



REPUBLIC OF KENYA



**KENYA LAW**  
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**Multiple ICDC (K) Limited v Zakheem International Construction Nigeria;  
Kenya Pipeline Company Limited (Garnishee) (Civil Suit E132 of 2020)  
[2024] KEHC 13783 (KLR) (Commercial and Tax) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13783 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E132 OF 2020  
A MABEYA, J  
NOVEMBER 7, 2024**

**BETWEEN**

**MULTIPLE ICDC (K) LIMITED ..... PLAINTIFF**

**AND**

**ZAKHEEM INTERNATIONAL CONSTRUCTION NIGERIA ..... DEFENDANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... GARNISHEE**

**RULING**

1. Before Court is the amended Notice of Motion by the plaintiff dated 14//12/2023. The Motion was brought under Order 23 rules 1 and 3 and Order 51 Rule 4 of the *Civil Procedure Rules*. The application sought that the garnishee order nisi be made absolute against Kenya Pipeline Company Limited and the garnishee be ordered to pay all monies attached and belonging to the defendant
2. The said amount was alleged to arise from the proceeds of contract number SU/QT/032N/13 and/or the consent judgment in favour of the defendant as against the garnishee in *Nairobi High Court (Commercial & Tax Division Civil Suit no. E322 of 2019* to the extent of USD 4,596,184/68 or its equivalent in Kenya Shillings and Kshs 3,689,305.00 to settle the decree of 18/8/2020.
3. The plaintiff relied on the grounds on the face of the Motion and the affidavit of Rajinder Singh Baryan sworn on 13/12/2023. The plaintiff contended that the parties adopted a consent judgment wherein the defendant was required to pay the plaintiff USD 3,286,590.80 together with costs and interest. That however, the defendant had failed to pay the said sum and as a result it had accrued interest of USD 1,309,593.88 bringing the total amount due to USD 4,596,184.68.



4. That the plaintiff had previously filed an application dated 7/3/2023 whereby it obtained orders for a *garnishee nisi*. However, the same was withdrawn since the garnishee had stated that it did not hold any funds for the defendant. It was contended that the garnishee had not given the correct information since the plaintiff came across a consent dated 25/9/2023 executed by advocates of the garnishee and the defendant.
5. That according to the consent, the garnishee owed the defendant USD 69,684,238.46 inclusive of VAT and the garnishee has paid the defendant USD 24,124,990 inclusive of VAT leaving a balance of USD 45,559,248.26. That there was a sum of USD 31,308,249.80 held pursuant to a mareva injunction and excluding this sum the garnishee was to pay the defendant USD 14,250,998.46. That the garnishee despite admitting on oath that it did not have any sum proceeded to remit to the defendant USD 20 million.
6. The application was opposed by the defendant vide a replying affidavit sworn by Ibrahim Zakhem dated 19/12/2023. He averred that the application was defective as it sought to attach funds over and above the stated decretal sum of USD 4,596,184.68 and Kshs 3,689,305.00. That this move by the plaintiff serves an undisclosed ulterior motive of third party entities. The defendant stated that there were no funds capable of being garnished presently in the garnishees custody.
7. It was contended that the application was defective since the garnishee was not a creditor of the judgment-debtor and the application failed to meet the formal requirements under Order 23. That the funds stated by the plaintiff were subject to two Mareva injunctions issued in *Nairobi HCCC No. 292 of 2018* on 26/7/2018 and *Nbi Misc Arb E042 of 2021*. That the consent had been withdrawn and save for USD 31,308,249.80 held by the garnishee under the mareva injunction, there was no other funds held on behalf of the judgment debtor.
8. The garnishee filed a replying affidavit sworn by Nelson Nyaduwa dated 16/2/2024. He stated that the consent dated 25/9/2023 filed in *Nairobi HCCOMM E322 OF 2019 Zakhem International Construction Limited v Kenya Pipeline Company Limited* was withdrawn on 18.12.2023.
9. That there were no funds held by the garnishee save for the sum of USD 31,308,249.80 under the Mareva injunction. That the decree holder/plaintiff had failed to establish that the garnishee holds any funds on behalf of the defendant capable of being garnished.
10. Parties canvassed the application by way of written submissions which I have considered. The plaintiff buttressed the averments in its supporting affidavit and submitted that Ibrahim Zakhem and Nelson Nyanduwa had purposefully and intentionally misled the Court. That it had been nearly 4 years since the consent judgment was entered in favour of the plaintiff which as the successful litigant it has the right to enjoy the fruits of its judgment.
11. The defendant submitted that the decree holder had failed to demonstrate that there were funds in the custody of the garnishee capable of attachment. That in any attachment proceedings, an applicant is required to demonstrate that there is availability of funds. Counsel submitted that the garnishee had stated that it holds no funds in favour of the judgment debtor other than the funds frozen by the mareva injunction.
12. I have considered the pleadings and the submissions on record. The core issue for determination is whether the decree order nisi should be made absolute. Order 23 Rule 1 of the *Civil Procedure Rules* provides that: -

