



**Milimo, Muthomi & Co Advocates v Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme; National Bank of Kenya & 2 others (Garnishee); Association of Kenya Railways Retirees (Interested Party) (Miscellaneous Civil Application 130 of 2018) [2023] KEHC 24321 (KLR) (Commercial and Tax) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION 130 OF 2018**

**A MABEYA, J  
OCTOBER 24, 2023**

**BETWEEN**

**MILIMO, MUTHOMI & CO ADVOCATES ..... DECREE HOLDER**

**AND**

**THE REGISTERED TRUSTEES, KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ..... JUDGMENT DEBTOR**

**AND**

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

**EQUITY BANK KENYA LTD ..... GARNISHEE**

**KCB BANK OF KENYA LIMITED ..... GARNISHEE**

**AND**

**ASSOCIATION OF KENYA RAILWAYS RETIREES ..... INTERESTED PARTY**

**RULING**

1. There are 2 applications before Court for determination. The 1st one is dated 22/7/2021 filed by the 3rd garnishee and the 2nd one is dated 12/10/2022 filed by the decree holder.
2. The first application by the 3<sup>rd</sup> Garnishee was brought under section 27(1) and 75 of the [Civil Procedure Act](#), Order 43 Rule 1(3) and Order 23 Rule 10 of the [Civil Procedure Rules](#). In it, the 3rd garnishee sought leave to partially appeal against the ruling of 8/7/202.



3. The basis for the application was that the 3rd garnishee was aggrieved by the part of the said ruling which ordered the garnishees to bear the costs of the application which was the subject of the ruling and therefore it wished to appeal against that portion.
4. I note that there was no opposition filed by any of the parties against the said application. Further, that the application seeking leave to file an appeal was made within 14 days from the date the ruling was made in accordance with Order 43 Rule 1(3) of the [Civil Procedure Rules](#). That being the case, I see no reason not to grant the 3rd garnishee the leave sought.
5. The second application is a Motion on Notice brought inter-alia under section 75 of the [Civil Procedure Act](#), and Order 43 Rules 1(2) and 1(3) of The [Civil Procedure Rules](#). In it, the decree holder sought leave to appeal against the ruling of this Court of 30/9/2022 and pending the determination of the intended appeal, an order to restrain the judgment debtor from withdrawing, utilising and or transferring in any way all that money held in: -
  - a) Bank Account Number 0107023xxxxxxx, National Bank of Kenya, Harambee Avenue Branch,
  - b) Bank Account Number 0470294xxxxxxx Equity Bank Kenya, Moi Avenue Branch and,
  - c) Bank Account Number 11023xxxxx, KCB Bank Kenya, Custody Services Branch.
6. The application was premised on the grounds that in its decision of 30/9/2022, the Court dismissed the decree holders garnishee application dated 17/9/2021 and partially allowed the interested party's joinder application dated 10/3/2022. That the decree holder is greatly aggrieved by the said decision and intends to appeal against the same to the Court of Appeal.
7. The decree holder asserted that leave of this court is required before it may exercise its right of appeal against the impugned decision of the Court and that it has very solid grounds for seeking an appeal including that there are no other means of satisfying the decree apart from the garnished accounts hence the need for preservation orders.
8. The judgment debtor opposed the said application by filing grounds of opposition dated 18/10/2022. It contended that in the impugned decision of 30/9/2022, the Court correctly found that the funds in the garnished accounts are not available to satisfy the decree herein as it would be contrary to the Pensions and Retirement Benefits Acts. That allowing the application would cause great prejudice and hardship to the retirees and the funds should be available at all times to the retirees as per the Court's ruling.
9. The judgment debtor argued that the decree holder did not satisfy the Court that there are no other means of satisfying the decree apart from garnisheeing the accounts.
10. The interested party also opposed the application through grounds of opposition dated 31/10/2022. It contended that the application was contra statute; i.e the [Pensions](#) and the [Retirement Benefits Acts](#) thus incompetent and that the Court already determined that the garnished amounts could not be garnished therefore the application was res judicata.
11. Further, that the orders would prejudice the interested party's members who would be occasioned hardship as they depend on their pension for upkeep and maintenance. That the decree holder has not made out a case for the grant of leave to appeal and the draft memorandum of appeal does not demonstrate any arguable ground of appeal.



