



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**MISC. APPLICATION NO. 31 OF 2019**

**LENSINKO NJOROG & GATHOGO ADVOCATES.....DECREE HOLDER/RESPONDENT**

**VERSUS**

**INVESCO ASSURANCE CO. LTD.....JUDGEMENT DEBTOR**

**AND**

**CO-OPERATIVE BANK OF KENYA LTD.....GARNISHEE/APPLICANT**

**RULING**

**Introduction**

1. The applicant, through its notice of motion dated 1st August 2019 brought under certificate of urgency and pursuant to the provisions of section 1A, 1B, 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 12 Rule 7, Order 22 Rule (2) and 7, Order 51 Rule 1 of the 2010 Civil Procedure Rules 1 and all enabling provisions of the law, seeks the following orders.

1) Spend

2) An order be granted to stay the execution of the order absolute issued by this court on 29th July 2019 pending the hearing and determination of this application.

3) An order be granted to set aside and/ or vary the order absolute granted by this court on 29<sup>th</sup> July 2019 and grant leave to the garnishee to file its response to the application dated 16<sup>th</sup> July, 2019.

4) An order to grant an inter parties hearing of the application dated 16<sup>th</sup> July, 2019.

5) An order to make provision for costs.

**The case for the Applicant/Garnishee**

2. The applicant's application is supported by ten grounds. The major grounds are as follows. First, vide application dated 16/7 /2019, a garnishee order nisi was obtained in respect to the judgement debtor's accounts No. 012460689328 and 0124606892800 held by the garnishee at its Kimathi street branch.

3. Second, the garnishee herein was served with the application dated 6 /7/2019 which sought to garnishee the defendant's account on 19/7 /2019 and was required to attend the hearing on 29/7 /2019.

4. Third, the garnishee appointed advocates to appear in court and file a response and due to bad luck failed to appear in court on the said hearing date.

5. Fourth, consequently the decree holder obtained a garnishee order absolute as against the garnishee to satisfy the decretal sum of Kshs. 3,559,340.47 without the garnishee being accorded the right to be heard.

6. Fifth, the non-appearance arose due to a mistake of counsel which should not be visited upon the applicant. There is an imminent risk of

execution against the garnishee unless the garnishee order absolute is set aside and the garnishee allowed to defend.

7. Sixth, the garnishee exercised due diligence in conducting a search and established that the judgment debtor's account No.012460689328 and 01246068932800 were collateral accounts and which the bank held a lien over the funds deposited in those accounts as security and would crave for leave to file a response on such grounds.

8. Seventh, the garnishee has a bona fide response, which raises triable issues and should not be driven from the seat of judgement. Finally, the application has been filed without delay.

9. In addition to its ground, the applicant through its legal officer (Naomi Mwangi) has deponed to an eleven (11) paragraphs supporting affidavit. The major averments are as follows.

10. The applicant has replicated the grounds that are set out on the face of the notice of motion in the affidavit, except for the following major matters. First, the applicant has deponed that it instructed the firm of Hannah Mureithi & Co., Advocates on 20 /7/2019 to file a response to the application and to attend the inter-parties hearing on 29 /7/2019.

11. Second, that it was only when they were served with the decree absolute that the applicant established that the said firm of advocates did not attend the inter parties hearing of 16/7/2019. Third, the garnishee should not suffer the penalty as it has triable issues and is only fair that it be given an opportunity to be heard, which is evidenced by an annexed copy of the replying affidavit marked "NM4."

12. Finally, annex marked "NM4" is a replying affidavit of the service manager (Rachel Kungu) of garnishee at its Kimathi Street Branch. Rachel Kung'u has deponed that the subject wo bank accounts are held by the judgment debtor, over which the applicant holds a lien, as those subject two accounts are collateral security accounts for the underwriting services that the bank granted to the judgement debtor's selected customers under is IPF /asses finance business.

13. Additionally, Rachel Kung'u has deponed that the said deposit funds are not liable to attachment as the bank holds a lien over them as security for its underwriting services that the bank granted to the judgment debtor's customers.

14. Finally, she had deponed that the garnishee is unable to comply with the court order as the garnishee company has no liability towards the judgement debtor.

