



**Mutulu Holdings Limited v Seven Fourteen Limited; Kenya Institute of Education
(Garnishee) (Civil Suit 443 of 2011) [2025] KEHC 11376 (KLR) (Civ) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 443 OF 2011

JN MULWA, J

JULY 24, 2025

BETWEEN

MUTULU HOLDINGS LIMITED PLAINTIFF

AND

SEVEN FOURTEEN LIMITED DEFENDANT

AND

KENYA INSTITUTE OF EDUCATION GARNISHEE

RULING

1. There are two (2) applications before the Court for determination, the one dated 15/7/2024 filed by Kenya Institute of Education (hereafter the Garnishee's motion) and the other is dated 09/09/2024 filed by Mutulu Holdings Ltd (hereafter the Plaintiff's motion).
2. The Garnishee's motion dated 15/7/2024 premised on Section 3A & 34 of the [Civil Procedure Act](#) (CPA), seeks inter alia:
 - a. That the Court do issue an order that the moneys deposited in Kenya Commercial Bank (KCB) High Court Branch, Account Number - XXXXXXXXXXXX, Account Name – Lumumba & Lumumba Advocates and LG Kimani Advocates be released to the Garnishee's advocate for onward transmission to the Garnishee.
 - b. That costs of this application be provided for.
3. The motion is premised on grounds found at the supporting affidavit sworn by Wycliffe Alfayo of even date. The gist of his deposition is that this Court entered default judgment in favour of the Plaintiff on 08/12/2011 and later ordered that the sum of Kshs. 2,573,400/- due to Seven Fourteen



Ltd (hereafter the Defendant) from the Garnishee be attached to satisfy the decretal sum due to the Plaintiff. That later, this Court dismissed the motion filed by the Garnishee seeking to set-side the order nisi & absolute and the Defendant's motion seeking to set aside *ex parte* judgment thus prompting an appeal by both the Garnishee and Defendant before the Court of Appeal. That as a condition for stay of execution of the garnishee order, the garnishee amount of Kshs. 2,573,400/- was deposited in a joint account in respect of the appeal filed by the Garnishee to the Court of Appeal, to wit, a bank account in the name of Lumumba & Lumumba Advocates and LG Kimani Advocates was opened with the sum therein being deposited in KCB High Court Branch Account Number – XXXXXXXXXXXX. He goes on to state that *ex parte* judgment in this matter was appealed before the Court of Appeal in COACA No. 17 of 2017, to wit, the said judgment was set aside alongside the Garnishee Order Nisi and Absolute. He further states that the difficulty in having the monies released was occasioned by the fact that the relevant parties to the deposited garnisheed amounts have since changed representation therefore it has proven impossible to have the signatories of the account approve the release of the sums therein. In conclusion he asserts that this Court ought to order the release of the decretal sum for onward transmission to the Garnishee.

4. The Plaintiff opposes the Garnishee's application by way of a replying affidavit deposed by Prof. Paul Musili Wambua dated 12/08/2024. He confirms that the Court of Appeal in COACA No. 17 of 2017 set aside the *ex parte* judgment along with the garnishee order nisi and absolute however feel short of ordering a refund of the monies already paid to the Plaintiff by the Garnishee. That in the absence of a specific refund order, the payment made to the Plaintiff was not deemed improper or subject to recovery thus the garnishee's motion lacks basis. He goes on to state that the Garnishee's claim for a refund disregards the unresolved financial obligations between the Garnishee and Defendant and thus cannot be justly refunded. That the Plaintiff has been exposed to financial uncertainty due to the protracted legal process therefore it is only fair and just to retain the funds in an account as security against any judgment that may be rendered against the Defendant. In summation he deposes that the Garnishee's motion lacks merit, is frivolous, is an abuse of the Court process as such it is in the interest of justice that the motion is dismissed with costs.
5. In rejoinder by way supplementary affidavit dated 04/09/2024, Wycliffe Alfayo iterates that on the backdrop of the Court of Appeal judgment, the Garnishee is an *ex-Garnishee*, the Plaintiff no longer a judgment-creditor and the Defendant no longer a judgment-debtor. He states that the Plaintiff is misguided on the fact that in absence of a refund order means the payment made to the Plaintiff was proper or subject to recovery whereas the purport of the Court of Appeal decision by setting aside the garnishee order is that the sum deposited therein ought to be refunded to the garnishee. That in the absence of a garnishee order there is no reason why the funds ought to continue being held in a joint account. He urged the Court to allow the Garnishee motion and that if the Plaintiff sought to attach before judgment it ought to move the Court appropriately.
6. On its part, the Plaintiff's motion dated 09/09/2024 is equally brought pursuant to Section 1A, 1B & 3A of the CPA, seeks *inter alia*:
 - a. Spent.
 - b. Spent.
 - c. That the honorable Court be pleased to order that the sum of Kshs. 2,573,400/- together with the accrued interest to date held in the joint Account Number XXXXXXXXXXXX - Lumumba & Lumumba Advocates and LG Kimani Advocates, at KCB be deposited as security in a joint interest earning account to be opened in the name of the Plaintiff's and Defendant's Counsel pending the hearing and determination of this suit.



