



**Safaricom Limited v King’oo & another (Civil Appeal
174 of 2021) [2024] KEHC 4698 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 174 OF 2021**

FROO OLEL, J

MAY 3, 2024

BETWEEN

SAFARICOM LIMITED APPELLANT

AND

DICKSON KIMWELI KING’OO 1ST RESPONDENT

IVESCO ASSURANCE COMPANY LIMITED 2ND RESPONDENT

JUDGMENT

A. Introduction

1. This appeal arises from the ruling and order of Honorable E.M Analo (SRM) dated 13th October 2021, where he confirmed the Garnishee Order Nisi issued on 19th August 2021 and made it absolute and further for avoidance of doubt, the learned Magistrate did order that, the garnishee (Appellant herein) to release to the decree holder(1st respondent herein) all the monies (or such monies as are sufficient to answer to the decree issued on 9th October, 2018) held in Mpesa Paybill No 980100 and 980101. The Applicant (1st respondent herein) too was granted costs of the said Application, which was to be borne by the 2nd respondent herein

B. The Pleadings

2. The 1st Respondent had filed the notice of motion dated 9th August 2021 seeking that a Garnishee order-Nisi do issue as against Safaricom Limited directing that all monies belonging to Ivesco Insurance Co Ltd, the judgment debtor herein held in the following accounts; Mpesa Paybill NO 980100 and 980101 be attached to answer the decree herein, the amounts unsatisfied being Ksh.1,639,140.00/= inclusive of the accrued interest.
3. The application was supported by grounds on the face of the said application and the supporting affidavit of the applicant, where he deponed that he had prosecuted his suit as against the 2nd



respondent herein and had a valid decree issued as against them for a sum of Ksh.3,985,336.00/= plus costs and Interest calculated at Kshs.221,358.00/=. He had managed to recover a total sum of Kshs.3,133,455.00/= leaving a balance of Kshs.1,223,239.00/=. which sum had attracted further interest of Ksh.415,901.00/= making the sum due and payable under the decretal sum to be Kshs.1,639,140.00/=. The 2nd respondent had failed to settle this sum and he believed that the garnishee was holding this sum under the MPESA PAYBILLS 980100 & 980101. The trial court heard this Application and issued the Garnishee order Nisi, at the Ex-parte stage.

4. The Appellant/Garnishee did file a replying Affidavit sworn by one Daniel Ndaba, a senior legal manager who deponed that indeed it was true that the Mpesa paybill number 980100 and 980101, belonged to and was operated by the judgment debtor, but as at 27th August 2021, when the garnishee Nisi order was issued, the said accounts had Nil balance due to the fact that adverse orders had been issued as against the said paybill and all collection and withdrawals had been suspended. The garnishee therefore did not have any funds to satisfy the Garnishee order Nisi earlier issued.
5. The 1st respondent herein did file a further affidavit dated 2nd September 2021, wherein he accused the Appellant/Garnishee of making misleading statements and filing falsified records. At page 4 of the Mpesa statement filed, related to the period between 15.03.2021 to 28.07.2021. Further at page 6 the same related to the period between 30.06.2021 to 09.07. 2021. From the Mpesa statement Exhibited, the Garnishee had not provided Mpesa statement for the period January 2021 to 27.08.2021 as alleged and also there was no disclosure for the statement of affairs of the period between 23.08.2021 to 01.12.2021. The garnishee therefore had not made full and frank disclosure and had not discharged the burden of proof, as is required in law.
6. The Appellant/Garnishee in response to the further affidavit filed by the 1st respondent, did file their supplementary Affidavit dated 14 September 2021, where the applicant one Daniel Ndaba, confirmed that the information presented (the statements from the period between 01.01.2021 at 00.00hrs to 27.08.2021 at 23.59.59 hours) was extracted from the Mpesa G2 portal, the same was accurate and was extrapolated by one Mr.Makau Mwendu. The inactivity pointed out by the decree holder, was basically caused by suspension of operation orders issued as against the said accounts and the same were clear on the following pages;
 - a. Page 4 – 28.07.2021 at 12.47.55
 - b. Page 5 – 28.07.2021 at 12.50.15
 - c. Page 6- 30.06.2021 at 09.16.53
 - d. Page 7-09.07.2021 at 09.44.23
7. It was therefore the Appellant/garnishee contention that they had satisfied and discharged their obligation to show that as at the date of service of the Garnishee order Nisi, they did not hold any funds in favour of the decree holder and prayed to be discharged thereof. The trial magistrate did consider the entire evidence presented and held that there had not been full and proper disclosure by the garnishee of the sums they held in the two Mpesa paybill accounts and they seem to have conveniently printed out Mpesa accounts statements that were not accurate. For the said reason, the trial Magistrate did make the order that the Garnishee order Nisi be made absolute and the Appellant/garnishee to settle the sums due to the decree holder.
8. Being wholly aggrieved and dissatisfied by the Ruling/decree issued, the appellant did prefer this appeal and raised Twelve (12) grounds of Appeal namely;



