



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NYAHURURURU

MISC CIVIL APPEAL NO 2 OF 2019

NYAGWA NGIGI & KIBET ADVOCATES.....APPLICANT/ DECREE HOLDER

-VS-

INVESCO ASSURANCE CO. LTD.....RESPONDENT

NCBA BANK KENYA PLC.....1ST GARNISHEE

DIAMOND TRUST BANK LIMITED.....2ND GARNISHEE

RULING

INTRODUCTION

1. By a Notice of Motion dated 14th February 2020 under Order 23 Rule 1 and 2, Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 and all enabling provisions of the law, the Decree Holder/Applicant sought the following orders;

a. Spent

b. Spent

c. That the Garnishee do appear before the Court to show cause why they should not pay the Decree Holder kshs. 84,025.00 plus costs from the amount held by the Respondent at their account numbers Account Number [...] at the 1st Garnishee Bank and Account Numbers [...] and [...] at the 2nd Garnishee Bank and/or any other account held by the aforesaid.

d. That the Garnishee Order Nisi be made absolute.

e. That costs be provided for.

2. The application was based on grounds stated in the application itself, supported by the affidavit and further grounds in the supplementary affidavit of Joseph N. Ngigi advocate for the Applicant dated 19/6/2019 and 19/11/2020 respectively together with annexures thereto.

3. There is no dispute that there is a decree in favor of the Applicant that has not been settled. The Judgment Debtor has not sought to have the decree issued herein on 28/11/2019 set aside neither is there an order for stay of execution of the said decree.

APPLICANT'S SUBMISSIONS

4. The Applicant established to this court by way of attaching a copy of Judgment Debtor's account statement and replying affidavit dated 14/7/2020 that there is a sum of money held by the Garnishee that is due to and recoverable by the Judgment Debtor that would constitute a debt for the purpose of Garnishee proceedings. In addition, the Judgment Debtor in their response did not dispute the existence of the attached bank accounts and the 1st Garnishee acknowledged the existence of the said account which is used to pay claims.

5. The Applicant averred that they have sufficient reason to believe that the account sought to be garnished indeed holds funds that are sufficient to satisfy the decree herein fully as the Respondent has not contested and that as at 3rd March 2020 when the Order Nisi was granted the garnished account number [...] had a credit of Kshs. 1,319,172.07/-, which was more than sufficient to settle the judgement sum herein of Kshs. 84,025/-.

6. Further the applicant asserted that it is clear that the 1st Garnishee satisfied Garnishee Orders Nisi in several matters handled by the

Applicants herein that is **Naivasha Misc. Numbers 97 of 2018, 98 of 2018, 99 of 2018, 100 of 2018, 111 of 2019, 114 of 2019, 118 of 2019, 66 of 2019 and Kerugoya Misc. Numbers 56 of 2019 and 58 of 2019 Ngaywa Ngigi & Kibet Advocates-vs-Invesco Assurance Company Limited & 2 Others** to a tune of kshs. 1,087,480 on 28/2/2020 and 16/3/2020, periods that are both prior to the issuance of the Garnishee Order Nisi herein and also after its issuance.

7. The Applicant submitted that the 1st garnishee bank herein failed to settle the judgment debt of kshs. 84,925.00 yet they were present in court when the Garnishee Order Nisi was granted back in 3/3/2020. It is the Applicant's case that they have since established that the garnished account has sufficient funds to satisfy the decree and that no cause has been shown as to why the funds in Account Number [...] should not be utilized to satisfy the judgement debt herein.

1ST GARNISHEE'S SUBMISSIONS

8. In rejoinder, the 1st Garnishee through their submissions admitted to holding Account Number [...] on behalf of the Judgement Debtor but further averred that the amount held therein had already been garnished by the Applicant in other Garnishee Orders Nisi issued to him and thus there are no sufficient funds to satisfy the Garnishee herein on issuance of Garnishee Absolute. **(See annexed marked SA-1(a) and (b) being a copy of the account statement and copy of the Garnishee Order Absolute)**

9. The 1st Garnishee averred that since the inception of the application herein the Applicant has never served it with the Garnishee Order Nisi as to be able to preserve the account and that it is not opposed to release the money on issuance of the Garnishee Order Absolute save that the said amount is already garnished by the Applicant in other Garnishee orders earlier issue and the funds therein are already exhausted.

10. Furthermore, the 1st Garnishee noted that the Applicant herein has been the beneficiary of all the funds held by the 1st Garnishee on behalf of the Judgement Debtor and that the book balance indicated on the Judgement Debtor statement attached to the 1st Garnishee supporting affidavit has also been garnished by the Applicant. **(See the copy of the Garnishees Order Absolute annexed and marked SA-1(b) and SA-2).**

11. Primarily, the 1st Garnishee asserted that the funds held by them on account of the Judgement Debtor have already been garnished by the Applicant and thus there will be no more funds to satisfy the Garnishee on issuance of Garnishee Order Absolute and that it will be in the interest of justice that the application herein be disallowed and that they be discharged from the proceedings.

ANALYSIS

12. The starting point in deciding this matter are the provisions of **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”.

13. The object of Garnishee Proceedings is to enable a Decree Holder to reach a debt due to the Judgment Debtor from the Garnishee as may be sufficient to satisfy a Decree. Crucial thereof is that the Garnishee is indebted to the Judgement Debtor.

14. 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.

15. In terms of **Order 23 Rule 4 of the Civil Procedure Rules**,

“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.”

16. In the instant case, there is no dispute that there is decree in favor of the applicant and that it has not been settled. It is the position of the law that in garnishee proceedings the Garnishee Banks are only required to appear before the court to acknowledge or dispute the debts. The respondent did not attend court to dispute its liability to the judgement debt or deny that the attached accounts belong to them despite service by the Applicant/Decree Holder. However, It is also clear that the 1st Garnishee acknowledged by way of their replying affidavit deponed on 14/7/2020 that it is not opposed to release the money on issuance of the Garnishee Order Absolute save that the said amount is already garnished by other garnishee orders earlier issued by the honorable court in other suits and that the remaining amount may not be sufficient. The 1st Garnishee did not provide accounts as to what sum of money will remain after the satisfaction of the garnishee orders aforementioned.

17. I would grant the application making the garnishee order nisi absolute, however, in view of the 1st Garnishee's response and the evidence presented, it is apparent that there are other Garnishee Orders absolute which rank in priority to the Applicant's, as such, the liability of the 1st Garnishee would be limited to the extent of the balance in the account once the other garnishee orders have been settled.

CONCLUSION

18. In the premises, the applicant's application allowed. Thus court makes the orders;

(i) The Garnishee Order Nisi is hereby made absolute however the 1st Garnishee is to pay forthwith to the Applicant in the order of priority of which they were served and to the extent of the sum of money remaining in the accounts after the same have been fulfilled.

(ii) The applicant is awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 13TH DAY OF MAY, 2021.

.....

CHARLES KARIUKI

JUDGE