



**Gitobu Imanyara & Co Advocates v Maina & 3 others; Llyod Masika Limited & another (Garnishee) (Miscellaneous Civil Case E163 of 2018) [2023] KEHC 20843 (KLR) (Commercial and Tax) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL CASE E163 OF 2018  
JWW MONG'ARE, J  
JULY 24, 2023  
IN THE MATTER OF ADVOCATE/CLIENT RELATIONSHIP**

**BETWEEN**

**GITOBU IMANYARA & CO ADVOCATES ..... APPLICANT**

**AND**

**FRANCIS CHEGE MAINA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MACHARIA MAINA ..... 2<sup>ND</sup> RESPONDENT**

**JAMES KIHARA MAINA ..... 3<sup>RD</sup> RESPONDENT**

**DEDAN MUTHAIGA MAINA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**LLYOD MASIKA LIMITED ..... GARNISHEE**

**COOPERATIVE BANK OF KENYA LIMITED ..... GARNISHEE**

**RULING**

1. On October 17, 2022 the Advocates-Clients Bill of costs between the Advocate/ Applicant and the Clients/Respondents was taxed and a ruling delivered for an award of costs of Kshs 1,022, 218.00/- in favour of the Advocate/Applicant. A Certificate of Costs was subsequently issued by the court on 6/12/2022. On 1/3/2023 the present application was filed by the Applicant seeking to Garnishee funds held in the Bank Account No xxxx of the 1<sup>st</sup> Garnishee at the 2<sup>nd</sup> Garnishee Bank.



2. By way of a background to the matter before this court, October 12, 2015 the Respondents/Clients retained the services of the Advocate Applicant to represent them in HCCC Misc No 354 of 2015; *M Njenga v Francis Chege Maina & others.*
3. Upon successful completion of the suit the Advocate, desirous of collecting his fees for the services rendered, filed a Bill of costs and the same was taxed by the Deputy Registrar in her capacity as a taxing master to the tune of Kshs 1,22,218.00/-. a Reference application was later filed under Order 11 Rule 2 of the Advocates Remuneration Order challenging the said taxation. The same is yet to be determined by the court.
4. The Applicant/Advocate has moved this court seeking the following orders;
  - a. That Judgment for the sum of Kshs 1,22,218.00/- plus accrued interest thereon at 12% per annum from 17<sup>th</sup> October 2022 until payment in full be entered in favour of the Applicant as against the Respondents jointly and severally.
  - b. That pending the hearing and determination of this application, the Honourable Court be pleased to issue a garnishee order nisi attaching and freezing the sum of Kshs 1,22,218.00/- belonging to the Advocate/Applicant through its advocates account No xxxx and which sums are held in by Llyod Masika Limited on behalf of the Respondents at Co-operative Bank of Kenya Limited, Account Number xxxx and any other account of the said bank or any other bank.
  - c. That the Garnishees appear before this honourable court on an appointed date and time to show cause why they should not pay the Claimant's advocates the sum of Kshs 1,22,218.00/- from the total amount held by the 1<sup>st</sup> Garnishee on behalf the Respondents in bank account number xxxx at Co-operative Bank as well as further costs and interest of this garnishee proceedings, That the garnishee appears before this court on an appointed date and time to show cause why it should not pay the Applicant's advocates the decretal sum of Kshs 1,22,218.00/- from the total held in the Respondents bank account number xxxx held at Co-operative Bank of Kenya Limited as well as further costs of this garnishee proceedings.
  - d. That in the Alternative to Prayer 4 Above, the Garnishees appear before the court an appointed date and time to show cause why they should not pay the sum of Kshs 1,22,218.00/-, from the total amount held by the 1<sup>st</sup> Garnishee on behalf of the Respondents in bank account number xxxx to a joint interest earning account to be held in the names of the advocates for the parties herein pending the hearing and determination of Chamber Summons dated October 31, 2022 filed by Respondents.
  - e. That upon the inter partes hearing of this application, the honourable court issues a garnishee absolute in terms of prayer 2 or as is enough to satisfy the unpaid decretal amount of Kshs 1,22,218.00/- to the Advocate/Applicant.
5. Prayer 2 of this application was partly spent and a garnishee nisi order placed on the funds held in the 1<sup>st</sup> Garnishee in the 2<sup>nd</sup> Garnishee Bank. The 1<sup>st</sup> garnishee has subsequently filed a Replying Affidavit in response thereto sworn by David K. Machua, one of the directors of the 1<sup>st</sup> Garnishee, Llyod Masika Limited. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents opposed the application and filed a Replying Affidavit sworn by the 1<sup>st</sup> Respondent, Francis Chege Maina on their behalf.
6. In the supporting affidavit to this application sworn by Gitobu Imanyara Advocate, the Applicant chronicles the events that led to this application for execution by way of garnishee proceedings. The Applicant contends that he is justly and legitimately entitled to his fees now taxed by the court at Kshs