- d. That the honorable Court be pleased to direct that no withdrawals transfers or any dealings whatsoever shall be made in respect of the said joint interest-earning account without the prior written consent of both counsel or by an order of this honorable Court.
 - e. That the costs of this motion and entire suit be borne by the Garnishee.
7. The motion is premised on grounds found in the supporting affidavit sworn by affidavit deposed by Prof. Paul Musili Wambua on even date. The gist of his deposition is a restatement of his response to the Garnishee's application. However, he asserts that this Court lacks the requisite jurisdiction to entertain the reliefs sought in the Garnishee application as the same is an invitation for this Court to sit on appeal and or review the Court of Appeal's judgment. He states that it is just and equitable that the funds be preserved and transferred into a joint -interest earning account to be opened in the name of the counsel for the Plaintiff and Defendant to secure the interest of the Plaintiff pending the hearing and determination of the suit. That the Plaintiff has a legitimate interest in the funds deposited in the said interest-earning account whereas an outcome of the instant suit will determine the parties right to the funds. He maintains that given the protracted nature of litigation in the matter it is in the interest of justice the Court preserves the status quo by having the money deposited as security in a joint interest account. He concludes by stating that the Court ought to allow the motion as prayed.
8. The Garnishee opposes the Plaintiff's application by way of a replying affidavit deposed by Wycliffe Alfayo dated 17/09/2024. He assails the Plaintiff's motion by deposing that presently there is no judgment, no decree and no garnishee order whereas the sums were deposited as security pending an appeal that has since been determined. He equally takes issue with the Plaintiff's claim of having a legitimate interest in the funds as having no legal basis. That the Plaintiff's assertion that the garnishee continues to be bound by its legal obligation to the Defendant is premature and can only be made once there is judgment in the instant suit. He further states that for attachment before judgment to issue, the Plaintiff ought to have demonstrated that the Defendant is intent to delay execution of a decree, is about to dispose of its property or is about to remove its property out of the local limit and jurisdiction of the Court, of which has not been demonstrated. That even if the Court were to hold that the Plaintiff is entitled to attachment before judgment from the Defendant, the said sums to cannot be attached for reason that they do not belong to the Defendant. He surmised by stating that allowing the motion would be to exert punishment upon the Garnishee and Defendant before determining the latter's liability therefore the motion ought to be dismissed.
9. Directions were taken on disposal of the both motions by way of written submissions. The parties duly complied. That said, this Court has duly considered the material canvassed in respect of the two (2) motions and postulates that the issues for determination concern:-
- a. Whether the Court ought to order that the sum of Kshs. 2,573,400/- together with the accrued interest to date held in Account Number XXXXXXXXXXXX - at KCB be deposited as security in a joint interest earning account to be opened in the name of the Plaintiff's and Defendant's Counsel pending the hearing and determination of this suit?
 - b. Whether the Court ought to order that the moneys deposited in Account Number XXXXXXXXXXXX - at KCB be released to the Garnishee's advocate for onward transmission to the Garnishee.
 - c. Who ought to bear the costs of the respect motions?

Whether the Court ought to order that the sum of Kshs. 2,573,400/- together with the accrued interest to date held in Account Number XXXXXXXXXXXX - at KCB be deposited as security



in a joint interest earning account to be opened in the name of the Plaintiff's and Defendant's Counsel pending the hearing and determination of this suit?