#### **The submissions of the applicant/Garnishee**

15. Counsel for the applicants have submitted that the court has a discretion to set aside an ex parte judgement, which discretion according to *Maina v. Muriuki (1984) KLR 407*, is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is no designed for any party which has deliberately sought to obstruct or delay the cause of justice

16. Counsel further cited Patel v. East Africa Cargo Handling Services Ltd (1974) EA 75, in which the court held that a regular judgement will not normally be set aside unless there is a defence on its merits. The foregoing are the major authorities cited by counsel.

#### **The case for the Decree holder/Respondent**

17. The respondent through Wilson K. Gathogo advocate have filed a forty-three (43) paragraphs replying affidavit in opposition to the application. The deponent has deponed to the following major averments. He has deponed that the garnishee has not met out a case to merit setting aside the absolute order. He has deponed that the replying affidavit of Rachel Kung'u, which is annexed to Naomi Mwangi's supporting affidavit (annex NM4), contains contradicting and false information made on oath.

18. Wilson K. Gathogo has deponed that Naomi Mwangi in her supporting affidavit has falsely and deliberately deponed to matters that are calculated to mislead the court. That it is against that basis that the garnishee obtained stay of execution orders.

19. Furthermore, that Naomi Mwangi in her supporting affidavit has only annexed a single page of bank statements for account numbers 012460689328 and 01246068932800 and has deliberately failed to exhibit the entire complete bank statement of an account that is stated to have been opened 7 years ago on 16th January, 2012.

20. Additionally, Wilson Gathogo, has deponed that if there exists a lien to underwrite IPF /Asset Finance Business the garnish would have been candid enough to exhibit Asset Finance Security contracts and loan documents showing the commencement of the insurance police and their expiry date or date of renewal.

21. Wilson Gathogo, has also deponed that he carried out a search with the Association of Kenya Insurers (AKI) to find out and verify whether Invesco Assurance Company limited (the judgement debtor) is the insurer of the motor vehicles listed the garnishee under its exhibit "NM2c." As a result, he found out that out of 49 searched motor vehicles, only 4 had insurance cover with Invesco Assurance Company Limited, while the majority were insured by other insurance companies including Kenya Orient, Madison, Fidelity, Direct line, CIC General Insurance and The Monarchy.

21. Furthermore, Wilson Gathogo has deponed that the basis for the issuance of Insurance Premium Finance (IPF) is the existence of a valid insurance policy between an insurance company and a policy holder, which in this case is lacking and does not exist.

22. The garnishee has not produced any lien document to support the credit limit of Kshs. 50,000,000 /- as alleged. The decree holder,

through Wilson Gathogo has deponed that account numbers 012460689328 and 01150068932801 now listed as collaterals according to the garnishee's annex marked "NM2c" and said to have funds for collaterals were in May 2019 described as current business accounts managed by the judgement debtor as account holders as per the replying affidavit in Kilungu SPMCC 8 of 2018, paragraphs 9 and 10.

23. The decree holder through Wilson Gathogo has in similar vein deponed to similar averments in respect of Makueni HCC Misc App 70 of 2019 in respect of the subject two accounts. He has also deponed to similar averments in respect of Kiambu Misc App 183 of 2019 and: Kerugoya Misc App 64 of 2018, matters in respect of which the deponent has alleged that the garnishee falsely lied that the accounts in those two cases were encumbered and not available. He has alleged that the two accounts in those two cases were successfully attached, which now the garnishee has referred to as collaterals.

#### **The submissions of the decree holder /respondent**

24. Counsel for the decree holder (Messrs Lesinko Njoroge & Gathogo Advocates) have submitted that the garnishee has not established a prima facie case to merit the setting aside of the orders absolute. It also has not 01246068932800. Counsel has further submitted that there is no lien contractual document between the garnishee and the judgement debtor showing the existence of a lien or security. There is therefore no trial issue.

25. Furthermore, counsel has submitted that the draft replying affidavit by Rachel Kung'u is tainted with falsehood and material non-disclosure. He further submitted that in a similar and previous proceedings against the garnishee over the same subject accounts, she deponed that there were funds available in those accounts for attachment but a few days later she alleged that the account is a cash collateral.

26. In a related similar application being Makueni Misc App 70 of 2017 by the same parties and against the same accounts, the application was allowed upon an inter parties hearing, which was a clear indication that the garnishee was not truthful.

