



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC. APPL. NO. 61 OF 2007**

**IN THE MATTER OF THE ADVOCATES ACT, CAP 106 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ADVOCATES REMUNERATION (AMENDMENT) ORDER 1997**

**AND**

**IN THE MATTER OF TAXATION OF ADVOCATES-CLIENT COSTS IN ELDORET CM.**

**CRIMINAL CASE NO.3274 OF 2005 BETWEEN REPUBLIC V. KITALE MUNICIPAL COUNCIL,**

**WILLIAM WABULWENYL, WILBERFORCE WAMBULWA AND RICHARD ROTICH**

**NICHOLAS GITUHU**

**KARIRA T/A KARIRA & CO. ADVOCATES.....APPLICANT/DECREE HOLDER**

**VERSUS**

**KITALE MUNICIPAL COUNCIL.....RESPONDENT/JUDGEMENT DEBTOR**

**EQUITY BANK LTD.....GARNISHEE**

**RULING**

1. The applicant (**NICHOLAS GITUHU KARIRA T/A KARIRA & CO. ADVOCATE**) by an ex-parte notice of motion under **Order 23 rule 1(1) of the Civil Procedure Rules** seeks that a decree nisi be issued against the Garnishee (**EQUITY BANK LTD**) attaching all the debt or balances owing to the judgment debtor at **Equity Bank account no. 033026072, Kitale Branch**, and an order do issue against the decree holder's advocate a sum of **Kshs. 598,193** or any balance owing to the judgment debtor held at the said account. The application is supported by the affidavit sworn by counsel **Jonah Kumutai Korir**. He averred that judgment was entered against the respondent and a decree was issued on 15.5.2012 against the defendant for **Ksh 325,105** and interest at **14%** per annum with effect from 15.9.2009 which amount has attracted interest of **Kshs. 380,247**, amounting to **Kshs. 705,352**. The amount has not been paid despite several notices.

2. The applicant urges the court to allow the application since the respondent had not filed in any response despite being served with the said application and hearing notice for 1.11.2019.

3. The background leading to this application is that on 15.5.2012 judgment was entered for the applicant as against the respondent for a sum of **Kshs. 325,105** which amount accrued interest at the rate of **14% per annum** with effect from 15/09/2009 to give a sum of **Kshs. 380,247**. The applicant seeks the court to order the garnishee to pay out that amount of money to him, as the respondent is said to have balances and/or cash deposits with the garnishee bank.

4. This application is premised on provisions of **Order 23 rule 1 (1)** which provides as below:

**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.

5. When a party has been served and there is a dispute as to owing any amount to the judgment debtor then **Order 23 rules 4 and 5 of the Civil Procedure Rules** would apply, and the same provides as follows:

**4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.**

**5. If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined.**

6. In this instant case, the applicant has not demonstrated that the garnishee Equity Bank was served. K.C.B bank had been enjoined as the 1<sup>st</sup> garnishee and they responded by denying the judgment debtor held any amount with them since the bank had closed the account in 2011. In the absence of an affidavit of service upon Equity bank, then the garnishee proceedings can not stand. Garnishee proceedings are taken out in matters where judgment or order for payment of money is given or made and the same is made within the process of execution seeking to enforce a money judgment or decree by seizure of or attachment of the debtor due or accruing to the judgment debtor. The applicant is required to demonstrate that Equity bank has some money held in the account for this process, yet in the present instance this court is being asked to rely on conjecture.

In the premise, I am constrained to find that the application has no merit, and is dismissed. I make no orders on costs.

**Delivered, Signed and dated this 18<sup>th</sup> day of February 2020 at Eldoret.**

**H. A. OMONDI**

**JUDGE**