REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL CASE NO. 18 OF 2019

NGAYWA NGIGI &

KIBET ADVOCATES.....APPLICANT/ DECREE HOLDER

VERSUS

INVESCO ASSURANCE

COMPANY LIMITED.....RESPONDENT/ JUDGMENT DEBTOR

DIAMOND TRUST BANK (TOM MBOYA &

KOINANGE STREET BRANCHES).....GARNISHEE

R U L I N G

A. Introduction

1. Before me is an application dated 18/10/2019 filed under certificate of urgency seeking for orders of attachment of deposits and funds held by the judgement debtor in the garnishee's bank account numbers 0002291014 and 0002291003 in satisfaction of a decree amounting to Kshs. 223,696/= as well as costs of this suit.

2. The applicant's case is that he has obtained a judgment against the respondent/judgment debtor on 18/09/2019 for a decretal sum of Kshs. 223,696/= but which the decree the respondent had failed, neglected and/or refused to settle. As such there were sufficient reasons to attach the accounts held by the garnishee so as to satisfy the decretal amount as the respondent may withdraw the same hence making it impossible to execute.

3. From the court records, it is clear that the respondent filed an application dated 5/11/2019 where it prayed for orders that their replying affidavit dated 5/11/2019 be deemed as duly filed. However, there is no evidence on record that the said application was prosecuted. Nonetheless, since the affidavit is part of court will consider its contents in this ruling.

4. The respondent deposed that if the orders subsist, the judgement debtor will not be able to meet its contractual and statutory obligations and several other decrees against it from other creditors and thus opening a floodgate of litigation and unprecedented financial crisis in the going concern of the company and which is contrary to the rules of procedure and could lead to abuse of the court processes and procedures. Further that if the orders sought are granted then the defendant would not be able to satisfy whatever amount may be due to the applicant.

5. The garnishee opposed the application vide a replying affidavit sworn by one Francis Kariuki- the Garnishee's Legal Officer and wherein it was deposed that after being served with Garnishee Order Nisi in relation to the above-mentioned accounts and upon checking their records for the said accounts as at the date of the Garnishee Order Nisi, it was discovered that account number 0002291003 had a balance of Kshs. -43.54 while account number 0002291014 had a balance of Kshs. -1,130,906.50 and thus overdrawn. Further that the remaining Kshs. 407,041/= being the uncollected amount consisted of amounts already attached pursuant to earlier Garnishee Orders Nisi issued before the Garnishee Order Nisi herein and thus the same could not be attached. That the garnished accounts had insufficient funds to satisfy the decretal sum and the costs and further that the garnishee could not be said to be indebted to the Judgment debtor as the Judgment debtor was in fact indebted to the Garnishee for Kshs. -1,130,906.50. Therefore, they prayed that the Garnishee Order Nisi be lifted, the bank be discharged and the applicant be directed to pursue other avenues of executing his decree as the Garnished accounts could not satisfy the decretal sum herein.

B. Parties' written submissions

6. The application was canvassed by way of written submissions. The applicants submitted that there was no dispute that there was a decree in their favour and which had never been settled or set aside or execution thereof stayed and that the judgement debtor had no role to play in garnishee proceedings and reliance was placed on the case of **Otieno Ragot &Co. Advocates -vs- City Council of Nairobi (2015) eKLR.** Further that he had established to the court that there was a sum of money held by the garnishee which is recoverable and which would constitute a debt for the purposes of garnishee proceedings and further that the applicant had sufficient reason to believe that the accounts sought to be garnished indeed held funds which may be sufficient to satisfy the decree fully. And despite the garnishee having been served, they did not attend court to dispute liability to the judgment creditor. The respondent filed their submissions to the effect they were never afforded an opportunity to be heard when the Order Nisi was being issued and which amounted to a violation of their right to a fair trial as guaranteed under Article 50 of the Constitution as well as Order 23 Rule 1 of the Civil Procedure Rules 2010. Reliance was made to the case of **Pinnacle Projects limited vs- Presbyterian Church of East Africa, Ngong Parish & Another (2019) eKLR**. Further that the application did not meet the threshold for granting of interim orders as were laid down in **Geilla -vs- Cassman brown (1973) EA 358.** Reliance was further made to the case of **American Cynamid Co -vs Ethicon Ltd Hl 5 Feb 1975.** The garnishee did not file submissions in respect of this application.

