



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL CASE NO. 4 OF 2017

MARTIN MWANGI NDIRANGU.....APPLICANT

VERSUS

INVESCO ASSURANCE CO. LTD.....RESPONDENT

RULING

1. By an order of this court I issued on 21/6/2019 the court issued an order to the effect that:

“A Garnishee Nisi order upon the Garnishees do issue and same be served on Garnishees, or any other bank or financial institution before being served on the defendant.

The Garnishee or any other financial institution holding accounts for the defendant, do appear before this court on appointed date and time to show cause why they should not pay the plaintiff’s advocates the sum of Kshs.5,150,404/- being the decretal sum in favour of the plaintiff herein and further costs of these proceedings.”

2. It is not disputed that the said order was served upon the Applicant herein (Family Bank) ON 12/7/019 for *interparte* hearing on 15/7/2019 as indicated on the same order.

3. The Applicant did not bother to appear in court to show cause as to why they could not honour the same order by freezing the defendant’s accounts.

4. On 29/1/2020 the court confirmed the said orders absolute as against the Applicant *inter alia*. The same order was also served upon the Applicant a fact not disputed herein.

5. Now the Applicant has moved court via notice of motion seeking the setting aside of orders issued on 24/2/2020 which were given on 29/1/2020.

6. The grounds advanced by the Applicant are on the face of the application namely; **that the Applicant was served with an order dated 24th February 2020 by this Court directing that the Applicant and three other banks pay to the Decree holder Kshs.5,150,404/- to satisfy the decree in the matter.**

7. The Applicant states that it is not in a position to satisfy the decretal sum as requested by the Plaintiff herein as there are no available funds in the defendant’s account and that it was not a party to the proceedings and was not served with the Garnishee Order Nisi or any other pleadings or documents for it to defend its interests.

8. That the defendant/judgement debtor holds three accounts with the Applicant Account No. 102000032868 with a current balance of Kshs.276,971/-, Account No. 102000033024 with a current balance of Kshs.1,134,830/- and Account No. 102000010148 with a current balance of Kshs.1,896,514.38/-.

9. That the funds held in the said accounts have been frozen in satisfaction of the orders made in the following matters;

- **Nyeri Misc. App. No. 14 of 2019 – Maina Njuguna & Associates vs Invesco & Family Bank Kshs.1,758,819.92/-.**
- **Nairobi Misc. App. No. E196 of 2019 – Robson Harris & Co. Advocates vs Invesco & Family Bank Kshs.6,380,000/-.**
- **Nairobi Misc. App. No. E197 of 2019 – Robson Harris & Co. Advocates vs Invesco & Family Bank Kshs.4,234,000/-.**

10. The Garnishee Order Nisi delivered on 21st June 2019 was delivered against the 1st and 2nd Garnishee's listed in the matter and the Applicant does not understand why the order absolute was issued against it. The matter was heard inter partes on the 29th of January 2020 before this court with all named parties present and orders issued in the absence of the Applicant.

11. That the Applicant which was entitled to defend in these proceedings had it been named was not included as a party to the proceedings despite orders being made against them.

12. The same grounds are reiterated in the supporting affidavit sworn by Christopher Mulili on 17/3/2020 particularly:

1. That the Applicant has been served with an order dated 24th February 2020 by this Honourable Court directing that the Applicant and the three other banks pay the decree holder Kshs.5,150,404/- to satisfy the decree in the matter.

2. That the Applicant is not in a position to satisfy the decretal sum as requested by the Plaintiff herein as there are no available funds in the defendant's account.

3. That the Judgement debtor holds three accounts with the Applicant: Account No. 102000032868 with a current balance of Kshs.276,971/, Account No. 102000033024 with a current balance of Kshs.1,134,830/- and Account No. 102000010148 with a current balance of Kshs.1,896,514.38/-.

4. That the funds held in the said Account No. 102000032868, Kshs.276,971/, Account No. 102000033024, Kshs.1,134,830/- and Account No. 102000010148, Kshs.1,896,514.38/- have been frozen in satisfaction of the orders made in the following matters:

a. Nyeri Misc. App. No. 14 of 2019 – Maina Njuguna & Associates vs Invesco & Family Bank Kshs.1,758,819.92/-.

b. Nairobi Misc. App. No. E196 of 2019 – Robson Harris & Co. Advocates vs Invesco & Family Bank Kshs.6,380,000/-.

c. Nairobi Misc. App. No. E197 of 2019 – Robson Harris & Co. Advocates vs Invesco & Family Bank Kshs.4,234,000/-.

13. The applicant avers that, It is imperative that the Garnishee order be set aside as the defendant's account with the Applicant does not have any funds and the Applicant would be prejudiced in being forced to settle the same.

14. That should the Plaintiff proceed with the execution of the order, the applicant will suffer irreparable harm.

15. The Respondent/Plaintiff opposes the said application via affidavit sworn by David Njoroge on 6/4/2020 that; **“This court issued an order for Garnishee Nisi as against ANY & ALL BANKS AND FINANCIAL INSTITUTIONS on 21st June 2019.”**

16. The 3rd Garnishee herein is a licensed bank and, as such, falls under the category of parties to this suit. The argument that it is not party to the suit is therefore misguided and ill-conceived.

17. The Garnishee Nisi order dated 1st June 2019 was thereafter served upon the 3rd Garnishee on 12th July 2019, directing it to freeze the sum of Kshs.5,150,404/-. The 3rd Garnishee readily accepted service and did not raise any issues at that juncture, such as not being party to the suit.

