



REPUBLIC OF KENYA



**Diamond Trust Bank Kenya Limited v Dzito & another (Civil Appeal
52 of 2021) [2023] KEHC 21298 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 52 OF 2021
SM GITHINJI, J
JULY 18, 2023**

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPELLANT

AND

GETRUDE KAINGU DZITO 1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED 2ND RESPONDENT

*(Being an Appeal from the Ruling and Garnishee Order Absolute issued by
J.M.Kituku – Senior Principal Magistrate on 13th May, 2020 pursuant
to the 1st Respondent’s Garnishee Application dated 19th December, 2019)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mr Jojo Advocate for the Appellant

Miss Osino Advocate for the Respondent

1. This is an appeal arising out of the ruling and orders of Hon. J.M. Kituku delivered and issued on 13th May 2020 in Kilifi SPMCC No. 157 of 2017. The Appellant listed six grounds of appeal as follows:
 1. That the learned magistrate erred in law by failing to properly consider the provisions of Order 23 of the Civil Procedure Rules, 2010, hence arrived at an erroneous conclusion.
 2. That the learned magistrate erred in fact by holding that the statement of Account no. 0002xxxxxx as at 9th January 2020 was not a true account statement.
 3. That the learned magistrate erred in law and fact by holding that the appellant should have provided the statement of the 2nd Respondent’s attached account no. 0002291014 as at the date



of the hearing of the garnishee application dated 19th December 2019-that is as at 12th February 2020, instead of the date of service of the garnishee order nisi- that is at 9th January 2020.

4. That the learned magistrate erred in law and fact by finding that the appellant was withholding material information from the court in respect to the 2nd Respondent's account no. 0002xxxxxx.
 5. That the learned magistrate erred in law and fact by holding that the 2nd Respondent's account no. 0002291014 had enough funds to settle the 1st Respondent's decretal sum of Kshs. 224,418/- despite the appellant's uncontroverted evidence to the contrary.
 6. That the learned magistrate erred in law and fact in failing to properly consider the appellant's replying affidavit to the garnishee application dated 19th December 2019, hence arrived at a wrong conclusion.
2. The Appellant urged that the impugned ruling be set aside and replaced with an order dismissing the garnishee application dated 19th December 2019.
3. A brief background of this case is that vide an application dated 19th December 2019, the 1st Respondent applied for a garnishee order absolute for a judgment sum of Kshs. 224, 418/- in Kilifi SPMCC No. 157 of 2017. The Appellant opposed that application via a replying affidavit sworn on 7th February 2020 by Francis Kariuki, the Appellant's legal officer, who deposed that the 2nd Respondent's account no. 0002xxxxxx did not have sufficient funds to satisfy the 1st Respondent's claim.
 4. The trial court in its aforementioned ruling held that the explanation given by the Appellant was not the true state of affairs as at the time of the hearing as it exhibited only a one-day statement. That the Appellant was expected to give a true statement of account as at the time of showing cause and not when the garnishee order nisi was served on 9th January 2020. The trial court observed that the Appellant was withholding material and essential information from the court. Consequently, the trial Court confirmed the Garnishee Order Nisi and issued a Garnishee Order Absolute.
 5. Parties agreed to dispose of the appeal by filing written submissions. The 1st Respondent's submissions were filed on 31st January 2023 while the Appellant filed its submissions on 30th March 2023. I have carefully perused the record and considered the submissions and authorities cited to formulate the following issues for determination;-
 - i. Whether the Learned Magistrate erred in fact and in law in finding that the 2nd Respondent's account No. 0002291014 had sufficient funds to satisfy the 1st Respondent's decree.
 - ii. Whether the Learned Magistrate erred in law and in fact by failing to properly consider the Appellant's Replying Affidavit.

Analysis and Determination

6. This being a first appeal, this court is under a duty to re-evaluate, reappraise and reassess the evidence in totality and arrive at its own independent conclusion, bearing in mind that it did not hear or see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.



7. Order 23 Rule 1(1) of the *Civil Procedure Rules*: -

“ 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.”

8. Order 23 Rule 4 of the *Civil Procedure Rules* further reads;-

“ 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.”

9. In *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee) [2020]* eKLR the Court stated as follows:

“ Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable”

10. It follows therefore that in garnishee proceedings such as the present one, it is the duty of the garnishee to prove whether or not the garnishee is indebted to the judgment-debtor. To discharge this burden, the garnishee has to produce sufficient evidence in that regard and whether or not the funds in its hands are sufficient to satisfy the decree.

11. In this case, there is no dispute that there is a decree in favor of the 1st Respondent and that it has not been settled. It is also undisputed that the Appellant holds the 2nd Respondent’s account number 000xxxxxx. The trial court issued a garnishee order nisi on 8th January 2020 which was served upon the Appellant on 9th January 2020. The only issue is that the said account did not have sufficient funds to satisfy the decree. The Appellant produced a bank statement for the said account dated 9th January 2020.

12. Notably, that statement provided only a one-day entry for 9th January 2020, being the date the Appellant was served with the garnishee order nisi. Bearing in mind that the purpose of



a garnishee order nisi is to preserve the account or prohibit any transactions in an account, it is my view that the Appellant should have provided a true statement for the period when the order nisi was issued on 8th January 2020 to the period when they filed a response to the application. Failure to do so implied untruthfulness on the part of the Appellant by withholding or concealing some crucial information.

13. In the foregoing, I find that the Appellant failed to discharge its duty so as to warrant the court to discharge it from the garnishee proceedings. The Learned Magistrate did not err in fact and in law in finding that the 2nd Respondent's account No. 0002xxxxxx had sufficient funds, he reached that finding while stating his reasons and properly considering the affidavit dated 7th February 2020.
14. The upshot is that I find no sound ground to warrant disturbance of the lower court's decision. The appeal is unmerited and is hereby dismissed with costs to the 1st Respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 18TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Pauline Osino for the 1st Respondent

Mr Jonjo is for the Appellant but is present on hold.

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