



REPUBLIC OF KENYA



KENYA LAW
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**KCB Bank Kenya Limited v Kinyua & another (Civil Appeal
E027 of 2023) [2025] KEHC 1625 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E027 OF 2023
AN ONGERI, J
FEBRUARY 14, 2025**

BETWEEN

KCB BANK KENYA LIMITED APPELLANT

AND

BEATRICE WANJIKU KINYUA 1ST RESPONDENT

KINDE ENGINEERING WORKS LIMITED 2ND RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. T. N. Sinkiyian
(PM) in Voi CMCC No. E005 of 2021 delivered on 6th July 2023)*

JUDGMENT

1. The Appellant filed an application dated 21st November 2022 seeking the setting aside of a Garnishee Order absolute made on 28th October 2022 which directed the Appellant to pay Kshs. 2,600,000/= to the 1st Respondent to satisfy the decree against the 2nd Respondent.
2. The Appellant was aggrieved by the said order made on 6th July 2023 dismissing the application dated 2nd November 2022 and has appealed to this court on the following grounds:-
 - i. The learned Magistrate erred in law and fact in failing to find that the proceedings leading to the garnishee order absolute had been conducted without notice to the Appellant.
 - ii. The learned Magistrate erred in law and fact in failing to find that the evidence on record demonstrated that the Appellant was not liable as a garnishee.
 - iii. The learned Magistrate in any event injudiciously exercised her discretion by refusing to set aside the garnishee order absolute against the Appellant.
3. The Respondents were served with the Memorandum and the Appellant's submissions but they did not file any submissions.



4. The Appellant submitted that a garnishee order nisi was issued on 18/5/2022 with no return date. The 1st respondent fixed a date at the registry for 2/6/2022. By then the 2nd respondent had filed an application seeking to set aside the judgement. The matter was adjourned to 3/6/2022. On the said date the 2nd respondent told the court that the garnishee had not been served notice.
5. The appellant argued that despite the lack of service on the appellant being brought to the trial court's attention, nothing was said of it. The matter came up again on 10/6/2022 and the court did not inquire on the service of the appellant. on 16/6/2022 the matter was again in court without notice to the appellant and the trial court made substantive orders varying the order nisi then ordered that the appellant be served to attend court on 29/7/2022.
6. The court did not sit on 29/7/2022 but instead a representative from the 2nd respondent attended the registry and fixed a mention date for 29/9/2022. He was directed to issue notice to the absent parties but neglected to do so.
7. The appellant submitted that the court erred when it found that section 170 of Cap 80 had not been complied with. The appellant contended that the provision simply required that appellant's officer to prove by affidavit or orally that the statement of account is one of the ordinary books of the appellant in his custody, Kept in the ordinary course of business and has been examined against the original.
8. The appellant argued that the evidence showed that the 2nd respondents account had negative balances and it therefore did not matter that the 1st and 2nd respondents had entered into a consent to freeze Kshs. 2,600,000.
9. The appellant contended further that an account that is overdrawn by an overdraft facility is evidence that the 2nd Respondent owes the Appellant. Since it is the Appellant who was, by the evidence, owed by the 2nd Respondent, the Appellant as garnishee could not be compelled to satisfy a debt owed by the 2nd Respondent. To do so was to convert the Appellant into the judgment debtor.
10. The issues for determination are as follows
 - i. Whether the Garnishee was condemned unheard.
 - ii. Whether the exparte garnishee order should be set aside.
11. On the issues as to whether the Appellant was condemned unheard, there is evidence of service.
12. The law requires that where a party who is served and does not appear in court, the case proceeds in the absence of such a party.
13. Order 12 Rule 2 provides as follows;

When only plaintiff attends [Order 12, rule 2]

If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—

 - (a) That notice of hearing was duly served, it may proceed ex parte;
 - (b) That notice of hearing was not duly served, it shall direct a second notice to be served; or
 - (c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.



14. I find that it not in dispute that the Garnishee was served and given an opportunity to show cause why the order made on 18/5/2022 should NOT be made absolute.
15. There is no dispute that the order was made absolute without hearing the Garnishee.
16. On the issue as to whether the exparte order absolute should be set aside, I find that the court has a wide discretion to set aside exparte orders upon certain conditions.
17. In the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR the Court held as follows;

“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”
18. The Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173 held as follows;

“In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle”.
19. The law requires that the Garnishee is liable if it is proved that they are holding funds on behalf of the Respondent. It is in the interest of justice that the Garnishee be heard before the Garnishee order should be made absolute.
20. I set aside the exparte garnishee order and direct that the Garnishee application dated 12/5/2022 be heard before any other court other than the court that issued the exparte order on condition that the Garnishee pays thrown away costs of Ksh. 30,000 within 30 days of this date.
21. The appeal partially succeeds and each party bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2025 VIRTUALLY AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina/Trizah

Miss Cheruyot holding brief for Mr. Kongere for the Garnishee/Appellant

No appearance for Respondents