1,22,218.00/- and that the Respondents have all along made promises to settle the same but failed to do so to date. That the fact that he was retained to represent the Respondents has not been disputed or at all. It is the position taken by the Applicant that the funds sought to be garnished belong to the Respondents and that by an order of the Court in HCC No 394 of 2011, the 1<sup>st</sup> Garnishee was mandated to manage and collect rent from some of the income generating properties owned by the Respondents by virtue of their shareholding in Ambassadeur Investments (K) Limited.

7. In opposing the application, the judgment-debtor have sworn a Replying Affidavit by the 1<sup>st</sup> Respondent. The Respondents argue that there is no competent garnishee application before the court in line with Order 23 of the Civil Procedure Rules. They urge the court to find that there is no guarantee capable of being executed as per the said Order 23 Rule 1 of the Civil Procedure Rules since the taxed costs of 6/12/2022 have not been admitted as a Judgment of the Court in line with Section 51 of the *Advocates Act*. In addition, the Respondents argue that there is pending before court a reference challenging the taxation of October 31, 2022 which is yet to be determined and which acts as a bar to entry of judgment of the taxed costs.
8. The 1<sup>st</sup> garnishee also opposes the garnishee proceedings and has sworn a Replying Affidavit in support thereto. In the Affidavit sworn by one its directors, the 1<sup>st</sup> garnishee argues that the funds collected by itself and held in an account in the 2<sup>nd</sup> garnishee bank are not solely held for the benefit of the 4 Respondents but for all the shareholders of the registered owner of the properties, namely, Ambassadeur Investments Limited. They urge the court to find that the said entity being a limited liability is distinct and separate from the Four (4) Respondents who are some of the shareholders thereto. The 1<sup>st</sup> Garnishee indeed confirms that the funds held in the garnisheed account as at the time of the order of garnishee nisi is Kshs 20419,890.00/-. The 1<sup>st</sup> Garnishee urges the court to lift the garnishee nisi orders on the said funds and dismiss the application as filed.

#### **Analysis and Determination:-**

9. I have carefully considered the application filed herein and the responses filed in opposition by the Respondents and the Garnishees and I note that the application before this court raises the following issues;
  - i. “Whether, in light of the fact that a Reference Application has been preferred and the same is yet to be decided one way or the other, can the judgment on the taxed costs be entered?”
  - ii. “whether the garnishee order nisi should be made absolute.”
  - iii. Whether the court can issue a mareva injunction”
10. As to
  - “whether, in light of the fact that a reference has been preferred and the same is yet to be decided one way or the other, can the judgment on the taxed costs be entered?”

In the first instance, the Applicant seeks to have the court enter of judgment of the taxed amount by this court. In the second instance, the Applicant then seeks to garnishee the taxed amount of Kshs 1,22,218.00/- against funds held by the 1<sup>st</sup> garnishee in the 2<sup>nd</sup> garnishee bank. It is not disputed that the Advocate Applicant was retained by the 4 Respondents to represent them in HCC of 2011. It is also



not disputed that the Advocate client has had his Advocate- Clients bill of costs taxed and the taxing officer returned taxed costs at Kshs 1,22,218.00/-. Section 51 of the Advocates Act stipulates as follows;

“The certificate by the taxing officer by whom any bill has been taxed shall unless it is set aside or altered, be final as to the amount of costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including, where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

11. The Respondents on October 31, 2022 filed a Reference Application challenging the taxation. The same is yet to be determined although the Applicant has filed a response in opposition thereto. In my view, it is only right to await the outcome of the reference as the same may affect the final judgment sum on the taxed costs as between the parties. I therefore hold and find on this prayer that a judgment under section 51 of the Advocates Act be entered on the taxed amount is premature.

12. The second issue is

“whether the garnishee order nisi should be made absolute.”

Order 23 of the Civil Procedure Rules garnishee application are execution provisions. These applications assume the following factors exist;

- i. That there is a valid judgment in favour of the decree holder against the judgment debtor.
- ii. That there is a decree that has been issued.
- iii. That the application brought is to aid the decree holder recover the judgment debt that has not been satisfied pursuant to an entry of judgment.
- iv. That the garnishee is holding funds that belong to the Judgment debtor or in which the judgment debtor has beneficial interest capable of being attached.

