



Gatundu & Co Advocates v Penelly Construction & Engineering Limited (Civil Case E819 of 2021) [2024] KEHC 6857 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E819 OF 2021
FG MUGAMBI, J
JUNE 7, 2024**

BETWEEN

GATUNDU & CO ADVOCATES APPLICANT

AND

PENELLY CONSTRUCTION & ENGINEERING LIMITED RESPONDENT

RULING

Background

1. There are 2 applications pending for determination before this Court. The first application is the one dated 22nd September 2021 in which the advocate sought to attach the arbitral award and decree in favour of the client against the Rural Electrification Authority (REA). In the alternative the advocate sought to have the defendant ordered to furnish security equivalent to Kshs. 39,311,456.68/=.
2. The genesis of the application and suit filed by way of an Originating Summons was an advocate/client relationship that existed between the parties whereby the advocate represented the client in an arbitration against the REA in a claim of Kshs. 373,503,583/=. The parties entered into a legal fees agreement dated 22nd December, 2020 by which the plaintiff's law firm would be entitled to 8% of the total arbitral award and filing fees of Kshs. 75,000/=.
3. The advocate claims that the client has no known assets and has no financial capacity nor liquidity to pay the said legal fees hence the fees agreement. The advocate further avers that the client's act of changing their Advocate when the arbitration was on going was to frustrate the execution of the said fees agreement. The plaintiff submitted that it had no other source of securing payment of their legal fees apart from the pending arbitral award.



4. The advocate secured an interlocutory judgment against the client on 1st November, 2021. The interlocutory judgment was set aside by this court vide a ruling of 10th November 2023 and directed that the Originating Summons proceeds to hearing. The advocate had filed a garnishee application which was also dismissed following the setting aside of the interlocutory judgment.
5. It is on the basis of the ruling of 1st November 2021 that the advocate filed the 2nd application of 30th January 2024 seeking to have the amount of Kshs. 39, 311, 456.68/= deposited in court by the garnishee pursuant to garnishee order nisi issued on 24th April 2023 attached before judgment to be applied to secure the money decree that may issue in this matter pending the hearing and determination on of the Originating Summons herein.
6. The grounds of the application of 30th January 2024 is that the client has no known attachable assets capable of satisfying any decree that this Honorable Court may issue eventually. The advocate submitted that the client had not furnished any proof of attachable assets or bank statements to prove they are liquid enough.
7. The advocate argues that since the security of decree already exists and is easily and conveniently available in form of the money deposited in court herein in the sum of Kshs 39,311,456.68/=, he prayed that the same monies be attached as security before judgment.
8. The 2nd application is dated 30th January 2024, which seeks that the sum of Kenya shillings thirty-nine million, three hundred and eleven thousand and four hundred and fifty-six and sixty-eight cents (kshs. 39, 311, 456.68/=) deposited in court by the garnishee herein pursuant to garnishee order nisi issued on 24th April 2023 be attached before judgment forthwith and the same be applied to secure the money decree that may issue in this matter.
9. The application is based on the averment that the respondent has no known attachable assets capable of satisfying any decree that this Honorable Court may issue eventually.
10. The client responded to the application of 30th January 2024 by filing a notice of preliminary objection on the grounds that this Court had by its ruling of 1st November 2021 determined the garnishee proceedings and that the present application was therefore *res judicata*.

Analysis and determination

11. This court has carefully considered the pleadings, responses, submissions, evidence and authorities cited by the parties. The first issue for determination is whether the application of 30th January 2024 is *res judicata*.
12. It is common knowledge that this Court vide a ruling dated 10th November 2023 allowed an application setting aside an interlocutory judgment that had been entered against the defendant on 1st November, 2021. Consequently, the Court dismissed an application filed by the plaintiff, seeking garnishee orders. Part of that decision read as follows:

“Having set aside the default judgment herein, it follows that the garnishee application dated 20th April, 2023 automatically collapses as the garnishee proceedings are not grounded on a decree of the court as required by Order 23 rule 1 of the *Civil Procedure Rules*.”
13. I have taken note that the present application is brought under section 63(e) of the *Civil Procedure Act*, Orders 37 and 52 rules 14(4), & (6) and Order 5 rule 1 of the *Civil Procedure Rules*. The application of 20th April, 2023 which the Court dealt with and dismissed was filed pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 and Order 23 of the *Civil Procedure Rules*.



