



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HC CIVIL MISC. APPL NO. 445 OF 2017

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

VERSUS

INVESCO ASSURANCE LIMITED.....RESPONDENT/JUDGMENT DEBTOR

AND

NCBA BANK KENYA PLC.....GARNISHEE

RULING

1. The application dated 27th February, 2020 is brought under Order 23 Rules 1 and 2 and Order 51 Rules 1 and 3 seeking orders that:

a) Spent

b) Spent

c) The Garnishee does appear before the court to show cause why they should not pay to the decree holder Ksh. 69,976.00 plus costs from the amount held by the respondent at their account number xxxx at the Garnishee Bank and/or any other held by the aforesaid.

d) The Garnishee Orders Nisi be made absolute.

e) Costs be provided for.

2. The application is based on the grounds that there exists a judgment against the Respondent/Judgment Debtor resulting in a decree which the Judgment Debtor has failed and/or refused to settle. It is deposed in the affidavit in support that the Judgment Debtor operates account number xxxx under NCBA Bank Kenya PLC, the Garnishee herein. It is further stated that the Applicant obtained a garnishee order *nisi* on the 28th of February, 2020 as against the garnishee herein and served on them on March 2nd, 2020. The Applicant avers that at the time of service of the garnishee order *nisi*, there were sufficient amounts in the said account to settle the debt herein.

3. In its reply, the Garnishee opposed the application on grounds that the said account has no funds and the only monies that it held have been garnisheed by equally deserving parties already issued with garnishee orders absolute.

4. In reply to the Garnishee's replying affidavit, the Applicant averred that the Garnishee has not shown sufficient reason why it did not settle the garnishee order *nisi* on a priority basis with the monies that were in the account as at 18th September, 2020 but instead opted for a garnishee order absolute issued way later after the garnishee order *nisi* herein had been issued. The Applicant argued that the garnishee order *nisi* should be made absolute and the Garnishee ordered to honour the same.

5. The Garnishee averred in its supplementary affidavit that it has no money in the aforesaid account and therefore should be discharged and the garnishee order *nisi* lifted. The Garnishee attached a schedule of payments showing who, when and how much they have paid. It is stated that the account is now overdrawn.

6. This application was canvassed by way of written submissions which I have duly considered together with the application and the affidavits in support and against.

7. Order 23, rule 1 on attachment of debts states;

1. (1) 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.

8. On the consequences of being served with a garnishee order nisi, this court is in agreement with the position taken in **Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee) [2020] eKLR**, where reference was made to the case of **Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225** at page 227 where it was stated:

“As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: see Joachimson v Swiss Bank Corpn [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin L.J. The money at the bank is then said to be ‘attached’, again derived from Norman-French. But the ‘attachment’ is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay.”

9. In the instant case, it is not in dispute that there exists a decree against the Judgment Debtor and that at the time of the issuance and service of the garnishee order nisi on the Garnishee, there were sufficient funds in the aforementioned account.

10. It is not in dispute that the decree nisi was served on 2nd March, 2020. The Garnishee upon being served with the decree order nisi was therefore under the obligation to preserve the amount garnisheed as the same was under attachment until the orders were discharged by the court. It is evident that the other monies paid out to other creditors by the Garnishee were paid out long after the garnishee order nisi herein had been served on the Garnishee.

11. It is noted that the Garnishee has not exhibited any documents to show when the other garnishee orders were served. The Garnishee does not claim to have made any mistake in that respect. It appears the Garnishee knowingly depleted the Judgment Debtor’s account herein knowing very well that the Applicant/Judgment Creditor herein had already served the orders attaching the money.

12. I am in that respect in agreement with the persuasive case of **Kinyanjui Njuguna & Co. Advocate v Invesco Insurance Co. Ltd; Jamii Bora Bank (Garnishee) [2020] eKLR** where it was held:

“There is no doubt that the effect of Order Nisi was to prohibit the garnishee from releasing money from the account until the order is discharged or applied to satisfy decree if made absolute.

It is evidence that the bank chose to disobey the court order which is frustrating the decree holder from making recovery to satisfy the court’s judgment. I find that the garnishee is in contempt of court order issued on 2nd July, 2017.

The Order Nisi is hereby ordered absolute and the Garnishee is ordered to pay to the applicant’s fund that were in the account and paid into account from the date of Decree Nisi to date an amount which adds up to a sum above the decretal amount herein.”

13. In the upshot, I allow the application with costs to the Applicant.

Dated, signed and delivered at Nairobi this 3rd day of June, 2021

B.THURANIRA JADEN

JUDGE