



REPUBLIC OF KENYA



**KENYA LAW**

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**Epc Builders Limited v Kenya Medical Association; Stanbic Bank Kenya Limited (Upperhill Branch) & 2 others (Garnishee); Kenya Medical Properties Limited (Third party) (Civil Suit E35 of 2015) [2024] KEHC 4748 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4748 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**CIVIL SUIT E35 OF 2015**

**A MABEYA, J**

**APRIL 19, 2024**

**BETWEEN**

**EPCO BUILDERS LIMITED ..... PLAINTIFF**

**AND**

**KENYA MEDICAL ASSOCIATION ..... DEFENDANT**

**AND**

**STANBIC BANK KENYA LIMITED (UPPERHILL BRANCH) ..... GARNISHEE**

**EQUITY LTD KENYA LTD (MOI AVENUE BRANCH) ..... GARNISHEE**

**ABSA BANK KENYA PLC (HURLINGHAM BRANCH) ..... GARNISHEE**

**AND**

**KENYA MEDICAL PROPERTIES LIMITED ..... THIRD PARTY**

**RULING**

1. Before Court are two applications dated 18/9/2023 and 29/9/2023 respectively. The application dated 29/9/2023 was brought by the defendant under sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rules 1, 3 and 3, Order 51 Rule 1 and Article 50 of the *Constitution*.
2. It sought orders that the ruling delivered on 28/7/2023 by Mshila J and all consequential orders be reviewed, varied and or set aside. The application was supported by the affidavits of Dr. Brenda Obondo sworn on 29/9/2023 and 23/10/2023, respectfully.
3. It was contended that there was an error apparent on the Court record as the ruling was delivered without the prior determination of the preliminary objection dated 14/12/2021 by the applicant. That



the ruling was delivered in the absence of the defendant and finally that the decretal amount of Kshs. 277,423,862/= awarded had not been pleaded in the plaint or the application. That the respondent had pleaded Kshs. 491,276,015/= thus the court entered judgment on admissions in respect to a sum that was not sought by the respondent.

4. That the decree was not drawn in accordance with the ruling as it indicated that interest ran from 30/10/2014 contrary to the ruling. That the respondent did not forward the draft decree to the applicant for approval thus curtailing its right to a fair hearing. That the Court could not have determined the preliminary objection dated 14/12/2021 as it had not been filed at the time the ruling was delivered on 18/3/2021 and that the ruling was solely founded on the application dated 4/12/2022.
5. That the admission ought to have been specific, unambiguous and clear and an admission for a specific amount thus the judgment on admission was erroneously entered.
6. The respondent opposed the application vide the replying and further affidavit of Ramji Devji Varsani sworn on 11/10/2023. It was contended that the application had not met the threshold for granting a review. That the decree was regular and the applicant's failure to attend delivery of the ruling was not the respondent's fault as a judgment notice had been served on 27/7/2023.
7. That the issues raised in the preliminary objection dated 14/12/2021 were conclusively determined in the ruling of 18/3/2021 and that the objection had been dismissed by Ngenye J.
8. That the amount of Kshs. 491,276,015/= prayed for in the amended plaint was a summation of the principal amount plus interest. That the amount of Kshs. 277,423,862/= was the principal amount admitted by the respondent while Kshs. 213,852,153/= was interest as at 30/10/2014.
9. The 2<sup>nd</sup> application dated 18/9/2023 was brought by the plaintiff under Order 23 Rules 1 & 2, Order 51 Rules 1 & 3. It sought that the garnishees do appear to show cause why the garnishee order nisi should not be made absolute and why the amount of Kshs. 277,423,862/= plus costs and interests should not be released to the decree holder.
10. It was supported by the affidavit of Ramji Devji Varsani sworn on 18/9/2023. It was contended that judgment of Kshs. 277,423,862/= was entered against the defendant on 28/7/2023 but had not been settled. That the garnishees were indebted to the judgment and that they held funds belonging to the defendant in account nos. 0100004469989, 0470298408112 and 045115582, respectively.
11. The 1<sup>st</sup> garnishee responded to the application vide the replying affidavit of Samuel Kahuhu sworn on 2/11/2023. He averred that account number 0100004469989 did not belong to the defendant debtor and the 1<sup>st</sup> garnishee was therefore unable to satisfy the order nisi dated 2/9/2023 owing to that error.
12. The third party responded to the application vide the replying affidavit of Dr. John Wamutitu Maina sworn on 11/10/2023. He averred that the third party was not a party to the suit and had only been joined in the garnishee proceedings to protect its interest against attempts by the plaintiff to falsely and irregularly attach its bank account. That account no. 0100004469989 belonged to the third party who was not the judgment debtor.
13. The plaintiff filed a further affidavit of Ramji Devji Varsani sworn on 19/10/2023. He stated that the defendant owned majority shares (999/1000) in the third party as per the attached CR-12. That the suit property on which the apartment, office block and associated external works were built was owned by the third party.