- a. The learned magistrate misdirected himself in arriving at the conclusion that the Appellant/Garnishee failed to give an account of the 2nd respondent/Judgment Debtor's account and failed to address his mind to the entirety of issues presented in the Appellants/Garnishee Replying Affidavit sworn on 27th August 2021 and the supplementary Affidavit sworn on 14th September 2021
 - b. The learned trial magistrate misdirected himself by failing to appreciate that the Appellant/Garnishee's statement for Mpesa Paybill numbers 980100 and 980101 are up to date and are for the TIME PERIOD 01.01.2021 00.00.00 to 27.08.2021 at 23:59:59 and that the statements were not conveniently printed out
 - c. The learned trial magistrate misdirected erred in law and in fact in making a blanket condemnation of the Appellant/Garnishee by upholding enforcement of execution of the Garnishee order Absolute to the tune of Kshs.1,639,140/= without considering that there is no money in the 2nd respondent/Judgment debtor's Mpesa Paybill numbers 980100 and 980101 which cannot satisfy the decree herein.
 - d. The learned trial magistrate erred in law and in fact by engaging in an inquiry on the statements of account as to the extent of the 2nd respondents/Judgment debtor indebtedness as of any date before 27th August 2021 there being no dispute in that regard for his determination pursuant to Order 23 rule 5 of the civil procedure Rules.
 - e. The learned trial magistrate erred in law and in fact by stating that the Appellant/ Garnishee has not given full disclosure of the 2nd respondent/Judgment Debtor's Mpesa Paybill numbers 980100 and 980101.
 - f. The learned trial magistrate erred in law in failing to find that a Garnishee order Absolute cannot issue going by the rendered statements of the 2nd Respondents/Judgment Debtor's on Mpesa Paybill numbers 980100 and 980101.
 - g. The learned trial magistrate erred in law and in fact by failing to appreciate that the 1st Respondent/Decree Holder introduced new issues in their submissions and that submissions are not pleadings; which failure led the trial court to erroneously conclude that the Appellant/Garnishee has not given a true account on Mpesa Pay bill Numbers 980100 and 980101.
 - h. The learned trial magistrate failed to appreciate the submissions of the learned counsel for the Appellants/Garnishee by failing to determine the indebtedness of the Appellant/Garnishee.
 - i. . That in all the circumstances of the case, the finding of the learned Magistrate are insupportable in law or on the basis of the evidence on record.
 - j. The learned Magistrate erred in law and fact in taking into account extraneous factors in determining the Application before him.
 - k. The learned Magistrate erred in law and fact in making conclusive finding on issues of fact based on diametrically opposed affidavit of evidence.
 - l. The learned Magistrate erred in law and in fact by failing to consider the authorities tendered by the Appellant/Garnishee in their written submissions and thereby trashed the principle of stare decisis.
9. The appellant prayed that this appeal be allowed, the finding/ruling of the trial magistrate dated 13th October 2021 together with all consequential orders be set aside, a declaration be made that the



