



Kenya Commercial Bank Limited v Ndung'u & another (Commercial Appeal E228 of 2024) [2025] KEHC 4500 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E228 OF 2024**

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

JOSEPH KARANJA NDUNG'U 1ST RESPONDENT

AFRICA MERCHANT ASSURANCE COMPANY LIMITED 2ND RESPONDENT

(Being an appeal against ruling of the Small Claims Court at Milimani (Hon. V.M. Mochabe) in its commercial claim number E6806 of 2024 dated 2-08- 2024))

RULING

1. On 2nd August 2024, Honourable V.M. Mochache delivered a ruling allowing the 1st respondent's application dated 25th April 2024. The court had on 1-05-2024 issued a decree nisi in favour of the 1st respondent attaching funds in the 2nd respondent's bank accounts numbers 111XXXX867, 120XXXX558, 130XXXX595 and 1312XXXX233 held in the appellant's bank and paybill account number 59XXXX99 and 545400 held with Safaricom PLC. The prayer for making the decree nisi absolute had been opposed by the appellant on the grounds that the accounts held with it had negative balances owing to locking of funds therein pursuant to earlier court orders in small claims court commercial cases numbers E3144 of 2023, E1336 of 2023 and E1281 of 2023 among others. The appellant in compliant with the court order also filed a further affidavit dated 16th July 2024 giving the updated status of the accounts.
2. The appellant has raised an issue of jurisdiction claiming that the small claims court had no jurisdiction to hear and determine the suit. I don't know why the appellant whose duty in this matter is to pay out the debt is so concerned with the suit to the extent that it wants the court to reopen it and go back



to issues of jurisdiction which should have been determined before the suit was concluded. There is already a judgement in place against the judgment debtor and not against the appellant. The matter is at the execution stage whose procedure is governed by Order 22 of the Civil Procedure Rules. A decree of the court should by law be executed by the court which passed the decree and that is what the honourable adjudicator did in issuing the garnishee orders. In my view the issue of jurisdiction cannot be raised during execution more so by a person who was not a party to the case. This objection has no basis and the same is overruled.

3. This appeal was disposed of by way of written submissions where the appellant filed submissions dated 19th November 2024 and the respondent filed its dated 2-12-2024. I have read the submissions by the both parties and the record of appeal and in my considered view, the only question for determination is whether the trial court was justified to issue decree absolute in the circumstances of the status of the 2nd respondent's accounts.
4. The effect of an order nisi is to block movement of funds from the judgment debtor's account until the court in the specified matter either discharges the order nisi or a subsequent order absolute is issued. If the bank or the person so served with an order nisi moves the funds out of account without the leave of the court or the same being discharged, they would be in contempt of court. The appellant had produced statements showing several entries which had locked the funds in the account for various reasons including legal fees and others which are not explained. In her ruling, the Honourable Adjudicator held that unless the sums were locked to comply with any other previous orders nisi, there was nothing else that would take the sums away from the court's reach. I do agree with the adjudicator that setting aside money for legal fees or unexplained reasons could not prevent issuing of order absolute.
5. The appellant had in the replying affidavit admitted that the 2nd respondent held the mentioned account but explained that the order absolute could not issue because the accounts were encumbered as follows;
 1. Account number 111XXXX867 had a credit balance of Kshs 3,871,243.75 but a sum of Kshs 4,492,964.56 was locked leaving a balance of -621,720.81.

SUBPARA 2.

Account number 120XXXX558 had a credit balance of 260,811.87 but a sum of Kshs 261,231.87 was locked leaving a balance of Kshs -420.00.

3. Account number 130XXXX595 had a credit balance of 2,376.35 but a sum of Kshs 2,343.35 was locked leaving a balance of Kshs 33.00.
4. Account number 131XXXX231 had a credit balance of 4,105,985.80 but a sum of Kshs 3,474,387.00 was locked leaving a balance of Kshs 631,598.70.
5. The credit balance of Kshs 631,598.70 in 4 above was locked by other decrees in small claims commercial cases numbers E3144 of 2023, E1336 of 2023 and E1281 of 2023. The total amount in these three orders which were exhibited as annexures CM5a, b, c and d was Kshs 741,280.00.
6. The replying and the further affidavits do not mention the numbers and details of the cases which had locked the other funds but the statements attached to the said affidavits have narrations showing several case numbers without much details. It is my opinion that where the funds are locked by a court order, they would not be available for payment in a subsequent garnishee order absolute. The garnishee should bring clear evidence to prove that the funds are locked by a previously issued order and where



there is evidence of withholding of material facts or lack of clarity from the garnishee, nothing should stop the court from issuing an order absolute.

