



**I & M Bank Limited v Odemo & 4 others (Civil Appeal E003 & E004 of 2022 (Consolidated)) [2023] KEHC 3124 (KLR) (Commercial and Tax) (6 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E003 & E004 OF 2022 (CONSOLIDATED)**

**DAS MAJANJA, J**

**APRIL 6, 2023**

**BETWEEN**

**I & M BANK LIMITED ..... APPELLANT**

**AND**

**FREDRICK MONGARE ODEMO ..... 1<sup>ST</sup> RESPONDENT**

**INVESCO ASSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**NCBA BANK KENYA LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**DIAMOND TRUST BANK KENYA LIMITED ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeals from the Ruling and Order of Hon. L. Lewa, PM dated 20th August 2021 at and from the Ruling and Order of Hon. C. K. Cheptoo, PM dated 17th December 2021 in the Nairobi Magistrates Court, Milimani in CMCC No. 7855 of 2019)*

**JUDGMENT**

1. These appeals arise from the same suit before the Subordinate Court and are lodged by the Appellant who was the 4<sup>th</sup> Garnishee in that court.
2. In order to understand the appeal, a brief background of the matter is necessary. The 1<sup>st</sup> Respondent, as Plaintiff, filed a declaratory suit in the Subordinate Court under the *Insurance (Motor Vehicles Third Party Risks) Act* (Chapter 405 of the Laws of Kenya) seeking a declaration that the 2<sup>nd</sup> Respondent was liable to satisfy decree for Kshs 2,175,195.23 issued against him by a third party. On August 10, 2018, the court entered judgment for the 1<sup>st</sup> Respondent against the 2<sup>nd</sup> Respondent.



3. By an application dated October 19, 2020, the 1<sup>st</sup> Respondent applied for attachment of the 2<sup>nd</sup> Respondent's accounts held by the Appellant, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents. When the application came up for inter-parties hearing on January 18, 2021, the court, in the absence of the Appellant, made the following order:

That the 4<sup>th</sup> *Garnishee* be and is hereby ordered to pay to the Plaintiff/Decree-holder the sum of Kshs 2,736,478.16 or such other sum as may be due to the debtor in its account number 03901468611810 or any other accounts with the 4<sup>th</sup> *Garnishee*, in settlement in settlement of the decree herein

4. The 1<sup>st</sup> Respondent proceeded to execute the order of January 18, 2021 by way of attachment of the Appellant's moveable property thus precipitating an application by the Appellant dated February 2, 2021 seeking to stay execution and set aside the garnishee order absolute. The application was heard and dismissed by a ruling dated August 20, 2021 (Hon Lewa) stating that:

In a nutshell, the 4<sup>th</sup> garnishee was served. Proof of service was filed to confirm the same. No response was filed to oppose the application. As such, a garnishee order absolute issued against the said garnishee compelling them to satisfy the decree on behalf of the judgment debtor.

5. After its application was dismissed, the Appellant filed another application dated August 20, 2023 seeking, *inter alia*, leave to appeal against the ruling and order of August 20, 2021 and a stay of execution pending appeal to this court. The application was heard and by the ruling dated December 17, 2021 (Hon Cheptoo), the court granted leave to appeal, ordered the Appellant to deposit in court the decretal sum within 45 days of the order and directed that failure to deposit the decretal sum within the period prescribed, the 1<sup>st</sup> Respondent would be at liberty to proceed with execution.
6. The Appellant appeals against the two orders issued by the trial court. As regards the order made on August 20, 2021 (Hon Lewa), the Appellant filed the Memorandum of Appeal dated January 18, 2022. The thrust of the appeal is that in dismissing its application, the trial court failed to take into account that it could not direct the Appellant, who is not a judgment debtor, to settle the judgment debt. That the decree-holder cannot attach the Appellant's property as it is a mere Garnishee and it is unfair, unjust and unconscionable for the Appellant to be ordered to utilize its own resources to settle the judgment debt and that the Appellant cannot be found liable for the acts of the judgment debt as it was not involved in the suit that led to the decree and judgment debt. The Appellant also complains that the trial court failed to appreciate that the 2<sup>nd</sup> Respondent's account did not have any funds hence the attachment was unlawful and illegal and the order of attachment made contrary to the law.
7. As regards the order made on December 17, 2021 (Hon Cheptoo), the Appellant filed the Memorandum of Appeal dated January 18, 2022. It complains that the trial magistrate erred in law and in fact in ordering it to deposit the decretal sum as security as it is merely a *Garnishee* and not a judgment debtor. It reiterates that as a *Garnishee* does not hold any money on behalf of the judgment debtor hence it could not be ordered to deposit security equal to the decretal sum. It urges that the trial court failed to appreciate the nature of a *Garnishee* order and garnishee proceeding under Order 23 rule 2 of the [Civil Procedure Rules](#).
8. The Appellant filed written submissions making arguments along the lines I have summarized above. Counsel for the Appellant also made brief oral submissions to support its case. The Respondents did not make any representation, oral or otherwise despite being served with court process. I have however considered the entirety of the record to reach this decision.



9. The genesis of this appeal is the ruling and order refusing to declare the attachment of the Appellant's property a nullity following the order issued on January 18, 2021. The Appellant challenges the discretion of the trial court in dismissing its application, it is therefore important to delineate the boundaries of this court's jurisdiction. In the seminal decision *Mbogo v Shah* [1968] EA 93, Sir De Lestang observed that:

I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

10. In essence the Appellant, in its application dated February 2, 2021, was seeking to set aside the ex-parte order made on January 18, 2021 making the garnishee order nisi absolute effectively compelling the Appellant to pay the judgment debt. The trial court, as I have summarized above found that the Appellant had been served with the application and garnishee order nisi but that it had failed to respond to the application.

