



CG Waithima & Company Advocate v Africa Merchant Assurance Company Limited; UBA Bank Kenya Limited & 2 others (Garnishee) (Miscellaneous Tax Cause 14 of 2018) [2023] KEHC 2344 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS TAX CAUSE 14 OF 2018
SM GITHINJI, J
MARCH 13, 2023**

BETWEEN

CG WAITHIMA & COMPANY ADVOCATES APPLICANT

AND

AFRICA MERCHANT ASSURANCE COMPANY LIMITED RESPONDENT

AND

UBA BANK KENYA LIMITED GARNISHEE

SAFARICOM KENYA LIMITED GARNISHEE

FAMILY BANK LIMITED GARNISHEE

RULING

- 1 For determination is the Applicant's Notice of Motion dated February 7, 2022 seeking the following orders;
 - a. Spent
 - b. That pending the hearing and determination of this application, the honorable court issues a Garnishee Order Nisi against Bank Westlands Branch account 55010xxxxx7128, Safaricom pay bill number 5xxxx0 and Family Bank account number 035xxxxx5877 Family Bank towers Muindi Mbingu Street Branch ordering that all the funds deposited and held to the Credit of Africa Merchant Assurance Co Ltd, the judgment debtor be attached to answer the decree issued on February 3, 2022.
 - c. The Garnishees, UBA Bank Westlands Branch, Safaricom Limited and Family Bank to appear before the court on a date to be fixed and show cause why the Garnishee Order Nisi issued should not be made absolute and that the sum of Kshs 7,000,000 together with costs of this



Garnishee proceedings should not be released to the Decree Holder's Advocates in satisfaction of the Decree issued on February 3, 2022.

- d. The costs of this application be borne by the judgment debtor.
- 2 The application is founded on the grounds on the face of it and on the supporting affidavit sworn by Charles Githitu dated February 7, 2022. The Applicant deponed that he obtained judgment against the Respondent in the sum of Kshs 7,000,000/= on February 2, 2022 and a decree was issued on February 3, 2022 which was subsequently served upon the 1st respondent on February 4, 2022. That despite being served, the decree remains unsatisfied to the extent of the whole amount.
- 3 It was further deponed that the respondent holds an account with the 1st garnishee and also holds and regularly operates a Pay bill number 5xxxx0 hosted by the 2nd garnishee through which the respondent receives insurance premium payments. In addition, the respondent holds an account with the 3rd garnishee and it is his belief that the respondent has money in the afore stated accounts to sufficiently and wholly satisfy the decretal sum and this court has unfettered powers to grant the orders sought.
- 4 The 1st Garnishee did not respond to the instant application and the Garnishee Order Nisi was made absolute against the 1st Garnishee. The 3rd Garnishee was discharged from the proceedings by consent after having settled an amount of Kshs 4,473,818.89 which they held in favour of the judgment debtor.
- 5 The 2nd Garnishee filed a replying affidavit dated May 6, 2022 deponed by Sheila Cherotich Bii the Senior Merchant officer in the Enterprise Channels Department- Mpesa Services, Law Enforcement Division for the 2nd Garnishee. She stated that the Pay Bill Number 5xxxx0 is indeed held and operated by the Respondent/Judgment Debtor.
- 6 Ms. Sheila Bii averred that upon receipt of the Garnishee Order Nisi, she accessed the Mpesa G2 portal to extract the statements for Pay Bill Number 5xxxx0. She noted that the account was suspended prior to court orders and last activities on the account were on April 30, 2022 being for the charges paid to the account and the balance as of the date was Kshs 657,621.62/=.
- 7 It was her further statement that Mpesa Pay Bill number 5xxxx0 had been garnished due to prior Garnishee Order Absolutes that rank in priority in varied amounts as per the schedule in paragraph 8 of the affidavit to the total amount of Kshs 5,558,862.38/=. Further there is a threat to attach the 2nd Garnishee's goods in one of the matters mentioned in paragraph 8 of the affidavit notwithstanding that the Pay Bill Number 5xxxx0 is insufficiently funded. She added that there have been ongoing Garnishee matters and during the pendency of the instant application, Pay Bill number 5xxxx0 was accessed by the 2nd Garnishee to settle Garnishee Order Absolutes ranking in Priority to avoid being in contempt of court orders.
- 8 It was stated that the current balance is insufficient to attach the current Garnishee Order Nisi served upon the 2nd Garnishee for a decretal sum of Kshs 7,000,000 together with the costs of the garnishee proceedings due to the Applicant/Decree Holder, and an Order Absolute cannot issue in the circumstances due to Garnishee Order Absolutes and Nisis that rank in priority, thus the 2nd Garnishee be discharged from satisfying the entire Garnishee Order Nisi.
- 9 In a further affidavit by the applicant in response to the replying affidavit by the 2nd Garnishee, Mr Charles Githitu deponed that the Pay Bill number 5xxxx0 has never been suspended since it is a utility Paybill which is continually operable and there has been no public notice by either the judgment debtor or the 2nd Garnishee indicating its discontinuation. He further averred that upon the receipt of the Garnishee Order Nisi of the court on March 3, 2022, the 2nd Garnishee in collusion with the judgment debtor proceeded to open several other Paybill numbers including 7xxxx3 and 5xxxx0 through which