12. The parties filed their respective submissions which I have considered.
13. On leave, the applicant submitted that there are specific instances where an appeal shall lie as of right under Order 43 Rule 1 of the [Civil Procedure Rules](#). However, the present application did not fall within those instances. That therefore, it was mandatory for it to seek leave before filing such an appeal.
14. Section 75(1) of the [Civil Procedure Act](#) and Order 43 Rule 1 of the [Civil Procedure Rules](#) provide for specific instances where appeals lie as of right. In this case, the decree holder sought to appeal against a ruling which rejected its application to grant a garnishee order. Such an order is not appealable as of right and leave of Court is therefore mandatory.
15. The grant of leave is discretionary. But like all discretions, the same must be exercised judiciously. In exercising such discretion, the Court has to consider that an applicant has a constitutional right to a fair hearing and a right to access to justice. This includes the right to appeal. The Court has also to consider the time taken to lodge the application and the prejudice, if any, to be suffered by either of the parties by either granting or declining leave.
16. In the present case, I note that application was made on 12/10/2022 while the impugned ruling was delivered on 30/9/2022. There was no delay in its lodgement. Further, it is important for there to be a second consideration of whether in the circumstances of this case, garnishment of the subject accounts is contrary to statute as held by this Court.
17. Based on the foregoing, I am satisfied that the leave sought is merited and I grant the same accordingly.
18. The second issue for determination is whether the Court should grant restraining orders against the judgment debtor from accessing the funds in the subject accounts.
19. The decree holder sought an order to restrain the judgment debtor from utilising the money in the garnished accounts pending the determination of its intended appeal.
20. In the ruling of 30/9/2022, the Court found that the funds in the garnished accounts were not available to satisfy the decree herein as it would be contrary to section 13 of the [Pension Act](#) and section 36 of the [Retirement Act](#). The reasoning was that, the funds in the garnished accounts constituted pension and could not be garnished in execution of a court decree under the said sections of the law.
  21. Section 36 of the [Retirement Benefits Scheme Act](#) provides: -

“Protection against attachment Notwithstanding anything to the contrary contained in any other written law, where a judgement or order against a member of a scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme rules and such contributions shall not form part of the assets of the member or of his employer in the event of bankruptcy.”
22. On the other hand, section 13 of the [Pensions Act](#) provides: -

“A pension, gratuity or other allowance granted under this Act shall not be assignable or transferable except for the purposes of satisfying—

  - (a) a debt due to the Government; or
  - (b) an order of any court for the payment of periodical sums of money towards the maintenance of the wife, or former wife, or minor child, of the officer to



whom the pension, gratuity or other allowance has been granted, and shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatever except a debt due to the Government.”

23. From the forgoing, this Court was and still of the view that, money held in pension is not available to be attached nor sequestered in respect of any claim except a debt due to the government or as provided for in the law.
24. In this regard, I still opine that it would be contrary to the letter and spirit of the law to grant an order restraining the utilization of the money in the garnished accounts. The members of the Interested Party are paid from the funds in those accounts. It has not been shown that the judgment-debtor does not have any other properties that can be attached to satisfy the decree herein.
25. In the premises, I would decline to grant that part of the 2<sup>nd</sup> application that seeks to restrain the utilization of the funds in the garnished accounts.
26. Accordingly, I grant prayer 1 of the application dated 22/7/2021 and prayer 4 of the application dated 12/10/2022 only.

It is so ordered.

**DATED AND DELIVERED NAIROBI THIS 24TH DAY OF OCTOBER, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