11. The Appellant's case set out in the deposition of its officer, Andrew Muchina, sworn on February 2, 2021 is that it was never served with the garnishee order nisi and was only served with the garnishee order absolute. In response, the 1<sup>st</sup> Respondent through the replying affidavit of its advocate, Nelson Kaburu, sworn on February 22, 2021 deponed that the Appellant was served with the garnishee order nisi on October 26, 2020 and with subsequent hearing notices.

12. According to his affidavit of service sworn on October 27, 2020, the process server, Patrick Juma Yuka, deponed that, "That on the same day [October 26, 2020], I served the Court *Order Nisi* and the application upon a legal officer by the name Ms Lucy at the Head Office, Bank Tower of the 4<sup>th</sup> *Garnishee*, 2<sup>nd</sup> Floor situated along Kenyatta Avenue, Nairobi, She accepted the service by stamping at the front bottom of the original copy. Time was 4:15pm." The attached order nisi issued by the court on October 22, 2022 annexed thereto shows that the order was received on October 26, 2020 as evidenced by the Appellant's date stamp. There is also a hearing notice dated December 11, 2020 showing that the Appellant was served with the hearing notice for the matter coming up on January 18, 2021. The hearing notice is endorsed by the Appellant on December 18, 2021.

13. The Appellant did not contest or controvert service as demonstrated by the 1<sup>st</sup> Respondent's process server hence I agree with the trial magistrate that the Appellant was duly served with the garnishee order nisi and the subsequent notices. It was therefore entitled to proceed with the application ex-parte. What then is the consequence of failing to attend court on the date for hearing as to whether the garnishee order nisi should be made absolute? The answer is to be found in Order 23 rule 4 of the [Civil Procedure Rules](#) which provides as follows:

[Order 23, rule 4.] Execution against garnishee.

4. 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 and 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 the costs of the garnishee proceedings; and the order absolute shall be in Form No 17 or 18 of Appendix A, as the case may require



14. As the trial magistrate pointed out, the aforesaid rule is clear and does not require any elaboration or elucidation. It simply provides that if the garnishee, having been given an opportunity to present the position of the judgment debtor, fails to do so or fails to attend court then the court may order execution against the person and goods of the garnishee. Thus the court is empowered to order execution in the event the garnishee fails to respond to the garnishee order nisi. This position is buttressed by the following rule which states as follows:

[Order 23, rule 5.] Trial of liability of garnishee.

5. If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined.
15. The Appellant suggests that the court cannot order execution against the Appellant on the ground that it is not the judgment debtor and cannot be liable for the debt. As I understand, the only reason the court orders execution is that the garnishee having been given an opportunity to, “appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgmentdebtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid”, under Order 23 rule 1 fails to do is assumed to be liable for the judgment debt. The duty on the garnishee is to appear before the court to show cause. If it fails to show cause, then it must bear the burden of the judgment debt as a consequence. Therefore, on the basis of the fact of service and the applicable rule, I cannot fault the trial magistrate for ordering execution against the Appellant.
16. Order 51 rule 15 of the *Civil Procedure Rules* provides that, “The court may set aside an order made *ex parte*.” The power of the Court to set aside *ex parte* orders and proceedings is wide and unfettered but must be exercised judicially. In *Patel v EA Cargo Handling Services Limited* [1974] EA 75, the Court was outlined the general principle as follows:

There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

17. In this case, the court only considered the issue of service, it did not proceed to consider whether the Appellant had an answer to the 1<sup>st</sup> Respondent’s application. In its application, the Appellant stated that the 2<sup>nd</sup> Respondent’s account had no funds and that the court did not direct the 1<sup>st</sup> Respondent to attach the Appellant’s property. It also stated that it had been complying with similar orders of the court.
18. Had the trial magistrate considered the other grounds raised by the Appellant, it would have reached the conclusion that the 2<sup>nd</sup> Respondent’s account did not have any funds hence the court could not make the garnishee order nisi absolute. I therefore hold that the trial magistrate, in exercising discretion, failed to consider material facts which were detailed in the Appellant’s deposition. Even though the Appellant had been served, any prejudice against the 1<sup>st</sup> Respondent would be assuaged by an award of costs.
19. I therefore set aside the order dated August 18, 2022 and discharge the order nisi as against the Appellant. While the logical consequence would be to return the matter back to the Subordinate Court



for consideration, the Appellant has shown that it does not hold any money to the credit of the 2<sup>nd</sup> Respondent hence no purpose will be served by adopting such a course. In any event and under section 78 of the *Civil Procedure Act*, the High Court may exercise the same powers as the court with original jurisdiction when exercising appellate jurisdiction.

20. Since the evidence is clear that the Appellant was served by process and failed to attend court, it shall bear the costs of the application before the Subordinate Court. This finding disposes of the appeal in respect of the stay orders which has now been effectively discharged.
21. For the reasons I have advanced above, I now make the following dispositive order:
  - a. Appeal Comma No E003 of 2021 is allowed on terms that the ruling and order of the Subordinate Court dated August 20, 2021 (Hon Lewa) be and is hereby set aside and the garnishee order absolute issued against the Appellant be and is hereby discharged. The Appellant shall bear the costs of the 1<sup>st</sup> Respondent before the Subordinate court.
  - b. Appeal Comma No E004 of 2021 is dismissed.
  - c. There shall be no order as to costs in respect of both appeals.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF APRIL 2023.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango.**

Mr Muhizi instructed by Wamae and Allen Advocates for the Appellant.

