Cooperative Bank of Kenya Limited v Makiya & another (Civil Appeal E1135 of 2023) [2025] KEHC 10995 (KLR) (Civ) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10995 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1135 OF 2023

TW OUYA, J

JULY 24, 2025

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED .... APPELLANT

AND

MESHACK OMBEO MAKIYA .... 1ST RESPONDENT

EMERGENCY COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED .... 2ND RESPONDENT

(Being an appeal against the entire ruling of the Cooperative Tribunal at Nairobi by Hon.B Kimemia, Hon. J. Mwatsama, Hon. B. Sawe, Hon. F. Lotuiya, Hon. P. Gichuki, Hon. M. Chesikaw and Hon. P Aol delivered on 27th April 2023 in Cooperaive Tribunal Case No. 301 of 2019)

JUDGMENT

1. The Appellant moved this honourable court that the Ruling delivered by the Honourable Tribunal on 27th April 2023 and all the consequential orders arising from the ruling issued against the appellant be set aside, with orders substituted thereof allowing the Appellant's application dated 25th April 2022. The Tribunal held that although the Appellant admitted service of the Garnishee Application, it had failed to sufficiently demonstrate the reason for failing to enter appearance or file a response to the Application. the Tribunal further opined that the excuse that an advocate had been instructed but failed to enter appearance on behalf of the Appellant was flimsy as the said advocate was not named by the Appellant.

2. Being wholly aggrieved and dissatisfied by the entire decision of the Tribunal, the Appellant filed the Memorandum of Appeal dated 19th October 2023 on grounds that the learned Tribunal erred in law and in fact and misdirected itself in:

    i. Failing to appreciate the proper effect and purport of the evidence before it an in arriving at a decision which is not supported by and / or is manifestly against the weight of evidence;

    ii. Disregarding the totality of the Appellants pleadings, submissions, cited authorities and as a result arrived at materially unsupported findings of fact and law;

    iii. Finding that the mistake of counsel should be visited upon the Appellant who had instructed other advocates to enter appearance on their behalf and defend the garnishee application, but failed to do so resulting in adverse orders being issued against the Appellant;

    iv. Holding and insinuating that the admission by the Appellant that they were served by the garnishee a[plication and thereafter instructed counsel who failed to defend the garnishee was a flimsy reason;

    v. Relying on the case of Martin Mwangi Ndirangu v Invesco Assurance Company Limited (2020)eKLR because in that case the Garnishee/ Applicant produced statements of accounts showing the Defendant's accounts had sufficient amount of money to satisfy the decree. However, in the Appellant's case, the statements showed that the 2nd Respondent's accounts had only Kshs.576.33.00 as compared to Kshs. 278, 387.00 which was the amount claimed by the 1st Respondent.

    vi. Failing to appreciate that the 2nd Respondent's account did not have sufficient funds to satisfy the decretal amount and therefore failed to exercise their discretion judiciously.

    vii. Failing to appreciate that the Appellant is a financial institution with no monies of its own but relies on money from members of the public which should be protected;

    viii. Failing to appreciate the Judgment Debtor's relationship with the Garnishee is limited to the fact that the Judgment Debtor holds an account with the Appellant;

    ix. Failing to appreciate the law and did not address itself wholly on the issues raised in the Appellant's application;

    x. Failing to appreciate that the appellant did not hold any money or assets on behalf of or for the 2nd Respondent and thus, could not satisfy the Garnishee order as directed by the Honourable Court;

    xi. Mixing up issues, to wit, the Application filed by the Appellant herein and an application filed by the 2nd Respondent seeking stay of execution of the Decree and the Garnishee Proceedings;

    xii. Stating that the Respondent by consent had agreed to pay the 1st Respondent a sum of Ksh. 10,000.00 monthly beginning with May 2023;

    xiii. Holding the Appellant accountable to promises made by the 2nd Respondent, which the Appellant was unaware of, to wit the consent referred to in paragraph *4* page 12 and final orders paragraph (b);

    xiv. Noting that the 2nd Respondent had indicated a willingness to pay the decretal amount yet still proceeded to dismiss the Appellant's application for stay of the garnishee absolute orders.

    xv. The orders issued by the Tribunal are both contradictory and confusing.

3. The Appellant filed a Notice of Motion Application dated 25th April 2022 seeking to set aside and or revoke the Garnishee Order Absolute issued on 13th April 2022 against the Garnishee/ Applicant.

4. The application was supported by grounds on the face of the application as well as the affidavit of Lucy Muthama, of even date in support of the Application. therein it was averred that the Garnishee Application was served upon the Applicant, who subsequently instructed advocates on its panel to enter appearance and handle the matter on its behalf. However, the said advocates neither entered appearance nor indicated to the honourable court the status of the accounts held by the Judgment Debtor at the Garnishee/ Applicant.

