



**Export Trading Company Limited v National Cereals and Produce Board & 2 others;
Kenya Commercial Bank Limited & 2 others (Garnishee) (Miscellaneous Application
E158 of 2021) [2024] KEHC 12053 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E158 OF 2021**

**PM MULWA, J
OCTOBER 3, 2024**

BETWEEN

EXPORT TRADING COMPANY LIMITED DECREE HOLDER

AND

NATIONAL CEREALS AND PRODUCE BOARD 1ST JUDGMENT DEBTOR

**MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES 2ND
JUDGMENT DEBTOR**

ATTORNEY GENERAL 3RD JUDGMENT DEBTOR

AND

KENYA COMMERCIAL BANK LIMITED GARNISHEE

CO-OPERATIVE BANK OF KENYA LIMITED GARNISHEE

CONSOLIDATED BANK OF KENYA LIMITED GARNISHEE

RULING

1. This ruling is in respect of three (3) applications. Two of the applications, that is the one dated 26th June 2022 and the other dated 8th July 2022 are filed by the decree holder. The application date 5th July 2023 is filed by the 1st judgment debtor. I must state from the onset that the applications by the decree holder are related as they both intend to have the garnishee proceedings issued. I will determine these two motions together.



Background

2. The dispute herein emanates from the contract dated 12th January 2017 between Export Trading Company Limited (herein the decree holder) and the Ministry of Agriculture, Livestock and Fisheries (herein the 2nd judgment debtor) for the supply and delivery of fertilizer. The 2nd judgment debtor assigned the contract to the National Cereals and Produce Board (herein the 1st judgment debtor).
3. A dispute arose as to the performance of the contract, and the matter was referred to arbitration. An award was issued in favour of the decree holder for the sum of Kshs. 1,749,041,690.98 plus interest and costs. The award was adopted as the judgment of this court. In enforcement of the decree, the decree holder filed garnishee proceedings by the application dated 26th June 2022.

Application dated 26th June 2022

- i. The decree-holder sought the following orders: Spent
 - ii. Spent
 - iii. An order directing the garnishees to disclose a full account of all monies held on behalf of the 1st judgment debtor, sufficient to pay Kshs. 1,749,041,690.98 and provide statements of accounts thereto confirming details of all accounts in credit in the name of National Cereals and Produce Board.
 - iv. A garnishee order absolute directing the garnishees to release and/or remit to the decree holder and its legal representatives the sum of Kshs. 1,749,041,690.98 and Kshs. 34,496,792.17 respectively, to satisfy the outstanding debt, interest, and costs owed to the decree holder.
4. On 29th June 2022 at the hearing of the application ex-parte this court issued a garnishee order nisi. It directed the garnishee to file affidavits within 7 days to confirm if they held any money in favour of the judgment debtor and the amount held.

Application dated 5th July 2022

5. The orders were served on the parties. The the 1st judgment debtor sought to set aside the decree order nisi and stay implementing the orders issued on 29th June 2022 and filed the Notice of Motion dated 5th July 2022. It also sought to be allowed to continue uninterrupted utilizing the funds contained in the accounts held with the garnishees.
6. The application is supported by the affidavit of John K. Ngetich sworn on 5th July 2022. It is premised on the grounds that the Ministry of Agriculture, Livestock, Fisheries and Co-operatives is responsible for honouring the decretal amount; the attachment of its funds is improper and irregular as it is not responsible for honouring the decree; the issuance of a decree order nisi disrupted the functions and management of the 1st judgment debtor including but not limited to paying staff salaries and meeting its contractual obligations. He argues that it is within the knowledge of the decree holder that discussions are underway with the Ministry and National Treasury on honouring the decretal amount.
7. When the application came up for hearing ex-parte on 6th July 2022 the court stayed the decree nisi.
8. In response, the decree holder opposed the application dated 5th July 2022 and filed grounds of opposition dated 12th July 2022 on the basis that the 1st judgment debtor's advocates, Gikera & Vadgama Advocates were improperly on record and the application was fatally defective and an abuse of the court process.



Application dated 8th July 2022

9. This was filed by the decree holder seeking to vary the orders of the court issued on 6th July 2022:
 - a. Spent
 - b. The court be pleased to recall, review and/or set aside the orders issued on 6th July 2022
 - c. The orders on 6th July 2022 be varied in terms that:
 - i. The garnishees to comply with the previous order directing the garnishees to file affidavits confirming they hold money in favour of NCPB within 2 days of the application;
 - ii. The 1st judgment debtor be directed to provide evidence of the salaries it pays its employees and the account details of the bank that these payments are made from;
 - iii. Upon providing evidence of the salaries paid, a garnishee order absolute be made directing the garnishees to remit the balance in the accounts after payments of the employees' salaries.
 - iv. The costs of the application be borne by the respondent.
10. The application is supported by the affidavit of Biren Jasani sworn on 8th July 2022. The gist of the application is that the 1st judgment debtor's application was based on material non-disclosure and misrepresentation of facts. The 1st judgment debtor misrepresented to the court that the 2nd judgment debtor was liable to honour the award and that it also failed to disclose the amount required to pay the staff salaries and the office overheads. The 1st judgment debtor has failed to demonstrate how it is willing to pay the award in instalments.
11. According to the applicant the firm Gikera & Vadgama is improperly on record having failed to follow provisions of the law on representation post-judgment. It contended that the garnishees ought to comply with the court orders of 29th June 2022 by providing a statement of accounts of the judgment debtors.
12. It was contended that the stay orders were to allow the 1st judgement debtor to meet its contractual obligations which included payment to farmers and suppliers, whereas the decree holder is a supplier who remains unpaid. It states that as per the last two audited accounts of the 1st judgment debtor submitted to the National Assembly, the 1st judgment debtor always factored in the amounts payable to the decree holder but the same remained unpaid. The decree-holder knows no other asset of the judgment debtors.
13. The applications were heard together by way of written submissions. The decree-holder filed submissions and supplementary submissions dated 14th October 2022 and 23rd May 2024 respectively, while the 1st Judgment Debtor filed submissions dated 21st May, 2024.

