



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. CIVIL APPLICATION NO 76 OF 2018

CONSOLIDATED WITH MISC.CIVIL APPLICATION NOS.77 -106 & 175-180 OF 2017

AND IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF AN ADVOCATE/CLIENT BILL OF COSTS.

BETWEEN

PATRICK L. OTIENO –OYOO t/a OTIENO-OYOO &

COMPANY ADVOCATES.....DECREE HOLDER

VERSUS

AFRICAN MERCHANT ASSURANCE COMPANY

LIMITED.....JUDGMENT DEBTOR

AND

DIAMOND TRUST BANK KENYA LIMITED.....GARNISHEE

RULING

1. By a notice of motion dated 21.06.19, brought under Sections 1A, 3A and 38 (c) of the Civil Procedure Act Cap 21 Laws of Kenya and Order 23 Rules 1 (1), 2, 9 and 10, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the applicant prays for orders:

a) **THAT the monies held by the Garnishee, Diamond Trust Bank Kenya Ltd – Capital Centre Branch, Nairobi, on behalf of the Judgment-Debtor M/s Africa Merchant Assurance Company Limited, in Current Account Nos [xxxx] and FDR Account No. FDLC [xxxx] at the Garnishee’s Capital Centre Branch, Nairobi, be and is hereby attached to answer the decree herein, the amount unsatisfied being Kshs.2,356,921/- together with the auctioneer’s costs of the failed execution of Kshs.124,00/- all totaling to Kshs.2,480,921/-, plus costs of these garnishee proceedings.**

b) **THAT the Garnishee herein do appear before the Honourable Court on the 3rd Day of July 2019 to show cause why it should not pay to the Decree-Holder the debt due from it to the Judgment-Debtor, being monies/funds held in Current Account Nos. [xxxx] & [xxxx] and FDR Account No.FDLC [xxxx] at the Garnishee’s Capital Centre Branch, Nairobi or so much thereof as may be sufficient to satisfy the decree herein together with the auctioneer’s costs, plus the costs of these garnishee proceedings.**

c) **THAT the costs of this application be provided for.**

2. The motion is premised on the grounds on the body of the application and the supporting affidavit of **PATRICK L. OTIENO - OYOO**, Advocate of the High Court of Kenya, sworn on 21.6.19. He avers the Applicants costs against the Judgment Debtor were taxed by consent on 14.10.17 and a decree for Kshs. 3,256,921/- was issued on 23.05.18. It is further averred that the Judgment Debtor has paid a total of

Kshs. 900,000/- leaving a balance of Kshs. 2,356,921/- together with Kshs.124,00/- being auctioneer's costs of the failed execution.

3. Annexed to the affidavit is copy of decree dated 23.05.18 and letter dated 20.06.19 by Okuku Agencies Auctioneers returning unexecuted warrants of attachment on the ground that the proclaimed goods are insufficient to satisfy the decretal sum and costs marked PLO1 and PLO2 respectively.

4. The application was opposed by the Garnishee by way of a replying affidavit sworn on 12th July, 2019 by **FRANCIS KARIUKI** who describes himself as the Garnishees' legal officer. He avers that the Judgment Debtor's account number [xxxx] is overdrawn by Kshs. 139,181,285.77 as shown by a statement of account as at 26th June, 2019 dated 11th July, 2019 marked FK1. The deponent avers that the Garnishee Order may issue on the Respondent's account No. [xxxx] which had a sum of Kshs. 464,564/- as shown by a statement of account as at 26th June, 2019 marked FK2. Additionally, the deponent avers that the funds in the Judgment Debtor's account No. FDR Account No. FDLC [xxxx] cannot be applied to satisfy the decree for the reason that the Garnishee has security over the account pursuant to credit facilities advanced to the Judgment Debtor as shown by Application for Credit Facility, Insurance Premium Finance Agreement and Lien Form marked FK3.

Submissions by parties

5. The application was argued by way of written submissions which both parties dutifully filed.

Applicant's submissions

6. The Applicant submits that Application for Credit Facility, Insurance Premium Finance Agreement and Lien Form marked FK3 are meant to defeat its claim for the following reasons: **THAT**

- i. The Application for Credit Facility is not dated and cannot be related to the Insurance Premium Finance Agreement and Lien Form which are similarly not dated
- ii. There is no evidence that the signatories to the Application for Credit Facility and the Insurance Premium Finance Agreement are directors of the Judgment Debtor or have authority of the Judgment Debtor to enter into a contract on its behalf
- iii. The Application for Credit Facility, the Insurance Premium Finance Agreement and Lien Form are not sealed with the company seal as required by Section 35(1) of the Companies Act
- iv. The Insurance Premium Finance Agreement is for a premium of Kshs. 30,000,000/- as opposed to the requested facility of Kshs. 40,000,000/- which was to be paid to the Judgment Debtor's account No. 800365007
- v. There's no indication in the statement marked FK2 that the account has a facility of either Kshs. 30,000,000/- or Kshs. 40,000,000/-
- vi. The Application for Credit Facility, the Insurance Premium Finance Agreement and Lien Form are instruments creating obligations between parties for valuable consideration and chargeable with stamp duty under the provisions of Section 5 and 30 (1) of the Stamp Duty Act Cap 480 Laws of Kenya and are not receivable in evidence under the provisions of Section 19(1) of the Stamp Duty Act.