13. Justice Mativo (as he then was) in the matter of Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Limited (Garnishee) (2021) eKLR citing with approval a decision of the Nigerian Supreme Court in C.B.N v Auto Import Export defined garnishee proceedings as follows;

“Garnishee proceedings are special species of process by which a judgment creditor may attach (garnishee) debts due in satisfaction of the judgment debt. The debt owed by the third party to the judgment debtor, on being attached, shall ultimately be paid by him to the judgment creditor on the order of the court. Thus, garnishee proceedings involve the attachment of debt due from a third party to the judgment debtor, and the use of the amount of that debt in liquidating the judgment. In garnishee proceedings, the third party indebted to the judgment debtor is called the garnishee. The judgment creditor, on the other hand is referred to as the garnishor”.

14. There is yet to be a judgment as envisioned by Section 51 of the Advocates Act. We agree on the previous issue that the issue of entry of judgment is premature at this stage as the reference by the Respondents is yet to be determined. In the premises therefore the prayer for garnishee absolute is premature and cannot be entertained. The said application must await the disposal and outcome of the Reference Application brought under the Advocates Remuneration Order.

15. The third issue that the court identified is “whether this court could grant a Mareva Injunction”. The Applicant has urged the court to in the alternative issue an order of injunction to preserve the account



as an alternative prayer in the proceedings. The Applicant argues that it stands to suffer irreparable harm if the Respondents were to remove the funds held by the garnishees and the same would render the garnishee proceedings nugatory. Order 39 Rule 5 provides as follows

“ 5.

- (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—
  - (a) is about to dispose of the whole or any part of his property;
  - (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
- (2) The Plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
- (3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.”

16. The parameters of granting an injunction as envisioned in Order 39 Rule 5 were set out in the English case of *Mareva Compania Naviera SA v. International Bulkcarriers SA* (1980) 1All ER 213 where Lord Denning MR. observed as follows:-

“If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.”

17. In the case before me the Applicant has expressed fear that the Respondents are moving to share out the funds held by the 1<sup>st</sup> Garnishee. The Applicant has therefore urged the court to preserve a portion of the funds in the garnisheed account to which he has an interest and in order to guarantee payment of his fees. It is not disputed that the Applicant was engaged by the Respondents to represent them in a matter before the court. It is also not disputed that pursuant to a bill of costs filed by the advocate, the court taxed the same at Kshs 1,22,218.00/-. The court notes that the Respondents have not made any offers to settle the Applicant’s fees nor has any proposal been placed before this court on how, should they not succeed in setting aside the taxation, they propose to compensate the Applicant for services rendered. The Respondents have filed a Reference Application before this court and the same is yet to be heard. I have perused the Reference Application filed herein and the Response by the Applicant to the same. I note from the filed Reference the Respondents only challenge one item of the taxed Bill and are seeking the reasons for the increase of the item under instructions fees to Kshs 50,000/- instead of the minimum set by the Advocates Remuneration Order at Kshs 75000/-.



18. In its response filed by the 1<sup>st</sup> garnishee to these proceedings, the garnishee alludes that the garnished accounts hold Kshs 20419,000/-. The amount the Applicant is seeking to be preserved is Kshs 1,22,218/-. I note that although the 1<sup>st</sup> garnishee alludes to holding these funds on account of Ambassadeur investments Limited, the counter arguments by the Applicant that these funds are held for the benefit of the Respondents has not been controverted. I am therefore persuaded that this is a matter where it is prudent to preserve the funds sought since the Applicant has a legitimate expectation to recover his fees in the long run after the Reference Application is dispensed with.
19. In light of the above findings, I hold and direct that the sum of Kshs 1,22,218.00/- from the garnished account of the 1<sup>st</sup> Garnishee held in in account Number xxxx in the 2<sup>nd</sup> Garnishee be deposited with the court pending the hearing and disposal of the Chamber Summons dated October 31, 2022. Costs of these garnishee proceedings shall be borne by the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY 2023**

.....

**J. W. W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

1. Mr. Njoroge for the Advocate/Applicant.
2. Mr. Wena for the Client/Respondent.
3. Mr. Lucheveleli holding brief for Mr. Mwangi for the 1<sup>st</sup> Garnishee.
4. Mr. Obura holding brief for Mr. Mbakaya for the proposed Interested Party.
5. Sylvia- Court Assistant