Appellant/Judgment debtor had made full disclose on its statement of Mpesa paybill No 980100 and 980101 and/or in the alternative if the court is in doubt the Appellant/Garnishee's officers be summoned to court to show cause and explain the nature of the statement of Mpesa Pay bill Numbers 980100 and 980101 to ascertain the liability of the Appellant/Garnishee. The Appellant also prayed for costs of this Appeal

D. Submissions

Appellant's Submissions

10. The appellant filed their submission dated 20th June 2023 and framed three (3) issues for determination; whether the Appellant/Garnishee had met the requisite threshold pertaining to full disclosure of the 2nd Respondent/Judgment debtor statement of accounts, Whether the learned trial magistrate erred in law and fact in making the order Nisi absolute and who should bear costs of this Appeal.
11. The yardstick for institution and scope of Garnishee proceedings was espoused under Order 23 rule 1(1) of Civil procedure Rules 2010. The pivotal consideration was the indebtedness of the Garnishee as stated in Ecobank Kenya Ltd Vrs True North Construction company Ltd & Another (2018) eKLR. The Appellant had been served with the Notice of motion Application and Garnishee Order dated 23rd August 2021 via electronic Mail on 27th August 2021 at 8.54 Am and in response thereto, the Appellant garnishee had filed various affidavits clearly showing that the Mpesa Pay bill numbers provided were for the Judgment debtor, but the same had Nil balances as at the time of service of the Garnishee order Nisi, on 27th August 2021 at 8.54 am.
12. Further the appellant, in response to the allegation made that it had provided inaccurate and statement of accounts which did not have full disclosure, did respond thereto by directing the court to the four Mpesa statements filed in relation to the aforesaid Mpesa Paybill Numbers. All the aforesaid Mpesa statements were all from the period 1st January 2021 to 27th August 2021; the first statement having transactions from 15th March 2021 to 28th July 2021, the other two statements only having transactions on 28th July 2021 and 30th June 2021 respectively while the last statement had transactions from 30th June 2021 to 9th July 2021. It was to be noted that the reason why the last transaction dates in the mpesa statement filed by the Appellant/Garnishee were 28th July 2021, 30th June 2021 and 9th July 2021 was because there were no transactions between the said dates and 27th August 2021 when the order Nisi was served upon the Appellant.
13. While the 1st respondent disputed the Mpesa statements provided on account of them being inaccurate, they did not tender any documents whereon the said claim was based. The Appellant therefore did contend that they had adequately discharged the burden to show that they did not hold any funds of the 2nd respondent/judgment debtor as at 27th August 2021. Reliance was placed on International Air Transport Association (IATA) & Another Vrs Akarim Agencies company limited & 2 others; Equity Bank limited (Garnishee)(2021) eklr, & Ngaywa Ngigi & kibet Advocates Vrs Ivesco Assurance company limited; Diamond Trust Bank (Tom Mboya & Koinage stree Branches), (Garnishee), (2020) Eklr where it was held that in order to discharge the burden, the Garnishee had to produce strong sufficient and convincing evidence that they had no funds in its hand or the debt is not due or payable.
14. Based on the evidence tendered, it was the Appellants contention that, the trial magistrate erred to make the order Nisi Absolute and direct the Garnishee to settle the decretal sum, yet it did not hold any funds of the decree holders' as at 27th August 2021. Reliance was again placed on the case of Ngaywa Ngigi & Kibet Advocates Vrs Ivesco Assurance company limited; Diamond Trust Bank (Tom



Mboya & Koinage street Branches), (Garnishee), (2020) Eklr & Maina Njuguna & Associates Vrs Ivesco Assurance Co Limited ; Family Bank Kneya Limited & 4 others (Garnishee), (2011) eKLR , to emphasize that the Garnishee order Nisi could only be made absolute where there was sufficient funds held to the credit of the Judgement debtor.

