



**Fitidis Group of Companies & another v Civicon Company Limited;
Equity Bank (K) Limited Lavington Branch (Garnishee) (Civil Case
56 of 2015) [2024] KEHC 838 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE 56 OF 2015
MW MUIGAI, J
JANUARY 19, 2024**

BETWEEN

FITIDIS GROUP OF COMPANIES 1ST DECREE HOLDER

LIGHT STEEL BUILDING KENYA LTD 2ND DECREE HOLDER

AND

CIVICON COMPANY LIMITED JUDGMENT DEBTOR

AND

EQUITY BANK (K) LIMITED LAVINGTON BRANCH GARNISHEE

RULING

Notice of Motion

1. Vide a Notice of Motion dated and filed in court on 5th July, 2022 brought under Sections 1A 3A, of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules wherein, the Applicant sought the following orders that:
 - a. Spent
 - b. Spent
 - c. This honorable court be pleased to review and set aside the Ruling dated 27th June, 2022 specifically the finding at Para. 23.
 - d. An order be granted reviewing the error on the face of the law and holding that the various bank statements provided by the Garnishee are up-to date.
 - e. Cost of this Application be provided for.



2. The grounds upon which the application is premised are on the face of the said Application.

Supporting Affidavit

3. The application was supported by the Supporting Affidavit dated and filed in court on 5th July,2022, sworn by Kariuki Kingori, Manager Legal Services of Equity Bank (K) Limited wherein he deposed that vide Application dated 17th December,2020, Garnishee Order Nisi was issued by Hon. Ondieki (DR) on 21st December 2020 in respect of the judgement debtors accounts namely held by the Applicant at its Lavington Branch.
4. Depositing that this Honorable Court issued an order dated 2nd September,2021 declaring the Order Nisi issued on 22nd December,2020 absolute and the Applicant to release to the decree holder all monies held in deposit for the benefit of the judgement Debtor on account numbers:
 - a. Account number 0470299420869- civicon limited main account.
 - b. Account number 1410260576144- civicon limited
 - c. Account number 1410163418622- civicon limited-cash margin
 - d. Account number 1410163418664- civicon limited-cash margin
 - e. Account number 1410278531907- civicon limited
 - f. Account number 1410278531923- civicon limited.
5. It was deposed that the Applicant herein filed an application dated 13th September,2021 seeking to have the said order discharged and Ruling dated 27th June,2022 delivered dismissing the said Application with costs.
6. He lamented that he is advised by his Advocate on record that there is an error manifested on the face of the said Ruling Specifically Para. 23 as follows:

“... the Garnishee only attached bank statement illustrating transactions from 24th February,2020 up to 27th August,2020 and that the various attached bank statements seemed no to have been up to date. The court therefore found that the Garnishee has not approached court with unclean hands”
7. Depositing that the account statement referred to in para 23 of the Ruling was for the period between February,2020 to March 2021; and it therefore showed that at the time the Garnishee nisi was issued on the 24th December,2020 the account had no sufficient balance.
8. It was deposed that they advise that an account will indicate the date of the last transaction done on the account and not the account balance as of the date of production of the account statement. (attached and marked copy of account statements as of 5th July,2022), in which the last transaction still remains the last day of the transaction on the account despite the period being indicated on the account statement.
9. Further, it was deposed that the Applicant is legitimately apprehensive that the Decree Holder is likely to imminently execute the Applicant to its great detriment and prejudice as already evidenced in the demand notice it has issued to the Applicant. (annexed and marked copy of the Demand Notice dated 4th July,2022)



10. Deposing that the manifest error on the face of the Ruling dated 27th June,2022 specifically Para. 23 will greatly occasion tremendous prejudice on the part of the Applicant as a Garnishee as it will be forced to disburse its own funds, which it holds in deposit on behalf of third parties, to honor the consequential Orders from the said Ruling; further that without the timely intervention of this Honorable Court and the Grant of orders for stay this Application will be rendered nugatory; to the detriment of the Applicant.
11. They beseeched the court to grant a stay of execution of the Ruling dated 27th June,2022 and consequential Orders thereto and review its own Ruling as prayed in the instant Application to accord justice to all parties.

Grounds of Objection

12. Vide grounds of objection dated 15th July,2021 and filed in court on 3rd August,2022, wherein the Decree Holders/Respondent opposed the application dated 5th July,2022 on the following grounds that:
 1. The application herein is frivolous, vexatious, fatally defective and an abuse of the court process.
 2. The Applicant continues to come to this court with unclean hands having failed and or refused to comply with previous orders as issued by this Honorable Court.
 3. The matters which are the subject of this application have been heard and determined and therefore the matter is res judicata.
 4. There is no apparent error on the face of the Ruling and that Paragraph 23 of the Ruling dated 27th June,2022 was well considered by the judge and even the Registrar before then.
 5. The Ruling issued on 27th June,2022 considered the actions of the Garnishee in totally and found that the application lacked any merit.
 6. The current application lacks merit and should be dismissed with costs.
 7. The application is aimed at delaying the execution and restricting the decree holders from enjoying the fruits of their judgment.
 8. The matter was canvassed by written submissions however, the Respondent did not file their submissions at the time of writing this ruling.