7. The appellant found it necessary to explain the reason for locking of Kshs 741,280.00 in account number 131XXXX231 by producing three court orders but failed to give details for locking the other funds and accounts leaving the court to rely on the narrations therein. The statements exhibited by the appellant showed summary of the locked amounts without indicating any other transactions which means that the said documents were not the true statement of accounts but an extract or summary of the locked funds. Even after being ordered to file a further affidavit showing updates of the status of the accounts, the appellant brought a similar statement of locked funds without a full statement of the transacted accounts. Some of the locking are shown to have been done way back in 2019 without updates of the matters which leads this court to wonder whether the locking was to be indefinite.
8. Some funds are shown to have been locked for lawyer's fees whose details are not given. In my opinion, court orders take precedence over any other interest which may be noted in the judgment debtor's account as long as the funds therein are shown to belong to the judgement debtor. I agree with the adjudicator that locking of accounts for lawyer's fees is does not take precedence over court orders.
9. For account number 131XXXX231, it is shown that subsequent to 2nd May 2024 when the respondent admits to have been served with the order nisi, the appellant locked funds for nine other matters and none of them was this matter which means that as at that date, the appellant had enough unlocked money which would have been locked in favour of this matter. Further, between 2-05-2024 and 16-05-2024 the funds locked in the account amounted to Kshs 4,152,860.10 including the three matters mentioned above. The appellant did not bother to exhibit orders for the other six matters. The credit balance deponed at paragraph 7 of the replying affidavit was what was available as at 2-05-2024.
10. Reading of the appellant's further affidavit dated 16th July 2024, it is indicative that during the period after service of the order nisi in this matter, cmcc number 5266 of 2020 with a value of Kshs 597,885.10; cmcc number E1331 of 2023 with a value of Kshs 386,168.00 and cmcc number E6046 of 2023 with a value of Kshs 519,906.92 were not in the list of locked funds meaning that they had been dropped. One would not tell whether they were dropped out of discharge of the orders locking the funds or payment of the said amounts to the beneficiaries of the decree in those suits.
11. Again, the further affidavit interestingly shows that the appellant continued to lock more funds in favour of other cases viz; scccomm E4020 of 2023 on 22nd May 2024 for Kshs 173,154.00, scccomm E1515 of 2023 on 22nd May 2024 for Kshs 14,776.00, cmcc E179 of 2021 on 23rd May 2024 for Kshs 47,362.50, scccomm E1720 of 2023 on 23rd May 2024 for Kshs 57,697.00 and scccomm E1145 of 2024 for Kshs 8,000.00. All this while, the appellant did not give attention to this matter and the reason it gives for that is that the garnishee orders are meant for the date they are issued and not later. I find this argument unmerited and meant to circumvent the court orders. An order nisi is a court order like any other and its execution is not dependent on status of affairs on a particular day. As long as funds become available when the order nisi is in force, the garnishee is bound to retain the funds once they hit the account. The garnishee cannot choose when and which orders to obey.
12. It is only the appellant who can explain why it gave priority and attention to all other cases including those which came later and gave a wide berth to this one. The fact that as at 7th June 2024 account number 13128842331 had a credit balance of Kshs 7,413,983.51 as deponed in paragraph 6 of the further affidavit despite the appellant having dropped the three matters mentioned above whose total value was Kshs 1,503,960.02, while as at 2nd May 2024 it had credit balance of Kshs 4,105,985.80 as deponed at paragraph 7 of the replying affidavit means that, there were transactions going in the said account. All this could only have been verified if the appellant had exhibited the transactional



statements rather than an extract of the locked funds. In this regard, I find that the appellant as the garnishee was not candid with the court and appeared to be in a mission to protect the judgment debtor or for reasons known to it discriminated against the orders in this matter.

13. On the basis of the above, I find that the appellant was not candid with the court for reasons this court cannot identify. Where a garnishee appears not to be candid, the court would be justified to infer against it and make independent decision on the apparent status of the account. In *atrick L. Otieno t/a Otieno Oyoo & Co. Advocates v Africa Merchant Assurance Co. Ltd; Diamond Trust Bank Kenya (Garnishee)* (2022) KEHC (KLR), Honourable Justice Kiarie Waweru was faced with a situation where the garnishee was not candid and in allowing the application before him, he stated as follows;

‘Through the legal officer with the garnishee has averred that Kshs.42, 899,968.56 which was deposited in a fixed deposit account and with maturity date of 8th October, 2021 was to be security for an overdraft facility. There is nothing in the document she attached to her affidavit and marked JT1 that support this contention.

Interestingly, she attached another document for enhancement of the mortgage which is incomplete. It could have inadvertent or deliberate and the court cannot be able to tell its probative value.

In the instant case, the garnishee ought to have attached the bank statement of the accounts of the judgment debtor which have been allegedly closed, for the court to ascertain that they no longer hold any funds for the judgment debtor. Without such a statement, the garnishee appears not candid in the matters in issue.

In the circumstances of this case, I must allow the application and make the garnishee order herein absolute.’

14. In the circumstances of the above discussion, I see no merits in the appeal and I dismiss it with costs to the 1st respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Wangari for the appellant, Mr. Chailu for the 1st respondent and Mr. Maiyah for the 2nd respondent.