C. Issues for determination

7. I have considered the application herein, the replying affidavits and the submissions filed by the parties herein. As noted, the instant application seeks garnishee orders. Order 23 Rule 1 of the Civil Procedure Rules provides that: -

> ***"A court may, upon the ex parte application of the 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 salary or allowances 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 costs of the garnishee proceedings; and by the same or subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay the decree-holder the debt due from him to the judgement-debtor or so much thereof as may be sufficient to satisfy the decree together with costs aforesaid."***

8. From the above provisions, it is clear that a decree holder has a right to move a court vide an *ex parte* application seeking orders that a debt owing from a third person ("garnishee") to the judgment- debtor be attached to answer the decree together with costs of the garnishee proceedings. However, the applicant in such an application has a duty to prove/ demonstrate by affidavit that: -

> *a) There is a decree which has been issued and is still unsatisfied to a certain amount*
>
> *b) There is a debt due from the Garnishee to the Judgment Debtor capable of being attached to answer the decree.*

9. The issue for determination is whether the applicant has satisfied the above conditions for grant of the orders sought.

10. It was the applicant's case that he obtained a judgment against the judgment debtor for a decretal sum of Kshs. 223,696/= and which amount had not been satisfied. A copy of the said decree was annexed to the application (Annexure "JNN 1"). These depositions were never opposed by the respondent herein in their replying affidavit save for deposition that they were not able to settle the same. This was repeated in their written submissions to the effect that the respondent would have told the court that it was willing to settle the debt in installments if it was given an opportunity to be heard. This being the position, that the issue as to the applicant being owed by the respondent for a decretal sum of Kshs. 223,696/= is not disputed.

11. As to whether there is a debt due from the Garnishee to the Judgment Debtor capable of being attached to answer the decree, the applicant herein sought the attachment of the deposits and funds held in accounts numbers xxxxxx and xxxxxxxxxxxx located at Tom Mboya and Koinange Streets branches respectively and which he had sufficient reasons to believe that they were being operated by the respondent herein. The garnishee and/ or the respondent did not dispute the existence of such accounts belonging to the respondent. Order 23 Rule 2 of the Civil Procedure Rules provides that: -

> ***"A credit in a deposit account with a bank or other financial institution shall for the purposes of this Order be a sum due or accruing and shall be attachable accordingly……"***

12. As such, it is my opinion that the prayer to attach the deposits in the two accounts is a competent prayer save for proof. The issue herein is whether the said accounts have a credit so as to be a sum due or accruing and thus attachable under Rule 2 herein in satisfaction of the decree herein.

13. Ordinarily in garnishee proceedings, the judgment-creditor has a duty to prove the garnishee's indebtedness based on sound evidence. As the Court of Appeal held in **James G. K. Njoroge t/a Baraka Tools & Hardware v APA Insurance Company Limited & 3 others [2018] eKLR,** as thus: -

> ***"….[28] With regard to the garnishee order, the appellant did not demonstrate or establish that the 1st respondent owed the 2nd respondent any debt upon which the order of garnishee could be pegged. It may well be that, there was some money due to the 2nd respondent from the 1st respondent on account of the Bond being discharged. However, this was neither alleged nor demonstrated. [29] As regards the Garnishee order, the provisions of Order XX11 Rule 1(1) reproduced above, shows that the order is for an attachment of a debt. Therefore, for the court to issue a garnishee order, the appellant had to satisfy the court that the 1st respondent was holding money belonging to or due to the judgment-debtor which monies should be attached to meet the decree or part of the decree that had been issued in favour of the appellant. The Bond relied on by the appellant, merely***

demonstrated that the 1st respondent had guaranteed payment of the decretal sum during the pendency of the application for stay of execution only. That guarantee did not amount to a debt that could be attached. The 1st respondent having specifically denied being indebted to the 2nd respondent, and there being no evidence to contradict the 1st respondent's denial, there was no basis upon which the court could issue a garnishee order. As was stated in Petro Sonko & another v H. A. D. B. Patel & another 20 EACA 99, the onus is on the Judgment Creditor to establish that there is a debt due and recoverable from the Garnishee to the Judgment Debtor."

14. Once the applicant has satisfied the above, the burden of proof then shifts to the garnishee satisfy that he is indebted to the judgment-debtor. Therefore, in law, the onus placed on a Garnishee would only be discharged where it successfully establishes that the account or accounts covered by the Garnishee Order nisi do not exist in its system or if it exists, it is in debt and not in credit or that it has a right of set off or lien which are due effective against the customer. (See **Lesinko Njoroge & Gathogo Advocates -vs- Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee) [2020] eKLR**). Lord Denning M.R in **Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225** at page 227 where he held as thus: -

There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means 'unless'. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see Pritchard v Westminster Bank Ltd [1969] 1 All ER 999, [1969] 1 WLR 547 and Rainbow v Moorgate Properties Ltd [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate…….(emphasis mine)."

