



Malde (Suing as Executor of the Will of Laitaben Kantilal Shah - Deceased) v Spire Bank Limited (Successor in Title to the Southern Credit Banking Corporation Limited); Mwalimu Sacco Limited (Garnishee) (Commercial Case 278 of 2017) [2025] KEHC 1560 (KLR) (Commercial and Tax) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 278 OF 2017
JWW MONG'ARE, J
FEBRUARY 14, 2025**

BETWEEN

**DINIT VIRCHAND MALDE PLAINTIFF
SUING AS EXECUTOR OF THE WILL OF LAITABEN KANTILAL SHAH -
DECEASED**

AND

**SPIRE BANK LIMITED DEFENDANT
SUCCESSOR IN TITLE TO THE SOUTHERN CREDIT BANKING
CORPORATION LIMITED**

AND

MWALIMU SACCO LIMITED GARNISHEE

RULING

1. Vide a notice of motion application dated 2/9/2024, the Plaintiff sought the following orders:

- “ 1. 1.Spent
- 2. Spent
- 3. That the Honorable Court be pleased to issue a Garnishee Order Absolute against Mwalimu Sacco Limited the Garnishee herein, in respect of funds received from Equity Bank in respect of the sale of the assets and liabilities of the Respondent/Judgment Debtor ordering that all monies held to the credit



of the Defendant/Judgment Debtor be attached to settle and/or satisfy the Warrants of Attachment awarding the sum of Kshs.53,568,569.74/= being the Decretal amount and interest thereon as of 5th December. 2023.

4. That the Honorable Court be pleased to issue a Garnishee Order Nisi against Mwalimu Sacco Limited. the Garnishee herein, in respect of funds received from Equity Bank in respect of the sale of the assets and liabilities of the Respondent/Judgment Debtor ordering that all monies so held to the credit of the Defendant/Judgment Debtor be attached to settle and/or satisfy the Warrants of Attachment awarding the sum of Kshs.53,568,569.74/= being the Decretal amount and interest thereon as of 5th December. 2023.
 5. That the Honorable Court be pleased to issue a Garnishee Order Absolute against Mwalimu Sacco Limited the Garnishee herein ordering that all monies held to the credit of the Defendant/Judgment -Debtor be attached to settle and/or satisfy the outstanding fees of the Plaintiffs/ Decree Holder's auctioneer fees of Kshs.1,434.500.00/=.
 6. That the costs of this Garnishee proceedings be certified by this Honorable Court and be added to the amount of the decree and be retained out of the money recovered by the Decree Holder in priority to the amount of the decree.”
2. The grounds of the application were that the court entered judgment in favor of the Plaintiff against the Defendant on 13/10/2023, for the sum of Kshs.16,829,886.74/=, together with costs and accruing interest, which, as of 5/12/2023, amounted to Kshs.55,003,069.00/= and that the Plaintiff's auctioneers, Moran Auctioneers, attached the available assets of the Defendant, recovering only Kshs.1,434,500.00/=, leaving an outstanding balance of Kshs.53,568,569.74/=.
 3. The Plaintiff asserted that he identified the only known asset capable of satisfying the decretal sum and accrued interest as the funds held by the garnishee, being proceeds from the sale of the Defendant to Equity Bank Ltd and that he is apprehensive that the Defendant may conspire with the garnishee to withdraw the said funds, thereby frustrating the execution of the decree.

Garnishee's Response:

4. BRENDA KIBERENGE, the company secretary of the garnishee, swore a replying affidavit on 19/9/2024 contesting the garnishee application.
5. She asserted that the garnishee does not hold any funds for the Plaintiff nor does it owe any liabilities to it and that the Defendant is a separate legal entity and the corporate veil cannot be pierced to hold the garnishee accountable for its debts.
6. Ms. Kiberenge averred that the claim that the garnishee transferred the Defendant to Equity Bank while retaining a shell entity is baseless.
7. Further she highlighted previous financial arrangements involving the Defendant, Equity Bank, and the garnishee, where the garnishee acted as a warrantor to settle certain liabilities. However, these transactions did not imply any outstanding financial obligation from the garnishee to the Defendant.
8. It was contended that the garnishee was not a party to the original dispute between the Plaintiff and the Defendant and bears no legal liability in the matter and that garnishee proceedings apply only where a garnishee owes funds to the Defendant which is not the case here.



Defendant's Response:

9. Through a replying affidavit, sworn by BRIAN KILONZO, the acting Managing Director of the Defendant, the Defendant responded to the instant application.
10. He averred that the garnishee does not hold any funds on the Defendant's behalf and has been wrongfully included in the execution proceedings; that the Central Bank of Kenya announced that Equity Bank Kenya Limited acquired certain assets and liabilities of the Defendant, effective 31/1/2023 and that the Defendant ceased operations, was deregistered from the Deposit Insurance Fund on 4/9/2023 and was voluntarily liquidated as per a notice published on 5/1/2024.
11. Mr. Kilonzo claimed that the Defendant's assets were liquidated at reduced values, with the Plaintiff participating in the disposal process and dismissed claims of conspiracy between the Defendant and the garnishee as baseless, citing public records of the liquidation process.
12. Further it was contended that the Plaintiff did not provide documentation proving that the garnishee held any funds for the Defendant and that Equity Bank, which took over Spire Bank's assets and liabilities, has not been enjoined in the proceedings.
13. It was argued further that the Plaintiff's application is procedurally flawed as no court leave was sought before filing and that the Defendant filed a Notice of Appeal against the judgment of 13/10/2023. The Defendant contended that the application is intended to disrupt business operations, lacks legal justification and ought to be dismissed with costs.