Analysis and determination

14. The court has considered the parties' pleadings, submissions, authorities and evidence from the parties. In my view, the three applications raise various issues which shall be considered hereunder.
15. For good order, I will first discuss the issue of whether the firm of Gikera and Vadgama Advocates is properly on record. According to the decree holder the said firm ought to have complied with Order 9



Rule 9 of the Civil Procedure Rules by seeking leave of the court or entering into a consent with the Attorney General who was the advocate in the conduct of the matter pre-judgment stage.

16. The 1st judgment debtor on its part argues that the requirement for consent or order for an advocate to come on record for a party after entry of judgment is not provided for under the *Arbitration Act*. Reliance was placed in the case of *Simon Ngariu Maina & another v Daniel Maina Gitau* [2022] eKLR where the court cited with authority the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR where it was held that:

“We would go further to add that, provided that where the failure to comply with the Rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the *Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings.”

17. Going by the above case I am not persuaded that non-compliance with Order 9 Rule 9 of the *Civil Procedure Rules* goes to the root of the matter. It did not occasion a miscarriage of justice, and no prejudice was caused on any party. I therefore find the advocate is properly on record.
18. The second issue is whether garnishee proceedings should proceed against the 1st judgment debtor. The 1st judgment debtor states it is a state corporation under the auspices of the 2nd judgment debtor. The 2nd judgment debtor is responsible for fulfilling its functions in compliance with any general or special directions given by the cabinet. It was submitted that the 1st judgment debtor being a government entity, execution must conform with the provisions of Section 21 of the *Government Proceedings Act*.
19. The decree holder submits that the 1st judgment debtor is a body corporate with perpetual succession and a common seal, vested with powers to enter into contracts and arrangements and operate bank accounts and thus ought to honour and settle the decretal sum.
20. I concur with the decree-holder that the 1st judgment debtor is a body corporate and thus should not evade its responsibilities. In the circumstances, I hold the garnishee proceedings against the 1st judgment debtor are properly before this court.
21. I will reserve the issue for setting aside and/or varying the decree order nisi issued on 29th June 2022 to a later stage of this ruling. The next issue I will deal with is the application by the decree holder seeking a garnishee order nisi. And the issue for determination is whether the decree holder has made out a case for making a garnishee order.
22. Order 23 Rule 1 of the *Civil Procedure Rules* provides for garnishee proceedings, thus:

“Order for the attachment of debts [Order 23, rule 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 (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 may be sufficient to satisfy the decree together with the costs aforesaid.”

23. The undisputed facts are that the decree holder has a decree in its favour for Kshs. 1,749,041,690.98 plus interest and costs. It has approached this court to assist it in getting the money from the garnishee. A garnishee proceeding is instituted to enforce a money decree held by a third party in execution by a decree holder. A garnishee order nisi serves as an injunction of the money held by a garnishee.
24. In *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* [2020] eKLR the Court stated as follows:
- “Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.”
25. When the court issues a decree order nisi and the same is served upon the garnishees, the garnishee is under an obligation to respond indicating the amount it holds on behalf of the judgment holder that can be paid in satisfaction of the decree. The fact that the debt is not disputed by the judgment debtors, a decree holder is entitled to enjoy the fruits of their own judgment. Further court orders should not be issued in vain. The decree holder having a proper decree from this court ought to be allowed to execute it in satisfaction of the decree.
26. In compliance with the decree order nisi the 2nd garnishee respondent vide the replying affidavit of Jackson Oire sworn on 12th July 2022 avers the bank owes a duty of care to its customers and in the absence of the particulars of the account the bank was in a difficult position and unable to make any disclosure. The 3rd garnishee complied and filed a replying affidavit sworn by James Munyasia on 8th July 2022, it disclosed the money held by the 1st judgment debtor in the accounts held with the bank.
27. In the circumstances, therefore, I hold that the application dated 26th June, 2022 is merited.
28. Back to the issue of setting aside garnishee order nisi. Order 51 Rule 15 of the *Civil Procedure Rules* empowers the court to set aside ex-parte orders. The 1st judgment debtor sought to set aside the decree order nisi on the strength that it had the obligation to pay staff salary and other contractual obligations. However, having pointed out that the decree holder is entitled to the fruits of the judgment, the judgment debtor ought to face its liability. I am not persuaded that the 1st judgment debtor has made out a case for this court to continue allowing it to evade its responsibility to satisfy the decree. I therefore decline to set aside the decree order nisi.

Disposition

29. The upshot is that:
- i. The decree holder’s application dated 26th June 2022. The application dated 8th July 2022 which seeks to reinforce the prayers sought in the earlier application of 26th June 2022, is merited and is equally.
 - ii. The 1st judgment debtor’s application dated 5th July 2022 is dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.



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P. MULWA

JUDGE

In the presence of:

Mr. Otieno hb for Mr. Kigata for Decree-holder

Ms. Opondo for 1st Judgment-debtor

Ms. Murugi for Hon. Attorney General

Ms. Ndung'u for 1st Garnishee

Court Assistant: Carlos

