



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCC.MISC.APPL. NO. 98 OF 2019

KINYANJUI NJUGUNA & CO. ADVOCATESAPPLICANT

VERSUS

INVERSCO ASSURANCERESPONDENT

AND

DIAMOND TRUST BANK KENYA LTD.....1ST GARNISHEE

JAMII BORA BANK KENYA LTD.....2ND GARNISHEE

RULING

1. The Applicant which is a law firm filed the application dated 28th March, 2019 seeking judgment against the Respondent in the sum of Kshs.1,614,381/40 plus interest at 14% until payment in full. The amounts owing are in respect to advocates fees. The Respondent was served but failed to respond to the application or even appear in court. Judgment was therefore entered as prayed.

2. The Applicant then filed the application dated 9th April, 2019 seeking a garnishee order nisi against two garnishees in respect to money held by them on behalf of the judgment debtor who is the Respondent. The application was brought under Order 23 Civil Procedure Rules. The order was granted with a direction that the Respondent and garnishees be served, for interpartes' hearing.

3. The garnishees filed their responses with the Applicant and 1st garnishee filing further responses on 25th April, 2019. When the application came for hearing the Applicant withdrew its application against the 2nd garnishee. In his submissions to the application, Mr. Khisa for the Applicant argued that the judgment debtor/Respondent has an unsatisfied decree of Kshs.2,896,156/= while it has Kshs.3,365,854/= to its credit in Account No. [...] in the 1st garnishee's bank .

4. It is his argument that the Applicant's claim against the judgment debtor is on the same platform as those of other claimants to the same. Further that the documents annexed to the supplementary affidavit showing that the available funds belong elsewhere could not be relied on for the reason that it is not clear when they were served. He adds that the 1st garnishee has not furnished any garnishee order absolute to confirm that the funds held in the Respondent's account belong to other parties. This to him meant that the funds are not secured by any other creditors.

5. Counsel further submitted that in some of the orders annexed, no specific accounts were shown e.g. Mombasa Chief Magistrates' Civil Case No.388 of 2019. He argued that among the garnishee orders annexed only one was from the High Court and that being the case, the others could not override the one from this court. It was his prayer that costs be paid from the funds in the account the subject of this application.

6. The application was opposed by the 1st garnishee, through the replying affidavit and the further replying affidavit. He referred to Order 23 Rule 4 CPR and submitted that the 1st garnishee had produced statements to confirm its position (FK1 and 2). That the said statements show that the available balance as at 11th April, 2019 was Kshs.116,753/= only.

7. Counsel submitted that there are amounts that had been blocked by virtue of orders received from various courts. It was his submission that court orders must be obeyed irrespective of the issuing court, and acting otherwise would result in a mockery. He therefore asked the court to issue a garnishee order absolute in respect of the available funds only. That the costs should be paid by the Respondent and not garnishee.

8. I have considered the application, affidavits, annexures and the submissions by counsel and found the following issues to fall for determination.

i. Whether the Applicant has proved its case for the issuance of a garnishee order absolute in this case.

ii. Whether the Respondent should be compelled to disclose all its accounts to the Applicant.

Issue No. (i) Whether the Applicant has proved its case for the issuance of a garnishee order absolute in this case.

9. The amount of money attached as per the garnishee order nisi is Kshs.2,896,156.40. It is the Applicant's submission that at the time of service of this order on the 1st garnishee on 11th April, 2019 there was a credit balance of Kshs.3,365,854/= in account No.0002291014/= Diamond trust Bank (DTB). This is not denied by the 1st garnishee.

10. In its replying affidavit the DTB has however indicated that the amount available as at the time of service of the garnishee order nisi was Kshs.116,753/46/= which the bank is ready to release to the Applicant. In the further replying affidavit, the bank has annexed several garnishee orders nisi received from other courts in respect to the Respondent's Account No.[...] held with the 1st garnishee Bank. Counsel for the Applicant Mr. Khisa submitted that such orders from the magistrate's courts are of no consequence before those emanating from the high court are satisfied. This is a very very unfortunate submission which is not supported by any provision of the Law.

11. A garnishee order nisi is an order preserving funds awaiting the process leading to the issuance of a garnishee order absolute. It is therefore not true that the garnishee order nisi from the other courts should be overlooked by this court because of the present application before this court. The decree holders in the other cases have the same rights as the Applicant herein in terms of their claims against the Respondent irrespective of where the claims were filed.

12. I have keenly scrutinized the garnishee orders nisi from the other courts marked annexure FK2 and found that they were received by DTB between 3rd – 8th April 2019. The garnishee order nisi in respect of this matter was served on the 1st Respondent on 11th April 2019, when the other sums had already been secured/preserved. There is therefore no evidence which has been placed before this court to show that the statements produced herein do not reflect the correct position as far as the Respondent's account with the 1st garnishee is concerned.

13. I therefore have come to the conclusion that the Applicant has not proved its case for issuance of the garnishee order absolute in the full sum of Kshs.2,896,156.40/=. Instead, I will grant the request for issuance of garnishee order absolute for the sum of Kshs.116,753/46 (One hundred and sixteen thousands, seven hundred and fifty three shillings and forty six cents) only.

Issue (ii) Whether the Respondent should be compelled to disclose all its accounts to the Applicant.

14. It's the Applicant's submission that the Respondent has opened several other accounts to avoid its money being located. It therefore wants the Respondent to be ordered by this court to disclose all its other accounts for purposes of attachment. This application dated 9th April, 2019 does not however contain this as one of its prayers. The Respondent could not therefore have had an opportunity to respond to it. Granting such an order would amount to condemning the Respondent unheard. I therefore decline that request.

15. The result is that the application only succeeds to the extent of Kshs.116,753/46 set out at paragraph 13 of this ruling.

16. The Applicant's costs to be paid by the Respondent.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 13TH DAY OF MAY, 2019 IN OPEN COURT AT MAKUENI.

H. I ONG'UDI

JUDGE