



Advocates v Invesco Assurance Co. Limited & 2 others (Miscellaneous Civil Application 1 of 2023) [2024] KEHC 12723 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPLICATION 1 OF 2023
CM KARIUKI, J
OCTOBER 23, 2024**

BETWEEN

NGAYWA NGIGI & KIBET ADVOCATES DECREE HOLDER

AND

INVESCO ASSURANCE CO. LIMITED JUDGMENT DEBTOR

AND

NCBA BANK KENYA PLC GARNISHEE

AND

KIRIIYU MERCHANTS AUCTIONEERS RESPONDENT

RULING

1. The Applicant herein filed the instant application vide notice of motion under certificate of urgency dated 10th August 2021 seeking the following orders
 - a. Spent
 - b. Spent
 - c. That the Honourable court be pleased to set aside, discharge, and expunge the warrant of attachment and proclamation of attachment issued against the garnishee/Applicant. The garnishee be discharged from the proceedings therein.
 - d. That an order of injunction does issue restraining the Respondents whether by themselves, agents, employees and/or servants from proclaiming attaching auctioning or in any manner whatsoever or howsoever from interfering with garnishee's movable and immovable properties of any kind in relation to the subject matter herein.



- e. The Respondent bears the costs of the Application.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Stephen Atenya, the Applicant's Legal Counsel, together with the annexures thereto.
3. In the said affidavit, the deponent admits that, indeed, he is aware of the ruling delivered on 13/05/2022 directing the Garnishee/Applicant to pay the Respondent herein the decretal sum in the order of priority of which the garnishee order absolute was served upon it.
4. The Applicant further avers that in compliance with the said orders, the 1st garnishee/Applicant made payment to the various garnishee orders absolute that had been issued earlier on prior to the issuance of the subject garnishee absolute order herein. The Applicant, therefore, contends that after the payment of the garnishee orders and the legal fees thereto, the remaining balances were not sufficient to pay the 1st Respondent herein.
5. The Applicant also stated that the 1st Respondent, on various dates, wrote letters to it requesting payment of the decretal sum of Kshs.84, 025/—. In all instances, the 1st garnishee informed it of the unavailability of the funds. Despite being aware of this, the 1st garnishee proceeded with execution, proclaimed the Applicant's movable properties, and served a warrant of attachment on 5 August 2021.
6. The garnishee contends that the issuance and service of the said proclamation notice and warrant of attachment against the Applicant are illegal and wrongful as the Applicant /garnishee is not the Judgment Debtor to the Decree Holder.
7. The Applicant/garnishee further contends that he is not the judgment debtor but a judgment debtor's banker, and as such, no execution can be commenced against it. For that reason, the warrant of attachment and proclamation notices against it are defective and should be set aside and discharged as the same cannot be effected against the garnishee/Applicant.
8. In response to Garnishee's application, the Respondent/Decree Holder filed a Replying affidavit sworn on 29 May 2023 and filed by the Decree Holder on 13 June 2023.
9. In its replying affidavit, the Decree Holder purports that the first garnishee has failed, neglected, or refused to settle the decretal sum of Kshs.84,025/-.
10. The Respondent avers that at the time of service of the subject garnishee order nisi and subsequent garnishee order, absolute herein, the garnished account number 10007xxxxxxx had available funds to satisfy the decretal amount.
11. The Respondent further avers that they made several follow-ups for compliance with the Applicant herein, and it was only when the Applicant failed to respond that they instructed the 3rd Respondent herein to commence the execution of the court orders to recover the decreed sum. The Respondent contends that it simply acted within the confines of the law by executing a valid court order as decreed thereof.
12. The Respondent has also admitted that they were the beneficiaries of all the funds held by the 1st Garnishee in other matters, totaling Kshs. 785,970/—, prior to the service of the instant matter.
13. Garnishee/Applicant's Submissions
14. Issues for determination by this Court: -
15. Whether the Applicant has met the threshold for setting aside an ex-parte order and warrants of attachment and proclamation of attachment



