Prime Bank Limited v Mwaringa & another (Civil Appeal E036 of 2023) [2025] KEHC 3548 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3548 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E036 OF 2023

M THANDE, J

MARCH 21, 2025

BETWEEN

PRIME BANK LIMITED ..... APPELLANT

AND

KATANA KEA MWARINGA ..... 1ST RESPONDENT

XPLICO INSURANCE COMPANY LIMITED ..... 2ND RESPONDENT

(An Appeal from the Ruling of Hon. J. M. Kituku, Senior Principal Magistrate delivered on 21.2.23 in Kilifi SPMCC NO. E130 of 2021)

JUDGMENT

1. The Appellant herein is aggrieved by the ruling dated 21.2.23 of the subordinate court in Kilifi SPMCC NO. E130 of 2021. The impugned ruling was in respect of an application dated 12.11.21 in which the 1st Respondent sought that the Appellant as garnishee, show cause why it should not pay to the 1st Respondent as decree holder, the sum of Kshs. 1,265,491/= plus costs and interest at 12% per annum. Also sought was a garnishee order absolute as well as costs. The trial magistrate allowed the application with costs of both the Appellant and 1st Respondent being paid from the account held by the Appellant.

2. In its memorandum of appeal dated 17.3.23, the Appellant raised the following grounds of appeal:

    1. That the learned magistrate erred and misdirected himself in law and fact in holding that the Appellant's response to the garnishee application before him for determination was of no evidential or probative value on the erroneous basis that it was a replying affidavit sworn by the Appellant's advocate when in truth the same had been sworn by an officer of the Appellant, its Legal Manager.

2. That the learned magistrate erred and misdirected himself in law and fact by exposing open bias against the Appellant and lack of consistency when he failed to appreciate that even if the replying affidavit had been sworn by the Appellant's advocate, which was not the case anyway, applying the same consideration that informed him to disregard the replying affidavit, he would not have been entitled to consider the depositions in the affidavit in support of the garnishee application which had been sworn by the advocate for the 1st Respondent yet the same related to contentious factual matters such as whether the Appellant was holding any funds belonging to the 2nd Respondent.

3. That the learned magistrate erred and misdirected himself in law and fact in failing to appreciate and consider that the uncontested evidence before him in the form of annexure "GWM-2" to the Appellant's replying affidavit being the statement of account in respect of the bank account subject of the garnishee application was to the effect that the credit balance therein was only a sum of Kshs. 367,682.05/= which was not sufficient to satisfy the 1st Respondent's claim against the 2nd Respondent.

4. That the Learned magistrate erred and misdirected himself in law and fact in allowing the garnishee application and issuing a garnishee order absolute against the Appellant thus making it liable to the 1st Respondent in the sum of Kshs. 1,265,491.00 when it had sufficiently demonstrated that it did not hold any such funds on behalf of the 2nd Respondent.

5. That the learned magistrate erred and misdirected himself in law and fact in failing to appreciate sufficiently or at all that if as demonstrated by the Appellant that the 2nd Respondent as the account holder had no right to access the small credit balance in the attached bank account by virtue of among others prior garnishee orders and freezing court orders, the 1st Respondent as an attaching creditor had no greater right to such funds and was therefore not entitled to a garnishee order absolute in respect of the attached bank account.

6. That the learned magistrate erred and misdirected himself in law and fact by failing to appreciate that by issuing a garnishee order absolute in respect of the 2nd Respondent's attached bank account, he was effectively trashing and overreaching previously issued and binding court orders relating to the said account without considering the effect thereof on the orderly administration of justice.

7. That the learned magistrate erred and misdirected himself in law and fact in failing to consider or sufficiently consider the Appellant's position as set out in its written submissions and the judicial authorities cited therein thus reaching a manifestly erroneous decision to issue a garnishee order absolute against the Appellant.

3. The gravamen of the Appellant's complaint is twofold. First, that trial Magistrate erred in holding that the averments in the Appellant's replying affidavit were of no probative value having been sworn by its advocate. The record shows that the trial Magistrate stated:

> It is unfortunate that the Advocate for the Garnishee chose to swear an affidavit on factual issues without disclosing the source of his information.
>
> For instance, he states that the Account has credit balance of Kshs. 367,682.05/= as at 21.10.21 without disclosing the source of that information.

4. Order 19 Rule 3 of the Civil procedure rules provides that Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. Further an advocate of a party may not depone to disputed facts.

5. In Simon Isaac Ngui v Overseas Courier Services (K) Limited [1998] eKLR, A. Mbogholi Msagha, J. (as he then was) dealt with a matter where an advocate had deponed to contested facts and stated:

> The learned counsel for the defendant has also criticised Mr Ukwonga for descending onto the arena of conflict. He cited H.C.C.C. NO 3504 of 1993 Kisya Investment Limited & Others -v- Kenya Finance Corporation Ltd. Where the court said:
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> ".....The applicants's counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge information and belief. It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit."
>
> With respect, I agree and go further to quote the same ruling by the learned judge (Ringera J) where he said.
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> "By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his deposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. he cannot be both counsel and witness in the same case."

6. I have looked at the replying affidavit in question. It was sworn by George W. Githui who described himself as an advocate of the High Court of Kenya and the Manager – Legal at Prime Bank Limited, the Garnishee herein. He went on to state that he was fully conversant with the facts relevant to the matter and was duly authorized and competent to swear the affidavit. At no point did he state that he had conduct of the matter as advocate on behalf of the Appellant. Accordingly, the trial Magistrate misdirected himself by finding that the deponent was the advocate for the Appellant in the proceedings before him. The trial Magistrate further erred in disregarding the averments in the replying affidavit and in particular that the Appellant only held the sum of Kshs. 367,682.05 in the 2nd Respondent's account with the Appellant.

7. The second limb of the Appellant's complaint is that the trial Magistrate made the garnishee order absolute yet the credit balance in the 2nd Respondent's account with Appellant was Kshs. 367,682.05, and thus insufficient to satisfy the decretal amount.

8. The record shows that in its replying affidavit, the Appellant had demonstrated that the amount it held in the 2nd Respondent's account in the Appellant, was Kshs. 367,682.05 which was not sufficient to satisfy the decretal sum. To support its position, the Appellant exhibited a statement of account showing the book balance as at 21.10.22.

9. Section 176 of the *Evidence Act* provides:

> Subject to the provisions of this Chapter of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.

10. The record does not contain any objection to the exhibited statement of account nor was any other statement of account produced to counter the Appellant's position. Sufficient cause was thus shown that the Appellant was unable to fully satisfy the decretal sum. In light of this, there was no basis for the trial Magistrate, to make the garnishee order nisi absolute to satisfy an amount that was clearly not

available, namely Kshs. 1,265,491/= together with costs and interest. The trial Magistrate misdirected himself in making the decision that he made.

11. In the end, I do find that this Appeal has merit and is allowed with costs. The ruling of 21.2.23 making the garnishee order nisi absolute is hereby set aside. The Application dated 12.11.2021 in the trial court is dismissed with costs.

DATED AND DELIVERED IN MALINDI THIS 21ST DAY OF MARCH 2025

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M. THANDE

JUDGE