



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MACHAKOS

MISCELLANEOUS CIVIL APPL. NO. 401 OF 2017

NGAYWA NGIGI & KIBET ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

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

DIAMOND TRUST BANKGARNISHEE

(Tom Mboya & Koinange Branches)

RULING

1. By a notice of motion dated 17.9.2019, brought under Order 23 Rules 1 and 2, Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 and all other relevant enabling provisions of the law, the applicant, sought for orders:

a) Spent

b) Spent

c) That the garnishee do appear before the court to show cause why it should not pay to the decree holder Kshs. 187,999/- plus costs from the total amount held by the respondent at their account numbers 0002291014 and 0002291003.

d) That the garnishee orders nisi be made absolute.

e) That costs be provided for.

2. The motion is premised on the grounds set out in the application and supported by the affidavit of Joseph N. Ngigi Advocate for the applicant deponed on 17.9.2019 to which is annexed the decree against the respondent for the decretal sum of Kshs 187,999/- marked JNN – 1. It was averred that the applicant had established that the respondent operated account numbers 0002291014 and 0002291003 located at Tom Mboya and Prestige plaza branches in favour of the garnishee as evidenced by the remittance advice from Diamond Trust Bank annexed and marked JNN.

3. The application is opposed by the respondent; there is an affidavit deponed by Paul Gichuhi, the legal officer of the judgement debtor's company on 25.9.2019. The deponent averred that the ex parte order nisi was granted without giving the judgement debtor an opportunity to be heard. It was averred that upon issuing instructions to the decree holder, the partners of the firm split and the judgement debtor was never informed. It was averred that if the orders subsist, the judgement debtor will not be able to meet its contractual obligations and several other decrees against it from other creditors are likely to be dishonored. It was averred that the judgement debtor had issued several payments to the decree holder as evidenced by the schedule of some payments annexed and marked KA2.

4. Vide supplementary affidavit deponed on 17.10.2019 on behalf of the applicant, it was averred that granting a judgement debtor an opportunity to be heard before the decree nisi is issued would defeat the point of garnishee proceedings. It was averred that the judgement debtor had no role in garnishee proceedings and it was the garnishee to show cause why the garnishee order nisi ought not to be made absolute. It was averred that the splitting of the subject firm did not in any way affect the proceedings for recovery of legal fees for work already done. It was averred that the schedule of payments relate to different matters and not the current proceedings and as such the orders sought be granted.

5. There is no indication of any response from the garnishee and when the matter came up for hearing on 26.9.2019, there was no indication

that the garnishee was present though there is a return of service on record. Directions were taken that the application be canvassed vide written submissions that are on record. Vide submissions dated 17.10.2019, learned counsel for the applicant submitted that the judgement debtor had no role to play in garnishee proceedings and reliance was placed on the case of *Otieno Ragot & CO Advocates v City Council of Nairobi* (2015) eKLR. Learned counsel cited the provisions of order 23 Rule 4 of the Civil Procedure Rules that state that if the garnishee did not dispute or did not appear on the day of the hearing then the court may order execution against the goods of the garnishee. It was counsel's submission that there is a sum of money held by the garnishee that is recoverable by the judgement debtor that would constitute a debt for purposes of garnishee proceedings and that the judgement debtor did not dispute the existence of the said accounts and in addition the decree holder had belief that the accounts sought to be garnisheed hold funds that are sufficient to satisfy the decree herein and thus urged the court to allow the application as prayed.

6. In response, counsel for the respondent/judgement debtor submitted that the respondent has a right to fair trial and that in terms of Order 23 Rule 1 and sub-rule 2 of the Civil Procedure Rules, the respondent had a right to a seven-day notice prior to the hearing of the order nisi, failing which the hearing of the garnishee nisi must be declared irregular and unconstitutional. It was emphasized that the judgement debtor ought to be heard and reliance was placed on the case of *Pinnacle Projects Ltd v Presbyterian Church of East Africa, Ngong Parish & Another* (2019) eKLR. Counsel submitted that the hearing of the order nisi did not comply with Order 23 Rule 1 sub-rule 2 of the Civil Procedure Rules as well as Order 51 Rule 13 sub-rule 3 of the Civil Procedure Rules and that the order absolute ought not be granted. Counsel submitted that the garnishee order nisi ought to be lifted and urged the court to exercise its jurisdiction under order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act to review the order dated 20.9.2019.