7. It was additionally submitted for the Applicant that the actual closing balance in Judgment Debtor's account No. [xxxx] as at 26.06.19 when the Garnishee Order Nisi was made was Kshs. 891,051/- which ought to be applied to satisfy the decretal sum.

8. The Applicant urged the court to find that it had met the threshold under the provisions of Order 23 rule 1 in that it has demonstrated that it has a valid decree against the Judgment Debtor and further that there is a debt due from the Garnishee to the Judgment Debtor capable of being attached from Respondent's account No. [xxxx] and No. FDR Account No. FDLC [xxxx].

9. In support of its assertion, the Applicant placed reliance on **Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 Others (2013) eKLR** where the court of Appeal held:

[25]. A judgment creditor has no greater rights in the judgment debtor's 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.

10. Reliance was also placed on **Odhiambo Owiti & Company Advocates v CFC Bank Limited (2015) eKLR** where the Court of Appeal held: the judgment's creditor's claim as against the respondent crystallizes upon issuance of the Garnishee order absolute.

11. In conclusion, the Applicant urged the court to order an attachment of a further 1,003,865.00 being costs of the Garnishee proceedings in 37 matters.

Garnishee's submissions

12. The Garnishee submitted that failure to date the Application for Credit Facility does not affect the validity of the application and does not go to the root of the matter. The Garnishee asserted that it had no obligation to delve into the issue of whether or not the persons that signed Application for Credit Facility and the Insurance Premium Finance Agreement are directors of the Judgment Debtor or had authority of the Judgment Debtor to enter into a contract on its behalf for that is against the doctrine of indoor management and Turquand's case. Further to the foregoing, the Garnishee submitted that the Board Resolution dated 27th March, 2019 established that the Judgment Debtor had power to borrow and that that was sufficient. In support thereof, reliance was placed on **East Africa Safari Air Limited v Anthony Ambaka Kegode & Another [2011] eKLR** where the Court of Appeal held:

We agree with Mr. Gachuhi that the *Rule in Turquand's Case* (supra) applies in this situation. The rule says:

"While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called "*the indoor management*" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained." (emphasis added).

Gower's Principles of Modern Company Law has summarized the rule in Turquand's case as follows: -

"This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf." (emphasis added).

13. Reliance was also placed on **Akuisi Farmers Company Limited v Robert Ndiritu Gitonga [2019] eKLR** where the court held:

Thus a corporation may be represented by its authorized officers which authority may be express or implied. Directors of a company are such officers. My understanding of Section 35 above is that such authority need not be in writing or even filed. It could be implied, by conduct of the parties.

In the instant appeal, all the eight directors of the company signed the Loan agreement. They were authorized officers of the company in terms of Section 2 of the Companies Act, and Order 9 rules (2) of CPR.

Article 98 of the Articles of Association of the Appellant Company empowers the company to borrow money for its benefit. This is what it did, which was within its mandate.

In its Board of Directors meeting held on the 2nd March 2002, the company was duly authorised by its resolution to borrow and receive the sum of Kshs. 2,000,000/= shillings from the Respondent – Min 3/10/2003 – which resolution formed the basis of the loan agreement.

14. The Garnishee urged the court to find that failure to affix the judgment debtor's stamp or company seal on the Application for Credit Facility, the Insurance Premium Finance Agreement and Lien Form was not fatal. Reliance was placed on **Akuisi Farmers Company Limited v Robert Ndiritu Gitonga** (supra) where the court held:

The only requirement missing from the agreement is the seal of the company. However, Section 34(1) is specific that director's action shall bind the company so long as the said actions are done in good faith, and that power is free from limitations if at all as may be contained in its constitution; or that they may have exceeded their powers – Section 34(1) (2).

In the absence of fixation of the company seal, provisions under Section 37 of the Companies Act came to play. It provides that

37(1) A document is executed by a company if it is signed on behalf of the company

(a) By two authorised signatories or

(b) By director of the company in the presence of a witness who attests the signature

37(2) – A document is validly executed by a company if it is signed on behalf of the company

(a) by two authorized signatories, or

(b) by a director of the company in the presence of a witness who attests to the signature.