27. In addition to the submissions based on the affidavit evidence, counsel for the decree holder cited a number of authorities including the following major ones. He cited **Otieno Ragot & Co. Advocates v. City Council of Nairobi (2015) Eklr, in** which the court (Mativo, J) rejected a contention by the garnishee that the subject funds were repayments by individual members of the Respondent's County Assembly and that it had a lien over the same funds and that the same was therefore security for loans and mortgages advanced. The court therein pointed out that property under a lien cannot be seized by a creditor and that the party claiming a lien must establish circumstances under which the lien arose.

29. Counsel also cited **Jackson Mokaya v. James Onchangwa Macharia (2014) Eklr, in** which the court emphasized the principle that a discretionary remedy is not available to a party that lacks candor and approaches a court of equity with unclean hands.

#### **Issues for determination**

30. I have considered the affidavit evidence of both parties namely the garnishee (the Co-operative Bank of Kenya) and the decree holder (Messrs Lesinko Njoroge & Gathogo Advocates) in the light of the applicable law. As a result, I find that the following are the issues for determination. whether or not the garnishee has made out a case for the grant of the orders sought.

2. Who bears the costs of this application?

#### **Issue 1**

31. The garnishee (the Co-operative Bank of Kenya Ltd) sought orders to set aside:

1. The order absolute
2. To stay the execution of the order absolute
3. To make provision for costs on the basis that it has a lien in respect of the funds held in its subject two account numbers 012460689328 and 01246068932800.

32. Additionally, it also contends the funds in those two subject accounts are collateral security in favor of the garnishee for underwriting insurance services. Messrs Lesinko Njoroge & Gathogo Advocates contends that the garnishee has not produced any documents in support of its contention.

33. In this regard, I find that the garnishee has not attached any annexures to its affidavit evidence in support of its contention that it has a lien over the two subject accounts. It also has not attached any annexures to its affidavit evidence in support of its contention that the two subject accounts are collateral security in its favor.

34. I find as persuasive **Otieno Ragot & Co. Advocates v. City Council of Nairobi, supra, that** property which is under a lien cannot be seized by a creditor.

35. After considering and evaluating the affidavit evidence of both parties, I find that the garnishee has no lien over the two subject bank accounts. I further find that the funds in the two subject accounts are not collateral security in favor of the garnishee. The burden of proof in respect of the existence of a lien and collateral security lies squarely on the shoulders of the garnishee. It has failed to discharge that burden, with the result that its application fails on this ground.

36. Furthermore, I find that the garnishee was not truthful that the funds in the two subject accounts were collateral security in its favor and that it had a lien over those accounts. In this regard, the decree holder produced ample and credible evidence that the funds in those accounts were neither collateral security nor held as a lien in its favor. It did not produce any documentary evidence to support those claims.

37. I also find as persuasive *Jackson Mokaya v. James Onchagwa, supra, in* which the court emphasized the principle that a discretion remedy is not available to a party that lacks candour and approaches a court of equity with unclean hands.

38. I find that the orders sought by the garnishee involve the exercise of discretion by this court. In the circumstances, I find that the lack of candour alone compels this court not to exercise its discretion in favour of the garnishee. The application also fails on this ground as well.

39. Furthermore, the garnishee has submitted that it instructed counsel to appear and defend the application, but counsel failed to do so. As a result, the orders were made absolute, without being heard.

40. The garnishee cited a number of authorities in respect of setting aside a regular order; with the major authorities being

1. Article 50 of the 2010 constitution
2. Manias. Muriuki (1994) KLR407
3. Patel v. E. A. Cargo Handling Services Ltd (1974) EA 75.

41. After considering the affidavit evidence of both parties and in the light of the applicable law, I find that the garnishee was not heard. This is due to the failure of its advocate to appear.

42. If the garnishee has suffered any damage, it may seek redress against its advocates.

## **Issue 2**

43. Costs in terms of section 27 of the Civil Procedure Act (Cap 21) follow the event. It therefore follows that the decree holder will have the costs of this application.

44. In the premises, the application fails in its entirety. It is hereby dismissed with costs to the decree holder.

Ruling delivered in open court this 7th day of May, 2020 in the presence of Mr. Killeen holding brief for Mr. Gathogo for the decree holder (Respondent) and Mr. Kinyanjui holding brief for Mr. Munene for Co-operative Bank of Kenya Ltd.

**J.M. Bwonwonga**

**Judge**

**07/05/2020**