10. The Plaintiff's motion invokes among others Section 3A of the CPA which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court", to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR and requires no restatement.
11. The history leading up to the rival application has been captured in the respective parties' affidavit material whereas the Court does not intend to restate the same. That said, the key take-away from the said affidavits is that the sum of Kshs. 2,573,400/- that the Plaintiff seeks to have deposited as security pending determination of this suit, were deposited in an interest earning account on the back drop of the Garnishee's application seeking stay of execution pending determination of an intended appeal to the Court of Appeal (Annexure WA3). Further, it must be remembered that pursuant to the decision of the Court of Appeal rendered on 17/03/2023, the ex parte judgment of 08/12/2011 and the garnishee order nisi of 31/05/2012 and order absolute of 19/06/2012 were set aside with the appellate Court further directing that the Defendant file and serve its defence within fourteen days of its decision (Annexure WA5). As is, the Plaintiff's suit has yet to be heard and determined on its merits yet the latter seeks the sum of Kshs. 2,573,400/- be applied as security pending hearing and determination of the instant suit.
12. With the foregoing in reserve, the Court garners from the Plaintiff's salient relief and arguments in support thereof that what has been sought for is subtle order for attachment before judgment by way of an order of security of the sums in account number XXXXXXXXXXXX prior to determination of Plaintiff's suit. Specifically, attachment of property before judgment is provided for in Order 39 of the CPR. Relevant the nature of the order as sought by the Plaintiff is Order 39 Rule 1, 2 & 5 of the CPR.
13. The Court of Appeal in the case of *Kuria Kanyoko t/a Amigos Bar and Restaurant v. Francis Kinuthia Nderu & Others* [1985] 2 KAR 126 p. 126 had the following to say on Order 38 Rule 5 of the previous CPR (equivalent of current Order 39 rule 5 and 6) that:

"The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 5 namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with the intent to obstruct or delay any decree that may be passed against him."
14. I further associate myself with the rendition by Kasango, J. in *Shiva Enterprises Limited v Jivaykumar Tulsidas Patel T/A Hytech Investment*, (2006) eKLR, where the following was stated:

"That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the plaintiff invoked has to be appropriately exercised to ensure that a party meets the aforesaid high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the plaintiff against the defendant's act aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the defendant before judgment is entered against him."
15. Adjunct to succeeding on a quest for attachment before judgment is that a prima facie case must be established. As to the nature of a prima facie case the same was settled by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. With the above in reserve, the



thrust of the Plaintiff's argument is that the funds were deposited in a joint interest account to secure the interest of the Plaintiff pending determination of the suit, as such it has a legitimate interest in the funds deposited. It must be remembered the funds were deposited as result of garnishee proceedings and an ex-parte judgment entered against the Defendant. By dint of the judgment before the Court of Appeal both Garnishee Order Nisi and Absolute were set aside alongside the ex parte judgment entered as against the Defendant.

16. Notwithstanding, the Plaintiff's cause of action the same has yet to be litigated on, to wit, it can reasonably be concluded the Defendants has yet to be found indebted to the Plaintiff by way of judgment and or an admission of indebtedness by the Defendant. Further, as rightly argued by the Garnishee, it has yet to be adjudged a judgment-debtor to wit a Garnishee Order nisi or absolute may arise. In any event, the Plaintiff has failed to evince any material that the Defendant is about to dispose of his property or to remove it from the jurisdiction with the intent to obstruct or delay any decree that may be passed against him.
17. Without demonstration of the latter, it is difficult to conclude that a prima facie case has been established to warrant attachment before judgment. A consequence of which the Plaintiff's motion cannot succeed and is accordingly dismissed.

Whether the Court ought to order that the moneys deposited in Account Number XXXXXXXXXXXX - at KCB be released to the Garnishee's advocate for onward transmission to the Garnishee?

18. I believe on this question I need not belabor much on it. As earlier stated, there was ex parte judgment entered as against the Defendant. Further as a result of the ex parte judgment the Plaintiff initiated Garnishee proceedings as against the Garnishee and successfully managed to secure a garnishee order nisi and eventually absolute as against the Garnishee. The forestated orders were set aside on appeal with the Defendant being directed to file defence. The Court has considered the rival arguments as advanced by both the Plaintiff and Garnishee. I am not convinced by the Plaintiff's argument given that the Court of Appeal fell short of ordering a refund of the monies already paid to the Plaintiff by the Garnishee, the latter cannot move to have the same released to it.
19. It warrants mentioning that the Garnishee order was premised on the existence of the judgment entered as against the Defendant. The Garnishee Order nisi and absolute having been set aside there is no basis for the said funds to be deemed still owing to the Plaintiff on account of a decree of this Court that has since been set aside. The financial issues obtaining as between the Defendant and Garnishee are not a preserve of the instant suit as the Plaintiff cause of action is specifically as against the Defendant. Had the Plaintiffs intended to secure security before judgment it ought to have availed necessary material to convince the Court in its application earlier motion dated 09/09/2024. It failed to pick up the gauntlet on the same and cannot now be heard to say that this Court lacks the requisite jurisdiction to entertain the reliefs sought in the Garnishee application, as the same is an invitation for this Court to sit on appeal and or review the Court of Appeal judgment.
20. In the end the Court is inclined to allow the Garnishee application as prayed. In light of the earlier finding in respect of the Plaintiff's motion, the commending order on costs is that each party bears its own costs of the respective applications.

Orders accordingly!

DELIVERED DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JULY, 2025

.....
JANET MULWA.



JUDGE

