



**Mayeku v Nyamweya t/a CD Nyamweya & Co Advocates; Lake Victoria
North Water Service Board (Garnishee) (Miscellaneous Civil Appeal
66 of 2020) [2023] KEHC 18523 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPEAL 66 OF 2020
RN NYAKUNDI, J
JUNE 5, 2023**

BETWEEN

JULIET NALIAKA MAYEKU APPELLANT

AND

**CHARLES DUKE NYAMWEYA T/A CD NYAMWEYA & CO
ADVOCATES RESPONDENT**

AND

LAKE VICTORIA NORTH WATER SERVICE BOARD GARNISHEE

*(Being an Appeal from the Ruling in Eldoret CMCC Miscellaneous Application
No. 2 of 2020 delivered by Hon. N. Wairimu (PM) on 7th August, 2020)*

JUDGMENT

Background

1. This ruling was made pursuant to the application dated 14/4/2020 in which the Appellant was the judgment debtor. In the said application Appellant herein had sought to set aside, review and or vary the garnishee order made on 8/1/2020 directed at the garnishee herein for attachment of 1/3 of all money payable to the Appellant as general damages, special damages and costs in Kitale CMCC No. 107 of 2019.
2. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 19/8/2021 filed the Memorandum of Appeal dated 7/8/2020 which sets out 11 grounds of appeal as follows That:



1. The Honourable Magistrate erred in law and fact in dismissing the Appellant's Application dated 14th April, 2020 when the Respondent was not a decree holder as there was no judgment in Kitale CMCC No. 107 of 2019 giving rise to a decree.
2. The Honourable Magistrate erred in law by failing to find that the garnishee application by the Respondent was incompetent *abi-nitio* as it did not comply with the requirements of Order 23 Rule 1 sub-rule (1), (2) and (3) of the *Civil Procedure Rules*.
3. The Honourable Magistrate erred in law and fact in failing to consider that the Respondent was not a decree holder as there was no judgment in Kitale CMCC No. 107 of 2019 giving rise to a decree.
4. The Honourable Magistrate erred in law and fact in failing to find that the Respondent's claim was omnibus which did not state the amount of the decree or the amount due to the Respondent.
5. The Honourable Magistrate erred in law and fact in failing to find that no order nisi was ever extracted and served upon the garnishee and the purported judgment debtor/applicant as required by law.
6. The Honourable Magistrate erred in law and fact in failing to find that the garnishee and the purported judgment debtor did not appear before the trial Magistrate before the garnishee order was granted.
7. The Honourable Magistrate erred in law and fact in failing to find that the application herein was scandalous and an abuse of the Court process as it did not comply with the provisions of Order 23 Rule 9 which requires that garnishee proceedings shall be filed upon the record or the suit in which the decree sought to be enforced was obtained.
8. The Honourable Magistrate erred in law and fact in failing to find that the garnishee order given was irregular, speculative and impossible to enforce as there were no debts owing from the garnishee as Kitale CMCC No. 107 of 2019 has not been concluded.
9. The Honourable Magistrate erred in law and fact in failing to find that the application herein was tenable in the circumstances as between advocate and client as the Respondent has not filed any suit to enforce the advocate and client agreement if any.
10. The Honourable Magistrate erred in law and fact in failing to appreciate that Counsel for the judgment debtor/Applicant swore an affidavit on pure matters of law which were within his knowledge.
11. The Honourable Magistrate erred in law and fact in failing in not judiciously exercising its discretion in abusing its discretion and in ignoring, incorrectly applying and/ or inadequately applying a generality of fact situations in the matter vis a vis the applicable legal standard.

Submissions by the Parties

3. The appeal was canvassed vide written submissions. The Appellant through her Counsel on 21/2/2023 filed submissions dated 17/2/2023 whereas the Respondent on 1/3/2023 filed submissions dated the same day.



