



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**MISC. CIVIL APPLICATION NO 172 OF 2018**

**CONSOLIDATED WITH**

**MISC. CIVIL APPLICATION NO 173 AND 174 OF 2018**

**AND**

**IN THE MATTER OF THE ADVOCATES ACT**

**AND**

**IN THE MATTER OF AN ADVOCATE/CLIENT BILL OF COSTS.**

**BETWEEN**

**BETWEEN**

**L.G. MENEZES & COMPANY ADVOCATES.....DECREE HOLDER**

**AND**

**AFRICAN MERCHANT ASSURANCE COMPANY LIMITED...JUDGMENT DEBTOR**

**AND**

**DIAMOND TRUST BANK LIMITED.....GARNISHEE**

**RULING**

1. By a notice of motion dated 14.07.2020, brought under Sections 1A, 3A and 38 (c) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 23 Rules 1 (1), 2, 9 and 10 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the Applicant prays for orders:

a) **THAT the monies held by the Garnishee, Diamond Trust Bank Kenya Ltd on behalf of the Judgment-Debtor M/s Africa Merchant Assurance Company Limited, in a fixed deposit Account No.008FDLC201750001 at the Garnishee's Capital Centre Branch, Nairobi, be and is hereby attached to answer the decree herein, the amount unsatisfied being Kshs. 262,370/- together with the further accrued interest plus costs of these garnishee proceedings.**

b) **THAT the costs of this application be provided for.**

2. The motion is premised on the grounds among others that out of the decree issued on 27.06.2019 for Kshs. 110,988/-, Kshs. 83,708/- and Kshs. 119,095/-, the Judgment Debtor has settled Kshs. 144,976/- leaving an unpaid balance of Kshs. 168,995/- excluding interest of 14% per annum w.e.f 20.09.2018. The application is supported by an affidavit sworn on 14.07.2020 by **Dancan Otieno Njoga**, Advocate for the Decree Holder/Applicant in which he reiterates the grounds on the face of the application. Annexed to the affidavit are certificates of costs dated 29.04.2019 were issued for Kshs. 110,988/-; Kshs. 83,708/- and Kshs. 119,095/- in respect of **Misc. Civil Application No 172, 173 and 174 Of 2018** respectively and the decree in respect thereof dated 27.06.2029. It is further averred that the Decree Holder/Applicant is entitled to 14% interest per annum w.e.f 20.09.2018 of the unpaid balance of Kshs. 168,995/- and costs of these garnishee proceedings.

3. The application was opposed by the Garnishee by way of a replying affidavit sworn on 24.07.2020 by **FRANCIS KARIUKI** who describes himself as the Garnishees' legal officer. He avers that the monies in the garnisheed fixed deposit account No. 008FDLC20175001 cannot be applied to satisfy the decree for the reason that the Garnishee has a lien over Kshs. 10,338,494.23 as a continuing security against an Insurance Premium Financing Facility advanced to the Judgment Debtor as shown by Lien Application Form and Certificate of Deposit annexed to the affidavit.

#### **Submissions by parties**

4. I directed that the application be argued by way of written submissions which the Applicant's counsel dutifully filed on 10.09.2020.

#### **Applicant's submissions**

5. The Applicant submits Lien Application Form and Certificate of Deposit are meant to defeat its claim for the following reasons: **THAT**

i. There is no evidence that the signatories to the Lien Application Form and Certificate of Deposit are directors of the Judgment Debtor or have authority of the Judgment Debtor to enter into a contract on its behalf

ii. The Lien Application Form and Certificate of Deposit are not sealed with the company seal as required by Section 35(1) of the Companies Act

iii. The Insurance Premium Finance Agreement was not exhibited

iv. The Lien Application Form and Certificate of Deposit are instruments creating obligations between parties for valuable consideration and chargeable with stamp duty under the provisions of Section 5 and 30 (1) of the Stamp Duty Act Cap 480 Laws of Kenya and are not receivable in evidence under the provisions of Section 19(1) of the Stamp Duty Act.

6. The Applicant urged the court to find that it had met the threshold under the provisions of Order 23 rule 1 in that it has demonstrated that it has a valid decree against the Judgment Debtor and further that there is a debt due from the Garnishee to the Judgment Debtor capable of being attached from Respondent's fixed deposit account No. 008FDLC20175001.

