



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC. CIVIL APPLICATION NO. 42 OF 2019

(CORAM: F.M. GIKONYO J.)

NGAYWA NGIGI & KIBET ADVOCATESAPPLICANT/DECREE HOLDERS

VERSUS

XPLICICO INSURANCE COMPANY LIMITED....RESPONDENT/JUDGMENT DEBTOR

NATIONAL BANK OF KENYA.....GARNISHEE (WESTLANDS BRANCH)

RULING

[1] Before me is a Notice of Motion dated 30th March 2021 brought under Orders 23 Rules 1 and 2, 51 Rules 1 and 3 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The application is seeking the following orders:

i. spent

ii. That garnishee orders Nisi do issue against the garnishee to attach any monies held by them in favour of the respondents' account numbers 020xxxxxxx, 010xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx held at the garnishee National Bank of Kenya Westlands branch and any other account by the aforesaid held at the garnishee bank in satisfaction of the decretal amount of Kshs. 274, 900.00 in this matter.

iii. That the garnishee do appear before the court to show cause why they should not pay to the decree holder Kshs. 274,900.00 plus costs from the amount held by the respondent at their own account number 020xxxxxxx, 010xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx at the garnishee bank and/ or any other account held by the aforesaid.

iv. That the garnishee orders Nisi be made absolute.

v. That costs be provided for.

APPLICANT'S CASE

[2] The application is supported by the affidavit of advocate **Joseph N. Ngigi**. The principal argument is that there is need to attach the accounts of the judgment debtor held by the garnishee.

[3] The Applicant set out the basic facts to justify garnishee order. First, they are holders of a judgment against the Respondent dated the 2nd November 2020 for a decretal sum of Kshs **274,900.00**. Second, the Judgment Debtor has refused to satisfy the said judgment. Third, the Applicant has sufficient reason to believe that the respondent operates account numbers **020xxxxxxx, 010xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx** under National Bank of Kenya Westlands branch, the Garnishee herein. Lastly, the Applicant obtained a garnishee order nisi on the 31st March 2021 as against the garnishee herein. The Applicant deposed that at the time of service of the garnishee order *nisi*, there were sufficient amounts in the said account to settle the debt herein.

Garnishee: Accounts have no funds

[4] In the replying affidavit sworn by **Richard Orora** on 21/05/2021, two pertinent depositions were made; (i) that some of the stated accounts have no funds; and (ii) the only monies held in the accounts is subject of garnishee orders issued earlier to equally deserving parties.

[5] He deposed further that the garnishee is a stranger to account number 020xxxxxxx as the same is not owned by the judgment debtor (JD) and account number 0110xxxxxxxxxxx and 0110xxxxxxxxxxx are nonexistent. Or in the name of the judgment debtor or at all.

[6] The decree holder obtained that bank a/c number from a banker's cheque drawn by the bank as opposed to the judgement debtor. Consequently, the bank does not hold any funds to the credit of the judgement debtor in the said bank account is not available for attachment to satisfy the decretal sum in question in this suit. Therefore, should be discharged and the garnishee order nisi lifted.

[7] The Garnishee in its supplementary affidavit attached a schedule of payments showing who, when and how much they have paid. He acknowledged that account numbers 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx were in the JD's name at the bank's westlands branch and had ledger balances of Kshs. 213,763/=, Kshs. 53,615.53/= Kshs. 10,974.45/= and Kshs. 308,491.50/= respectively as at the time of service of the garnishee order nisi.

[8] He however deposed that bank account number 0110xxxxxxxxxxx was attached by an application for garnishee dated 9th December 2020 filed in Mombasa RMCC NO.1899 of 2019 – Abdall Mohammed Ali Vs Explico Insurance Company Limited -attaching a sum of Kshs. 1,833,617.49/=. The parties entered into a consent in the said Mombasa RMCC NO.1899 of 2019 for settlement of the application for garnishee by the release of the funds held in the account for partial settlement of the decree therein. Therefore, the bank will no longer be holding funds to the credit of the judgment debtor in the bank account no. 010xxxxxxxxxxx.

[9] The bank is holding a total sum of Kshs. 373,081.48/= to the credit of judgement debtor in account number 010xxxxxxxxxxx and 010xxxxxxxxxxx. However, the judgement debtor filed a similar application for garnishee dated 30th March 2021 in ***Kiambu Hc Misc. Appl. No 98 Of 2020 Joel Ngigi Vs Xplico Insurance Company limited*** against the same judgement debtor attaching the same bank accounts which have been attached in this suit.

