



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

MISCELLANEOUS CIVIL APPLICATION CAUSE NO. 158 OF 2019

MAINA NJUGUNA & ASSOCIATES.....DECREEE HOLDER/ APPLICANT

-VERSUS-

INVESCO ASSURANCE CO.LTD.....JUDGMENT DEBTOR/RESPONDENT

AND

CO-OPERATIVE BANK INSURANCE LTD1ST GARNISHEE

DIAMOND TRUST BANK KENYA LTD.....2ND GARNISHEE

I & M BANK LTD.....3RD GARNISHEE

KENYA COMMERCIAL BANK.....4TH GARNISHEE

NATIONAL BANK OF KENYA LTD.....5TH GARNISHEE

RULING

1. The application for determination is dated 14/11/2019 and was filed under certificate of urgency. It is brought under Order 23 Rule 1,2, 8 &9, Order 50 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. Prayers no. **a-d** have been spent. The remaining ones seek the following prayers.

a. That this Honorable court be pleased to make the order *nisi* absolute and the garnishee be ordered forthwith to pay the decree holder's advocates the sum of Kshs.744,986.00.

b. The decree holder be at liberty for any such further orders and/or directions as this Honorable court may deem fit.

c. Costs of this application be borne by the judgment debtor.

2. The application is supported by the affidavit of Mr. Maina Njuguna advocate sworn on the same date and a further affidavit sworn on 28/11/2019. The principal ground is that the Applicant represented the Respondent in various suits whereby certificates of taxation were issued for a cumulative amount of Kshs.744,986/= which the judgment debtor has refused to satisfy. He deposed that the decree holder's awareness of the judgment debtor's funds, in accounts held by the various garnishees, is not in dispute. It's also his deposition that the certificates of taxation have not been challenged in any court.

3. The 1st garnishee opposed the application through the affidavit of Judy Mwai sworn on 21/11/2019. She deposed that the 1st garnishee is a stranger to account number 01100037961300 as the same is not owned by the judgment debtor (JD). She acknowledged that account numbers 01246068932800 and 012460689328 (the two accounts) were in the JD's name and had ledger balances of Kshs.5,155,561.65/= and Kshs.5,117,966.10/= respectively as at 31/10/2019. She exhibited copies of certified statements of account as **JM-1a** and **1b**.

4. She however deposed that the two accounts are collateral for purposes of securing advances issued by the 1st garnishee to the

JD with respect to Asset finance insurance and Insurance premium finance business. She deposed that the two accounts have been locked and cannot satisfy the decretal amounts as ordered. Further, she deposed that disbursing the funds in the two accounts will cause the 1st

garnishee to lose security over advances granted to the JD and expose the 1st garnishee in that its business is commercial in nature.

5. She exhibited a letter from INVESCO as **JM-2a**, the 1st garnishee's response as **JM-2b** and Insurance confirmation forms (ICFs) as **JM-3a & 3b**. She deposed that the ICFs confirmed to the 1st garnishee that its interests were protected in the event of an occurrence which would put the bank's financial interests at risk.

6. Further, she deposed that the two accounts have been garnished by previous orders and exhibited copies of orders from Tawa Law Courts as **JM-4a, 4b & 4c**.

7. In rejoinder, the Applicant deposed that JM-2a & 2b do not prove that the 1st garnishee has a claim to the deposits in the two accounts and that the statement of account does not show that the two accounts have been used as security by the 1st garnishee. He deposed that the 1st garnishee never appealed against the orders issued by the Tawa Law Courts and that it concealed material facts by not disclosing that the two accounts were subject to previous garnishee proceedings whereby money was credited to the creditor's account. He exhibited a ruling of this court in **Misc No. 70 of 2019** delivered on 08/08/2019 as **MN-2** and noted that no appeal had been preferred against it.

8. The 2nd garnishee responded to the application through the replying affidavit of its legal officer, Francis Kariuki, sworn on 07/01/2020. He noted that a garnishee order *nisi* had been issued on 18/11/2019 with respect to the JD's account No. *****. He deposed that the available amount in the account was Kshs.570,829.13/= which the 2nd garnishee was not claiming and as such, a garnishee order absolute could be issued for the said sum. He exhibited a statement of account as **FK-1**.

9. Further, he deposed that the sum of Kshs.2,324,008/= indicated as uncollected amounts had already been attached pursuant to earlier garnishee orders *nisi* issued before 20/11/2019 when the 2nd garnishee was served with order *nisi* in this case.

10. There was no response from the 3rd to 5th garnishees.

11. The application was canvassed by way of written submissions. The applicant and 1st garnishee complied and filed their respective submissions. There were no submissions from the 2nd to 5th garnishees.

The Applicant's submissions

12. The Applicant identifies the issue for determination as;

“Whether the Applicant is entitled to payment of its debt from judgment debtor's account numbers 01246068932800 and 012460689328 held with the 1st garnishee.”

13. The Applicant submits that the documents exhibited by the 1st garnishee do not prove that it has a claim over the accounts and as such, there is a deliberate attempt to mislead the court. The

Applicant relies on the case of **Patrick L. Oyoo t/a Otieno-Oyoo & Co. Advocates –vs- African Merchant Assurance Company Ltd; Diamond Trust Bank Kenya Ltd (Garnishee)** where the Court held that;

“And if the garnishee had advanced the credit facility to the judgment debtor which as stated hereinabove has not been proved, the garnishee in this case has no greater right than the Applicant to the judgment debtor's funds held by the garnishee. Further, if the credit facility had been proved to have been advanced by the garnishee to the judgment debtor, the Applicant has a garnishee order and ranks in priority to the garnishee who would be a secured creditor.”

