**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 55 OF 2020**

**CONSOLIDATED WITH CIVIL APPEAL 56 OF 2020**

**DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT**

**VERSUS**

**INVESCO ASSURANCE COMPANY LIMITED.....1ST RESPONDENT**

**FRANCIS OCHIENG KOBA.....2ND RESPONDENT**

(Being an appeal against the Ruling and Garnishee Order Absolute of Honourable Mr. C.N. Ndegwa Senior Principal Magistrate AT Mombasa law Court delivered on the 7th May 2020)

**J U D G M E N T**

1. This Court vide order issued on the 23/6/2020 ordered that Appeal No. 55 of 2020 and No. 56 of 2020 be consolidated and heard together and a determination made in Appeal No. 55 of 2020. In this Judgment, for the purposes of order, I will refer to the two plaintiffs in the lower Court as the 2nd Respondents, while the Defendant will be referred to as the 1st Respondent and the Garnishee will be referred to as the Appellant.

2. This is an appeal arising out of the rulings and orders of Hon. C.N. Ndegwa delivered and issued on 8th May 2020 vide Mombasa CMCC No. 1684/2012 and Mombasa CMCC 1933 OF 2019. The appellant listed eight grounds of appeal as follows:

**a. The learned Magistrate erred in law in failing to consider the provisions of order 23 of the Civil Procedure Rules hence arrived at an erroneous decision.**

**b. That the Learned Magistrate erred in law and in fact in finding that the 1st Respondent operated account No. 01050919221 with the appellant despite the evidence to the contrary.**

**c. That the Learned Magistrate erred in fact in finding that the BTB Bank reference number 0105091221 for remittance advice dated 6th September 2019was an account number for an account held by the 1st Respondent with the appellant and not a transaction reference.**

**d. That the Learned magistrate erred in fact and in law in finding that the 1st Respondent had confirmed the existence of account number 01050919221 with the appellant despite evidence to the contrary.**

**e. That the Learned magistrate erred in law and in fact in failing to find the appellant didn't hold funds for the benefit of the 1st Respondent which could be garnished hence arrived at a wrong decision.**

**f. That the Learned Magistrate erred in law and in fact in failing to consider the appellant's submissions and in doing so arrived at a wrong decision.**

**g. That the Learned Magistrate erred in law in failing to uphold the doctrine of precedent.**

3. The brief facts of the case are that, the 2nd Respondent applied for a garnishee order absolute for a judgment sum of Kshs. 207,503.60 in Mombasa CMCC 1684 of 2019 and Kshs. 3,771,970.97 in Mombasa CMCC1933 against the appellant. The Appellant opposed the

Application via a Replying Affidavit from its Legal Officer **Francis Kariuki** who explained that account No. 002291014 did not have any funds and that the judgment debtor did not hold an account No. 01050919221. The Plaintiff via a further Affidavit in response to the Appellant's response attached an Affidavit sworn on 25/2/2019 where one Paul Gichuhi confirmed that account number 01050919221 was being operated by the Judgment debtor.

4. The Trial Court in its ruling delivered on 8/5/2020 held that the Appellant had the legal obligation to disclose all the account operated by the judgment debtor, all the balances in those accounts and that the by the Appellant concealing the judgment debtors account, the said action is to the Appellant's detriment. Consequently, the trial Court confirmed the Garnishee Order Nisi and issued a Garnishee Order Absolute.

**Submissions**

5. Parties agreed to dispose of the Appeal by filing written submissions whereby the Appellant filed its submissions on 17/9/2020, while the 2nd Respondents submissions were filed on 21/9/2020.

**6. Mr. Kisinga** Learned Counsel for the Appellant submitted that the trial Court erred and took into account irrelevant factors in confusing a reference number with an account number and that the number captured as the account number 01050919221 was a remittance advice dated 6/9/2019 which was a notice that money has been paid to the firm of M. Ananda & Co. Advocates.

**7. Mr. Kisinga** further submitted that the trial Court relied on the Judgment Debtor's Affidavit filed in a different suit (Mombasa CMCC No. 799 OF 2018) and particularly relied on paragraph 3 of the said Affidavit in an erroneous manner since the admission of the alleged account number was not a clear admission but a mere recital by the deponent.

8. Counsel also submitted that the Appellant produced an account statement for account No. 0002291014 showing a balance of Kshs. 0. 00., thus showing that the Appellant did not hold any funds to credit the 1st Respondent. Therefore, this Court should allow it appeal.

**9. Mr. Ananda** Learned Counsel for the 2nd Respondents submitted that the Appellant never filed a further Affidavit to deny the existence of account number 01050919221 on the remittance advice when in fact the judgment debtor had confirmed the existence of the said account number. Consequently, the trial Court's discretion was exercised judiciously and this Court should not interfere with the trial's Court's discretion. He made reference to the case of **Mbogo & Another Vs. Shah (1968) E.A** on the principles that would guide the court in deciding whether to interfere with the discretion of the trial court.

**10. Mr. Ananda** further submits that the introduction of the Remittance Advice dated 6/9/2019 is fresh evidence on appeal and the same evidence was not before the trial Court. Therefore, the new evidence should be disregarded.

**11. Mr. Ananda** also submits that it was the judgment debtor's obligation to confirm the seek proper details and clarify its account details held by the Appellant and in this case it is the judgment debtor's Legal Manager **Paul Gichuhi** himself confirmed the existence of the said account number 01050919221.