- the judgment debtor started diverting its utility payments with the sole purpose of defeating these proceedings.
- 10 The application was canvassed by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied upon. The issue I'm called upon to determine is whether the Garnishee Order Nisi against the 2nd Garnishee should be made absolute.
- 11 Order 23 Rule 1 of the [Civil Procedure Rules](#) provides that: -
- “A court may, upon the *ex parte* application of the 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 salary or allowances 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 costs of the garnishee proceedings; and by the same or subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay 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 costs aforesaid.”
- 12 From the above provisions, it is clear that a decree holder has a right to move a court seeking orders that a debt owing from a third person (“garnishee”) to the judgment- debtor be attached to answer the decree together with costs of the garnishee proceedings. However, the applicant in such an application has a duty to prove/ demonstrate by affidavit that: -
- a. There is a decree which has been issued and is still unsatisfied to a certain amount.
 - b. There is a debt due from the Garnishee to the Judgment Debtor capable of being attached to answer the decree.
- 13 The question herein then is whether the applicant has satisfied the above conditions.
- 14 It is the applicant's case that he obtained a judgment against the judgment debtor for a decretal sum of Kshs 7,000,000 and which amount has been partially satisfied by the 3rd garnishee in the sum of Kshs 4,473,818.89. A copy of the said decree was annexed to the application. Therefore, there is no contest that the decree is not fully satisfied.
- 15 As to whether there is a debt due from the Garnishee to the Judgment Debtor capable of being attached to answer the decree, the applicant herein sought the attachment of the deposits and funds held in the 2nd garnishee's Paybill number 5xxxx0. The 2nd garnishee does not dispute that the judgment debtor operated the said Paybill. However, it is the 3rd garnishee's position that the said Paybill number was suspended and had been previously garnished due to prior Garnishee Order Absolutes that rank in priority and has already satisfied decretal sums following the aforesated Garnishee Order Absolutes. Further, that the remaining balance is insufficient to attach to the current Garnishee Order Nisi.



- 16 Ordinarily in garnishee proceedings, the judgment-creditor has a duty to prove the garnishee's indebtedness based on sound evidence. As the Court of Appeal held in *James G K Njoroge t/a Baraka Tools & Hardware v APA Insurance Company Limited & 3 others* [2018] eKLR, as thus: -

“...[28] With regard to the garnishee order, the appellant did not demonstrate or establish that the 1st respondent owed the 2nd respondent any debt upon which the order of garnishee could be pegged. It may well be that, there was some money due to the 2nd respondent from the 1st respondent on account of the Bond being discharged. However, this was neither alleged nor demonstrated. [29] As regards the Garnishee order, the provisions of Order XX11 Rule 1(1) reproduced above, shows that the order is for an attachment of a debt. Therefore, for the court to issue a garnishee order, the appellant had to satisfy the court that the 1st respondent was holding money belonging to or due to the judgment-debtor which monies should be attached to meet the decree or part of the decree that had been issued in favour of the appellant. The Bond relied on by the appellant, merely demonstrated that the 1st respondent had guaranteed payment of the decretal sum during the pendency of the application for stay of execution only. That guarantee did not amount to a debt that could be attached. The 1st respondent having specifically denied being indebted to the 2nd respondent, and there being no evidence to contradict the 1st respondent's denial, there was no basis upon which the court could issue a garnishee order. As was stated in *Petro Sonko & another v H A D B Patel & another* 20 EACA 99, the onus is on the Judgment Creditor to establish that there is a debt due and recoverable from the Garnishee to the Judgment Debtor.”

- 17 Once the applicant has satisfied the above, the burden of proof then shifts to the garnishee to satisfy that he is indebted to the judgment-debtor. Therefore, in law, the onus placed on a Garnishee would only be discharged where it successfully establishes that the account or accounts covered by the Garnishee Order nisi do not exist in its system or if it exists, it is in debt and not in credit or that it has a right of set off or lien which are due effective against the customer. Lord Denning M R in *Choice Investments Ltd vs Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225 at page 227 held as thus: -

“There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate.”

- 18 From the evidence placed before me, it is my considered view that the 2nd garnishee has demonstrated that payment to the applicant will be unfair by preferring him to other creditors. I find that the existing Garnishee Order Absolutives rank higher in priority and the 2nd Garnishee is incapable of satisfying the decretal sum. The Applicant drew the courts attention to other existing pay bills operated by the judgment debtor in the 2nd Garnishee. This was disputed by the 2nd garnishee. On this, it is my finding that the applicant did not adduce any evidence to support the claim and the application was not in regard to the newly alleged pay bill numbers.



19 In the end, I find that the 2nd garnishee has satisfactorily demonstrated that it is not capable of satisfying the decretal sum thus the application is hereby dismissed for want of merit with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF MARCH, 2023.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Kinyua for the Applicant

Ms Rweya for the 2nd Garnishee (Safaricom)