7. In support of its assertion, the Applicant placed reliance on **Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 Others (2013) eKLR** where the court of Appeal held:

**[25]. A judgment creditor has no greater rights in the judgment debtor's assets held by the garnishee than the judgment debtor does. In the present case, the 1st respondent has no greater right than the judgment debtor (2nd respondent) had to the funds held by the appellant bank. The rights of the 1st respondent over the funds held by the appellant bank are co-extensive and limited to the exact rights that the judgment debtor had over the funds. What were the rights of the judgment debtor in relation to the accounts held by the appellant bank"**

**[26]. The rights of the judgment debtor are contractual rights that govern the relationship between the 2nd respondent and the appellant in their capacity of bank/customer relationship with the bank having security over liabilities of the 2nd respondent. The appellant bank was a secured creditor. A secured creditor with a perfected security interest in a deposit account has rights that are superior to a subsequent judgment (unsecured) creditor. The situation is different if the garnishee creditor is not secured. In such a case, the judgment creditor with a garnishee order would rank in priority.**

8. Reliance was also placed on **Odhiambo Owiti & Company Advocates v CFC Bank Limited (2015) eKLR** where the Court of Appeal held that ***the judgment's creditor's claim as against the respondent crystallizes upon issuance of the Garnishee order absolute.***

9. In conclusion, the Applicant urged the court to order an attachment of a further Kshs. 101,015 being costs of the Garnishee proceedings.

#### **Analysis and Determination**

10. I have considered the notice of motion in the light of the affidavits thereto, the submissions by the Judgment Creditor/Applicant and the cited authorities.

11. Garnishee proceedings are proceedings where a third party holding funds or property on behalf of a judgment debtor can be called upon to honour the claim of a judgment creditor over those funds or property. A Garnishee order can only issue in instances where there is something which the law recognizes as a debt. Issuance of a notice to a Garnishee binds the funds in the hands of the Garnishee.

12. There is no dispute that the Garnishee is holding funds on behalf of the Judgment Debtor. It is similarly not disputed that the Judgment Debtor is indebted to the Judgment Creditor/Applicant.

13. The Garnishee contends that the funds in the Judgment Debtor's fixed deposit account No. 008FDLC20175001 cannot be applied to satisfy the decree for the reason that the Garnishee has a lien over Kshs. 10,338,494.23 as a continuing security against an Insurance Premium Financing Facility advanced to the Judgment Debtor as shown by Lien Application Form and Certificate of Deposit annexed to the

14. I have considered the holding in **Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 Others** (supra) and I have come to the

following conclusion. That there is no evidence that the Garnishee has granted the Judgment Debtor an Insurance Premium Financing Facility for Kshs. 10,338,494.23 allegedly secured by the sums of money in the Judgment Debtor's account.

15. And even if the Garnishee had advanced a credit facility to the Judgment Debtor which as stated hereinabove has not been proved, the Garnishee in this case has no greater right than the Applicant to the Judgment Debtor's funds held by the Garnishee. Further, if the credit facility had been proved to have been advanced by the Garnishee to the Judgment Debtor, the Applicant has a garnishee order and ranks in priority to the Garnishee who would be a secured creditor.

#### **DISPOSITION**

16. On the material presented by the parties, this court is satisfied that the Applicant has demonstrated that it is entitled to recover its debt from sums held for the Respondent by the Garnishee in fixed deposit account No. 008FDLC20175001 as much as may be sufficient to pay the judgment debt, interest and the costs of the Garnishee proceedings.

17. It is therefore hereby ordered THAT:

**THAT the monies held by the Garnishee, Diamond Trust Bank Kenya Ltd – Capital Centre Branch, Nairobi, on behalf of the Judgment-Debtor M/s Africa Merchant Assurance Company Limited, in Fixed Deposit Account No. 008FDLC201750001 at the Garnishee's Capital Centre Branch, Nairobi, be and is hereby attached to answer the decree herein, the amount unsatisfied balance of Kshs. 168,995/- together with interest of 14% per annum w.e.f 20.09.2018 plus Kshs. 101,015 being costs of these garnishee proceedings.**

**DATED THIS 12th DAY OF November 2020**

**T.W. CHERERE**

#### **JUDGE**

For Decree Holder - **L.G.Menezes & Company Advocates**

For Judgment Debtor - **N/A**

For Garnishee - **Mohamed Madhani & Co. Advocates**