



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPL. NO. 175 OF 2018**

**L.G. MENEZES & CO. ADVOCATES.....APPLICANT/DECREE HOLDER**

**VERSUS**

**AFRICA MERCHANT ASSURANCE CO. LIMITED...RESPONDENT/JUDGMENT DEBTOR**

**AND**

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

**RULING**

The application dated 1<sup>st</sup> July 2019 is for order to compel the Garnishee, **DIAMOND TRUST BANK KENYA LIMITED**, to remit money to the Applicant, **L.G. MENEZES & COMPANY ADVOCATES**, in settlement of Decrees which the Applicant holds against the Judgment-Debtor, **AFRICA MERCHANT ASSURANCE COMPANY LIMITED**.

1. It was the Applicant's case that the money held by the Garnishee, in the following three accounts, were being held to the order of the Judgment-Debtor, and were thus available for attachment, through a garnishee order;

*(a) Current Account - 800365007*

*(b) Current Account - 365537002* and

*(c) Fixed Deposit Account - FDLC 190590503*

2. Pursuant to the Decrees in issue, the Applicant was desirous of recovering the decretal sums amounting to Kshs 1,784,965.00, plus further interest and the costs of these proceedings.

3. In response to the application, the Garnishee filed the affidavit of **FRANCIS KARIUKI** who is their Legal Officer.

4. The said affidavit indicated that the Current Account No. 036553702 was overdrawn to the tune of Kshs 149,865,939/35.

5. The Garnishee said that the Current Account No. 0800365007 had a credit balance of Kshs 614,577/00.

6. Finally, the Garnishee indicated that the funds in the Fixed Deposit Account No. FDLC 190590505 were being held as a Security for Credit Facilities which the Garnishee had advanced to the Judgment-Debtor.

7. The Garnishee made available to the court, documents to support the information about each of the 3 accounts.

8. When canvassing the application, the Applicant expressed doubts about the legitimacy of the alleged Security, pointing out that the Lien Form was undated.

9. Secondly, the Applicant pointed out that the Lien Form does not have any Reference Number.

10. But the Garnishee responded by drawing the Court's attention to the fact that the Security arose from three documents, being;

*(a) The Application Form;*

***(b) Insurance Premium Agreement; and***

***(c) Lien Form.***

11. I have perused the three documents and I note that the Lien Form is not dated and also it does not have any Reference Number on its face.
12. However, the said Lien Form appears to have the signatures of a Director and of a Director/Secretary.
13. Also annexed to the Replying Affidavit is a Board Resolution dated 27<sup>th</sup> March 2019. By that Resolution the Judgment-Debtor accepted the Facility offered by the Garnishee herein.
14. The third document is the Application for the facility, which bears a date stamp showing that it was received by the Garnishee on 3<sup>rd</sup> of April 2019.
15. A reading of the three documents shows that the Judgment-Debtor had accepted a facility from the Garnishee, and had provided a security for the said facility.
16. Pursuant to **Section 107** of the **Evidence Act**, the burden of proof vested in the Applicant who was inviting the court to find that the documents produced by the Garnishee were of doubtful legitimacy.
17. On the garnishee's part, it had discharged the onus vested upon it, by making available the documents.
18. Therefore, if the Applicant was disputing the authenticity, or the legitimacy of the documents, it was incumbent upon the Applicant to demonstrate that the absence of dates on the documents, rendered the documents unenforceable.
19. I find that the Applicant failed to demonstrate that the documents were not authentic and binding between the Garnishee and the Judgment-Debtor.
20. In effect, the money in the Fixed Deposit Account are not available to the Judgment-Debtor at their behest.
21. The said funds could only become available to the Judgment-Debtor, at their behest if they will have repaid the facility in respect to which the Deposit is a security.
22. I therefore reject the Applicant's request to grant a Garnishee Absolute in respect to the funds in the Fixed Deposit Account.
23. However, in respect to the funds held in the Current Account No. 0800365007, I order that a Garnishee Absolute do issue forthwith, commanding the Garnishee to remit the said funds to the Applicant.
24. The costs of the application are awarded to the Applicant, and shall be payable by the Judgment-Debtor.

**DATED, SIGNED and DELIVERED at KISUMU This 28<sup>th</sup> day of November 2019**

**FRED A. OCHIENG**

**JUDGE**