



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCC. MISC NO. 70 OF 2019

LESINKO & NJOROGI GATHOGO ADVOCATES.....APPLICANT/DECREE HOLDER

-VERSUS-

INVESCO INSURANCE COMPANY LTD.....JUDGMENT DEBTOR/RESPONDENT

-AND-

CO-OPERATIVE BANK OF KENYA.....GARNISHEE

RULING

1. The decree holder/Applicant filed the application dated 17th July 2019 under Order 23 Rule 1 and 2 Civil Procedure Rule seeking the following orders: -

a) An order nisi be issued attaching deposits and the money held by the judgment debtor in Co-operative bank of Kenya account no. 012***** and Co-operative Bank of Kenya account no. 01246***** but to the extent and limited to the sum of Kshs.340,190.36 being the amount under the decree of the court.

b) The garnishee herein Co-operative bank of Kenya be ordered to appear before court on a date to be fixed by the court and show cause why they should not pay to the decree holder/Applicant the credit deposit in Cooperative bank of Kenya account number 0124***** and Co-operative bank of Kenya account

number 01246***** in settlement and satisfaction of the decree of this court.

c) A garnishee order absolute to issue attaching deposits funds held by the judgment debtor in Co-operative bank of Kenya account number 01246***** to pay and satisfy the decree holder in the sum of Kshs.340,190.36.

d) The costs of this application be to the decree holder and be recovered and retained out of the money under the garnishee order.

2. The main ground was that the decree holder has a decree for the sum of Kshs.340,190/36 against the Respondent out of which nothing has been paid. Further that the Respondent has deposits held to its credit in account No.s 0124***** and 01246***** with cooperative bank of Kenya.

3. The application is supported by the affidavit of Wilson Gathogo an advocate from the firm of Lesinko, Njoroge and Gathogo advocates appearing for the decree holder. After hearing the Applicant ex parte as is provided for under Order 23 Rule 1(1) Civil Procedure Rule, the court granted prayer **(a)** and **(b)** as set out above.

4. The court further directed that both parties i.e. the Respondent and garnishee be served for an interparties hearing on 6th August, 2019. Service was effected as directed by the court. The garnishee filed a replying affidavit and was represented by counsel when the matter came for hearing. The Respondent did not respond nor send a representative for the hearing.

5. Ms. Movindya for the garnishee submitting on the replying affidavit stated that the garnishee had annexed statements of account of the mentioned accounts. Further that these were collateral accounts for securing facilities for the Respondent and so could not be attached. That the 3rd mentioned account had no funds. Further that the bank had not been a party to the suit and is therefore entitled to costs.

6. Mr. Botany for the Applicant in response contended that the matter before court was a declaratory suit and there was no need of adding the garnishee as a party. He stated that the account ending with digits **801** was not one of the accounts named by the Applicant.

7. Finally, he submitted that exhibits RNK1c, and RNK2a did not show that the bank accounts were collateral. He wondered what interest the garnishee had in the accounts. He prayed for their application to be allowed as the statements showed that the accounts had money.

8. It noted that the judgment debtor/Respondent did not file any response to this application. It does not therefore dispute being indebted to the decree holder in the sum claimed. All that the garnishee came to tell the court is that the cited accounts belong to the Respondent but they are special in that they are collateral and cannot be touched.

9. **Order 23 Rule 2 Civil Procedure Rule provides that:-**

(2) 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 notwithstanding that any of the following requirements is applicable to the account and has not been complied with –

a) That notice is required before any money is withdrawn;

b) That a personal application must be made before any money is withdrawn;

c) That a deposit book must be produced before any money is withdrawn; or

d) That a receipt for money deposited in the account must be produced before any money is withdrawn.

10. It is clear that there is money in form of deposits in the two accounts named by the Applicants as the accounts of interest. These two accounts are:-

i. 0124*****

ii. 01246***** both of Co-operative bank and belonging and operated by the Respondent.

11. What then is a collateral?

“Collateral is an asset pledged by a borrower to a lender, usually in return for a loan. The lender has the right to seize the collateral if the borrower defaults the obligation. Obvious forms of collateral include houses, cars, stocks bonds and cash – all things that are readily convertible into cash to repay the loan.”

12. From what has been placed before this court, there is cash in the two named accounts. Whose money is it?

13. The Respondent and garnishee have not clearly come out to explain what the money has been secured for. It is not enough just to come and make claims that an account is a collateral. It is not the duty of this court to investigate the same. The replying affidavit has not been of any assistance as all it says is that because the accounts are collateral the money therein cannot be touched.

14. There must be proof of the collateral and what the collateral is for. If it is a loan or overdraft, it is money deposited in the Respondent’s account and is therefore its money and is subject to attachment under Order 23 Rule 1 and 2 Civil Procedure Rules.

15. The garnishee has prayed for costs because it feels it ought to have been made a party to the declaratory suit but was not. The matter in the declaratory suit was between the judgment debtor and decree holder. It had nothing to do with the garnishee. The garnishee only came in at the time of execution of the decree under Order 23(1) Civil Procedure Rule. It cannot therefore claim for costs on account of not having been made a party to the declaratory suit.

16. I therefore find merit in the application dated 17th July 2019 and issue a garnishee order absolute in respect of Co-operative bank account No. 01246***** for the sum of Kshs.340,190.36 plus reasonable costs.

DELIVERED, SIGNED AND DATED THIS 8TH DAY OF AUGUST, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG’UDI

JUDGE