[10] The total sums held by the bank to the credit judgement debtor in the bank account 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx is Kshs. 64,589.98/=. Therefore, an order garnishee absolute can only be made in terms of Kshs 64,589.98/=.

[11] The garnishee argued that based on the foregoing the accounts in question in this suit are not capable of being attached as they have already been attached in Kiambu HC Misc. Appl. No. 98 of 2020. Once the high court in Kiambu issues a garnishee order absolute there would be no funds capable of being attached to satisfy the decree herein or any part thereof. Therefore, the garnishee urges this court to dismiss the application for garnishee. The garnishee bank further prays for costs of the application under reply assessed at Kshs. 100,000/= payable by the judgement debtor/Respondent.

APPLICANT'S FURTHER REPLIES

[12] In rejoinder, the Applicant deposed 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.

[13] The Applicant is apprehensive that the respondent may withdraw its monies held by the garnishee making impossible for them to execute the decree awarded by this court hence want the money to be attached.

APPLICANT'S SUBMISSION

[14] The Applicant submitted that it is not disputed 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 herein dated 16th November 2020 set aside neither is there any order for stay of execution of the said decree.

[15] The Applicant submitted that from the law it is clear that the judgment debtor has no role to play in garnishee proceedings. They cited the case of ***Otieno Ragot & Co. Advocates V City Council of Nairobi [2015] eKLR*** and Order 23 Rule 4 of the Civil Procedure Rules 2010.

[16] The Applicant submitted that The decree holder has established by attaching a copy of the judgment debtor's bank account statement that there is a sum of money held by the garnishee that is due to and recoverable by the judgment creditor that would constitute a debt for the purpose of garnishee proceedings. They cited the case of ***Ngaywa Ngigi & Kibet Advocates V Invesco Assurance Co. Ltd ; Diamond Trust Bank (Garnishee) [2020] eKLR.***

[17] The Applicant submitted that The garnishee has acknowledged to holding account numbers on behalf of the judgment debtor herein; that the account number **020xxxxxxx**, and **010xxxxxxxxxxx**, held a total of Kshs. 373,081.48, **0110xxxxxxxxxxx** held a total of Kshs. 53,615.53 **0110xxxxxxxxxxx** held a total of Kshs. 10,974.45 **010xxxxxxxxxxx** held a total of Kshs. 213763 thereby making the total credit balance of the accounts to **Kshs. 586,844.48**. They pointed out the however garnishee, produced a statement for account numbers **0110xxxxxxxxxxx**, **0110xxxxxxxxxxx**, and **0110xxxxxxxxxxx** in support of its contention of the account balances.

[18] The Applicant submitted that The garnishee under Section 107-109 of the Evidence Act has a duty to prove its claim on a balance of probability by providing the said statement of accounts and in the absence of the same their allegations on the balance of the account should be dismissed and a decree absolute issued. They cited the case of ***Lensinko Njoroge & Gathogo Advocates V Invesco Assurance Co. Ltd; Co-Operative Bank Of Kenya Ltd (Garnishee/Applicant) [2020] eKLR***

[19] The Applicant submitted that they have sufficiently proved that the judgment debtor has not settled the judgement debt since the decree

was passed and that the garnishee bank herein was indeed holding funds to the credit of the judgment debtor in the attached accounts as at 18th December 2019 when the garnishee order was served upon them.

[20] The Applicant submitted that the garnishee has not supported its allegation that at the time of service of the order *Nisi*, account number 0110xxxxxxxxxx was credited with Kshs 213,763 but the same had been attached by an application dated 9th December 2020. They argued that the garnishee has not annexed any order from the honourable court attaching the monies in the said account as an application is not proof of an existing court order. They have annexed a consent order dated 17th May 2021 alleging the same settles the above application. It is worth noting that the order *nisi* herein was served on 13th March 2021 and therefore ranks in priority to the consent dated 17th May 2021. The further said consent is invalid as it has not been signed by all parties in the proceedings.

[21] The Applicant submitted that in the event that the funds in account number 0110xxxxxxxxxx have been released in respect of the consent dated 17th May 2021 the Applicant prayed that the garnishee be ordered to pay the applicant herein the decretal amount.

[22] The Applicant cited the case of *Kinyanjui Njuguna & Co. Advocates V Invesco Insurance Co. Ltd ; Jamii Bora Bank (Garnishee) [2020] eKLR* and stated that the effects of an order *nisi* as per Order 23 of the Civil Procedure Rules are that;

- i. The order acts as an injunction and prohibits garnishee from moving monies attached until the order *nisi* is discharged or made absolute.
- ii. The order *nisi* acts as an equitable charge and garnishee cannot pay the debt to anybody without incurring the risk of having to pay it again.

