed a replying affidavit dated 22nd July, 2019 wherein it stated that it was holding 3 accounts on behalf of the judgment debtor, 2 of which are collateral accounts and one with Kshs.3,498,142.10/-, which sums it deemed insufficient to settle the decree. The 1st Garnishee thereafter filed a further affidavit annexing the account statements, but this time round stating that none had sufficient funds to settle the decree.
3. Parties were directed to canvass application via submissions which they filed and highlighted.

PLAINTIFF'S SUBMISSIONS

4. It is the Plaintiff's submission and further uncontroverted that, as at the 6th of May 2019 when the Garnishee Nisi order was served upon the 1st Garnishee, the latter held sufficient funds on behalf of the defendant, to honour the said court order. This position is supported by the following evidence:
 - (i) In paragraph 13 of the 1st Garnishee's replying affidavit, the deponent, one Rachael Kung'u (Service Manager of the 1st Garnishee), swore that the Defendant's bank account number 01150068932802 held a credit balance of Kshs.3,498,142.10/- as at 12th July 2019. This was a month after being served with the Garnishee Nisi Order.
 - (ii) In the 1st Garnishee's supplementary affidavit dated 18th November, 2019 the 1st Garnishee has attached the Defendant's bank statements from January to December 2019. A quick look at the bank statement for account number 01150068932802 shows that as at the 6th of May 2019, the said account held a credit balance of Kshs.10,195,160.75/=-.
5. In both instances, it is rather clear that the 1st Garnishee was, at all times, fully capable of effecting the Garnishee Order Nisi issued by this court, but simply and recklessly decided to disobey the orders of this court, thereby exposing the Plaintiff to loss as recovery of the judgment debt was deliberately impeded. It is also evident that there was possible collusion as between the bank and the Defendant to deny the Plaintiff an opportunity to recover the decretal sum.
6. It is therefore not in doubt that, based on the 1st Garnishee's own records and admission, it held sufficient funds to satisfy the judgment

debt. So far, no valid explanation has been given for failing to effect the said Garnishee Orders Nisi. Unless a valid explanation is offered, they humbly pray that the 1st Garnishee be compelled to pay the judgment debt.

7. The reasons provided by the 1st Garnishee for not honouring Garnishee Orders of this court are not compelling, for the following reasons:

(i) Funds not sufficient: The 1st Garnishee has argued that the sums held in the Defendant's accounts are not sufficient to warrant the issue of a Garnishee Absolute Order. This argument is misplaced and unconvincing. The subject matter Garnishee Order strictly provides for, "...Any/all monies in any/all accounts be held to answer the judgment of court for the sum of Kshs.5,150,404/-." A simple reading of this clause is interpreted to mean that any sums to the maximum amount of the judgment debt is to be held by the Garnishee.

(ii) Funds insufficient: Further to the foregoing, they have aptly illustrated that the 1st Garnishee actually held monies in excess of Kshs.10,000,000/= in favour of the Defendant, as at the 6th of May 2019. This was more than sufficient to cover the judgment debt but, this notwithstanding, the 1st Garnishee opted to ignore the court order.

(iii) Collateral accounts: The 1st Garnishee has confirmed holding the sum of Kshs.5,117,966.10 in account No. 012460689329 and also the sum of Kshs.5,155,561.65/= in account No. 012460689328, in what they have described as a "collateral account." The 1st Garnishee has not explained what asset has been secured by this amount, which only goes further to show that these are mere lies and fabrications by the 1st Garnishee. The evidence further shows that:

(a) The attached documents in support of the alleged securities are ten (10) years old, and do not confirm that any assets have been provided to the defendant as against the said monies deposited therein. The Defendant has further opted not to participate in these proceedings, whilst it is best placed to provide sufficient information to secure these amounts.

(b) The documentation attached are mere proposals between the Defendant and 1st Garnishee, and not actual contract documents proving the placing of securities. There is no indication that an agreement was actually reached. If indeed these were collateral accounts securing movable assets granted to the Defendant, nothing could have been easier than for the 1st Garnishee to attach supporting documentation, signed by the Defendant, to this effect.

8. The Defendant herein has actively colluded with the 1st Garnishee and ensured that the judgment debt shall not be settled. Despite holding accounts that had sufficient credit to satisfy the judgment debt, the 1st Garnishee opted to ignore the Garnishee Order served on it, participated in the instant proceedings by filing frivolous replying affidavit, while in the meantime it aided the Defendant in emptying its accounts. This was done while the Plaintiff, an accident victim with serious injuries and who is yet to recover, ran from one financial institution to another, trying to recover the judgment debt.

9. No compelling reasons have been provided by the 1st Garnishee to justify their blatant disregard for court orders and for avoiding to effect a Garnishee Absolute Order in favour of the Plaintiff, once the same is issued by this court. They therefore pray that the remaining sums of over Kshs.10,000,000/= still held in the fictitious collateral accounts be released to the Plaintiff, to the maximum amount of Kshs.5,150,404/=.