The Appellant's Submissions

4. On whether the Respondent complied with the *Civil Procedure rules* in making the garnishee application. Mr. Nakitare, Counsel for the Appellant submitted that Order 23 Rule 1 of the *Civil Procedure Rules* provides for attachment of debts.
5. Counsel relied on the findings in *Mengich T/A Mengich & Co Avocades and another v Joseph Mabwai & 10 Others* [2018] eKLR and *Macharia Waiguru & another v John Njenga & 7 Others* [2014] eKLR to buttress his submissions.
6. Counsel contended that as per Order 23 Rule 1(2) (4) order *nisi* which ought to have been served on the garnishee as per Form No.16 of Appendix A should have disclosed that date it was made, the sum owing or accruing due from the garnishee to the judgment debtor, the sum to be paid and costs of the garnishee proceedings. Counsel maintained that application was irregular as it never stated the elements above and that there was no judgment/decree in Kitale CMCC No.107 of 2019 to be enforced through garnishee proceedings.
7. Counsel further submitted that Order 23 Rule 9 requires that garnishee proceedings shall be filed upon the record or the suit in which the decree sought to be enforced was obtained. Counsel argued that the suit between the judgment debtor and garnishee being Kitale CMCC No. 107 of 2019 was filed in Kitale Law Courts whereas the application by the Respondent which resulted into granting of the garnishee order was filed in Eldoret *vide* Miscellaneous Application No. 2 of 2020. This is in total contravention of the provisions of Order 23 Rule 9 of the *Civil Procedure Rules*.
8. Counsel further argued that it is not in dispute that the Respondent herein worked for the judgement debtor, however in absence of any judgment or decree as in this case, then the Respondent cannot enforce his agreement through garnishee proceedings but rather by filing a suit seeking to enforce their contractual obligations and particularly specific performance of the part of the judgement debtor and alternatively move court through a motion to have his Bill of costs taxed by a taxing master in accordance with the provisions of the *Advocates remuneration Order*.
9. In view of the foregoing, Counsel urged that the garnishee proceedings herein and the resultant order should be set aside and the Respondent be ordered to follow the proper procedure and file in the proper forum.

The Respondent's Submission

10. Mr. Nyamweya, Counsel for the Respondent submitted that this instant appeal is an abuse of the process of Court as the Respondent Advocates were paid their fees way back in the year 2020 which payment Counsel for the Appellant is aware of.
11. Counsel contended that to that extent the orders sought to be set aside and the application which is sought to be declared by this Court to be vexatious, frivolous, scandalous and an abuse of Court process have already been executed in the year 2020. Counsel cited the case of *Madison Insurance Company Ltd v Augustine Kamanda Gitau Machakos* Civil Appeal No. 123 of 2018 in arguing that this instant appeal is only vexatious.
12. According to Counsel, the Appellant's Counsel should have notified the Court that this appeal has since been overtaken by events



Determination

13. This being the first appellate court, its duty is to re-evaluate the evidence and all the material availed before the trial court so that I may come up with its own conclusions while bearing in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. In the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
14. I have considered this appeal and submissions relied on. I have also perused the trial court’s record and considered the impugned ruling.
15. In a nutshell the appeal herein seeks to find that the trial Magistrate in Eldoret Miscellaneous Application No. 2 of 2020 erred in law and fact by issuing a garnishee order nisi when the Respondent had not complied with the provisions of Order 23 Rule 9 which requires that garnishee proceedings ought to be filed upon the record or suit in which the decree sought to be enforced was obtained. The Appellant further contends that there was no judgment in Kitale CMCC No. 107 of 2019 so as to give rise to any decree.
16. It is not in dispute that the Court in Eldoret Miscellaneous Application No. 2 of 2020, made a garnishee order directed at the garnishee for attachment of 1/3 of all that money payable to the Applicant as general damages, special damages and costs in Kitale CMCC No. 107 of 2019. From the facts before this Honourable Court it is also not in dispute that the aforementioned order was complied with sometimes in the year 2020. That being the position at the time when this judgment was being delivered, there was absolutely nothing left for this Court to determine in so far as this appeal is concerned.
17. This appeal does not seek for the refund of the sum paid to the Respondent and thus the court would not have been expected to determine a matter that was not before it. The precise circumstances of this Appeal falls within the ambit of the *dicta* in *Mbogo & another v Shab* (1968) EA 93 at 96 affirmed the decision of the High Court thus: “We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”
18. In my view the nature of the action by the Appellant looked at from the 4 corners of the Memorandum of Appeal is not capable of being set aside as it hinges in challenging the judicial discretion of the session magistrate in the court below. With this goes Lord Mansfield’s famous *dictum* in *Rex v Wilkes* (1770 K. B.) 4 Burr. 2527, 25 39 “Discretion, when applied to a court of justice, means sound discretion



guided by law. It must be governed by rule not by humour. It must not be arbitrary, vague and fanciful, but legal and regular.”

19. The case of *Haywood v Cope* (1858 ch.) 25 Beav, 140, 151 is very instructive in this regard “ ... it is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the other Courts, which is that the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by considering what, as between the parties, would be fair to be done; what one person may consider fair, another may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.”
20. In view of the foregoing, it is the finding of this Court that appeal herein has already been overtaken by events and thus the Court cannot make any such orders in futility. That’s not to say that Appellant’s right to pursue the Respondent for a refund is closed. However, the same cannot be pursued by way of this appeal.
21. In the end, the appeal herein is not meritorious and is hereby dismissed with no order as to costs.
It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE, 2023.

In the presence of

Mr. Kimaru for the Respondent

.....

R. NYAKUNDI

JUDGE

