



Diamond Trust Bank Kenya Limited v Juba & another (Civil Appeal 164 of 2022) [2023] KEHC 19107 (KLR) (15 May 2023) (Judgment)

Neutral citation: [2023] KEHC 19107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 164 OF 2022
DKN MAGARE, J
MAY 15, 2023**

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPELLANT

AND

AHMED KIBWANA JUBA 1ST RESPONDENT

INVESCO INSURANCE CO LTD 2ND RESPONDENT

JUDGMENT

1. This Appeal under form garnishee proceedings taken in Kwale CMCC 339 of 2017 before Hon JM Omido. The Appellant was the judgment debtor's bankers. The court had issued a garnishee order nisi on December 20, 2019 and served on December 23, 2019. The said order was subsequently made absolute. The Appellant had in its defence stated that it had been served with an existing Garnishee order on December 11, 2019, in respect of Account No (xxxxx) 3,745,216.94 from the Machakos CM's Court, Case No 641 of 2017. The impugned order had been served on December 23, 2009 while the other order from Machakos was served on December 11, 2019, in respect of Account No xxxx.
2. Before retiring to write this Judgment, I directed the Appellant to favour court with consent bank statement. I have not laid my hands on the same. I am reminded of Section 112 of the [Evidence Act](#).
112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.



Determination

3. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others [1968] EA 123*, where the law looks in their usual gusto, held by as follows:-

' An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.'

4. The Court is to bear in now that if need her seen the witnesses.it is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
5. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd [2017] eKLR*, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

' Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed.'

6. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.
7. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
8. Order 23 Rule 1(1) of the [Civil Procedure Rules](#) provides for garnishee as follows: -

' 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'.

9. The bottom line is there should be funds to satisfy the decree. The funds could be there but are subject to other genuine court orders. They are not subject to the garnishee order. It is not the duty of the court, to act as an appellate court for a parallel process of garnishee by other people over the same account.



10. In the case of *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishee) [2020] eKLR*, the court stated as doth: -

' 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 GK 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 HAD 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.'

11. The processes involved in garnishee are fairly straight forward. If we have to relook at the books to discern, calculate and deal with the garnishee, it is not garnishee proceedings but accounting. In the case of *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee) [2020] eKLR*, the court cited the decision of Lord Denning MR in *v 793070309 Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225* at page 227 where he 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. 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.'

12. The funds in Account No (xxxxx) were only Kshs 3,745,276.94. The balance as at December 11, 2019 of the Decree for 1st Respondent, who was the Decree holder was Kshs 636,343/- They tabulated amounts that were due in paragraph 3 of the supporting affidavit.

13. A casual look at the decree, I note that the interest is compounded. The balance due should by now be less than 600,000/=. The 1st Respondent should have a proper decree drawn by the court without the



compounding effect of the instalment interests. This however were not change facts on the ground. The decree ought to be redrawn without compounding effect.

14. The garnishee order is said to have been served to the bank. on December 23, 2019 to comply as regards the account No xxxx.
15. For a garnishee order to be operational, it should be noted that it is not a continuing security. The operational dates are December 23, 2019 up to December 30, 2019. The Garnishee indicated that as at December 23, 2023 a sum of Kshs 3,573,553.94 was in the account and had been attached to the tune of Kshs 4,480,883 in Machakos CMCC 641 of 2017.
16. The amount at the end of the day December 23, 2019 was 3,745,726.94. The question was whether it was attached vide an order dated December 10, 2019 the court, C A Ocharo SPM, as then she was issued a garnishee order over the said amounts.
17. The bank had shown that the account was attached and the money was not available on the said date. The attached amount was less than the amount garnished in Machakos CMCC 64 of 2017. It was the first garnishee.
18. The garnishee is not a party to the suit. They have no duty to show that some other account has money or that they have complied with the court order in Machakos CMCC 641/2017. Release of money attached by another court attracts penal consequences. The court thus erred in placing a burden on the bank, to show that it does not have another account.
19. If for any reason, the money in the account later became available or other monies became available after December 23, 2019, it was incumbent upon the Decree holder to issue another garnishee order. This is because bankers have a continuing obligation to maintain confidentiality. Once money is not available on day one, the banker is discharged. For example, if the plaintiffs' herein is indebted to someone, the money in the decree herein can be Garnished.
20. However, if I set aside the garnishee order, the obligation ends. It is the duty of the Court to use their discretion and prudence. To the Limited extent, the bankers were not to blame, from the multiple garnishees. I do find that the appellants was not under duty to settle the Decree.

Determination

21. I find merit in the Appeal. I therefore set aside the Decree absolute issued on September 22, 2021 and issue on order dismissing the garnishee proceedings. The Appellant shall have costs of Kshs 4,000/= payable by the 1st Respondent within 30 days, in default, execution to issue.
22. The 2nd Respondent to bear its costs in this Court and the Court below for garnishee proceedings. The 2nd Respondent to bear costs of the garnishee proceedings of Kshs 20,000/= in the court below. The security deposited be returned to the Appellant. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF MAY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Miss Osino for 1st Respondent

No appearance for the Appellant