14. The Applicant also relied on the case of **Barclays Bank of Kenya Ltd –vs- Kepha Nyabera & 191 others (2013) eKLR** where the court of Appeal affirmed the above position by stating as follows;

“25.A judgment creditor has no greater rights in the judgment debtors assets held by the garnishee than the judgment debtor does. In the present case, the 1st Respondent has no greater right than the judgment debtor (2nd Respondent) had to the funds held by the Appellant bank. The rights of the 1st respondent over the funds held by the Appellant bank are co-extensive and limited to the exact rights that the judgment debtor had over the funds. What were the rights of the judgment debtor in relation to the accounts held by the appellant bank?

26.The rights of the judgment debtor are contractual rights that govern the relationship between the 2nd Respondent and the Appellant in their capacity of bank/customer relationship with the bank having security over liabilities of the 2nd Respondent. The Appellant bank was a secured creditor. A secured creditor with a perfected security interest in a deposit account has rights that are superior to a subsequent judgment (unsecured) creditor. The situation is different if the garnishee creditor is not secured. In such a case, the judgment creditor with a garnishee order would rank in priority.”

15. The Applicant submits that it has a valid decree against the JD and that there is a debt due from the 1st garnishee to the JD capable of being attached from the two accounts.

1st Garnishee's submissions

16. The 1st garnishee does not deny being in possession of the funds in the two accounts but contends that it has provided evidence to show its claim in the monies therein. It submits that issuance of a garnishee order absolute will expose it to risk to the tune of Kshs.10,273,527.75/=.

17. It submits that there is a commercial agreement between it and the JD which requires each party to the agreement to honour their obligations. It contends that it is not in the province of the courts to rewrite contracts for parties and relies on **National Bank of Kenya Ltd – vs- Pipeplastic Samkolit (K) Ltd & Anor (2001) KLR, 112** where that position was adopted by the Court of Appeal.

18. It also relies on **Paget's Law of Banking, 6th Edn at pg 115** where it is stated that;

“If at the date of the service of the order, the banker has any lien on or set off against the moneys attached, this should be presented to the court and would certainly prevail against the garnishee order”

19. It submits that the applicant has not indicated the amount to be attached thus making it possible for the Applicant to have orders against it yet the decretal sum has already been satisfied by the other garnishees.

20. Further, the 1st garnishee submits that **Makueni HC Misc No. 70 of 2019** is not good law as the ruling therein is subject to an application for setting aside and stay orders have already been issued. It contends that such a situation would contradict the law which provides that courts should not issue orders in vain. Accordingly, it contends that the Applicant herein cannot purport to cite it as an authority.

21. Having considered the application, the supporting affidavit, the replying affidavits and the rival submissions, I find that the only issue for determination is whether the decree in favour of the Applicant should be satisfied from the various accounts held by the garnishees.

Whether the decree should be satisfied from accounts held by the garnishees.

22. It is not in dispute that the Applicant holds a valid decree for Kshs.744,986/= and that there is money in the two accounts held by the 1st garnishee as well as account No. **** of the 2nd garnishee.

23. This court has already issued a garnishee order absolute against the 2nd garnishee in the sum of Kshs.570,829.13/=. The balance is Kshs.174,156.86/= and this court should now determine whether the amount should be satisfied from one of the two accounts held by the 1st garnishee. I am alive to the fact that there are other garnishees in this application who though served did not file any responses to the application. This court on 18/11/2019 issued a order *nisi* in respect of the accounts held by the 1st and 3rd garnishees before the 2nd garnishee offered to pay the bulk of the claim.

24. For avoidance of doubt, the ruling in **Makueni HC Misc No. 70 of 2019** was delivered on **27/02/2020** and this court declined to set aside the decree absolute order previously issued against account No.s *****8 and ***** belonging to the JD and domiciled in the 1st garnishee. These same accounts are the subject matter in this application. In the aforesaid ruling, this court had the opportunity to interrogate the two accounts and others in detail and after considering the overwhelming evidence exhibited, the irresistible conclusion was that the 1st garnishee had totally abused the court process, wasted precious judicial time and enjoyed undeserved stay orders. This court stated as follows;

“21. Despite maintaining that the accounts are collateral, nothing new has been exhibited by the garnishee to warrant a change of mind by this court. In any case, the DH has gone to great lengths to demonstrate that the status of the concerned accounts has been fluctuating to suit the JD's convenience and garnishee's narrative. In the Kilungu case for instance, the deposition of Rachel Kung'u as at 21/05/2019 was that account No. ***** was a current business account and had Kshs.5,117,966.10/=. Two months later, the narrative was that the account was collateral.”

If the above finding is bad law as submitted by counsel for the 1st garnishee, it is not for this court to make that determination vide this ruling.

25. Similarly, the narrative of the two accounts being collateral is what the 1st garnishee is latching on in this application and I am not convinced that the 1st garnishee has shown cause as to why a garnishee order absolute should not be issued against it. Order nisi was issued against account No.s***** and **** and the 1st garnishee's position is that the former account does not belong to the JD. Accordingly, I find that the balance of Kshs.174,156.86/= should be satisfied from the JD's account No. ***** held at the 1st garnishee's bank and account No.***** held at the 3rd garnishee's bank in equal portions.

26. The upshot is that the application has merit and is allowed with the following orders being made.

i. The garnishee order nisi against the 1st garnishee and 3rd garnishee is made absolute.

ii. The 1st and 3rd garnishees to pay Kshs.174,156/86 from account No.s *** and **** respectively in equal portions.**

iii. The 4th and 5th garnishees are hereby discharged.

iv. Costs to be paid by the JD.

Orders accordingly.

Delivered, signed & dated this 12th day of May 2020, in open court at Makueni.

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H. I. Ong'udi

Judge