5. It was further averred that because of counsel's nonappearance, the Garnishee Application proceeded undefended and Garnishee Order Absolute issued on 13th April 2022. The Appellant thus contended that the mistakes of an advocate ought not be visited upon an innocent litigant.

6. The Appellant deponed that he holds no monies or asset on behalf of the Judgment Debtor and cannot therefore satisfy the Garnishee order absolute as directed by the honourable court. In any case, the Judgment Debtor's account only had Ksh. 567.33 in his current account no. 011xxxxxxxxx800. As a result, it is only fair and just that the Garnishee Order Absolute against the Appellant be set aside to allow the Decree Holder to pursue other modes of execution of their decree.

7. The Appellant posited that if the Garnishee Order Absolute is not set aside, he stands to suffer great prejudice as the decretal amount giving rise to the Garnishee proceedings and Order shall be settled from the Appellant's assets contrary to the doctrine of equity, justice and fairness. It was also contended that if the Decree Holder would not suffer any prejudice if the Garnishee Order Absolute is set aside as he can still pursue other modes of execution as against the Judgment Debtor.

8. The 1st Respondent filed an affidavit dated 10th May 2022 in response to the Application. He contended that the notice of summons and pleadings in the suit were duly served upon the 2nd Respondent who in turn filed a notice of admission to the claim on 26th June 2019. Consequently, the 1st Respondent prayed for a judgment on admission, which was allowed as prayed. Nevertheless, the Judgment Debtor failed and neglected to satisfy the said judgment.

9. It was further posited that following the failure of the 2nd Respondent to satisfy the judgment, the 1st Respondent filed a garnishee application on 25th January 2022which was made nisi by the court on the same day and directed that the same be served upon the parties. When the garnishee application came for hearing, the Appellant failed to attend court despite service having been duly effected. Therefore, the order nisi was made absolute.

10. The 1st Respondent contended that the application was an attempt to deny him the fruit of his judgment. Moreover, the Garnishee failed to give a plausible reason for failing to file a response to the application despite service being lawfully effected.

11. The Application was disposed through written submissions and upon considering the pleadings and the submissions by the parties, the Tribunal dismissed the Application with costs. The tribunal was dissatisfied with the Appellant's assertion that it failed to enter appearance and file a response due to failure by its advocate to represent it as instructed.

12. The tribunal also noted that the Respondent had indicated that it is possible to find means to settle the Garnishee, to be paying the Claimant a sum of Ksh 10,000.00 every month beginning May 2023 on or before the 22nd every month by cheque.

13. The appeal was disposed through written submissions.

14. It was the appellants submission that the honourable Tribunal had misdirected itself in finding that the Appellant's Application was unmerited. The Appellant contended that the Garnishee Order was made absolute purely on the basis that the same had not been defended. While admitting receipt of the Garnishee Application, the Appellant submitted that the mistakes of the advocate ought not to be visited upon the client. Therefore, it was in the interest of justice and fairness to have the tribunal set aside that Garnishee Order Absolute when the Appellant demonstrated that there was sufficient cause to warrant setting aside of the order. The Appellant urged that the court's discretion to set aside an ex parte judgement and order was intended to avoid an injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but not to assist a person seeking to deliberately obstruct or delay the cause of justice. Reliance was placed on the case of *Commissioner of Income Tax v Kencell Communications Limited* [2013] eKLR as cited in *Patick L. Otieno Oyoo t/a Otieno Oyoo & Company Advocates v Africa Merchant Assurance Company Limited & Another; Diamond Trust Bank Kenya Limited (Garnishee/ Applicant)* [2021] eKLR.

15. It was further submitted that the Tribunal misdirected itself in finding that the reason given by the Appellant was flimsy.

16. Reliance was placed on the case of *Gideon Mose Onchwati v Kenya Oil Co. Ltd & Another* (2017) eKLR to urge the position that a litigant ought not bear the consequences of the advocates default unless the litigant is privy to the default results from failure, on the part of the litigant, to give the advocate due instructions.

17. Regarding the position that the 2nd Respondent was to pay Ksh. 10,000.00 to the 1st Respondent monthly on the 22nd of every Month, the Appellant submitted that the Tribunal misdirected itself in making such a finding as the same was not part of the prayers that it had asked in the Application before court. Also, there was no reason to involve the Appellant as a Garnishee when the Judgment Debtor had already consented to settling the decretal amount. In any case, the Appellant was not a party to the said consent.

18. It was further submitted that the Appellant would suffer great injustice of compelled to satisfy the Garnishee order as the amount in the 2nd Respondent's account was way less than the decretal sum. There was therefore no legal justification to uphold the Garnishee order.

