



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E110 OF 2021

EQUITY BANK LIMITEDGARNISHEE/APPELLANT

VERSUS

DR. FRANCIS O.G. MATETE.....D/HOLDER/1ST RESPONDENT

XPLICO INSURANCE CO. LTD.....JUDGMENT DEBTOR

RULING

The application dated 15th September 2021 is for stay of execution until the appeal is heard and determined.

1. The Applicant, **EQUITY BANK LIMITED** was the Garnishee in the proceedings between the Plaintiff, **DR. FRANCIS O.G. MATETE** and the Defendant, **XPLICO INSURANCE CO. LTD.**
2. The Plaintiff had obtained a Judgment in his favour, for the sum of Kshs 1,607,750/=. After extracting a Decree for the judgment sum, the Plaintiff instituted execution proceedings by applying for garnishee orders against the Applicant.
3. The learned trial magistrate issued a garnishee order nisi, after being persuaded that the Applicant held money to the order of the Defendant.
4. The Applicant now asserts that the garnishee order nisi was never served upon it. The Applicant's case was that the person who was allegedly served with the said order, was a stranger to the Applicant.
5. However, the Respondent holds the view that the Applicant was simply putting forward an excuse, after it had failed to answer to the application for orders of garnishee.
6. It was the understanding of the Respondent that the alleged failure by the Applicant to trace the application at their offices, cannot be said to imply that the Applicant had not been served.
7. As far as the Respondent was concerned, the Applicant had misplaced the Application, which had been served upon its Legal Officer named **MARY NJOROGE**.
8. The issue of service of the application is central to the whole appeal. If the Applicant were to satisfy the Court that it was not served with the application dated 28th June 2021, it would follow that the proceedings at which the garnishee order nisi was made absolute, had been conducted without notice to the Applicant herein.
9. I hold the considered view that justice demands that the Applicant be granted an opportunity to canvass the said issue of the alleged non-service.
10. Secondly, the Applicant asserts that whilst there may have been funds in bank accounts of the Judgment Debtor, at the time when the trial court granted the garnishee order nisi, the said funds were not being held to the order of the Judgment Debtor, at the material time.
11. According to the Applicant, the bulk of the money was already, at the material time, subject to other garnishee orders which had been served upon the bank. Therefore, it was contended that the debits made against the accounts of the Judgment Debtor were effected in compliance with Orders of the Courts.
12. It is therefore possible that if the Applicant were to demonstrate to the appellate court that there were no funds available to meet the decretal amount due to the Decree Holder, the court could find that the garnishee order absolute ought not to have been granted.

13. In effect, I find that the Applicant has an arguable appeal.
14. Secondly, I note that the Respondent had taken steps to attach the property belonging to the Respondent.
15. If the execution was not stayed, I find that the Applicant's property would be carted away and sold-off.
16. That raises a very fundamental question in my considered view. The question is;

“If a garnishee failed to comply with a garnishee order absolute, is the Decree Holder entitled to carry out execution by attaching the property of the said garnishee?”

17. In my understanding, a garnishee does not become a Judgment Debtor when a garnishee order nisi is served upon it.
18. The garnishee order nisi is effectively an *“injunction”* to restrain the bank from paying out money from the account of the Judgment Debtor.
19. The garnishee order nisi may also be construed as an order of *“attachment”* of the money which the garnishee was holding to the order of the Judgment Debtor.
20. If the garnishee was not holding money to the order of the Judgment Debtor, the court ought not to issue a garnishee order absolute.
21. As a garnishee is only under an obligation to pay the Decree Holder out of funds it is holding for the Judgment Debtor, I hold the considered view that if the Respondent were permitted to proceed with execution, against the assets of the garnishee, the garnishee is likely to suffer substantial loss.
22. This finding is further informed by the fact that the Respondent did not make available any information concerning his ability to repay the Applicant, if the appeal were to succeed, when the decretal amount had been paid out.
23. I therefore order that there shall be a stay of execution until the appeal is heard and determined.
24. However, the stay is conditional upon the provision of security by the Applicant. The Applicant shall deposit the decretal amount in an interest-earning account, to be held in the joint names of the advocates representing the parties herein.
25. The Applicant has 30 days to deposit the security.
26. On the issue of costs, I order that the same shall abide the outcome of the appeal. Whichever of the parties is successful in the appeal, shall also be awarded the costs of the application herein.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF FEBRUARY 2022

FRED A. OCHIENG

JUDGE