



**Waweru Gatonye & Co Advocates v Insurance Regulatory Authority; National Bank of Kenya & 3 others (Garnishee) (Miscellaneous Application E207 of 2019) [2023] KEHC 17332 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17332 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E207 OF 2019**

**A MABEYA, J**

**MAY 12, 2023**

**BETWEEN**

**WAWERU GATONYE & CO ADVOCATES ..... JUDGMENT CREDITOR**

**AND**

**INSURANCE REGULATORY AUTHORITY ..... JUDGMENT DEBTOR**

**AND**

**NATIONAL BANK OF KENYA ..... GARNISHEE**

**KENYA COMMERCIAL BANK ..... GARNISHEE**

**CO-OPERATIVE BANK LIMITED ..... GARNISHEE**

**NCBA BANK KENYA PLC ..... GARNISHEE**

**RULING**

1. Before Court is the application by the judgment/creditor dated February 28, 2023. It is brought under Order 23 Rule 1,2 and 3 of the *Civil Procedure Rules*. The application seeks orders directing the garnishees to appear in court to show cause why they should not pay the decree holder the sum of Kshs 45,963,369/=. That the monies deposited in the garnishees in account number 01003006xxxx and 120264xxxx for the judgment debtor be released to the judgment creditor to settle the sum of Kshs 45,963,369/-.
2. The application is premised on the grounds on the body of the notice of motion and on the affidavit in support by Leonard Kibet Rono dated February 18, 2023.



3. It was deponed that there is a judgment in favour of the judgment/creditor for Kshs 262,990,246/- against the judgment/debtor. That the amount paid thus far, following previous garnishee applications, was Kshs 283,402,658/- leaving a balance of Kshs 45,963,369/- which the judgment debtor had failed to pay. It was stated that the garnishees were holding substantial amounts to the credit of the judgment/debtor which should then be used to settle the debt.
4. The 2<sup>nd</sup> garnishee filed a response to the application through the replying affidavit sworn by its Assistant manager at the Capital Hill Branch dated March 9, 2023. She stated that the balance in account number 120264xxxx as at March 1, 2023 was Kshs 5,579,012.80 and therefore insufficient to cover the decretal amount.
5. The 1<sup>st</sup> garnishee filed a replying affidavit dated 8/3/2023 sworn by Nicholas Otieno the relationship manager for the Institutional Banking. He stated that the account number 0100300668xxxx as at March 1, 2023 had a balance of Kshs 1,475,397.99. He prayed for costs to be assessed at Kshs 50,000/-.
6. The judgment debtor opposed the application vide a replying affidavit of George Kiptum sworn on March 9, 2023. He stated that the decretal amount crystallized in July 22, 2022 and could not be included in the budget projections of 2023/2024. That the judgment/debtor and the decree/holder had undertaken negotiations whereupon the parties agreed to a payment of Kshs 300 million as the final settlement of the matter.
7. He stated that the judgment/debtor had to get approvals from the board of directors and national treasury for settling the decretal amount before committing to pay the same. That the National treasury had not communicated its decision and the judgment/debtor was running on a deficit and it risks crippling its operations.
8. I have considered the motion and the averments by the parties. It is not in dispute that there exists a judgment in favour of the judgment/creditor for Kshs 262,990,246. That through the previous garnishee proceedings a total sum of Kshs 283,402,658/- has been recovered leaving a balance of Kshs 45,963,369/=. The applicant has moved the Court seeking to have the garnishee order nisi be made absolute for the amounts held by the garnishees.
9. The 2<sup>nd</sup> garnishee admitted that it was holding in account number 120264xxxx a sum of Kshs 5,579,012/80 as at March 1, 2023. That sum cannot satisfy the balance of the decretal sum. On the other hand the 1<sup>st</sup> garnishee admitted having a credit balance of Kshs 1,475,397/99 in account number 0100300668xxxx as at March 1, 2023.
10. The objection by the judgment/debtor was that it requires approvals from the board and National treasury. That it had not budgeted for the said amount. A simple answer to that is that, it is high time public bodies realized that they cannot incur obligations and fail to honor them. The accounting officers have a duty to factor in their workplans and budgets, settlement of Court decrees as are other liabilities.
11. One other issue that Learned Senior Counsel Mr Gatonye observed was the unwillingness of the judgment/debtor to settle the decretal sum. That since the decree was passed in 2021, a sum in excess of Kshs80 million in interest has accrued. The same is to be borne by the Kenyan tax payer who is already hard beaten by the bad times that are the economy.
12. I agree with Senior Counsel on that. That it may well be that time has come whereby public officers who negligently subject public bodies to unwarranted losses should personally be held liable for such losses. Failure to plan is planning to fail. The accounting officers of the judgment/debtor knew of the



debt way back in 2021. It is now 2023 and they allege that the decretal amount was never factored in its estimates for 2023! That will not stop the wheels of justice from moving.

13. In *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co Ltd; Diamond Trust Bank (Garnishee)* [2020] eKLR the court cited the case of *Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, Garnishee)* (1981) 1 All ER 225 at page 227 wherein it was stated: -

“The word ‘garnishee’ is derived from the Norman-French. It denotes one who is required to ‘garnish’, that is, to furnish, a creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. The creditor can get a ‘garnishee’ order against the bank by which the bank is required to pay into court or direct to the creditor, out of its customer’s £150, the £100 which he owes to the creditor.

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. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days’ notice, the order nisi operates as the notice.”

14. These proceedings are aimed at ensuring that the judgment/debtor settles the debt from the garnishee. Two garnishees confirmed holding some amounts which however cannot satisfy the debt.
15. In this regard, I allow the application and make the order nisi absolute only to the extent of the monies being held in the identified accounts. The two garnishees will pay over the funds disclosed less their costs assessed at Kshs 50,000/- each.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