Further affidavit by the Plaintiff:

14. The Plaintiff filed a further affidavit sworn on 4/10/2024 by himself in response to the replying affidavits discussed above. The Plaintiff asserted that a formal search at the Registrar of Companies revealed that the Defendant has no listed members, effectively rendering it a non-existent entity for legal purposes, as such, the Plaintiff questioned the authority of BRIAN KILONZO to represent the Defendant in these proceedings.
15. He asserted that his claim arose from a transaction in 2007 in which the Defendant allegedly sold property belonging to the Plaintiff but failed to remit the proceeds which led to the filing of a suit in 2017, seeking an account and payment of all amounts due to the estate of LALITABEN KANTILAL SHAH, the deceased. On October 13, 2023, the court awarded judgment in favor of the Plaintiff for Kshs.16,829,886.74/=, plus costs and interest, against the Defendant.
16. The Plaintiff asserted that the garnishee purchased and operated the Defendant for a period before selling it to Equity Bank and just months before the court's judgment, the Defendant sold its assets and some liabilities to Equity Bank, ceased operations, and later moved to voluntarily liquidate in January 2024.
17. The Plaintiff argued that this liquidation was a deliberate attempt to evade liability for the decretal amount and that to prevent this, the Plaintiff wrote to the authorities on 12/8/2024 seeking to block the irregular dissolution of the Defendant.
18. It was contended that during trial, the Defendant's sole witness confirmed that the liability owed to the Plaintiff was not transferred to Equity Bank, which precluded the Plaintiff from pursuing the bank for recovery. Despite this, the Plaintiff argued that the garnishee, which controlled the Defendant, should now be held responsible for the decree.



19. The affidavit further references public records and media reports indicating that the garnishee had full control of the Defendant until its sale to Equity Bank. Moreover, it is noted that the garnishee injected substantial financial support into the Defendant, including a sum of Kshs.510 million, yet did not account for the Plaintiff's claim.
20. The Plaintiff asserted that the garnishee selectively transferred some liabilities while excluding the decretal amount owed. Given that the garnishee managed the Defendant's assets and liabilities until its sale, the Plaintiff argued that it should bear responsibility for settling the judgment debt.

Analysis and Determination:

21. The garnishee, Plaintiff and Defendant filed written submissions dated 2/9/2024, 4/10/2024 and 10/12/2024 respectively. I have considered and analyzed the same together with the pleadings and annexures filed by the parties in this matter.
22. The sole issue for determination is whether the court should issue a garnishee order absolute against the garnishee in respect of funds received from Equity Bank from the sale of the assets and liabilities of the Defendants in order to satisfy the warrants of attachment dated 5/12/2024 for the amount Kshs.55,003,069/= and to pay the auctioneer's fees of Kshs.1,423,500.00/=.
23. A background of this matter is that judgement was entered on 13/10/2023 in favour of the Plaintiff and against the Defendant to the tune of Kshs.16,829,886.70/= plus costs and interest thereon. Subsequently, warrants of attachment dated 5/12/2023 for the sum of Kshs.55,003,069/= were issued and the Plaintiff's auctioneer proclaimed some of the Defendant's office equipment found at the garnishee's offices belonging to the Defendant realizing the sum of Kshs.1,434,500/=. The Plaintiff alleged that the auctioneers incurred costs of Kshs.1,234,500/= during the process of proclamation.
24. The Plaintiff submitted that the garnishee has the funds to satisfy the outstanding sum of Kshs.55,003,069/= having sold the Defendant to Equity Bank.
25. Order 23 Rule 1 of the Civil Procedure Rules provide as follows:

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

26. In the case of *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishe)* [2020] eKLR the following was stated:

“Ordinarily in garnishee proceedings, the judgment-creditor has a duty to prove the garnishee's indebtedness based on sound evidence.....With regard to the garnishee order, the appellants 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.... the onus is on the Judgment Creditor to establish that there is a debt due and recoverable from the Garnishee to the Judgment Debtor.”

27. In concurrence with Order 23 Rule 1 of the Civil Procedure Rules reproduced herein and the authority quoted above, it is clear that in order for the court to issue a garnishee order, the decree holder has to satisfy the court that the garnishee is 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 decree holder.
28. What is discernible from the evidence tendered by the parties is that the garnishee had acquired a majority stake in the judgment debtor in 2014 and later on the Central Bank of Kenya announced that Equity Bank of Kenya had acquired certain assets and liabilities of the Defendant on 31/1/2023. This is evidenced by the press release dated 30/1/2023 issued by the Central Bank of Kenya and which is produced as 'BK-1' in the Defendant's replying affidavit. Further the evidence indicates that the Defendant ceased operating as a bank from 4/9/2023 and that its members sought to voluntarily liquidate it as seen in the gazette notice issued on the same date issued by the Kenya Deposit Insurance Corporation and the voluntary liquidation notice dated 5/1/2024 produced as 'BK-2' and 'BBK-3' in the Defendant's replying affidavit.
29. The decree holder has however not presented any evidence before the court to demonstrate that the garnishee owes any sum of money to the Defendant nor that the garnishee holds funds on behalf of the Defendant. This is the lifeline of a garnishee application and without it the court cannot issue a garnishee order.
30. Although the Plaintiff is entitled to reap the fruits of a favourable judgment against the Defendant, I am of the view that the present garnishee proceedings are baseless and lack the evidence to support the Plaintiff's claims.
31. In conclusion, I find no merit in the Plaintiff's garnishee application and dismiss it entirely. Each party is directed to bear its own costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2025

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J.W.W. MONGARE

JUDGE



In the Presence of:-

1. Mr. Mutuku Mbithi for the Decree-Holder/Applicants.
- 2, Ms. Njagi holding brief for Mr. Kimani for the Judgment-Debtor/Respondent.
3. Ms. Otimbo for the Garnishee.
4. Amos - Court Assistant