[23] The Applicant submitted that the consent in Mombasa RMCC NO 1899 of 2019 is also irregular as the garnishee has allocated itself a sum of Kshs. 100,000 on costs an amount which has not been taxed and is excessive. They argued that cost of the garnishee in any proceedings are at the discretion of the court and do not rank in priority to the cost of the decree holder as provided under Order 23 Rule 10 of the Civil Procedure Rules 2010.

[24] The Applicant submitted they filed an application in *Kiambu Misc 98 of 2020*. The order *nisi* in *Kiambu Misc. 98 of 2020* was obtained and served upon garnishee on the 13th April 2021 way after the order *nisi* herein was issued and served upon the garnishee thereby attaching the monies in the stated accounts. Thus the garnishee order *nisi* herein ranks in priority to *Kiambu Misc. 98 of 2020* as the funds in the cited accounts had already been attached by the order *nisi* herein and thus the same does not bar this court from making the garnishee order *nisi* absolute.

[25] The Applicant submitted that Schedule 6 of the advocate's remuneration order 2014 provides for garnishee costs of Kshs. 14,000 and thus the cost sought of Kshs. 100,000 is excessive and just and the same should not be allowed.

[26] The Applicant submitted that they have sufficiently proved that the judgment debtor has not settled the judgment debt since the decree was passed and that the garnishee bank herein was indeed holding funds to the credit of the judgment debtor in the attached accounts as at the time of service.

[27] The Applicant submitted that there is reason to believe that the said held amount is sufficient to satisfy the outstanding debt.

[28] The Applicant submitted that it is in the interest of justice that the garnishee orders *nisi* issued on 31st March 2021 be made absolute and the garnishee be ordered to honor the decree.

[29] On 19/04/2021 this matter came up for hearing. This court directed that the application be disposed of by way of written submissions.

[30] this honorable court issued orders on 25/5/2021 as follows;

“I note time is of the essence. However, as illness prevented counsel for garnishee to file a replying affidavit in time. I validate the affidavit filed on behalf of the garnishee. The affidavit shall be served through email to be supplied by the applicant, latest end of day. If applicant finds need to file a further affidavit they will do so within 7 days. They will also file submissions within same time. Upon service, the garnishee shall serve submissions in 7 days thereof. Ruling shall be on 20/9/2021 therefore parties will strictly observe time.”

[31] The Applicant filed their written submissions. On the other hand, the garnishee failed to comply with the orders above. I have duly considered the applicant's written submissions dated 11th May 2021 and 28th May 2021 on record, together with the application and the affidavits in support and against.

ANALYSIS AND DETERMINATION:

[32] I waste no time; it is not in dispute that there is a decree in favour of the applicant that has not been settled. Accordingly, the agenda for court's resolution in this case is whether the court should discharge or make absolute the decree *nisi* issued herein upon the garnishee. The thrust to attaining this penultimate decision comes from establishing whether there is any sufficient cause shown by the garnishee why the debt should not be paid towards satisfaction of the decree and garnishee costs herein. The debt consists in funds held by the garnishee in the judgment-debtor's accounts held in the bank.

[33] See Order 23, rule 1 of the Civil Procedure Rules on attachment of debts: -

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.

[34] Garnishee Proceedings provide a lawful aperture through which the Decree Holder may reach a debt due to the Judgment Debtor from the Garnishee and have the debt utilized towards satisfaction of a Decree. Crucial therefor is that the Garnishee is indebted to the Judgment Debtor. Thereto, the applicant bears the legal burden of proof which he must discharge by placing before the court such *prima facie* evidence of the indebtedness of the garnishee to the judgment-debtor. At that juncture, the garnishee is called upon to show cause why the debt should not be utilized towards settlement of the decree. The latter is called evidential burden, and may shift to the party who would fail without further evidence

[35] The applicant argued that the subject account numbers **020xxxxxxx, 010xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx held** at the garnishee National Bank of Kenya Westlands Branch hold credit balances sufficient to settle the decretal sum of **Kshs. 274,9000.00**

[36] The garnishee has disputed accounts numbers **020xxxxxxx, 0110xxxxxxxxxxx and, 0110xxxxxxxxxxx** belong to the judgment debtor. The garnishee however, acknowledged that account numbers **0110xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx** belongs to the JD and are held at the bank’s westlands branch and had ledger balances of Kshs. 213,763/=, Kshs. 53,615.53/= Kshs. 10,974.45/= and Kshs. 308,491.50/= respectively as at the time of service of the garnishee order *nisi*.