14. The defendant opposed the application by the affidavit of Dr. Brenda Obondo sworn on 11/10/2023. He averred that the ruling of 28/7/2023 was delivered in the absence of the defendant and was thus irregular. That the decree was irregular as it was extracted without the defendant's involvement or approval, was not drawn in accordance with the judgment and indicated that interest ran from 30/10/2014 contrary to the ruling.
15. That the bank details were obtained in a manner that contravened the provisions of the [Data Protection Act](#) No. 24 of 2019.
16. The parties filed their respective submissions dated 10/11/2023, 23/10/2023 and 23/10/2023, respectively which the Court has considered.
17. There are two issues for determination. The first is whether the ruling delivered on 28/7/2023 ought to be reviewed and the second is whether the order nisi herein should be made absolute against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> garnishees.
18. On the first issue, it is well settled that review has to be strictly confined to the scope and ambit of Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#) and Section 80 of the [Civil Procedure Act](#). That there has to be an error on the face of the record, or that there is discovery of new evidence that was not in the possession of an applicant or could not be discovered after exercise of diligence at the time the ruling was made and for sufficient reason.
19. In the present application, the applicant has relied on the ground that there was an error apparent on the face of the record. That the Court failed to determine the preliminary objection dated 14/12/2021 before delivery of the ruling, that the ruling was delivered in the absence of the defendant and that the decretal amount of Kshs. 277,423,862/= awarded was not pleaded in the amended plaint.
20. I have seen the ruling of 28/7/2023 by my sister Mshila J. In it, the Court entered judgment on admission for Kshs. 277,423,862/= plus costs and interest at court rates. Though the defendant claimed that the amount had not been pleaded in the amended plaint, I note that at paragraph 11 of the said amended claim, the plaintiff/decreed holder clearly pleaded the amount of Kshs. 277,423,862/= as the principal debt and Kshs. 213,852,153/= as interest thus totaling to Kshs. 491,276,015/=.
21. Further, in the ruling, the Court clearly identified the admitted debt to be Kshs. 277,423,862/= from the defendant's letter dated 12/8/2014. Anything over and above that figure was interest which the Court did not award or consider appropriate.
22. In this regard, there was no error apparent in the ruling or consequent decree and this ground fails.
23. On the ground that the ruling was delivered in the absence of the defendant, I note that absence of parties does not hinder a Court from delivering its judgment and such absence does not invalidate the ruling or judgment. In any case, there was on record evidence of service of the judgment notice sent out to the parties on 27/7/2023. Accordingly, the allegation that the defendant was not notified of the ruling lacks merit and is dismissed.
24. As regards the ground that the ruling was delivered before the determination of the preliminary objection dated 14/12/2021, that issue was raised on 20/6/2022. The Court observed that a similar objection had been determined by Ngenye J and saw no purpose in re-litigating the same. In the circumstances, if the defendant was aggrieved thereby, it should have appealed against the same. I therefore find no merit on the same and I dismiss the same.
25. In the premises, I find no merit in the application dated 29/9/2023 and the same is hereby dismissed.



