



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPL. NO. 33 OF 2020

PATRICK L. OTIENO - OYOO

t/a OTIENO OYOO & CO. ADVOCATES.....APPLICANT

-VERSUS-

AFRICA MERCHANT ASSURANCE CO. LTD.....RESPONDENT

AND

DIAMOND TRUST BANK KENYA LIMITED.....GARNISHEE

RULING

The application dated 13th October 2020 was brought by **PATRICK L. OTIENO – OYOO t/a OTIENO – OYOO & COMPANY ADVOCATES**, who was seeking a Garnishee Order to issue against **DIAMOND TRUST BANK KENYA LIMITED**, in respect of money which the said Garnishee was holding to the order of the Respondent, **AFRICA MERCHANT ASSURANCE COMPANY LIMITED**.

1. The Applicant holds a Decree in the sum of Kshs 5,680,000/=, which is due and payable by the Judgment Debtor, who is the Respondent to this application.

2. The Applicant identified the following 3 Accounts as those which the Respondent had at the bank, and in respect to which the garnishee orders should apply;

(1) Current Account No. xxxxxxxxx;

(2) Fixed Deposit Account

No. FDLC xxxxxxxxx; and

(3) Fixed Deposit Account

No. FDLC xxxxxxxxx

3. On 14th October 2020 the Court granted the Garnishee Order Nisi, and directed that the returnable date would be the 28th of October 2020.

4. Mr. Lugano advocate represented the Respondent in court on 28th October 2020, and he sought leave to file a Replying Affidavit within the next 14 days.

5. However, the Respondent did not file any replying affidavit thereafter.

6. On its part, the Garnishee filed a Replying Affidavit. Thereafter, the application was canvassed by written submissions.

ACCOUNT NO. XXXXXXXXX

7. The Garnishee said that that account had a credit balance of Kshs 6,126.05 as at 21st October 2020 when the Garnishee Order Nisi was served upon the bank.

8. However, as the Applicant noted, the said account was not a Kenya Shillings Account; it was a Dollar Account. That fact is verifiable from the bank's annexature "JT - 1".

9. It was the bank's position that there were no attachable funds in that account, that could warrant the issuance of a garnishee order absolute.

10. If the bank was saying that the insufficiency of the funds in the account was a bar to issuance of the orders being sought, I wish to tell them that that is not the position.

11. If an account is in credit, even if the funds therein were not sufficient to satisfy the decree, that cannot be a bar to the issuance of a garnishee order.

ACCOUNT NO. FDLC XXXXXXXXX

12. In that Fixed Deposit Account, there is a credit sum of Kshs 40,000,000/=.

13. The bank submitted that the said funds were not available as the bank holds a lien over the same. The said lien is said to have arisen after the Respondent executed a Lien Form as security for the Overdraft Facility of Kshs 40,000,000/= which the bank made available to the Respondent.

ACCOUNT NO. FDLC XXXXXXXXX

14. The said Fixed Deposit Account had a credit balance of Kshs 9,546,293.30 as at 29th September 2020.

15. In order to secure the Overdraft Facility which the bank had advanced to it, the Respondent executed a Lien Form in favour of the bank, for a sum equivalent to facility of Kshs 9,546,293.30.

16. As regards Overdraft Facilities, it is a fact the same is only repayable by the customer when he has utilized it. In other words, the facility may be available for use by the customer but, the said customer may or may not make use of it.

17. And even when the customer makes use of the overdraft facility, he may use either a part of it or the whole facility.

18. Therefore, the bank ought to have made available proof that the Respondent herein had utilized the overdraft facilities.

19. As the bank failed to provide proof that the Respondent had utilized the 2 overdraft facilities, I find no basis upon which the Court could conclude that the Respondent owed any money to the bank.

20. In the absence of proof of the Respondent's indebtedness to the bank, there is no way that the Court could conclude that the bank had a lien over either a portion of or all of the money in the Fixed Deposit Accounts.

21. In principle, the money in the fixed deposit accounts are available for attachment by way of a garnishee order, because the garnishee has failed to show cause why it should not pay to the decree holder, the debt due from it to the Judgment Debtor.