- “ 1) A court may, upon the ex parte application of the 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 salary or allowances 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 costs of the garnishee proceedings; and by the same or subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay the decree-holder the debt due from him to the judgement-debtor or so much thereof as may be sufficient to satisfy the decree together with costs aforesaid.”

13. In *Mengich t/a Mengich & Co. Advocates & Another v Joseph Mabwai & 10 Others* [2018] eKLR, the court laid out the procedure in garnishee proceedings as follows: -

“Garnishee proceedings is done in two different stages. The first stage is for the garnishee order nisi, while the second stage is for the garnishee order absolute. At the first stage, the judgment creditor makes an application ex parte to the court that the judgment debt in the hands of the third party, the garnishee, be paid directly to the judgment creditor unless there is an explanation from the garnishee why the order nisi should not be made absolute. If the judgment creditor satisfies the court on the existence of the garnishee who is holding money due to the judgment debtor, such third party (garnishee) will be called upon to show cause why the judgment debtor’s money in its hands should not be paid over to the judgment creditor, and if the court is satisfied that the judgment creditor is entitled to attach the debt, the court will make a garnishee order nisi attaching the debt.

The essence of the order nisi is to direct the garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the judgment debtor. It is a requirement that a copy of the order nisi must be served on the garnishee and judgment debtor at least 7 days before the adjourned date for hearing. The second stage is for the garnishee order absolute, where on the adjourned date, the garnishee fails to attend court or show good cause why the order nisi attaching the debt should not be made absolute, the court may subject to certain limitations make the garnishee order absolute. The garnishee, where necessary also have an option of disputing liability to pay the debt.

The primary object of a garnishee order is to make the debt due by the judgment debtor available to the decree holder in execution without driving him to the suit.”

14. In the present case, it is not in dispute that the defendant/judgment debtor remains indebted to the plaintiff pursuant to a consent judgment agreed upon by the parties on 13/8/2020 for USD 3,286,590.80 and Kshs 3,689,305.00 together with costs and interest. The said consent further stated that the decretal sum to be paid to the plaintiff either directly by Kenya Pipeline Company Limited or by the defendant.
15. The plaintiff alleged that in response to a similar application dated 7/3/2023, the garnishee had misrepresented to the Court that it did not hold any funds belonging to the defendant. That both the garnishee and the defendant had recorded a consent showing that the total debt owed to the defendant by the garnishee was USD 69,684,238.46. The garnishee in its replying affidavit stated that it did not hold any funds for the defendant save for the sums held under mareva injunction.



16. In garnishee proceedings, the Court has power to order a garnishee to pay directly the sums it owes a judgment-debtor to a decree-holder from the garnished sum or so much of it as may be sufficient to satisfy the amount of the unsettled decree. The Court is called upon to determine how much of the debt owed by the garnishee is required to satisfy the judgment amount, including any associated costs.
17. In such proceedings, a garnishee has the obligation to respond to the Court and answer to the claim that it owes a judgment-debtor. In the present case, the plaintiff has contended that both the garnishee and the judgment-debtor lied to the Court when they stated that the garnishee did not hold any funds for the judgment-debtor. That subsequent to those averments, they entered into a consent that revealed that indeed the garnishee owed the judgment-debtor close to US\$ 69million odd.
18. It is sad that such situations would arise where a garnishee and a judgment-debtor would connive and defeat a court process. There may be other avenues of meting out punishment upon those who made deliberate false statements to the Court. In the present proceedings, what the garnishee and the judgment-debtor have admitted is that there are funds amounting to US\$ 31million that is held by the garnishee but under a mareva injunction.
19. That means that the said amount cannot be available for sequestration as that would be to breach the order under which they are held. Until that order is set aside and the funds freed, the same cannot be subject of a garnishee order absolute.
20. Accordingly, the application is without merit and is dismissed. In the circumstances of this case, I order that each party do bear own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