14. Following the setting aside of the interlocutory judgment, the present application seeks orders for the deposit of security before judgment (pre-judgment attachment). This is a measure that this Court can impose under certain circumstances to protect the plaintiff from the risk that if the judgment is in their favour, the defendant will not be able to pay the awarded sum. Essentially, it ensures that there are funds or assets set aside to satisfy the judgment before the case is decided.
15. The orders sought are distinguishable from the application of 20th April, 2023 which sought garnishee orders post judgment. In addition, the parties in the present application are the advocate and client. Although the garnishee application arose out of the present suit, the application of 20th April 2023 was between the advocate and the garnishee, Renewable Energy Corporation.
16. The long and short of this is that the defendant has not proved to the required threshold as laid out in *Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) that the application before the Court is res judicata. The Preliminary Objection raised on 26th February 2024 by the defendant therefore fails. This paves way for the question whether the prayers sought in the 2nd application should be allowed.
17. The jurisprudence regarding deposit of security before judgment is quite clear and settled. In *Kuria Kanyoko T/A Amigos Bar and Restaurant V Francis Kinuthia Nderu, Helen Njeru Nderu & Andrew Kinuthia Nderu*, (1988) 2KAR 126, at p.127 the court pronounced itself thus:

“The power to attach before Judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Ord.38, r.5, namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”
18. I also align myself with the findings of the court 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.”
19. The purpose of the procedure is to secure a plaintiff against any attempt on the part of a defendant to defeat the execution of any decree that may be passed or to delay the proceedings in the plaintiff’s case. The court is forewarned that having not had the opportunity to try the case, the court has to trade carefully so as not to hamper the equal protection to the law that both parties are entitled to. The application must not rest on an apprehension that has no practical or evidentiary basis.
20. Given this background, I observe that the primary concern expressed by the advocate is the client’s lack of known assets within the jurisdiction and their current lack of liquidity. Under the Order 39 *procedure*, when applying for security before judgment, the respondent has the right to demonstrate why they should not be required to provide security. This is because the respondent is typically in



the best position to present evidence and information of their financial capability that is within their knowledge. Order 39, Rule 2, states as follows:

“Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1. (2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.”

21. This court notes that the client herein has not provided any evidence of liquidity or known assets to discredit the advocate’s claim. The parties both confirm the existence of the Consent Agreement on Legal Fees dated 22nd December 2020. The existence of the agreement does not in itself satisfy the high standards of non-liquidity as alleged by the advocate. The said agreement is on the face of it executed by the advocate and the client and is the basis of the advocate’s claim in this suit.
22. The agreement provides in part that:
 - b. Penelly Construction and Engineering Company Limited shall pay the sum of Kshs. 75,000/= to facilitate the arbitration.
 - c. Penelly Construction and Engineering Company Limited shall after the hearing and determination of the arbitration pay 8% of the total award to the firm of advocates.”
23. I am satisfied that the claim by the advocates is on the face of it prima facie claim to which the client has not presented evidence of financial capability to pay. I however agree with the client that the amount sought to be attached is not commensurate with the agreement between the parties. Be that as it may, I am convinced that a case has been made out for the attachment of monies equivalent to the amounts stated in the legal fees agreement between the parties. I see no reason as to why the same should not be attached from the monies held by the now discharged garnishee.
24. The same shall be calculated based on 8% of the arbitral award of Kshs.373,503,583/= together with disbursements of Kshs. 75,000/= which adds up to Kshs. 29,955,286.64. On the amount will be added a provisional amount for costs of this application and of the suit should the advocate be successful, which amount is a contingency of Kshs. 500,000/=.

Disposition

25. The advocates 1st application is overtaken by events and is therefore spent. The 2nd application is successful in as far as the amount to be attached in court shall be Kshs. 30,455,286.56. The rest of the monies shall be released and paid out to the client forthwith. The costs of this application shall await the outcome of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7TH DAY OF JUNE 2024.

F. MUGAMBI
JUDGE