Submissions

Applicant's written submissions

9. By the Applicant's written Submissions dated 10th June,2023 and filed in court on 14th June,2023, counsel for the Applicant raised the following issues for determination:
 - a. Whether the court misdirected itself in interpreting the statement of Accounts attached by the Applicant in reaching its conclusion; and
 - b. Whether it is lawful for the Decree Holder to attach the Garnishee's personal property in execution of a decree against the Judgement Debtor.
10. As to Whether the court misdirected itself in interpreting the statement of Accounts attached by the Applicant in reaching its conclusion, Counsel submitted that the Applicant in its role as a garnishee for



purposes of illustrating that it did not hold sufficient funds to satisfy the decretal sum, averring that for good measure and to discharge its neutral responsibility as a Garnishee, the Garnishee has attached the statements in the said application and further in the application dated 18th October, 2022 all indicating not holding any monies to warrant the garnishee nisi being made absolute with regard to the Applicant herein.

11. Credence was made on the case of International Bank Ltd vs SCOA Nigeria Ltd & Another, where the court while applying Section 83 of the Sheriff and Civil Process Act Cap S6, LFN 2004 whose provisions are similar to Order 23 Rule 1 held that:

“... the primary duty of a garnishee in garnishee proceedings is for the garnishee to appear in court upon receipt of the order Nisi, and show cause why the funds in the judgement debtor’s account should not be paid over to the Judgment Creditor in satisfaction of the judgement debt. This is done by an affidavit to show cause with relevant documents, disclosing the true picture, status of standing of the judgement debtor’s accounts at the time of the service of the Garnishee Order Nisi on it...”

12. It was contended that a bank statement is a summary of financial transactions that occurred at a certain institution during a specific time period. Averring that the account statement referred to in the Ruling was for the period between February, 2020 to March, 2021 showing that at the time the garnishee nisi was issued on the 24th December, 2020, the account had and still has no sufficient balance.
13. Submitting that an account statement will indicate the date of the last transaction done on the account and not the account balance as of the date of production of the account statement.
14. It was submitted on behalf of the Applicant that the court manifestly made an error reaching the conclusion that:

“... the Garnishee only attached bank statement illustrating transactions from 24th February, 2020 up to 27th August, 2020 and that the various attached bank statements seemed no to have been up to date. The court therefore found that the Garnishee has not approached court with clean hands”

15. Reliance was made on the holding of the court of Appeal decision in Barclays Bank of Kenya Ltd vs Kepha Nyabara & 191 Others, a Garnishee’s property cannot be subject to adverse action in realization of a debt due to judgment debtor.
16. It was contended that the Garnishee has approached the court with clean hands and prayed that the manifest error be arrested as the Applicant is at risk of being turned into a judgement debtor whereas its role is restricted to that of a garnishee.
17. On whether it is lawful for the Decree Holder to attach the Garnishee’s personal property in execution of a decree against the judgement Debtor, counsel relied on Order 23 Rule 1 of the Civil Procedure Rules, and submitted that from Order 23 the Garnishee is not a judgement Debtor. The attachment levied is against the judgement debtor’s property in the custody of the Garnishee which includes all monies held in account.
18. Averring that upon the payment of the monies (IF ANY) held by the Garnishee to a Decree Holder the garnishee shall remain discharged from its obligations to the judgment debtor to the extent of the amount Garnished. Contending that Garnishee is merely the agent of the principle debtor who is the judgment debtor hence would not ordinarily bear any personal responsibility for the principal debtor



unless it can be shown that the Garnishee has acted outside its mandate as an agent which the Decree Holder has failed to prove.

19. It was opined that the essence of Order 23 is not to offer an interpretation that the Garnishee would dig up its own recourses to pay for the costs where the amount owed to the judgement debtor cannot satisfy a decretal amount. Reliance was on the case of Societe Eram Shipping Co. Ltd & Others Vs Compagnie Internationale De Navigation [2003] ALLER 465, where it was stated that:

“... The Order took effect against the property of the judgement debtor. The property of the third party was in no way involved, save by the diminution of its debt to the judgement debtor. If the effect of an order in the... case would be to compel the third party to disburse its own funds, that would be very clear indication that the order was one which should never have been made”

20. It was the Applicant’s position that the Garnishee is not a judgement Debtor and certainly, the decree was not issued against the Garnishee hence the actions by the Decree Holder to execute the Decree against the Garnishee is unlawful for attaching the Garnishee’s personal property. Reliance was further made in the case of James G.K. Njoroge t/a Baraka Tools & Hardware Vs APA Insurance Company Limited & 3 Others [2018] eKLR to support his position, and submitted that this Honorable Court Discharge the Applicant from its obligations as a Garnishee having proved that it submitted a true account of the statement of Accounts for the said accounts.