[37] The evidence produced show that account numbers **0110xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx** belongs to the JD and are held at the bank’s westlands branch and had ledger balances of Kshs. 213,763/=, Kshs. 53,615.53/= Kshs. 10,974.45/= and Kshs. 308,491.50/= respectively as at the time of service of the garnishee order *nisi*. Accordingly, these accounts held sums sufficient to pay the decree herein as at the time the order *nisi* was served upon the garnishee. Except, the garnishee has introduced a twist; that the funds in the accounts herein are subject of garnishee order issued earlier in other proceedings.

[38] The garnishee stated that it was in the process of transferring some of the monies to another judgment creditor under a garnishee order. The applicant argued that there was no other garnishee order at the time the decree *nisi* herein was served upon the garnishee.

[39] A decree *nisi* binds the debt in the hands of the garnishee and creates a charge in favour of the judgment creditor. See case of ***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 LJ. 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.”*

[40] The evidence show that, at the time the decree *nisi* issued herein was served upon the garnishee there was no any other garnishee order upon the moneys in issue. The garnishee has annexed application for garnishee order, submissions and a consent in Mombasa RMCC 1899 of 2019. The consent is dated 17/5/2021. It is not therefore discernible from the record that other Garnishee order existed before the one issued herein. The claim by the garnishee that there were earlier garnishee orders upon any of the accounts herein is not supported by any documents. As such, it is my finding that, at the time of the issuance and service of the garnishee order *nisi* on the Garnishee, the funds in the accounts stated above was available for attachment through garnishee order herein. I should state that, once a garnishee order is served, the garnishee is under an obligation to bind the debt in accordance with the order; the garnishee was not at liberty to choose whether or not to bind the debt as ordered or to bind it to subsequent garnishee order. It would be total disregard of court order for a garnishee to disobey the order and instead pretend to bind the funds to subsequent orders. Such conduct may be a basis for an order to the garnishee to pay back the money. Specific reference is made to the Applicant’s submission that they filed an application in ***Kiambu Misc 98 of 2020***. The order *nisi* in ***Kiambu Misc. 98 of 2020*** was obtained and served upon garnishee on the 13th April 2021 way after the order *nisi* herein was issued and served upon the garnishee. The order in the case before me effectively attached the monies in the stated accounts. The applicant therefore, correctly argued that the garnishee order *nisi* herein ranks in priority to ***Kiambu Misc. 98 of 2020*** as the funds in the cited accounts had already been attached by the order *nisi* herein and thus the same does not bar this court from making the garnishee order *nisi* absolute.

[41] I further find and hold that account numbers **0110xxxxxxxxxxx, 0110xxxxxxxxxxx, 0110xxxxxxxxxxx, and 0110xxxxxxxxxxx** belongs to the JD and are held at the bank’s westlands branch and had ledger balances of Kshs. 213,763/=, Kshs. 53,615.53/= Kshs. 10,974.45/= and Kshs. 308,491.50/= respectively as at the time of service of the garnishee order *nisi*. Accordingly, these accounts held sums sufficient to pay the decree herein as at the time the order *nisi* was served upon the garnishee. I therefore, find that the funds in the accounts herein were and still are sufficient to satisfy the decree herein.

[42] In the upshot, I make the following orders:

1) *The garnishee order nisi issued against the garnishee herein is hereby made absolute.*

2) *The funds held by the garnishee in account numbers 0110xxxxxxxxxx, 0110xxxxxxxxxx, 0110xxxxxxxxxx, and 0110xxxxxxxxxx at the National Bank of Kenya Westlands branch which belongs to the JD and with ledger balances of Kshs. 213,763/=, Kshs. 53,615.53/= Kshs. 10,974.45/= and Kshs. 308,491.50/= respectively as at the time the decree nisi was served upon the garnishee, shall be paid out by the garnishee in the following order: -*

(i) *In satisfaction of the decretal amount of Kshs. 274, 900.00 in this matter within 7 days of this ruling; and*

(ii) *The balance thereof, in satisfaction of costs of the garnishee once taxed or agreed upon between the parties.*

[43] It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 20TH DAY OF SEPTEMBER, 2021

F. GIKONYO M.

JUDGE

In the Presence of:

1. M/s Bitok for Ngigi for the Applicant
2. Kariuki for Garnishee
3. Mr. Kasaso – CA

F. GIKONYO M.

JUDGE