



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 454 OF 2019**

**ZINGO INVESTMENTS LIMITED.....APPELLANT/JUDGMENT DEBTOR**

**VERSUS**

**JONDU ENTERPRISES LIMITED.....RESPONDENT/DECREE HOLDER**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED.....GARNISHEE**

**RULING**

1. The respondent/decree holder in the present instance brought the Notice of Motion dated 26<sup>th</sup> July, 2021 supported by the grounds presented on its face and the facts deponed to in the affidavit of advocate **Samuel Kariuki**. The decree holder sought for the following orders in its Motion:

***i. Spent.***

***ii. Spent.***

***iii. THAT the Garnishee be and is hereby ordered to appear before court to show cause why it should not pay the decree holder the part of the decretal sum from the funds held in the joint interest earning account.***

***iv. THAT the Garnishee Order Nisi herein be and is hereby made absolute for the sum of Kshs.1,940,000/ plus interest thereon owed to the decree holder by the judgment debtor against the Joint Fixed Deposit Account Number xxxxxxxxxxxxxx in the names of Kinyua Muriithi & Company Advocates and Kariuki Kiplang'at Lesaigor & Associates Advocates domiciled at Co-operative Bank of Kenya Limited, Parliament Road Branch.***

***v. THAT costs of the application be awarded to the decree holder.***

2. To oppose the Motion, Robert Njoka Muthara who is the Managing Director of the appellant/judgment debtor swore a replying affidavit.

3. The Motion was canvassed through oral arguments, which I have considered together with the grounds featuring on the face of the Motion; and the affidavits both supporting and resisting the same.

4. It is clear from the record that the Garnishee did not participate in these proceedings.

5. It is noted that the orders sought in the instant Motion touch on the institution of Garnishee proceedings in execution of the decree issued by the trial court.

6. A brief background of the matter is that the decree holder instituted a civil suit against the judgment debtor before the subordinate court and sought for the sum of Kshs.1,940,000/ being the outstanding sum owed to the decree holder by the judgment debtor.

7. Upon hearing the parties, the trial court delivered judgment in favour of the decree holder and against the judgment debtor as prayed in the plaint. Subsequently, the judgment debtor lodged the present appeal to challenge the decision of the trial court, vide the memorandum of appeal dated 5<sup>th</sup> August, 2019.

8. Returning to the instant Motion, advocate Samuel Kariuki states that the lower court had granted the judgment debtor a conditional stay of execution, thereby requiring it to deposit the decretal sum in a joint interest earning account.

9. The deponent states that the parties' respective advocates opened the said account with the Garnishee but that the judgment debtor has failed to comply with the conditions for a stay of execution and has further failed to set the appeal down for directions or hearing, and hence the decree holder is entitled to the sum of Kshs.1,940,000/ being held by the Garnishee in Account Number xxxxxxxxxxxxxxxx.

10. The deponent goes on to state that unless the orders sought in the instant Motion are granted, the decree holder stands to suffer prejudice since it will be denied the fruits of its judgment.

11. In oral arguments, *Kariuki* advocate for the decree holder submits that the decretal amount should ordinarily comprise of the principal sum plus interest and that in the absence of compliance with the conditions for the order on a stay of execution granted earlier on, the present appeal cannot be admitted and that consequently, the decree holder prays that it be allowed access to the sum in the joint interest earning account by the Garnishee.

12. In retort, Robert Njoka Muthara states that the judgment debtor deposited the entire decretal sum upon being granted an extension of time by the lower court and therefore terms the instant Motion as being unfounded.

13. The deponent also states that despite there being compliance with the conditions for a stay of execution, the decree holder has applied for execution of the decree before the lower court and that it has been issued with warrants of sale and attachment, which execution the judgment debtor has challenged.

14. It is equally the assertion of the deponent that the judgment debtor has in no way delayed the prosecution of the appeal but that it is in fact the decree holder who is hindering its progress by bringing the instant Motion.

15. To back the foregoing assertions, *Mureithi* advocate for the judgment debtor contends *inter alia*, that by the time the decree holder instituted execution proceedings against the judgment debtor, the decretal sum had already been deposited in the joint interest earning account being held by the Garnishee and that there was in place an interim stay of execution issued by the lower court pending its ruling which was slated for the 3<sup>rd</sup> of September, 2021.

16. Upon considering the rival positions, I observed that the decretal sum awarded to the decree holder by the trial court is Kshs.1,940,000/. It is apparent from the averments of the respective parties that the said sum has since been deposited by the judgment debtor into the joint interest earning account opened by the parties' respective advocates and held by the Garnishee.

17. Concerning the lower court, it is apparent from the averment of the parties that execution proceedings were lodged therein and that an order for a stay of execution had previously been issued by the lower court. Nonetheless, the current status of the matter before the lower court and/or the stay orders remains unclear.

18. Suffice it to say that upon my perusal of the record, I note that the lower court file had initially been forwarded to the High Court for purposes of the appeal but that the same was recalled by the lower court sometime in 2021. The letter dated 9<sup>th</sup> July, 2021 from the Deputy Registrar-High Court Civil Division shows that the file was forwarded to the lower court. Going by the record, it is apparent that the lower court file has not been returned to the High Court.

19. The record also shows that vide the letter dated 8<sup>th</sup> July, 2021 issued by the Deputy Registrar-Civil Division and served upon the parties' respective advocates indicates that the appeal was listed for directions on 27<sup>th</sup> July, 2021. Going by the record, when the parties attended court on the aforesaid date, the decree holder's advocate requested that the instant Motion be dispensed with first. This explains the reason why the appeal is yet to be set down for hearing.

20. In view of the foregoing circumstances, I am of the view that the instant Motion is premature and I am unable to grant the orders sought therein at this stage.

21. Consequently, the Motion dated 26<sup>th</sup> July, 2021 is hereby struck out with no order on costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE APPELLANT/JUDGMENT DEBTOR**

..... **FOR THE RESPONDENT/DECREE HOLDER**