**Analysis and Determination**

12. This being a first appeal, this court is under a duty to re-evaluate, reappraise and reassess the evidence in totality and to make its own conclusions. It must however, keep at the back of its mind that a trial court, is the trier of facts and it takes a very strong case to disturb the factual determinations by an appellate Court. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123, Peters vs Sunday Post Limited** [1985] EA 424 as well as in **Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**

13. Having read the record in satisfaction of the court's mandate, I do find the following two issues to isolate selves for determination by the court:

**1. Who has the obligation to furnish proper accounts details belonging to the judgment debtor in Garnishee proceedings.**

**2. Whether the trial Court fell into error in relying on an Affidavit of the judgment debtor in relation to account number.**

**Who has the obligation to furnish proper accounts details belonging to the judgment debtor in Garnishee proceedings**

14. 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".**
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> **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."**

15. In **Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee) [2020] eKLR and** the Court stated as follows:

> **"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"**

**Was the evidence account number 01050919221 sound?**

16. Before the trial Court, the Garnishee opposed the application through the affidavit of **Francis Kariuki** sworn on 17/2/20120. He deposed that Upon checking their records the Garnished Account Number 0002291014 as at 3/2/2020 did not have any funds in it and the available balance was 0.00/=. Further, the Garnishee stated that it is a stranger to account number 0150804900 as the same is not owned by the judgment debtor.

17. The 2nd Respondents indeed filed a further Affidavit in response to the Garnishee's Affidavit wherein an Affidavit sworn by the Judgment Debtor's Legal Manager, one **Paul Gichuhi,** on 26/9/2019 in Mombasa CMCC 799 of 2018, was produced and in which the existence of account number 0150804900 is admitted.

18. I have read that Affidavit and formed the view and make a finding that the 2nd Respondents discharged their burden of proof on the existence of the account hence the evidential burden of proof then shifted to Appellant to confirm or deny that it held the two accounts on behalf of the Judgment Debtor. While it would suffice that one account had nil balance, it would not be sufficient to merely say that as a bank it was a stranger to the account number given to it. To this Court, that was no more than a bare denial and not a sufficient traverse. It failed in that duty and I find that the averment was just an evasion.

**Whether the trial Court fell into error in relying on an Affidavit of the judgment debtor in relation to account number.**

19. The Court of Appeal in ***Child Welfare Society of Kenya Vs Republic, Exparte Child in Focus Kenya & AG & Others [2017]eKLR*** per Waki, Nambuye & M'noti JJA held while citing ***Mbogoh & Another Vs Shah [1968] EA 93***, on the power of the appellate court in matters discretion exercised by the court below: -

> "**37**. **Sir Clement De Lestang V-P in Mbogoh & Another Vs Shah [1968] EA 93** stated thus:
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> **"I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

For his part, the court President, Sir Charles Newbold in the same case stated:

> **"For myself, I like to put in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in the exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of the discretion and that as a result there has been a misjustice."**

20. I find that the trial Magistrate indeed exercised his discretion properly and he was satisfied that the reference number 0150804900 evidenced on the Remittance advice issued by the Appellant was the Judgment debtor's account number as confirmed via the Affidavit of the Judgment Debtor's Legal Manager, and that the Appellant was withholding the said information and therefore the concealment will be presumed to mean that the said account held sufficient fund to cover the sums claimed.

21. From the above passages it is evident and clear that the Learned Trial Magistrate gave clear reasons as to why he came to the conclusion that the Appellant held an account with funds in favour of the judgment debtor. Once that affidavit and its evidence was availed, it behoved the Appellant to seek to respond to the issue of the Remittance Advice and the Affidavit of **Paul Gichuhi** sworn on 26/9/2019. That was never done.

22. It must be remembered that an appellate court will only interfere with findings of act by the trial court upon a demonstration that the trial court either misapprehended the evidence tendered before it or that it relied on the wrong principles in arriving at its findings[1].

23. The Appellant through its written submissions has sought to introduce additional evidence challenging the Affidavit of the Judgment Debtor's Legal Manager **Paul Gichuhi** sworn on 26/9/2019 in Mombasa CMCC 799 OF 2018 and the contents of the remittance balance. Such evidence in law when not availed to the trial Court during trial is not admissible on appeal unless leave be sought and obtained prior to being availed. In this matter no leave was ever sought or granted by the Appellant to adduce additional evidence on appeal. Worse still, evidence cannot be adduced by way of submissions. The consequence of the foregoing is that such material is inadmissible and the Court

will not consider the same in its determination of this matter.

24. Appellate courts have consistently shown reluctance towards allowing parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in **TARMOHAMED &ANOTHER V LAKHANI &CO (1958) EA 567** where the Court of Appeal in adopting the Judgment of Lord Denning in **LADD V MARSHALL (1954)1 WLR, 1489,** stated that:

> **"except in cases where the application for additional evidence is based on fraud or surprise:**
>
> **"to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that , if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."**"

25. Similarly, In **National Cereals And Produce Board V Erad Supplies & General Contracts Ltd (Ca 9 Of 2012), The Administrator, H H The Agha Khan Platinum Jubilee Hospital V Munyambu (1985)Klr 127 The Court Of Appeal** emphasized that the principal rule in admission of additional evidence is that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage. In **Wanjie &others v Sakwa & others (1984) KLR 275** the Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the Court of Appeal Rules. Chesoni JA observed at page 280:

> **"This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It** follows ***that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."***"

26. In light of what I have stated above, there was no error in principle committed by the lower court in the exercise of its discretion. I have no reason therefore to substitute my discretion for that of the lower court. In the result, this appeal is lacking in merit and this Court orders that it be and is hereby dismissed.

27. The cost of the Appeal shall be awarded to the 2nd Respondents. Orders accordingly.

**Dated, signed** and **delivered** on line this **23rd day of October, 2020**

**P.J.O. OTIENO**

**JUDGE**

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[1] In **Mwanasokoni v Kenya Bus Services Ltd [1985] KLR** the court of appeal said: -

> **"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.**
>
> **But the jurisdiction "(to review the evidence) should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."**