18. The Garnishee Nisi order was accompanied by the Garnishee Application, which clearly indicated a hearing date of 15th July 2019. The 3rd Garnishee did not appoint any advocate to represent to at the said hearing. Annexed hereto and marked “DNN-2” is a copy of the Garnishee Application.

19. On behalf of the plaintiff, we thereafter served the 3rd Garnishee with a second letter annexing the Garnishee Nisi order, this time on the 15th of November 2019, highlighting once of the defendant's account numbers. The said letter was readily accepted by the 3rd Garnishee. Annexed hereto and marked “DNN-3” is a copy of the said letter.

20. Based on the foregoing averments and the 3rd Garnishee's own averments as captured in its supporting affidavit, as at the 15th of July 2019 and 15th November 2019, the three (3) accounts held at the bank were in positive credit status, with none of the stated Garnishees orders having being served on them. The orders mentioned in the supporting affidavit were served upon the 3rd Garnishee on 22nd January 2020 and 20th December 2019, all being served after our Garnishee Nisi order had already been served upon the bank.

21. It is evident that the instant Garnishee Nisi order took precedence over the other 3 orders mentioned by the 3rd Garnishee and, as such, the latter is legally bound to honour the current Garnishee absolute order of this court.

22. That it is therefore the Plaintiff's position that the instant application is misguided, has no merit, has been brought in bad faith and should be dismissed with costs. The 3rd Garnishee herein is attempting to circumvent that initial orders of this court to freeze the defendant's accounts, an act that is detrimental to the Plaintiff's interests, a clear bias in favour of the defendant and, worse still, a deliberate breach of this court's order.

ANALYSIS AND DETERMINATION

23. Order 23, Rule 1 of the Civil Procedure Rules, 2010 on attachment of debts provides; that: -

“1 (1) 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. Third, the above rule contemplates the existence of a decree for the amount claimed. Generally, Garnishee proceedings is done in two different stages.

[2] The first stage is for the garnishee order nisi, while the second stage is for the garnishee order absolute.

At the first stage, the judgment creditor makes an application ex parte to the Court that the judgment debt in the hands of the third party, the Garnishee, be paid directly to the judgment creditor unless there is explanation from the Garnishee why the order nisi should not be made absolute.

If the judgment creditor satisfies the Court on the existence of the Garnishee who is holding money due to the judgment debtor, such third party (Garnishee) will be called upon to show cause why the judgment debtor's money in its hands should not be paid over to the judgment creditor, and if the Court is satisfied that the judgment creditor is entitled to attach the debt, the Court will make a garnishee order nisi attaching the debt.

[3] The essence of the order nisi is to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the judgment debtor. It is a requirement that a copy of the order nisi must be served on the Garnishee and judgment Debtor at least 7 days before the adjourned date for hearing.”

24. The second stage is for the garnishee order absolute, where on the adjourned date, the Garnishee fails to attend court or show good cause why the order nisi attaching the debt should not be made absolute, the Court may subject to certain limitations make the garnishee order absolute.

25. The Garnishee, where necessary also have an option of disputing liability to pay the debt.

26. The primary object of a garnishee order is to make the debt due by the debtor of the judgment debtor available to the decree holder in execution without driving him to the suit.

27. The court may, in the case of debt (other than a debt secured by a mortgage or charge), upon the application of the attaching creditor, issue a notice to garnishee liable to pay such debt, calling upon him either to pay into court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.

28. Seventh, the order contemplated by Order 23 is discretionary and the court may refuse to pass such order if it is inequitable. The discretion, however, must be exercised judicially. Where the court finds that there is bona fide dispute against the claim and the dispute is not false or frivolous, it should not take action under this rule.

29. Further, counsel for the Bank stated that the funds have since been transferred from the accounts. A bank statement produced in court confirmed this position. Even if the proper procedure had been followed and all the other requirements discussed earlier satisfied, in view of the foregoing revelations, the court would be inclined to decline to exercise its discretion in favour of the applicant.

30. There is evidence vide DN1 and DN2 showing that the applicant was served with order nisi which would have triggered the freezing of all the defendant's account held by the applicant pending interparte hearing when the applicant could have appeared in court in case there was any objection over attachment of the defendant accounts.

31. Subsequently after ignoring appearance in court as aforesaid, the court made order absolute on 29/1/020 and applicant acknowledges service of same order dated 24/2/020.

32. In instant application, the applicant claims that the defendant accounts vide para 6 of the supporting affidavit are frozen in favour of orders issued in Nyeri Misc. App 14 of 2019 issued on 21/1/2020, Nairobi Misc. App.

E196 of 019 issued on 20/12/2019 and Nrb Misc. App. 197 of 019 issued on 20/12 /019.

33. All these orders were issued far after the issuance and service of this court's order nisi which was confirmed absolute on 20/1/2020 thus takes precedent over all other subsequent orders.

34. In view of the foregoing analysis and exposition of the law and fact, I find and hold that the applicant ignored this court's order thus the

instant application stands dismissed for want of merit. The applicant has a legal obligation to honour this court's order lest the penalty of contempt be invoked.

35. Thus the court makes the following orders;

i. The instant application dated 17/3/2020 is dismissed with costs to the plaintiff.

ii. The applicant to honour this court's order absolute and in default the plaintiff to move court for contempt proceedings.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE