



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION

CIVIL APPEAL NO. 568 OF 2019

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANT

-VERSUS-

NANCY NALIKA & EDWARD GIKUNJU WANJOHI (Suing as the administrators

of the estate of PETER NGUGI WANJOHI-Deceased.....RESPONDENTS

(Being an appeal from the order of Makau, SPM issued on 26th September 2019 in Milimani CMCC No. 3923 of 2019).

JUDGMENT

1. This appeal emanates from the orders issued in **Milimani CMCC No. 3923 of 2019**. In that suit, (hereafter the declaratory suit) **Nancy Naliaka** and **Edward Ngugi** (hereafter the Respondents) had in their capacity as administrators of the estate of **Peter Ngugi Wanjohi** sued **Directline Assurance Company Limited** (hereafter the Appellant), seeking in the main a declaration that the Appellant was liable to satisfy the judgment in **Milimani CMCC No. 4166 of 2017 Nancy Naliaka and Edward Ngugi (suing as administrators of the estate of Peter Ngugi Wanjohi Deceased) vs Tanjal Investments & Another** (hereafter the primary suit) .

2. The Respondents averred in the declaratory suit that the Appellant was liable pursuant to a **Policy of Insurance No. 03097304** issued in respect of a motor vehicle registration no. **KAL 494 J** , and the provisions of the Insurance (Motor Vehicle Third Party) Act, to satisfy the judgment in the primary suit wherein the driver of the said vehicle had been found liable for the accident in which **Peter Ngugi Wanjohi** (deceased) sustained fatal injuries.

3. The Appellant was served with summons to enter appearance on 1st July, 2019. The Appellant filed a memorandum of appearance on 13th August, 2019 and its statement of defence on 14th August, 2019, denying the averments in the plaint and liability. However, prior to the Appellant filing its statement of defence, the Respondents had already lodged a request for default judgment on 7th August 2019. On 20th August, 2019 the lower court entered a default judgment against the Appellant. Subsequently, the Respondents extracted a decree dated 24th September 2019 for the sum of Kshs. 5,495,207.85/-.

4. Two days later, on 26th September, 2019 the Respondents moved the court under certificate of urgency through a motion of even date seeking a garnishee order *nisi* in respect of accounts held by the Appellant at **Diamond Trust Bank, Equity Bank and Co-operative Bank**. The lower court granted a garnishee *order nisi* “freezing operations” of the identified accounts and any other accounts held in the stated banks by the Appellant, pending *inter partes* hearing of the said motion on 8th October, 2019.

5. The Appellant being aggrieved by the said order issued on 26th September, 2019 preferred this appeal seeking inter alia that the garnishee order *nisi* issued on 26th September, 2019 in the declaratory suit be set aside. The memorandum of appeal contains five grounds as hereunder:

1. The Learned Magistrate erred in law and fact by issuing a garnishee order nisi that was patently defective because it completely froze the entire operation of all the Appellant’s bank accounts in the country instead of limiting the garnishee order to the sum of Kshs. 5,495,207.87 contained in the decree being executed by the Respondents.

2. The Learned Magistrate erred in law and fact by issuing a garnishee order nisi based on an application that was patently defective for failure to state the particular branches where the accounts being garnisheed are held, which requirement is mandatory.

3. The Learned Magistrate erred in law and in fact by issuing a blanket freezing order without due regard to the fact that the Appellant would be unable to continue operating as a going concern and as such the Learned Magistrate improperly exercised her discretion in issuing the garnishee order nisi.

4. The Learned Magistrate erred in law and fact in issuing the garnishee order nisi when the Learned Magistrate failed to note the following factors regarding the judgment which the garnishee order sought to execute;

i. The Appellant had entered appearance on 13th August, 2019 and subsequently filed a statement of defence on 14th August, 2019. As such the default judgment entered on 20th August overlooked the presence of a valid defence on record which rendered the default judgment irregular.

ii. The default judgment entered was final in nature despite the suit before the trial court being a declaratory suit and therefore not a claim for liquidated damages for which a final judgment can be entered. As such pursuant to the provisions of Order 10 Rule 9 of the Civil Procedure Rules, 2010, the Respondent ought to have set down the matter for hearing to prove its claim, which mandatory procedure was flouted.

iii. Prior to seeking the garnishee order nisi, the Respondent had not issued a 10-day notice of Entry of Judgment to the Appellant as required under the proviso to Order 22 Rule 6 of the Civil Procedure Rules. As such the execution of the default judgment would be premature.

5. Other grounds and reasons to be adduced at the hearing hereof.” (Sic)

6. On 15th February, 2021 the court issued directions for the appeal to be canvassed by way of written submissions. The parties duly complied.

7. The Appellant’s counsel, referring to the provisions of Order 23 Rule 1(1) of the Civil Procedure Rules submitted that a proper garnishee order nisi is specific and limited to the decretal sums owed by the judgment debtor as may be due to him from the garnishee. Counsel took the position that the garnishee order nisi issued in this case was effectively a *mareva* injunction that was unwarranted in the circumstances of the case. In this regard, he cited **Goode on Commercial Law, 4th Edition at Pg. 1287** and the cases of **International Air Transport Association & Another v Akarim Agencies Company Limited & 2 Others [2014] eKLR** and **Electric Mobility Company Pty Ltd v Whiz Enterprises Pty Ltd [2006] NSWSC 580**. He contended on these authorities that a *mareva* injunction could only be issued if there was solid evidence by the applicant that there existed a real threat of dissipation of assets by the defendant and that in the instant case the Respondents did not so establish.

8. Secondly, he described the default judgment entered by the court below as irregular for having been entered while there was a valid statement of defence on record and complained that the Respondents did not serve upon the Appellant the 10-day notice of entry of judgment prior to seeking the garnishee order nisi, contrary to the provisions of Order 22 Rule 6 of the Civil Procedure Rules. Citing the decisions in **Fidelity Insurance Company v Hussein M. Ali t/a Crescent Service Station [2015] eKLR**, **Kenya Commercial Bank Ltd v Joshua Aggrey Oburi & Another CA 199, 200, 201 of 2019** and **Andrew Washington Njenga v Co-operative Merchant Bank Ltd [2004] eKLR** counsel further argued that the default judgment was irregular and a nullity as the plaintiff in the declaratory suit had sought a declaration, and hence pursuant to Order 10 Rule 9 of the Civil Procedure Rules no default judgment was available. Instead, the Respondents ought to have set down the suit for hearing as provided in the Rule. The court was urged to allow the appeal.

9. Counsel for the Respondents submitted in defence of the default judgment and garnishee order nisi. He contended that garnishee order nisi was premised on a proper judgment and decree that was neither settled nor challenged by the Appellant. He invoked the provisions of Order 10 Rule 4(1) & (2) to argue that the default judgment was properly entered as the Appellant had despite being served with summons failed to enter appearance or file defence in the prescribed period. Counsel submitted that the lower court did not err in law or principle in issuing the garnishee order nisi and that the learned magistrate had duly considered the material before him before issuing the contested order. He asserted that the appeal is without merit and ought to be dismissed.

10. The court has perused the record of appeal, the original record of lower court and considered the material canvassed in respect of the appeal. The chronology of events leading up to this appeal are not in dispute. There is no dispute that the Respondents having obtained a decree for the sum of Sh. 5,019,759.70 and costs in the primary suit had proceeded to file the declaratory suit against the Appellant; that summons to enter appearance were served upon the Appellant on 1st July 2019; and that on 7th August 2019, the Respondents filed a request for judgment dated 23rd July 2019. Further, that the Appellant had entered appearance on 13th August 2019 and filed its statement of defence on 14th August 2019; and that notwithstanding, the lower court did on 20th August 2019 enter default judgment against the Appellant as requested by the Respondents. On 12th September 2019, the Respondents requested for the decree and certificate of costs in respect of the “*interlocutory judgment ...entered on 20th day of August 2019*”. The decree issued on 24th September 2019 and the garnishee motion filed under certificate of urgency followed on 26th September 2019. The garnishee order nisi giving rise to this appeal issued on the same date.

11. On 30th September 2019, the Appellant filed a motion in the lower court seeking among other reliefs, temporary orders to raise the freezing order and stay of execution of the default judgment of 20th August 2019. Other prayers sought the setting aside of the default judgment and deeming of the Respondents’ defence statement on record as duly filed. No orders were granted, and the motion was set down for hearing on 8.10.2019, but before that date, the Appellant filed yet another certificate of urgency dated 1.10.2019. The lower court having considered the certificate reiterated the orders made on 30.9.2019. On 2nd October 2019 the Appellant filed the instant appeal contemporaneously with the application to stay execution pending appeal. The motion was settled by consent on 21.11.2019, the Appellant having deposited the decretal sum in compliance with the conditions for stay of execution earlier imposed by the Court.