15. The appellant therefore prayed that this appeal be allowed with costs of prosecuting the Appeal

1st Respondents Submissions

16. The 1st respondent did file their submissions dated 24th August 2023, wherein they did submit that the Mpesa statements provided were not for the period in question. The Mpesa statement for account 980100 was for the period 15.03.2021 to 27.07.2021 and the 2nd statement for the same account was for the period represented as 28.07.2021. For Mpesa Account 980101, the statement produced represented the period between 30.06.2021 and 09.07.2021. The Appellant/Garnishee lawyers were conflicted as they had benefited from the said accounts as demonstrated by the provided accounts and therefore had not made full and frank disclosure as expected in law, but proceeded to conveniently print out incomplete statements which were incomplete and misleading.
17. There was non-disclosure and suppression of material facts in the course of the court proceedings and they urged this court not to close its eye to the mischief that, the Garnishee's advocate seem to perpetrate as they were the only beneficiaries of the said account as shown by the statement produced. Reliance was placed on Unicom limited Vs Diamond Trust Bank & Another (2020) eklr, Kilima Limited & Another Vrs Samuel Ruto- chairman & 21 others; Carewell Farmers company Ltd & Another (Interested parties), (2019) eklr & Standard Ltd Vrs Alfred Mincha Ndubi (2018) eklr , where courts had held that such conducts could not be countenanced by the court.
18. Pursuant to Section 107 of the Evidence Act, the burden of proof laid with the party who asserts the existence of a particular set of facts. It was therefore the Garnishee's burden to provide the correct statements of the 2nd respondent Mpesa till accounts, which had full entries and transactions to satisfy provisions of section 176 of the Evidence Act. The 1st respondent emphasized that the evidence provided by the Appellant/Garnishee did not constitute the full accounts and was therefore inadmissible Evidence. To the extent that the statements provided were misleading and inaccurate, the trial court was right to find that they had made a compelling case for the Garnishee order Nisi to be made absolute. Reliance too was placed on International Air Transport Association (IATA) & Another Vrs Akarim Agencies company limited & 2 others; Equity Bank limited (Garnishee)(2021) eklr, & Ngaywa Ngigi & kibet Advocates Vrs Ivesco Assurance company limited; Diamond Trust Bank (Tom Mboya & Koinage street Branches), (Garnishee), (2020) Eklr, to show that the Garnishee had not discharge the legal burden placed on them.
19. The 1st respondent therefore urged this court to find that this Appeal as filed was groundless, unmeritorious and prayed that the same be dismissed with costs.

Analysis and Determination

20. 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 Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

21. 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 Vs Varkey Ouseph AIR 1969 Keral 316.
22. 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 trial magistrate was right in confirming the Garnishee order Nisi and directing the appellant/Garnishee to settle the outstanding decretal amount owing to the 1st respondent decree holder.
23. 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.”
24. It is trite law that as soon as the Garnishee order Nisi is served on the bank, it operates as an injunction. It prevents the bank/Garnishee from paying money to its customer until the garnishee order is made absolute, or is discharged, as the case maybe. It binds the debt in the hands of the garnishee, and creates a charge in favour of the judgment creditor. What Garnishee order Nisi does is to freeze the sum in the hands of the bank until the Garnishee order is made absolute or is discharged. If the said order is made absolute, then the Garnishee bank becomes liable to pay the Decree holder. See Joachimson Vs Swiss Bank Corp (1921) 3KB 110 at 131, (1921) All ER Rep 92 at 102 per Atkin Lj.
25. The key question for consideration from the onset in this Appeal and which the Garnishee is called to unburden is the fact as to whether they were indebted to the Judgment debtor and if not, if they provide sufficient and convincing evidence that they do not have enough funds in their hands to settle the decree due. See; Ecobank Kneya ltd Vrs True North construction Company limited & Another (2018) eklr & International Air Transport Association (IATA) & Another Vrs Akarim Agencies company limited & 2 others; Equity Bank limited (Garnishee)(2021).
26. On the question of proof of as to whether the Garnishee had enough funds held in favour of the Judgment debtor, which should be used to settle the outstanding decree, the 1st respondents have gone to great lengths to show that the Mpesa statement provided for of account 980100 and 980101 were inaccurate, incomplete and misleading. The Garnishee had failed to provide full, frank and complete disclosure of the aforementioned accounts and therefore the learned magistrate was right to confirm



the decree Nisi issued and direct that they settle the outstanding decretal amount. The appellant/ Garnishee on the other hand averred that they had made full disclosure of the aforesaid accounts and had confirmed that as at 27th August 2021, when served, they did not hold any monies on behalf of the decree holder and therefore were wrongly condemned to settle the decree due to the 1st respondent.