Determination/Analysis

21. This Court considered the application for review and response and written submissions on record.
22. For the record there are various Judgment/Rulings pertaining to this substantive matter as follows;
- a. Judgment by Hon G.V.Odunga J (as he then was) of 5/2/2020 dismissed Counterclaim and entered judgment for Plaintiff USD 292,041.88
 - b. Rulings by DR MHC Hon E.M.Onalo 12/5/2021,1/9/2021on application of 17/12/2020 making decree nisi of 22/12/2020 absolute
 - c. Ruling by Hon G.V.Odunga J (as he then was) of 27/1/2022 setting aside regular judgment on conditions to be complied with in 45 days
 - d. Ruling by Hon G.V.Odunga J (as he then was) of 27/6/2022
And dismissed the application filed on 13/9/2021seeking to discharge the Applicant upon remitting to the Decree-holder all monies collectively held by the Applicant on behalf of the Judgment Debtor.
 - e. Ruling by this Court of 25/5/2023 where the Applicant sought orders of Contempt of Court as execution was levied pending stay of execution orders pending hearing and determination of the instant application for review of Ruling of 27/6/2022 particularly paragraph 23.
23. The Jurisdiction of this court is found in the Civil Procedure Rules, which provide for the powers of Deputy Registrars to hear some applications. Order 49 Rule 2, provides the circumstances under which a Deputy Registrar and Rule 7(1) Civil Procedure Rules thereof provide and outline for the sort of applications the Deputy Registrars may hear. The Ruling of

On 1/9/2021at Pg 5-6 of the Court proceedings, the Deputy Registrar found that the Applicant/ Garnishee had not made full disclosure and printed the bank statement upto the period ending August 2020. In 1Account, the Garnishee filed bank statement illustrating transactions from



24/2/2020-27/8/2020. The Bank Statements were not up to date. From the aforesaid history, the Garnishee did not approach the Court with clean hands.

24. This excerpt was adopted by the Judge in the Ruling of 27/6/2022 at paragraph 23 which is the subject of review.
25. A party may file for review of Court Ruling/Judgment/Order/Decree under Order 45 CPR 2010 which provides;
 - (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
26. According to the Applicant there is a legal basis for review due to an error on the face of the record; ie paragraph 23 of Ruling of 27/6/2022 in essence is that the bank statements were not up to date and the Garnishee came to Court with unclean hands.
27. On the other hand, the Applicant asserted that the account statement referred to in the Ruling was for the period between February, 2020 to March, 2021 showing that at the time the garnishee nisi was issued on the 24th December, 2020, the account had and still has no sufficient balance to settle the judgment debtor's debt.
28. The Applicant also takes issue with execution levied against it, it is a banking institution, as it is not the judgment debtor but agent to the principal the judgment debtor and hence its assets ought not to be used to settle the judgment debtor's debt.
29. The Applicant went on to state that the Bank wants the Court to reconsider the law and the evidence before Court and come to a different decision which the could not do as it would be tantamount to sitting in appeal on Court's own judgment.
30. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.
31. In *National Bank of Kenya Ltd vs Ndungu Njau* Civil appeal 211 of 1996 1997 eKLR, the Court of Appeal belabored on what constitutes basis for review and what constitutes the basis for an appeal and considered as follows;

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which



has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

32. In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

33. The Court finds that there is no error on the face of the record as deposed, but difference of opinion in the finding of the Deputy Registrar and the Judge on the same issue, that the bank statements filed that were not comprehensive and both Courts found that the Applicant came to Court with unclean hands. There is no error on the face of the record but concurrent findings on the bank statements filed with regard to the garnishee nisi and later absolute which the Applicant finds wrong. The issue is best ventilated before an appeal.

Disposition

1. The Application for review of an error on the face of the record is not upheld, it amounts to this Court relooking bank statements and hopefully making a different finding this will be the 3rd Court relooking at the bank statements which amounts to the Court sitting on appeal which jurisdiction it lacks.
2. The Applicant shall file an appeal and stay of execution is granted for 90 days on condition the Applicant deposits 1,000,000/- in a joint account of both advocates on record for the parties pending appeal in Court of Appeal.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 19/1/2024.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

