



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 87 OF 2018

LESINKO NJOROGE & GATHOGO ADVOCATES.....DECREE HOLDER

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....JUDGMENT DEBTOR

AND

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

RULING

1. By way of Notice of Motion dated the 29th day of May, 2019 the Applicant/Garnishee (Co-operative Bank of Kenya Limited) seeks an order setting aside the Garnishee Order Absolute dated 28th May, 2019 and dismissal of the Plaintiff's Notice of Motion dated 23rd May, 2019 with costs to the garnishee.

2. The Application is premised on grounds that: The Garnishee was served with an Order Absolute dated 28th May, 2019 at 3.00 p.m. on the same date requiring it to pay the Decree Holder a sum of Kshs. 2,345,261.00/=. That it was served with the order nisi on 24th May, 2019 at 4.53 p.m. while the matter was coming up on 28th May, 2019, this, did not give it adequate time to file a reply and serve the same to the other parties; in the absence of service stated, the proceedings and orders of 28th May, 2019 are in violation of Order 23 Rule 1 of the Civil Procedure Rules, 2010 which require at least seven (7) clear days' notice to the Garnishee.

3. That had the Garnishee been given adequate notice as required by law, it would have presented evidence that the Judgment Debtor holds Account Number 01150068932802 and 01150068932801 at the Garnishee Kimathi Street Branch but the accounts, at the time of service with the Garnishee Order Absolute, had no funds capable of satisfying the Garnishee Order in part or full as whatever funds held in the accounts had earlier been attached by other Garnishee Orders by various Courts; the Garnishee is now faced with the threat of execution to satisfy debts owed by the Defendant yet the Garnishee is by law not able to nor required to satisfy any Decree when it holds no money belonging to the Judgment Debtor.

4. In an affidavit deposed by Debra Ajwang-Ogada the Garnishee's Legal Manager, it was averred inter alia that it was in the interest of justice and in upholding the rule of law for the orders sought to be granted.

5. The Respondent/Decree Holder filed a response opposing the application. In a Replying Affidavit dated 7th June, 2019 filed herein on the 10th June, 2019 it was deposed by Wilson K. Gathogo, Advocate, that the Garnishee Absolute was issued after a proper and regular hearing of the Decree Holder's Notice of Motion dated 23rd May, 2019. That the Court would only set aside the Judgment or Order if satisfied that the Defence has no merit.

6. That Debra Ajwang-Ogada has sworn facts falsely calculated to mislead the Court which is an abuse of the Court process amounting to fraud and perjury. That statements annexed for Account No. 01150068932801 with a balance of Kshs. 10,972.17 and 01150068932802 with Kshs. 10,195,160.75 alleged to have been attached by other Garnishee Orders issued by various Courts is an attempt to conceal fraud as the listed cases do not show the names of the Courts. He argued that the list provided confirmed that no Garnishee Order had been made against Account Number 01150068932802 and Decrees indicated had been paid by a different Bank (Diamond Trust Bank (DTB)).

7. The Decree Holder alluded to various Replying Affidavits filed in other matters that established the fact that the Garnishee a reputable bank would make false allegations intended to mislead the Court, obstruct and defeat justice and that should the application be allowed, the deponent of the Replying Affidavit be availed for cross examination.

8. In addition, the Decree Holder issued a notice to produce documents under Section 69 of the Evidence Act of original document of particulars of all matters concerning the Garnishee Orders and complete bank statements of Account No. 01150068932802 which was duly produced on 25th June, 2019 indicating a credit balance of Kshs. 5,769,961.89/=-.

9. The Garnishee filed a Supplementary Affidavit dated 4th July, 2019 arguing that pursuant to a Ruling delivered on 19th June, 2019 and the Garnishee Absolute Orders issued by Kiambu Court on 30th May, 2019 the Garnishee paid the Decree Holder a total sum of Kshs. 5,390,287.48/= leaving a balance of Kshs. 4,804,873.27/=. It enumerated a number of cases where orders nisi were issued hence factually the Order Absolute cannot be satisfied.

10. The Decree Holder on their part urged that due diligence carried out showed that none of the matters alluded to had orders attaching Accounts No. 01150068932801 and 01150068932802.

11. The application was canvassed by way of oral submissions. It was argued by Mr. Otieno for the Applicant that Account No. 01150068932801 had a balance of Kshs. 10,972.17 while Account No. 01150068932802 had a balance of Kshs. 10,195,160.75. But there was a pending Garnishee Misc. Application No. 183/2019 and after the Ruling was delivered on 19th June, 2019 where the Decree Holder herein was paid Kshs. 5,390,287.50/= from Account No. 01150068932802.

12. That they were not able to obtain documents to establish where the balance on the account was frozen, they had expressed willingness to comply with the Court Order having paid the Kshs. 5 Million in compliance with the order made by the Kiambu Court. However, they maintained that the account has no sufficient funds to satisfy a Decree.

13. Mr. Botany for the Decree Holder argued that the Decree Absolute obtained was for Account Nos. 01150068932802 and 01150068932801 but what was presented by the Applicant was for Account No. 01150068932800, an account that was not relevant in this case. That matters listed by the Garnishee were settled by different banks. That affidavits sworn by Naomi Mwangi dated 8th July, 2019 confirms that the account has Kshs. 4,804,873.27/= which sum is sufficient to settle the Decree of Kshs. 2,345,261.76/=.

14. The Notice of Motion dated 23rd May, 2019 filed herein on the same date seeking appearance of the Garnishee herein to show cause why they could not pay the Decree Holder credit deposit in its Accounts Nos. 01150068932801 and 01150068932802 respectively in settlement and satisfaction of the Decree in Court was served upon the Garnishee on 24th May, 2019. They had notice of the application coming up for hearing on the 28th May, 2019 but disregarded it. There having been no appearance in Court on the part of the Garnishee as provided by Order 23 Rule 4 of the Civil Procedure Rules, it was taken that the Garnishee was not disputing the debt due from it to the Judgment Debtor. The Court having found that it could satisfy the Decree a Garnishee Order Absolute was made. The sum to be satisfied was Kshs. 2,345,261.76/=.

15. The argument of the Applicant is that it was not given sufficient notice as required by law to present evidence. No explanation was rendered as to why the Court Order was disregarded. That notwithstanding, following the application they were granted time to explain whether or not they had sufficient funds to satisfy the Decree. It would be in the interest of justice that the Order Absolute made be set aside if indeed they did not have sufficient funds in their accounts identified.

16. It is urged by the Applicant that various Decree nisi orders were made prior to the Garnishee Absolute Order made in the instant case hence the sum of Kshs. 4,804,873.27/= is not available as it had been frozen.

17. The Garnishee by way of affidavit sworn by Naomi Mwangi listed cases where Decree nisi had been made as follows:

“i) Mombasa Civil Suit No. 393 of 2018; Hamisi Dida vs. Invesco Assurance & Co-operative Bank of Kenya Ltd

(a) Garnishee Order Nisi issued against the Bank for Kshs. 282,262/= on 16th January, 2019.

(b) Garnishee application pending hearing and determination.

ii) Mombasa CMCC No. 2148 of 2018; Violet Kauchi Kalume vs. Invesco Assurance & Co-operative Bank.

(a) Garnishee Order Nisi issued against the Bank on 15th January, 2019 for Kshs. 154,571/=.

(b) Garnishee application pending hearing and determination.

iii) Kikuyu SPMC 152 of 2018 Daisy Wanjiku Kinyanji vs. Invesco Assurance & Co-operative Bank Limited.

(a) Garnishee Order Nisi issued against the Bank on 24th September, 2018 for Kshs. 413,121/=.

(b) Garnishee application pending hearing and determination.

iv) Kikuyu SPMC 149 of 2018 David Muhuho Thuo vs. Invesco Assurance & Co-operative Bank Limited.

(a) Garnishee Order Nisi issued against the Bank on 24th September, 2018 for Kshs. 316,297/=.

(b) Garnishee application pending hearing and determination.

v) Kikuyu SPMC 154 of 2018 Virginia Wanjiru Njenga vs. Invesco Assurance & Co-operative Bank Limited.

(a) Garnishee Order Nisi issued against the Bank on 24th September, 2018 for Kshs. 483,460/=.

(b) Garnishee application pending hearing and determination.

vi) Malindi CMCC No. 2192 of 2018 Issah Juma Changawa vs. Invesco Assurance & Co-operative Bank Limited.

(a) Garnishee Order Nisi issued against the Bank on 24th September, 2018 for Kshs. 362,433.00/=.

(b) Garnishee application pending hearing and determination.

vii) Mombasa CMCC No. 666 of 2016 Khamisa Nzilaki Ngovu vs. Invesco Assurance & Co-operative Bank Limited.

(a) Garnishee Order Nisi issued against the Bank on 26th September, 2018 for Kshs. 1,059,932/=.

(b) Garnishee application pending hearing and determination.

viii) Mombasa CMCC No. 310 of 2018 Chengo K. Mutsowe vs. Invesco Assurance & Co-operative Bank Limited.

(a) Garnishee Order Nisi issued against the Bank on 26th September, 2018 for Kshs. 1,014,394.60/=.

(b) Garnishee application pending hearing and determination.

ix) Mombasa SRMCC No. 476 of 2018 Stephen Chaka Tsuma vs. Invesco Assurance & Co-operative Bank Limited.

(a) Garnishee Order Nisi issued against the Bank on 26th September, 2018 for Kshs. 910,845/=.

(b) Garnishee application pending hearing and determination.”

18. The total sum required is Kshs. 5,004,315.60/=.

19. Annexures of the stated orders show that credit to be attached in all the cases was what was held in Account No. 01150068932800 held at the Githurai Branch. In his submissions Mr. Otieno for the Garnishee stated that they were not able to obtain the Decree nisi orders in respect of Account Number 01150068932802 to justify why the sum of Kshs. 4.6 Million was frozen. It is therefore not demonstrated that orders nisi exist that have been issued against Account No. 01150068932802. The Order Absolute was made after the Decree Holder demonstrated an existence of credit in Account Number 01150068932802 held by the Judgment Debtor at the Garnishee Bank. The sum claimed by the Decree Holder being Kshs. 2,345,261/= there is sufficient money to satisfy the Decree. In that regard the Garnishee has no defence.

20. From the foregoing, I find the application lacking merit. Therefore, it is dismissed with costs to the Decree Holder.

21. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2020.

L. N. MUTENDE

JUDGE