26. The second issue is whether the garnishee order nisi ought to be made absolute as against the garnishees.
27. The word garnishee proceedings is described in the *Black's Law Dictionary*, 10<sup>th</sup> Edn to mean: -
- “A statutory proceeding whereby a person’s property, or credit in possession or under control of, or owing by, another are applied to payment of former debt to third person by proper statutory process against debtor and garnishee.”
28. This is provided for under Order 23, rule 1 of the *Civil Procedure Rules, 2010*. In order to succeed, an applicant must establish that, he has an unsatisfied decree against a judgment debtor and that the garnishee holds funds for or is indebted to the judgment debtor.
29. There is no dispute that there is an unsatisfied decree. In *Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225, it was held that: -
- “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: see *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788.
- 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. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days’ notice, the order nisi operates as the notice.
- As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: see *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be ‘attached’, again derived from Norman-French. But the ‘attachment’ is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay.”
30. The first stage was already completed and garnishee nisi orders were issued on 2/9/2023. All that remained was the second step wherein a determination has to be made whether the garnishees have satisfactorily shown good course why the garnishee nisi should not be made absolute.
31. The 1<sup>st</sup> garnishee responded to the application and alleged that though it held the account cited by the plaintiff, the same did not belong to the defendant.
32. The third party joined the proceedings and averred that the garnisheed account belonged to it. That it had its own legal personality and had not been sued in the claim nor did it owe any debt to the defendant thus the order nisi ought to be set aside.
33. The plaintiffs answer to the third party’s claim was that the defendant owned 999 out of 1000 shares in the third party. It produced the CR12 to prove that fact and a copy of the certificate of title showing



that the suit property upon which works that resulted in the claim were executed was owned by the third party.

34. I have seen the CR12 produced by the plaintiff. Though the defendant is the majority shareholder in the third-party, there is also a minority shareholder whose interests must be considered before adverse orders are issued against the third party. I also note that the third party is a registered company which has its own legal personality.
35. The plaintiff is seeking to pierce the third party's corporate veil through garnishee proceedings. That cannot do. There are elaborate procedures for doing so. Even if the third party was 100% owned by the judgment debtor, still the garnishee proceedings could not succeed until and unless proper proceeding are lodged and prosecuted for the purpose of attaching the interests of the defendant in the third party.
36. In this regard, it would be unlawful to order the 1<sup>st</sup> garnishee to release funds belonging to a totally different party from the defendant in order to settle a decree which has nothing to do with the third party.
37. In this regard, the order nisi issued on 2/9/2023 is hereby set aside.
38. The 2<sup>nd</sup> and 3<sup>rd</sup> garnishees did not participate in the proceedings and did not show course why garnishee absolute orders should not be entered against them. Consequently, the plaintiff's allegations against the 2<sup>nd</sup> and 3<sup>rd</sup> garnishees remained uncontested. In the circumstances, there is no reason to deny the plaintiff the orders sought as against the 2<sup>nd</sup> and 3<sup>rd</sup> garnishees.
39. In the end, this Court hereby issues the following final orders: -
  - a. The application dated 29/9/2023 is hereby dismissed with costs to the plaintiff/decree holder.
  - b. The application dated 18/9/2023 is found to be partly merited and the decree nisi issued on 2/9/2023 is hereby made absolute as against the 2<sup>nd</sup> and 3<sup>rd</sup> garnishees.
  - c. The decree nisi issued on 2/9/2023 as against the 1<sup>st</sup> garnishee is hereby set aside and the freezing order against account number 0100004469989 held by the 1<sup>st</sup> garnishee is hereby lifted and costs of Kshs.50,000/- awarded to the garnishee.
  - d. The plaintiff/decree holder is hereby awarded costs for the application dated 18/9/2023 to be paid by the defendant.

It is so ordered.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF APRIL, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