16. Whether the garnishee /Applicant should be discharged from the proceedings herein.
17. On the first issue, the Applicant stated that the law on setting aside an ex-parte order is well settled, and as such, the courts have wide and unfettered discretion to do so, as held in *Shah v Mbogo* (No. 1) [1967] EA 116 and *Mbogo and Another v Shah* [1968] EA 93. Further, they relied on Order 12 Rule 7 of the Civil Procedure Rules 2010.
18. It was asserted that the legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting setting aside the ex-parte decision or proceedings, as was held in *Wachira Karani v Bildad Wachira* [2016] eKLR.
19. The garnishee/Applicant averred that from the preceding has established that it had excuse reasons for not complying with the garnishee order absolute. The Applicant has stated that at the time of service of the aforesaid garnished order absolute, the judgment debtor's account had insufficient funds. Further, the Applicant also noted that the Decree Holder/Respondent loss garnished the funds in the said account in other matters, therefore rendering the object account insufficient of funds to satisfy the instant garnishee absolute order herein
20. On whether the Garnishee/Applicant should be discharged from the proceedings herein, Order 23(5) of the Civil Procedure Rules, 2010 was quoted. The Garnishee/Applicant herein disputes the attachment of the account on the basis that. Such an account held by the Garnishee on behalf of the judgment debtor has no sufficient funds; hence, the same cannot warrant the Garnishee order absolute to be issued by the court. Further, the Decree Holder/Respondent holds several other Garnishee orders on the same account. The funds therein have been utilized to satisfy the Garnishee order absolute in various matters and payment of legal fees. As such, the remaining balance in the account therein is not sufficient to meet or pay for the instant garnishee order absolute.
21. It was stated that there are no sufficient funds to satisfy the garnishee on issuance of garnishee order absolute. Thus, the court ought to discharge the Garnishee from the proceedings. Reliance was placed on Order 23 rule 1(1) of the Civil Procedure Rules, *Otieno Ragot & Co. Advocates v City Council of Nairobi* [2015] eKLR
22. The garnishee/Applicant submitted that the garnishee is not the judgment debtor and any garnishee order issued ought to be on account of the judgment debtor's property in the custody of the garnishee. It was stated that the order does not yield an interpretation that the garnishee would dig up his resources to pay for the costs of the garnishee proceedings where the amount of debt owed to the judgment debtor cannot fully satisfy the decretal amount. It was averred that service of the proclamation notice and warrant of attachment against the Applicant is illegal and wrongful as the Applicant is not the judgment debtor but the judgment debtor's banker. As such, no execution can be commenced against it. Reliance was also placed on the case of *Societe Eram Shipping Co Ltd v Compagnie International De Navigation* [2003]. All ER 465
23. Decree Holder/ 1st Respondent's Submissions
24. The Respondent asserted that there is no dispute that there is a decree in favor of the 1st Respondent that has not been settled. The Garnishee seeks to have the execution of the decree issued herein on the 13th day of May 2021 stayed pending the hearing of this application. Additionally, they seek to have the warrant of attachment and proclamation discharged and an injunction issued against the Respondents from proclaiming, attaching, auctioning, or interfering with Garnishee's moveable and immovable property.



25. The Decree Holder, in its replying affidavit, opposes the orders sought by the Garnishee on the basis that the Garnishee Order Nisi was issued upon the Decree Holder on the 3rd of March 2020, which orders were served and received by the Garnishee. At the time of service of the Garnishee order, the garnished account number 1007xxxxxx had an available credit balance of Kshs. 1,319,172.07. The Decree was then made absolute on the 13th of May 2021, compelling the Garnishee to pay the decretal sum. Despite the service of several letters, the garnishee failed to honor the decree absolute, and therefore, an auctioneer was instructed to execute them.
26. It was submitted that the Garnishee claims that they are not a party to this proceedings as they are not the Judgment Debtor. Still, the Judgment Debtor's banker, and therefore, the warrant of attachment and proclamation notices against it, are defective and need to be discharged. From the law, it is clear that the Judgment debtor has no role to play in garnishee proceedings. Reliance was placed on *Otieno Ragot & Co Advocates vs City Council of Nairobi* [2015] eKLR, Order 23 Rule 4 of the Civil Procedure Rules, 2010
27. The Decree Holder stated that they have sufficient reason to believe that the account sought to be garnished indeed holds funds that may be sufficient to satisfy the decree herein fully as the Decree Holder had other matters that had garnishee order absolute to a tune of Kshs. 785,970 and two more to the tune of Kshs 301,510 out of the Kshs 1. 319,172.07, therefore retaining a balance of Kshs. 231,692.07. The sum owed in the current suit is Kshs 84,025 only, and therefore, the balance is sufficient to settle the same.
28. Further, the Decree Holder pointed out that despite service, the garnishee did not attend court to dispute its liability to the judgment debt or deny that the attached accounts belong to the Judgment debtor.
29. In conclusion, the Decree Holder submitted that they have sufficiently proved that the judgment debtor has not settled the judgment debt since the decree was passed and that the garnishee bank herein is indeed holding funds to the credit of the judgment debtor in the attached account. It was contended that there is reason to believe that the said held amount is sufficient to satisfy the outstanding debt and that they have proved that the decree order absolute was duly served upon the garnishee bank, and it did not comply. The 1st Respondent, therefore, urges this Honorable Court to find that the application lacks merit and ought to be dismissed as prayed and cost awarded to the Decree Holder.