19. Ultimately, the Appellant urged that it was in the interest of justice that the Appeal be allowed.

20. The 1st Respondent on the other hand submitted that the appeal is unmerited as the Appellant was duly served in accordance with the law but chose not to file any response to the Application without any lawful cause. Also, garnishee proceedings have different stages as per Order 23 of the *Civil Procedure rules*, yet the Appellant has failed to challenge either the proceedings or the order nisi but only the order absolute. Reliance was placed on the case of *Martin Mwangi Ndirangu v Invesco Assurance Co. LTD* [2020] eKLR.

21. Regarding the allegation that the 2nd Respondent's account no. 011xxxxxxxxx800 balance of KShs. 576.33 could not settle the decretal sum, the 1st Respondent submitted that the statement of account relied on by the Appellant was not conclusive as it did not disclose the current bank balance but the balance ats at 29th January 2022. Therefore, the same was unreliable.

22. It was further submitted that the Appellant's assertion that the mistakes of the advocate ought not be visited upon the innocent litigant is a flimsy excuse and no longer accepted in practice. Reliance was placed on the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3others* [2015] eKLR where an application to amend a defence on the basis of inadvertent mistake of an

advocate was disallowed on the basis that justice might be better served by allowing the consequences of the negligence of lawyers to fall on their own heads.

23. Ultimately, the 1st Respondent urged that the Appeal be dismissed with costs.

24. The 2nd Respondent did not participate in the proceedings.

25. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs* (2001) 3 SCC 179.

26. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Ouseph* AIR 1969 Keral 316.

27. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions. I have considered the entire proceedings, the ruling appealed against and the submissions filed by parties and discern that the central issue for determination in this Appeal is whether the Appeal herein is merited.

28. Order 23 rule 1(1) of the *Civil Procedure Rules, 2010* provide that:

> "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 salaries or allowances coming and is within the provisions of order 22, rule 42 owing from such third persons (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 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 maybe sufficient to satisfy the decree together with the costs aforesaid."

29. Order 23 Rule 4 of the *Civil Procedure Rules* further reads:

> "If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require."

30. The bottom line is there should be funds to satisfy the decree. The funds could be there but are subject to other genuine court orders. They are not subject to the garnishee order. It is not the duty of the court, to act as an appellate court for a parallel process of garnishee by other people over the same account.

31. It follows therefore that in garnishee proceedings such as the present one, it is the duty of the garnishee to prove whether or not the garnishee is indebted to the judgment-debtor. To discharge this burden, the garnishee has to produce sufficient evidence in that regard and whether or not the funds in its hands are sufficient to satisfy the decree. In this case, there is no dispute that there is a decree in favor of the 1st respondent and that it has not been settled. It is also undisputed that the Appellant holds the 2nd respondent's account number 011xxxxxxxxx800. The only issue is that the said account did not have sufficient funds to satisfy the decree. The appellant produced a bank statement for the said account dated January 29, 2022 which shows that the 2nd Respondent's account had only Ksh. 576.33 as at the date when the garnishee order was made absolute.

32. The *Civil Procedure Rules* provide an elaborate procedure that ought to be applicable in dealing with Garnishee proceedings. The Procedure laid out in Order 23 of the *Civil Procedure rules* ensures that a litigant is able to enjoy the fruit of its judgment. It is a self contained rule that prescribes its own procedures. In *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee)* [2021] eKLR the court further observed that:

> " 11. A garnishee order nisi binds the debt in the hands of the garnishee. The rule operates as soon as the garnishee order nisi is served on the garnishee. By the same order or the subsequent order, the court may order the garnishee to appear before the court to show cause why he or she shall not pay to the decree holder the debt due from him or her to the judgment debtor or so much of the debt as may be sufficient to satisfy the decree with costs. The garnishee order nisi is also served on the Judgment-Debtor. Where the garnishee does not dispute the debt due or claimed to be due from him or her to the Judgment-Debtor or if he or she does not appear upon the day of hearing named in the garnishee order nisi, the court may order execution against the goods of the garnishee together with the costs of the garnishee proceedings. Where the garnishee disputes his or her liability, the court, instead of making an order that execution be levied, may order that the issue or question necessary for determining his or her indebtedness should be tried and determined. The garnishee may suggest or advance the argument that the debt sought to be attached belongs to a third party. Subsequent to that, the court may order the third-party to appear and be heard."

33. Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the garnishee's indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.

34. In the instant case, the Appellant has not placed before this court any argument or evidence to suggest that the procedure set out in Order 23 of the *Civil Procedure Rules* was not followed to warrant the setting aside of the Garnishee Order Absolute. Further, there is nothing to satisfactorily demonstrate why the 1st Respondent should be denied the fruits of the decree.

