



Kioko t/a Urbanus K & Associates Advocates v Kenya Commercial Bank & 2 others (Miscellaneous Application E265 of 2021) [2024] KEHC 10925 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E265 OF 2021
DO CHEPKWONY, J
SEPTEMBER 20, 2024**

BETWEEN

**URBANUS KIOKO T/A URBANUS K & ASSOCIATES
ADVOCATES APPLICANT**

AND

KENYA COMMERCIAL BANK GARNISHEE

AND

TRIDENT INSURANCE COMPANY LIMITED RESPONDENT

AND

SAFARICOM PLC GARNISHEE

RULING

1. The Applicant filed Notice of Motion application dated 1st August, 2024 pursuant to Order 1A, 1B, 3A of the *Civil Procedure Act* and Order 23 Rules 1, 3, and 10 of the Civil Procedure Rules in which it seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That the Garnishee do appear before this court on an appointed date and time to show cause why the Garnishee Order nisi should not be made absolute and the outstanding sum of Kshs 127,869.70 being the decretal sum herein be released to the Decree Holder together with costs of these garnishee proceedings being Kshs 50,000/=
 - d. That upon hearing of the application the court be pleased to grant a garnishee order absolute in terms of prayer number 3.



- e. That the costs of this application be borne by the Judgment Debtor and/or the 1st and 2nd Garnishees jointly and severally from the judgment debtor's funds held by the garnishees in Account number 1121577XXX held at Kenya Commercial Bank Nairobi High Court Branch And Safaricom Mpesa Paybill Number 985850.
2. The Application is based on the grounds as set out on its face of it and the Supporting Affidavit of Urbanus Kioko sworn on the instant date. According to the Applicant, he obtained judgment against the Respondent for the taxed Advocate Client Bill of costs of Kshs. 80,000/= as contained in the Certificate of Taxation dated 15th January, 2024 with interest thereon at the rate of 14% per annum from 28th February, 2022 until payment in full. which makes the total amount to be Kshs 127,869.70/ =.
3. The Applicant holds that he is apprehensive that the Respondent may withdraw the funds in its account if the Order nisi is not issued. He contents that no prejudice will be suffered by the garnishees as funds are held on behalf of the Judgment Debtor who is obligated in law to satisfy the decree. It is the Applicant's contention that the Respondent holds account with the Kenya commercial bank and mpesa paybill which can satisfy the Decretal sum and costs. That it would be imperative and in the interest of justice that the court issues a Decree nisi be issued immediately to ensure the Applicant is not kept away from enjoying fruits of the judgment and grants the orders sought so as to allow the Decree Holders the opportunity to recover all the amounts due and owing.
4. The 2nd Garnishee filed Replying Affidavit which was sworn by Sheila Cherotich Bii, Data Analyst in Law enforcement Liaison sworn on 19th August, 2024 in the response to the application. The 2nd Garnishee confirms that the Respondent holds and operates paybill number 985850 which sum holds a sum of Kshs 28,281,629.17/= which is sufficient to satisfy the unpaid Decree of Kshs 127,869.70, exclusive of costs which will abide the outcome of the garnishee proceedings. The 2nd Garnishee is however urging the court to grant it costs on the application . The 2nd Garnishee also undertakes to release the unpaid decree as well as accrued interest and costs of the garnishee proceedings less its costs upon service of the Garnishee Order Absolute. The 2nd Garnishee also prays to be discharged from the proceedings upon determination of the matter.
5. This matter came before the court on 19th September, 2024, for interparties hearing of the application, Ms. Sarenge, counsel holding brief for Mr. Kioko, Counsel for the Applicant indicated that the Garnishee Order Nisi was served upon all parties and that the 2nd Garnishee had filed a Replying Affidavit indicating that it has sufficient sums to settle the decretal sum in question. She therefore urged the court to render the Garnishee Nisi Absolute and that the costs of the garnishee proceedings be adopted as Kshs.50,000/=.
6. Ms. Ojong'a, Counsel for the Respondent confirmed to court that the 2nd Garnishee has sufficient funds to satisfy the decretal sum and is thus not opposed to the Garnishee Nisi being made absolute. He equally prayed for costs of Kshs 50,000/= to be awarded to the 2nd Garnishee and the same be borne by the Judgment Debtor.

Analysis and Determination

7. Having carefully listened to both counsel for the Applicant and 2nd Garnishee, this court finds that the 2nd Garnishee is not opposed to settling the decretal sum owing to the fact that the Mpesa Paybill account they hold for the Judgment Debtor has sufficient funds to settle the said decretal sum. This court therefore proceeds to order the Garnishee Order Nisi Absolute.



8. The next issue for determination is on costs. Both the Counsel for the Applicant and that of the 2nd Garnishee have sought for costs of Kshs. 50,000/= each. The issue of costs is enshrined under Section 27 of the Civil Procedure Act which provides as follows:-

27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

9. It is trite that the issue of costs is discretionary and the same is meant to compensate a successful party in a suit. However, the grant of costs should not be used to penalize the losing party. This was the position held in the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review Application No.6 of 2014, where the court held as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.

10. In this case, given that the Applicant prosecuted the application and the 2nd Garnishee defended the same, both are entitled to costs as compensation. However the courts finds that a sum of Kshs. 50,000/= for each one of them as submitted by the Counsel is excessive and could be detrimental to the Respondent. In exercise of its discretion, the court proceeds to award costs of Kshs. 30,000/= to the Applicant herein and Kshs. 15,000/= to the 2nd Garnishee party herein.

11. In the upshot, this court hereby issues the following orders:

- a. Garnishee Order nisi be and is hereby made absolute for the 2nd Garnishee to settle outstanding decretal sum of Kshs. 127,869.70 being the decretal sum herein to Decree Holder.
- b. The Applicant is awarded a sum of Kshs.30,000.00 while the 2nd Garnishee party is awarded a sum of Kshs.15,000.00 as costs of the Garnishee proceedings and the same to be borne by the Judgment Debtor.
- c. The 2nd Garnishee be discharged from the proceeding upon satisfying the decretal sum as ordered under order No.(1) herein.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF SEPTEMBER , 2024.

D.O CHEPKWONY

JUDGE

In the presence of:



M/S Sarange holding brief for Mr. Kioko counsel for the Applicant

Mr. Ojong'a counsel for 2nd Garnishee

Court Assistant - Martin