(See also the persuasive decision by Mativo J in **Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others [2018] eKLR**-paragraphs 19-22)

15. In response to this, the garnishee deposed to the fact that the funds held in the said accounts were insufficient to satisfy the decretal sum and the garnishee's costs as they had been overdrawn to a tune of Kshs. 1,130,906.50. The Garnishee produced bank statements for the two accounts and which indeed confirmed that assertion. However, I note that account Number 0xxxxxxxxxx3 was indicated on the statement to be held at Prestige Plaza Branch and not Tom Mboya Street branch as alleged. It was the garnishee's deposition further that the uncollected amount being Kshs. 407,041.00 was an amount attached pursuant to earlier Garnishee Orders Nisi issued before Order Nisi herein was issued and thus the same cannot be attached again to settle the decretal sum herein. The garnishee in support of this averment annexed a Garnishee Order Nisi in respect of **Mombassa Chief Magistrate's Court Civil suit No. 2265 of 2016- Samuel Wambua Nzengula -vs- Invesco Insurance Co. Ltd & Diamond Trust Bank Kenya Ltd.** These annexures were never challenged by the Applicant (by way of a further affidavit) despite being the applicant's duty to controvert/ challenge the same.

16. It is my considered opinion that the garnishee tendered sufficient evidence to the effect that it did not have any money held in favour of the judgment debtor and which could be attached in satisfaction of the decree. This was done by exhibiting the account statement of the judgment debtor, as at the relevant date indicated on the Garnishee Order Nisi and which disclosed the true status of the account of the judgment debtor. [See the Court of Appeal of Nigeria's decision in **Citizens International Bank Ltd. –vs- SCOA Nigeria Ltd. & Anor. (2006) LPELR-5509 (CA)]**. The Applicant failed to prove that there was a credit in the said accounts which was capable of being a sum due or accruing so as to be attachable in satisfaction of their decree.

17. It was the applicant's assertion that the garnishee did not dispute or appear on the day of the hearing so as to dispute its liability to the judgment debtor or deny the ownership of the attached accounts. However, I have perused the court's record and it is clear that the garnishee did seek leave to file its replying affidavit. The said affidavit disputed the liability to the judgment debtor by the garnishee. Under Order 23 Rule 4 the garnishee has an option of either disputing the debt due or claimed to be due from him to the judgment-debtor, or, appearing upon the day of hearing named in an order nisi. It is my opinion that as such, the garnishee disputed the liability to the Judgment debtor. Physical appearance was never necessary. I rely on **Citizens International Bank Ltd. –vs- SCOA Nigeria Ltd. & Anor. (supra)**, the Court while applying section 83 of the Sherriff and Civil Process Act CAP S6, LFN 2004 whose provisions are similar to Order 23 Rule 1, held that: -

"……The primary duty of a Garnishee in garnishee proceedings is for the garnishee to appear in Court upon receipt of the order Nisi, and show cause why the funds in the judgment debtor's account should not be paid over to the Judgment Creditor in satisfaction of the judgment debt. This is done by filing an affidavit to show cause with all the relevant documents, disclosing the true picture, status or standing of the judgment debtor's accounts at the time of the service of the Garnishee Order Nisi on it……"

18. It was the respondent's case that their right to fair hearing under Article 50 and Order 23 Rule 1 were violated as they were never heard before the Order Nisi was made. It was caimed that if the garnishee was given an opportunity to be heard, it would have told the court of their willingness to settle the decretal sum in installments. However, under Order 23 Rule 1 a *garnishee order nisi* can be made ex parte either before or after an oral examination of the judgment-debtor. In this case the Respondent was not examined by the court which granted the *garnishee order nisi*. However, when the Order Nisi were being made, the counsel for the respondent was in court and did not object to the proceedings. No application was ever filed to set aside the nisi orders. It is trite law that the judgment debtor has no locus to apply to seek to dismiss the garnishee order as the judgment debtor is not a party to the garnishee proceedings. Garnishee proceedings are separate proceedings between the judgment creditor and the garnishee, regardless of the fact that the judgment debtor may be examined before or after the making of an order for attachment of debts.

19. I find that the applicant has not satisfied the court that the garnishee is holding funds in favour of the judgment debtor that are attachable under the law.

20. I find no merit in this application and it is hereby dismissed with costs to the garnishee.

21. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 22nd day of October, 2020.

F. MUCHEMI

JUDGE

Ruling delivered in the absence of the parties