Liquidation Proceedings

22. The bank submitted that the Applicant was barred by statute, from attaching the Respondent's assets, because on 12th February 2020 liquidation proceedings were commenced against the Respondent.

23. On 1st December 2020, Miss Mungai, the learned advocate for the bank, informed the court that a Liquidation Order was issued by Hon. Lady Justice Muigai, on 23rd November 2020.

24. Although the Garnishee Order Nisi had been issued before the Liquidation Order, the bank has submitted that the court cannot now proceed to make the garnishee order absolute.

25. It was the bank's position that the process of execution would now have to be suspended until the liquidation was lifted.

26. Later, on 9th December 2020, Mr. Otieno - Oyoo, the learned advocate for the Applicant, informed the Court that the Court had stayed the liquidation order.

27. Whilst acknowledging that the liquidation order had been stayed, the bank reasoned that the stay did not lift the liquidation order.

28. On the other hand, the Applicant pointed out that the proceedings before this court had not been stayed. As far as the Applicant was concerned, he was entitled to proceed with execution until these proceedings were stayed.

29. In principle, the fact that these proceedings have not been stayed implies that the Applicant could take further steps in the matter. I do not understand the bank to be asserting that the Applicant was barred from taking any steps in the case.

30. Indeed, that would explain why the application before me was canvassed, as that could not have been possible if proceedings had been stayed.

31. The bank's reasoning was that the liquidation proceedings against the Respondent precludes the Applicant from executing his judgment against the Respondent.

32. Section 428 of the **Insolvency Act** stipulates that;

“(1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or any contributory, may –

(a) if legal proceedings against the company are pending in the Court, apply to the Court for the proceedings to be stayed and

(b) if proceedings relating to a matter are pending against the company in another court, apply to the Court to restrain further proceedings in respect that matter in the other court.

.....”

33. In the circumstances, the bank may have chosen to bring an application for stay of these proceedings, but it did not.

34. The question that then arises is whether or not the Applicant could therefore proceed with execution against the Respondent, because these proceedings had not been stayed.

35. Section 430 of the **Companies Act** stipulates that;

“If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void.”

36. The relevant reference point in that provision is *“the commencement of the liquidation.”* In the event, we need to ascertain when liquidation is deemed to have commenced.

37. Section 431 (2) of the **Companies Act** provides as follows;

“If the Court makes a liquidation order under section 534, the liquidation

commences on the making of the order.”

38. In the instance, the court was informed that a liquidation order was made on 18th November 2020. Pursuant to **Section 431 (2)**, that implies that it is from 18th November 2020 when the liquidation of the Respondent commenced.

39. The garnishee order nisi was issued on 14th October 2020. That means that it was issued before the liquidation order.

40. Nonetheless, the process of execution had not yet been completed before the liquidation order was made.

41. The effect of the liquidation order was to render void any attachment, sequestration, distress or execution against the assets of the company after the commencement of the liquidation.

42. In the case of **NDANE CONSTRUCTION COMPANY LIMITED Vs SPENCON KENYA LIMITED, HCCC NO. 185 OF 2015**, Tuiyot J. expressed himself thus;

“22. A rationale of the provisions of

Section 225 of the Companies Act

(and Section 430 of the Insolvency Act)

is that once a Winding Up Petition is

presented, the assets of the Company

need to be protected, as they are now

subject to the Winding Up Cause, and

secondly, no action that destabilizes

the equality among Creditors of the

same class is permitted. This Court

cannot, therefore, make orders that

are voided by the provisions of Section

225.”

43. If I were to make the garnishee order herein absolute, that would enable the Applicant to complete the process of execution, as the garnishee would be compelled to pay money from the Respondent’s accounts, to the Applicant. If that happened, the court would have facilitated an exercise which, by law, is void.

44. In my considered view, the fact that there was a stay of the liquidation order, does not alter the position, as the said liquidation order has not been set aside.

45. For now, I reject the application to make absolute, the garnishee order. However, the garnishee order nisi will continue to remain in force.

46. Should the liquidation order be set aside against the Respondent, I direct that the garnishee order would then become complete, without the need for a fresh application.

47. Finally, each party will pay their own costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF MAY 2021

FRED A. OCHIENG

JUDGE