27. The Section 107(1) of the *Evidence Act* provides that;

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist.”

Section 108 of the *Evidence Act* further provides that ;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side.”

28. I refer to The Halsbury’s laws of England, 4th Edition, Volume 17 at para 13 and 14 where it states that;

“The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.

{16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence.”

29. In the case of *Evans Nyakwana Vs Cleophas Rwanda Ongaro* (2015) eKLR it was held that

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

30. The Mpesa statement of Account No 980100 indicates that it was for the period 1st January 2021 to 27th August 2021, however the statement attached provided data for the period dated 15th March 2021 to 28th July 2021. For Account 980101, the period indicated is that the statement is from the period 1st January 2021 to 27th August 2021, while the statement attached provides data for the period from 30th June 2021 to 9th August 2021. According to the 1st respondent this shows that the statements provided were deliberately edited to conceal information and were meant to deliberately mislead court.



31. The Appellant/Garnishee countered this argument by stating that, while indeed it was true that the judgment debtor held and operated the two Mpesa accounts, as at the time the Garnishee order Nisi was served on 27th August 2021, the said accounts had nil balances. The accounts filed were accurate and as explained vide the supplementary Affidavit sworn on 14th September 2021, the reason why the last transaction dates in the Mpesa statements filed were on 28th July 2021, 30th June 2021 and 9th July 2021 was because there were no transaction between the said dates and 27th August 2021 when the order Nisi was served upon them.
32. Further in response to the objection raised, the Appellant/Garnishee did file a comprehensive supplementary affidavit sworn by one Daniel Ndaba, who explained that on being served with the Garnishee order Nisi, he had liaised with one Mr Makau Mwendwa who worked at the Mpesa team and requested him to access the G2 portal and extrapolate the Mpesa statements of the two accounts in question. The said Mr Makau Mwendwa did act as instructed and a certificate of electronic Evidence was filed to confirm the same.
33. The inactivity shown in the statement provided was due to several suspension of operation orders that had been issued on various dates as against the said account, which he specified. They had therefore made full and frank disclosure of the Judgment debtors' statement of Affairs. This specific averment by the Garnishee on suspension of operations of the said accounts by Appellant were never traversed by the 1st respondent, who then had the evidential burden to prove otherwise and was the party, who would fail without further evidence being adduced.
34. Further, while it is true that the Mpesa statements provided by the Garnishee were scanty and indeed created a strong suspicion of the same being meddled with, the same just remained mere speculation. There was no evidence tendered whatsoever by the 1st respondent the basis upon which their allegation could be held as true. It is also trite law that suspicion, however strong cannot be the basis upon which a conviction/culpability is founded no matter how strong it is, unless supported by independent verifiable evidence.
35. Finally, what was in issue was if the Appellant/Garnishee held funds in favour of the judgment debtor as at 27th August 2021. The accounts clearly show that the Mpesa paybill were inactive from end of July 2021 and/or early July 2021. The learned magistrate thus erred in his determination to the effect that the Appellant/Garnishee had not provided full and frank disclosure and/or indeed held funds in favour of the judgment debtor, which could be used to settle the decree held by the 1st respondent.

Disposition

36. The upshot, having exhaustively analyzed all the issues raised in this appeal, I do find that this Appeal has merit. The ruling/order of Hon E.M Analo (SRM) dated 13th October 2021 making the Garnishee order Nisi- Absolute is hereby set aside and the 1st respondents Application dated 9th August 2021 is hereby dismissed.
37. Each party is to bear their own costs.
38. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 3RD DAY OF MAY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 3rd day of May, 2024



In the presence of: -

Ms Edna for Appellant

Mr. Muuo for Respondent

Sam Court Assistant