12. The issues canvassed on this appeal for the court’s determination are whether the garnishee order was essentially a disguised *mareva*

injunction whose issuance was unwarranted in the circumstances of the case; and whether the garnishee order *nisi* was irregular for reasons that, firstly it was based on an irregular judgment, and secondly, because no notice of entry of judgment had been served upon the Appellant prior to commencement of execution proceedings. The duty of this court as a first appellate court is to re-evaluate the evidence adduced at the trial and to draw its own conclusion, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; and William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278.**

13. In the case of **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, the Court of Appeal stated concerning that duty that: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2EA 212 wherein the Court of Appeal held, *inter alia*, that: -

“On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.” “

Whether the garnishee order *nisi* was a disguised *mareva* injunction whose issuance was unwarranted in the circumstances of the case

14. In dealing with the garnishee application before it, the lower court was exercising its discretion pursuant to the provisions of Order 23 of the Civil Procedure Rules. It is trite that such discretion must be exercised judicially as stated in **Martin Mwangi Ndirangu v Invesco Assurance Co. Ltd (2020) eKLR**. The Court of Appeal in **Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR** observed as follows: -

“This Court ought not to interfere with the exercise of a Judge’s discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo Vs. Shah, (*supra*):

“...A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”. ”

15. In my opinion, it may be unnecessary on this appeal to attempt to distill the pure essence of the impugned order *nisi* which was clearly intitled as a garnishee order *nisi* issued under Order 23 of the Civil Procedure Rules. The garnishee order *nisi* issued pursuant to a motion brought under Order 23 of the Civil Procedure Rules, *inter alia*. The said order stated *inter alia* that:

“Garnishee Order Nisi is hereby issued upon 1st, 2nd and 3rd Garnishees freezing operations on A/C xxx held at Diamond Trust Bank, A/C xxx held at Equity Bank of Kenya, A/C xxx held at Co-operative Bank of Kenya or any other account held by Judgment Debtor with the 1st, 2nd and 3rd Garnishees....” (sic).

16. Order 23 Rule 1(1) & (2) of the Civil Procedure Rules provides as follows:

“(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.

(2) At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor. “

17. The Appellant is justifiably irked by the form and substance of the garnishee order *nisi* and especially the use therein of the phrase “*freezing operations*” in relation to bank accounts held by the Appellant, contained in the subject order. This is because Order 23 Rules 1, 2 and 3 of the Civil Procedure Rules envisage an order of “*attachment of deposits*” in such accounts and not a freezing order. Rule 3 of Order 23 states that the effect of the order *nisi* when served upon the garnishee is to “bind” debts or deposits owing from such garnishee and attached under the order *nisi*, for the satisfaction of the decree. Further, Order 23 Rule (1) sub-rule 4 provides that an order *nisi* shall be in Form No. 16 of Appendix A the latter which also uses the phrase “*should be attached to answer a decree*”, in relation to debts or deposits accruing from the garnishee. A cursory comparison of the impugned order *nisi* above with the prescribed format in Form 16 of Appendix A

clearly reveals that the former does not at all comply with the prescribed wording and format envisaged in the law under which it was purportedly issued. Besides the order *nisi* is a blanket order effectively freezing all accounts held by the Appellant in the stated banks without specifying as required, the decretal sums in respect of which it was issued.

18. The Appellant cannot therefore be blamed for complaining that as granted and drawn, the garnishee order *nisi* is a disguised *mareva* injunction. It may well be that the format of the impugned order appears to approximate more to an order to freeze accounts as anticipated in a *mareva* injunction than a garnishee order as known to the law. However, the court is not persuaded in the circumstances of this case that the offending format without more, transforms the order into a *mareva* injunction, and that the court should consider whether the issuance of such an injunction was warranted in this case. Suffice to say that the garnishee order as drawn was defective in form, and in substance too because contrary to the purport of the order *nisi*, the Respondents' rights to funds in the frozen accounts was not at large, but strictly limited to the amounts in their decree. This is enough to dispose of the first issue. The second issue goes further to the root of the order *nisi* and can be paraphrased positively as follows.

Whether the garnishee order of 26th September 2019 was regularly or properly issued

19. This question of necessity touches on the pleadings and proceedings preceding the order *nisi*. This court is alive to the fact that in considering the question it must deal with certain aspects of the motion dated 30th September 2019 that is pending before the lower court. Nevertheless, the said issues were raised in the memorandum of appeal and were vigorously canvassed by the parties on this appeal. The parties evidently viewed them as pertinent to the determination thereof, and the Court is of the same considered view. More so as the pertinent facts are not in dispute.

20. It is an undisputed fact that at the time the default judgment was entered on 20th August 2019, there was a memorandum of appearance and defence statement on record, having been filed by the Appellant on 13th and 14th of August 2019, respectively. The summons to enter appearance served upon the Appellant on 1st July 2019 required it to enter appearance within 15 days, i.e., by 16th July 2019. By the time the request for judgment was filed on 7th August 2019 the Appellant had neither entered appearance nor filed a defence. Undeniably therefore, the Defence statement was filed outside the prescribed period under Order 7 Rule 1 of the Civil Procedure Rules, but before judgment could be entered. Order 7 Rule 1 of the Civil Procedure Rules provides that:

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

21. The record of the lower court shows that the memorandum of entry of judgment contained a handwritten note to the effect “*N.B Defence filed out of time*”. Nevertheless, the court proceeded to enter default judgment. The second disturbing aspect is that the judgment entered was final as evidenced by the issuance of the decree subsequently and the commencement of the execution process. Order 10 Rule 4 which the Respondents have cited in defence of the said default judgment provides as follows:

“(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

“(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”

22. The key relief sought in the Respondents' declaratory suit was a declaration that the Appellant was “*liable to satisfy judgment in Milimani CMCC 4166 of 2017.*” This relief does not qualify as a liquidated demand and a default judgment could not be entered under these provisions, which at any rate were not cited in the request for judgment. I agree with the Appellant's submission that the demand in the declaratory suit did not fall under the categories in Rule 4, or indeed Rules 5-7 of Order 10, which include claims for liquidated amounts, pecuniary damages, detention of goods and so forth. The Respondents' claim fell within the purview of Order 10 Rule 9 which states: -

“9. Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

23. The Court of Appeal stated in *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] eKLR that: -

“Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim.” [Emphasis Added]

See also *Gemstaviv Limited v Kamakei Ole Karia & 5 others* [2015] eKLR

24. After the decree issued, the Respondents commenced execution by way of garnishee proceedings. The Respondents have not disputed the Appellant's complaint that the said proceedings were commenced without compliance with the proviso to Order 22 Rule 6 of the Civil Procedure Rules. The said proviso states that where judgment in default of appearance or defence has been entered against a defendant, no execution by payment or attachment shall issue "unless not less than ten days' notice of the entry of judgment" has been served on the defendant and a copy thereof filed with the first application for execution. In this case, the first application for execution was the garnishee application to which only a copy of the decree was attached.

25. Therefore, there are three fundamental flaws that go to the root of the garnishee order *nisi*. The first is that the judgment in the lower court was improperly entered because there was on record a defence statement at the time of the entry of judgment. The Respondents could not properly obtain a default judgment before applying to strike out the defence for being filed out of time. The second and more serious defect is that a final judgment was entered, and a decree issued in respect of a claim which was declaratory in nature and for which no judgment in default of appearance or defence, interlocutory or otherwise could be entered by dint of Rule 9 of Order 10 of the Civil Procedure Rules. The Rule required the Respondents to set down the matter for hearing. In my view, to the extent that the said judgment was final in nature, it was irregular and liable to be set aside *ex debito justitiae* as a matter of judicial duty to uphold the integrity of the judicial process. Finally, no notice of the entry of the default judgment had been served upon the Appellant as required.

26. Needless to say, at the time of the garnishee application, there was in truth no proper judgment in existence that was capable of execution against the Appellant. The procedural lapses in the lower are serious as they tend to circumvent due process of the law as prescribed in the Civil Procedure Rules. However, inasmuch as the trial court erred in improperly entering a final default judgment and by wrongly issuing a garnishee order *nisi* that was also defective in form and substance, the Respondents were the prime movers who stood to benefit from the irregularities and lapses.

27. In **Martin Mwangi Ndirangu v. Invesco Assurance Co Ltd [2020] eKLR**, it was held that: -

“The order contemplated by Order 23 is discretionary and the court may refuse to pass such order if it is inequitable. The discretion, however, must be exercised judicially. Where the court finds that there is bona fide dispute against the claim and the dispute is not false or frivolous, it should not take action under this rule”.

28. The record of proceedings in the lower court manifests misdirection on the part of the court on the law and facts, resulting in the issuance of a chain of wrong orders. Concerning the garnishee proceedings in particular, the court in exercising its discretion failed to be guided by law and pertinent facts. In that regard, the court appears to have acted in a perfunctory manner indifferent of the provisions of the applicable law, the pleadings filed and facts of the case. Hence the court was clearly wrong in the exercise of its discretion and occasioned injustice to the Appellant by making a blanket order freezing all its accounts in the garnishee banks. For all the foregoing reasons, this appeal must be allowed with costs to the Appellant.

29. In the result, and in the interest of justice the final and most effectual orders that commend themselves are as follows:

- a. The default judgment entered on 20.8.2019 in the declaratory suit is hereby set aside.
- b. The garnishee order *nisi* issued on 26.9.2019 in the declaratory suit is hereby set aside.
- c. The Respondents' motion dated 26.9.2019 and filed in the declaratory suit is hereby struck out.
- d. The Appellant's motion filed in the declaratory suit and dated 30.9.2019 is declared to be spent.
- e. The court directs that the monies deposited into this court by the Appellant in compliance with the condition in the order staying execution pending appeal, if not yet released, are to forthwith be released to the Appellant.

It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 11Th DAY OF NOVEMBER, 2021

C.MEOLI

JUDGE

In the presence of:

Appellant: N/A

Respondent: N/A

C/A: Carol