35. The record shows that the Appellant was duly served with the Garnishee Application as required by law but it failed to enter appearance or defend the application. Only to appear after the Garnishee order had been made absolute and claim that the order absolute ought to be set aside since the mistakes of counsel ought not be visited upon the litigant. The Appellant had an opportunity to show cause why the Garnishee nisi should not be made absolute, but they instead kept mum and made no response. It is the position of the law that in garnishee proceedings the Garnishee Banks are only required to appear before the court to acknowledge or dispute the debts. In the present case, the Garnishee Bank did not appear or file a response and in the absence of evidence to the contrary, I find that they acknowledged that the respondent held accounts with them.

36. The processes involved in garnishee are fairly straight forward. If we have to relook at the books to discern, calculate and deal with the garnishee, it is not garnishee proceedings but accounting. In the case of *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* [2020] eKLR), the court cited the decision of Lord Denning MR in *Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225 at page 227 where he held as thus:

> "There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means 'unless'. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate."

37. Evidently, the decree that the Appellant was to satisfy on behalf of the 2nd Respondent was Ksh. 287,387.00. However, the amount available in the 2nd Respondent's account as at 29th January 2022, the time the decree absolute was issued, was Ksh. 576.33. therefore, the account attached and the money was not available on the said date. Even if the 2nd Respondent had monies in any other account, it was not the duty of the Appellant to show that some other account had the money. It is the 1st Respondent's role to trace assets belonging to the 2nd Respondent that can be attached to satisfy the decretal amount.

38. On the contention by the 1st Respondent that the Appellant ought to have issued a bank Statement beyond 29th January 2022. If for any reason, the money in the account later became available or other monies became available after 29th January 2022, it was incumbent upon the 1st Respondent to issue another garnishee order. This is because bankers have a continuing obligation to maintain confidentiality. Once money is not available on day one, the banker is discharged.

39. The Appellant has sufficiently demonstrated that it lacks the funds to honour the garnishee absolute, hence cannot be condemned to take responsibility or liability of the 2nd Respondent.

40. There is no evidence that the Tribunal satisfied itself that the decretal sum existed in the attached account prior to issuing the garnishee Order absolute.

41. On the issue that the failure to enter appearance due to mistake of counsel is a flimsy excuse. The Supreme court of Kenya observed in *Karinga Giciani & 11 others v Ndege Kabibi Kimanga & Another* Application no. 4 of 2023 that:

> "Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due

diligence, through evidence or correspondence of the follow up with the Advocates or to pursue their rights as we found in *George Kang'ethe Waruhiu v Esther Nyamweru Munene & another* Civil Application No.18 of 2020 [2021] eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not."

42. In the instant case, the Appellant has not attached any evidence to demonstrate that it had indeed instructed a firm of advocates to represent it at the Garnishee proceedings, also no evidence of any practical steps have been demonstrated to prove that the Appellant went beyond merely instructing an advocate to actively following up on the progress of the proceedings. Respectfully, the reason advanced by the Appellant for failing to enter appearance is a flimsy excuse that does not warrant the setting aside of a garnishee order absolute.

43. The last issue to consider is whether this court should interfere with the trial courts findings. On this the general principles on when an appellate court may interfere with a discretionary power of a trial Court are now well settled. In the case of *Mbogo & Another v Shah*, [1968] EA, it was stated as follows:

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

44. The appellant had the burden of proving the judgment Debtor's account held with them lacked enough funds to satisfy the garnishee absolute. However, it was unable to do so since it did not enter appearance or file any response to the Garnishee Application. Be that as it may, when the Tribunal had the opportunity to reconsider the issue while determining the Appellant's application for setting aside the Garnishee order absolute, it dismissed the case without considering the triable issues raised in the affidavit of Lucy Muthama annexed to the Application dated 25th April 2022. The interest of justice would have bee served if the Application had been heard on its merits. Upon doing so, it denied itself the opportunity to interrogate whether the amount in the attached account was sufficient to satisfy the decretal sum.

45. Furthermore, the alleged consent order where the 2nd Respondent agreed to submit Ksh. 10,000.00 monthly to satisfy the decretal sum had no basis in law as it neither appears in the record nor was it part of the prayers made by the Appellant in its Application dated 25th April 2022. Therefore, it is evident that the Tribunal was clearly wrong in the exercise of its discretion. In any case, the mere existence of a consent between the 1st and 2nd Respondent negated the need to continue with the garnishee proceedings. This is because the 2nd Respondent was already willing to satisfy the decretal sum, hence there was no need of involving a garnishee to settle the same.

46. I find merit in the Appeal. I therefore set aside the Tribunal's ruling dated 27th April 2023 and issue an order dismissing the garnishee proceedings.

47. Each party to bear its costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH JULY, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.........No Appearance

For 1st Respondent......Ms Tuwesi hb Kirimi

For 2nd Respondent......No participation

Court Assistant......Brian