10. That the orders sought against the 1st Garnishee ought to be issued, noting that the latter is a party not keen on adhering to court orders and has further shown bias in favour of the Defendant. This court, they humbly submit, ought to exercise its judgment and discretion in favour of the Plaintiff, a disabled and deeply affected party who has for the last seven (7) years sought justice before this court. Unless this court intervenes, the Plaintiff will continue to suffer.

1ST GARNISHEE'S SUBMISSIONS

11. It is 1st Garnishee's submissions that it filed its replying affidavit dated 22nd July 2019 and filed on the 25th July 2019 attaching the bank statements of the Defendant's accounts being account numbers 012460689328, 01246068932800 and 01150068932802 and stated that two of the accounts (012460689328 and 01246068932800) were collateral accounts securing facilities with the bank hence the same could not warrant a Garnishee Order Nisi to be issued by the court, while the third account collateral accounts securing facilities with the bank hence the same could not warrant a Garnishee Order Nisi to be issued by the court, while the third account (01150068932802) had a book balance of Kshs.3,498,142.10 which amount was very minimal to warrant a Garnishee Order Nisi to be issued by the court.

12. In a supplementary affidavit dated 18th November 2019 and filed on the same day, the 1st Garnishee reiterated the contents of the replying affidavit and attached letters dated 26th November 2010 and 7th December 2010 confirming the nature of the collateral accounts held by the Defendant. Further, the 1st Garnishee stated that the book balance for the third account vide account number 01150068932802 as at 15th November 2019 was Kshs.90,496.70 as the said account number had settled various Garnishee Orders Absolute as shown in the bank statements attached herein.

13. It is further submitted that, under Order 23 rule 5 of the Civil Procedure Rules 2010 on trial of liability of garnishee: -

"If the garnishee disputes his liability, the court instead of making an order that execution be levied, may order that any

issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined.”

14. It is evident that the 1st Garnishee herein disputes to the attachment of the accounts on the basis that, such accounts held by the 1st Garnishee on behalf of the judgment debtor are collateral accounts securing credit facilities to the judgment debtor hence the same cannot warrant garnishee order to be issued by the court.

15. It is also worth noting that, the status of the said accounts keeps on changing due to various attachments from several garnishee orders by other decree holders.

16. The rights and interests of the 1st Garnishee of the above named accounts supersede those of the decree holder hence the same cannot be attached for the satisfaction of the judgment decree.

17. On this issue, it is their submissions that the 1st Garnishee has interest in the said account as the same is securing credit facilities to the judgment debtor and therefore cannot be attached to satisfy the decree.

ISSUES, ANALYSIS AND DETERMINATION

18. After going through the parties' affidavits and submissions, I find the issues are: -

(i) Whether there is dispute as to the Garnishee liability to warrant court to make determination of its indebtedness via a trial under Order 23 rule 5 of the Civil Procedure Rules, 2010?

(ii) What is the order as to costs?

19. The 1st Garnishee does not deny or contest that the Plaintiff holds a judgment/decree of Kshs.5,150,404/= in the instant suit against the Defendant who is its customer. It does not also deny that it is holding various and stated accounts with different content of credit/financial status in favour of the Defendant herein.

20. Further there is no contest on the fact that the court issued an order nisi against 1st Garnishee and it was duly served. The 1st Garnishee has raised

grounds for not being able to comply with a Garnishee Order in event it is made absolute i.e. the issues that (i) the account held in Defendant's name are collateral securing facilities with it and that its rights and interest in the same accounts supersedes those of the Plaintiff/decree holder hence same cannot be attached for the satisfactory of the judgment/decree.

21. Various copies of documents have been attached to support the 1st Garnishee position in essence the 1st Garnishee raises disputes as provided by section 23(5) of the Civil Procedure Rules, 2010.

22. The Plaintiff contests that named accounts are collateral as no explanation as to what assets have been secured by the amount in the accounts. The Plaintiff opines that the averment by 1st Garnishee side are mere lies and fabrications.

23. The provisions of Order 23(5) of the Civil Procedure Rules, 2010 prescribes that –

“If the garnishee disputes his liability, the court instead of making order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined.”

24. This court finds that 2 issues have arisen from dispute over indebtedness by the 1st Garnishee under Order 23 rule 5 of the Civil Procedure Rules, 2010 namely – in sufficiency of the fund as at the time of service of order nisi and the fact that the accounts named are collateral securing facilities with bank.

25. Thus, same shall be tried or determined before court can decide whether an order absolute shall issue.

26. Costs in the cause herein.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 10TH DAY OF MARCH, 2020.

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C. KARIUKI

JUDGE