Considering the above legal provisions, I find nowhere where it is mandatory that a document must be signed under the seal of the company to make it valid. These are options that the company may take. I decline to find and hold that failure to affix the seal of the company invalidates an otherwise valid document or agreement.

15. Concerning payment of stamp duty, the Garnishee submitted that that this was a new issue that cannot be raised by way of submissions and in support thereof reliance was placed on **John Joel Kanyali v SBM Bank (Kenya) Limited [2019] eKLR**, where the court reiterated that submissions do not constitute evidence at all.

16. Finally, the Garnishee submitted that the funds in the Judgment Debtor's account No. FDR Account No. FDLC [xxxx] cannot applied to satisfy the decree for the reason that the it has security over the account pursuant to credit facilities advanced to the Respondent.

Analysis and Determination

17. I have considered the notice of motion in the light of the affidavits thereto, the submissions by the parties and the cited authorities.

18. It is not disputed that the Application for Credit Facility, the Insurance Premium Finance Agreement and Lien Form attached to the replying affidavit are not dated. There is similarly no evidence that the signatories to the Application for Credit Facility and the Insurance Premium Finance Agreement are directors of the Respondent. There is however evidence that the Respondent's Board had by a Resolution passed on 27.03.19 authorized borrowing of a facility from the Garnishee. I have considered the numerous authorities cited by the parties and in the light of the foregoing find that procedural omissions on the Respondent's documents are not fatal and do not affect the substance of the said documents. Similarly, I find that authority of the persons that signed documents filed herein, on behalf of the Judgment Debtor can be inferred from their conduct. Concerning evidence of non-payment of stamp duty, the issue was only raised by way of submissions and since submissions cannot take the place of evidence, the assertion by the Applicant is rejected.

19. Garnishee proceedings are proceedings where a third party holding funds or property on behalf of a judgment debtor can be called upon to honour the claim of a judgment creditor over those funds or property. A Garnishee order can only issue in instances where there is something which the law recognizes as a debt. Issuance of a notice to a Garnishee binds the funds in the hands of the Garnishee.

20. There is no dispute that the Garnishee is holding funds on behalf of the Respondent. It is similarly not disputed that the Respondent is indebted to the Applicant.

21. The Garnishee does not challenge the attachment of Judgment Debtor's account No. [xxxx] but states that the funds in the Judgment Debtor's account No. FDR Account No. FDLC [xxxx] cannot applied to satisfy the decree for the reason that the it has security over the account pursuant to credit facilities advanced to the Respondent.

22. The issue in question is whether the Applicant is entitled to payment of its debt from Judgment Debtor's account No. FDR Account No. FDLC [xxxx].

23. I have considered the holding in **Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 Others** (supra) and I have come to the following conclusion. That there is no evidence in the Judgment Debtor's statement marked **FK2** that the account has a facility of either Kshs. 30,000,000/- or Kshs. 40,000,000/- advanced by the Garnishee which credit facility the Garnishee alleges is secured by the sums of money in the Judgment Debtor's account No. FDR Account No. FDLC [xxxx].

24. And even if the Garnishee had advanced a 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

DISPOSITION

25. On the material presented by the parties, this court is satisfied that the Applicant has demonstrated that it is entitled to recover its debt from sums held for the Respondent by the Garnishee in both account No. [xxxx] and No. FDR Account No. FDLC [xxxx] as much as may be sufficient to pay the judgment debt and the costs of the Garnishee proceedings.

26. It is therefore hereby ordered THAT:

a) THAT the monies held by the Garnishee, Diamond Trust Bank Kenya Ltd – Capital Centre Branch, Nairobi, on behalf of the Judgment-Debtor M/s Africa Merchant Assurance Company Limited, in Current Account Nos. [xxxx] and FDR Account No. FDLC [xxxx] at the Garnishee's Capital Centre Branch, Nairobi, be and is hereby attached to answer the decree herein, the amount unsatisfied being Kshs. 2,356,921/-

b) THAT the monies held by the Garnishee, Diamond Trust Bank Kenya Ltd – Capital Centre Branch, Nairobi, on behalf of the Judgment-Debtor M/s Africa Merchant Assurance Company Limited, in Current Account Nos. [xxxx] and FDR Account No. FDLC [xxxx] at the Garnishee's Capital Centre Branch, Nairobi, be and is further hereby attached to the extent of Kshs. 1,000,000/- to answer the auctioneer's costs and costs of these garnishee proceedings to be assessed by the

Deputy Registrar of this court.

DATED, DELIVERED AND SIGNED THIS 07th DAY OF November, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi

For Applicant -

For Respondent -

For Garnishee -