30.

Analysis and Determination

31. I have considered the Application, response, and parties' submissions. The issues for determination crystalize into;
 - a. Whether the Applicant has established grounds for setting aside, discharging, and deleting the warrant of attachment and proclamation of attachment issued against the garnishee/Applicant and for the garnishee to be discharged from the proceedings herein.
 - b. Whether the Respondent has established grounds for an order of injunction restraining the Respondents, whether by themselves. Agents. Employees and servants are from proclaiming attaching auctioning or, in any manner whatsoever or howsoever, from interfering with garnishees' movable and immovable properties of any kind in relation to the subject matter herein.
32. Garnishee proceedings serve to facilitate the satisfaction of judgment debts. Garnishees, in this regard, often have no objections to garnishee orders being made final so long as there is a discernible debt due



and owing to the judgment debtor; once such indebtedness is established, it is inconsequential to the garnishee who the debt is paid to. However, garnishee orders are premised on indebtedness; without such debt to the judgment debtor, it would be plainly unjust to order a party to pay a sum to the judgment creditor.

33. Order 23 Rule 1 of the Civil Procedure Rules, 2010 on attachment of debts provides that-
- a. “1 (1) 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 salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (from now on 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 may be sufficient to satisfy the decree together with the costs aforesaid. Third, the above rule contemplates the existence of a decree for the amount claimed. Generally, Garnishee proceedings are done in two different stages.
34. Order 23 Rule 4 of the Civil Procedure Rules provides: -
- a. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person. Goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with costs of the garnishee proceedings, and the order absolute shall be in Form 17 or 18 of Appendix A, as the case may require.
35. Accordingly, the court herein, in its ruling dated 13th May 2021, made orders that the garnishee order nisi be made absolute. However, the Applicant was to pay the Decree Holder in the order of priority in which they were served and to the extent of the sum of the money remaining in the accounts after the same has been fulfilled. The Applicant asserted that they proceeded to make payment to the various garnishee orders absolute and legal fees in the order of priority, after which the remaining balance was not sufficient to pay the amount of Kshs. 84,025/- sought by the Decree Holder.
36. Further, the Applicant wrote to the Decree Holder in that respect, but it appears the 1st Respondent went on to insist on payment of the decretal sum. On 29 July 2021, the 1st Respondent proceeded and issued instructions to the 3rd Respondent to proceed with execution. Then, the 1st Respondent proclaimed the Applicant’s movable properties and served them with a warrant of attachment on 5 August 2021.
37. The Applicant herein attached evidence to prove that there were insufficient funds to pay the amount sought by the 1st Respondent after they had paid out several garnishee orders and absolute and legal fees. In my considered opinion, they provided sufficient and reasonable explanation as to why they were unable to pay the 1st Respondent. Despite the 1st Respondent’s insistence that the Applicant had enough funds to pay them, they did not adduce any evidence to prove the same.
38. It is my considered opinion that the Applicant should not be condemned as the garnishee and assume the liabilities of a judgment debtor. It is the Judgment Debtor who should shoulder the responsibility. The Garnishee’s liability is limited only to the extent of releasing the total amount they are holding on



behalf of a judgment debtor, and having confirmed that there are insufficient funds to satisfy the 1st Respondent's decree, it is in the interest of justice, not to unfairly punish them for the same.

39. In view of the preceding, the court makes the order;

i. I allow the Applicant's application dated 10th August 2021 with costs to the Applicant.

RULING, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 23RD DAY OF OCTOBER 2024.

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CHARLES KARIUKI

JUDGE