7. Order 23 of the Civil Procedure Rules governs the manner in which garnishee proceedings shall be conducted. It recognizes that such proceedings can only be brought by a decree holder, either before or after oral examination of the judgment debtor. This rule presupposes that the judgment debtor has a right to address court on the correctness/propriety of the execution proceedings brought against him or her before or even after a Decree Nisi is entered on court record. In this regard, the issues that I am commended to find are;

- a) Whether there was any decree and/or judgment of the High Court in HCMA NO.401 of 2017.
- b) Whether the respondent has locus standi to challenge the Garnishee proceedings by way of replying affidavit.
- c) Whether the court can grant the orders sought.

8. As regards the first issue, the record bears witness that there is a decree entered on 20.3.2019 in favour of the applicant and therefore the garnishee proceedings were grounded on a decree of the court as required by Order 23 rule 1 of the Civil Procedure Rules.

9. As regards the 2nd issue, it was the submission of Counsel for the respondent that the judgement debtor was not examined by court as legally required hence the order nisi that was issued ought to be reviewed. It was the submission of counsel for the applicant that the Garnishee Bank did not dispute the amount and therefore the order nisi ought to be made absolute. I have perused the proceedings prior to the granting of the garnishee nisi and I find that Order 23 Rule 1 provides that it is not obligatory to examine the judgement debtor. I also find that the Garnishee bank was given an opportunity to show cause why it should not pay the decretal sum. On the 26.9.2019 and 24.10.2019, the garnishee did not appear in court and there is a return of service. On all these occasions, the Garnishee bank had an opportunity to show cause why the Garnishee nisi should not be made absolute, but they instead kept mum and made no response. I disagree with counsel for the respondent that the court can review the order nisi in the instant proceedings. At this stage, what was required is the Garnishee to show cause why the Garnishee Order Nisi should not be made absolute. The judgment debtor has no locus to apply to seek to dismiss the garnishee order in the instant proceedings as the judgment debtor is not a party to the Garnishee proceedings. Garnishee proceedings are separate proceedings between the judgment creditor and the Garnishee, regardless of the fact that the judgment debtor may be examined before or after the making of an order for attachment of debts. Counsel was aware of the order nisi that was served on them on 23.9.2019 and the procedure for them if they were aggrieved was to file and application to set aside the same and not leverage in the instant proceedings to air their concerns. In this regard, the decree nisi issued by this court remains valid unless and until set aside.

10. On the 3rd issue, the applicant sought that the garnishee order be made absolute. This is a form of attachment. A garnishee order is the order served on a garnishee attaching a debt in his hands. The effect of attachment is to prevent private alienation of the property to the prejudice of the claims enforceable under the attachment. It does not create any security, charge or lien in favour of the attaching creditor. A garnishee order is a prohibitory order that prohibits the garnishee from giving in this case the money on the account over to the respondent.

11. As far as case law is concerned, Denning M.R. considered the procedure for attachment of debts in the case of *Choice Investments Ltd vs. Jeromnimon* (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225 at page 227 where he said:

“The word ‘garnishee’ is derived from the Norman-French. It denotes one who is required to ‘garnish’, that is, to furnish, a creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. The creditor can get a ‘garnishee’ order against the bank by which the bank is required to pay into court or direct to the creditor, out of its customer’s £150, the £100 which he owes to the creditor.

There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days’ notice, the order nisi operates as the notice.

As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: see *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be 'attached', again derived from *Norman-French*. But the 'attachment' is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay."

12. I agree with the contention of counsel for the applicant that in terms of Order 23 Rule 4 of the Civil Procedure Rules, 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.

13. It is the position of the law that in garnishee proceedings the Garnishee Banks are only required to appear before the court to acknowledge or dispute the debts. In the present case, the Garnishee Bank did not appear or file a response and in the absence of evidence to the contrary, I find that they acknowledged that the respondent held accounts with them and it was not necessary for court to question them and cross examine them as they did not have any objections in relation to the attachment.

14. In light of my analysis above, the applicant's application dated 17.9.2019 has merit. The same is allowed in terms of prayers (d) and (e). The garnishee nisi is hereby made absolute. The applicant is awarded costs of the application.

It is so ordered.

Dated and delivered at Machakos this 7th day of May, 2020.

D. K. Kemei

Judge