

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
HCCC NO. 517 OF 2009
(Coram: F. Gikonyo J)

ARMSTRONG ENGINEERING LIMITED.....
DECREE HOLDER

VERSUS

COLUMBIA DEVELOPERS (K) LIMITED.....
JUDGMENT DEBTOR

AND

I & M BANK LIMITED.....
GARNISHEE

RULING

1. There are two applications before the court. Through the first application dated 14th April 2025, the decree holder seeks that the garnishee order *nisi* issued on 14th April 2025 to be made absolute. Through the second application dated 30th April 2025, the judgment debtor seeks the setting aside of the garnishee order *nisi* due to its pending appeal before the Court of Appeal, among other reasons. These are the two sides of the same coin.

First application

2. The prayers sought through the first application are: -

(1) SPENT

- (2) That this Court be pleased to issue order nisi against the Garnishee attaching monies in the Respondent's bank account number 01500459731210 at the I & M Bank, Karen Branch to satisfy the decretal sum and costs in this suit amounting to Kshs.15, 422, 164.00**
- (3) That all debts (or so much thereof as may be sufficient to satisfy the under mentioned judgment debt) from the I & M Bank Limited, Karen Branch (herein called "the garnishee") to the above Judgment debtor in its bank account with the said garnishee be attached to answer a Judgment obtained in the suit herein against the judgment debtor on the 2nd July 2020 for the sum of Kshs.5, 602,139.86 together with interest at Court rates from the date of filing suit and costs of the suit herein which translates to Kshs.16, 819,508.50.**
- (4) That the said garnishees should attend before the High Court of Kenya at Milimani Commercial Court on theday of.....2025 at 9.00 O' clock in the forenoon to show cause why the said garnishees should not pay to the said decree holder the debt due from the said garnishees to the judgment debtor in part or in full satisfaction of the judgment debt and costs including costs of these garnishee proceedings.**

(5) That in the absence of reasonable cause shown by the garnishee order absolute do issue compelling the said Garnishee to settle the decretal sum and costs of this suit.

3. The application is premised on the grounds outlined in its body, the supporting affidavit sworn by the decree holder's director, **GERALD WAFULA KANGALE** on 14th April 2025.

4. The application is opposed by the judgment debtor through a replying affidavit sworn by its director, **JOHN K. GATOBU** on 27th May 2025.

Second application

5. The judgment debtor prays that the court sets aside the ex-parte Garnishee Order *Nisi* issued on 15th April, 2025 with the effect of freezing account number 01500459731210 held at I & M Bank, Karen Branch.

6. The application is premised on the grounds set out in the body of the application and the supporting affidavit sworn by the judgment debtor's director, **BRIAN MWENDA GATOBU** on 30th April 2025.

7. The application is opposed by the decree holder through the replying affidavit sworn by **GERALD WAFULA KANGALE** on 2nd May 2025.

Decree Holder's case

8. The decree holder's case is as follows: -

- (1) That judgment was entered against the judgment debtor on the 2nd July 2020 in the sum of Kshs.5, 602,139.86 together with interest from the date of filing suit and the costs of the suit assessed at Kshs.461, 260.10.
- (2) That judgment debtor has failed or neglected to settle the said decretal sum and costs of the suit and the same has now escalated to the sum of Kshs.16, 819, 508.50 together with the costs aforesaid.
- (3) The judgment debtor holds 01500459731210 at the I & M Bank, Karen Branch where they transact most of their business.
- (4) The judgment debtor's money in the said bank account is sufficient to settle the decretal sum and costs.
- (5) The judgment debtor does not have any other known assets capable of being attached besides the subject account.
- (6) The judgment debtor does not have any stay orders before this Court or any other Court.
- (7) In execution proceedings there is no order of priority or procedures to be exhausted as long as the decretal sum and costs remain unpaid.

Response

9. The judgment debtor deposed that it was dissatisfied

with the judgment of 2nd July 2020. It then filed a notice of appeal dated 10th September 2020. It also filed an application seeking leave to file appeal out of time and stay of execution of judgment before the Court of Appeal in Civil Application No. E305 of 2020.

10. The judgment debtor stated that the Court of Appeal delivered its ruling on 18th February 2022 granting the applicant leave to appeal out of time. That it subsequently filed a memorandum of appeal before the Court of Appeal, being **COACA/E098/2022**, that is yet to be heard and determined.

11. The judgment debtor faulted the decree holder for material non-disclosure due to its participation in the proceedings in Civil Application No. E305 of 2020 and awareness of the orders of 18th February 2022.

12. Against this backdrop, the judgment debtor asserted that the garnishee order nisi ought to be set aside because: -

(1) The decree holder has failed to exhaust all avenues of execution as envisaged under **Order 22 of the Civil Procedure Rules** before applying for a garnishee order.

- (2) THAT a garnishee order is the last resort of execution and the decree holder had other avenues of execution.
- (3) THAT the money held in the subject account is a tool of trade which the company uses as an operation account to conduct business and projects. The money held in the subject account is payment from contracts with companies such as JKUAT and the company uses the money to pay its labourers, employees and staff on a regular basis.
- (4) THAT freezing the subject account shall only destabilize the company as the money in the account is not enough to settle the sum claimed of Kshs. 16, 819,508.50
- (5) THAT issuance of the orders sought shall render the appeal nugatory when the appeal was filed within the timelines sought.
- (6) THAT that the application herein is pre-mature and an abuse of the court process, the judgment and decree being a matter that is still alive in the Court of Appeal.
- (7) THAT in the interest of justice and fairness the decree holder's application dated 14th April 2025 be dismissed with costs.

Analysis and Determination

13. On 14th April 2025, the court issued the following orders: -

“2. THAT, from the averments made in the affidavit; the decree herein remains unsatisfied; and the funds in the respondent's account number 01500459731210 at I&M Bank, Karen Branch may be sufficient to satisfy the decree in part or in full. Accordingly, the said account is attached to the extent of the decretal sum herein Ksh 16,819,508.50. The garnishee shall ensure the attached funds in the account shall not be dissipated in any way whatsoever.”

“The garnishee to show cause why the funds should not be used to satisfy the decree. Further directions on 22.5.25.”

14. The issues for determination are: -

(1) Whether the garnishee order *nisi* should be set aside.

(2) Whether the garnishee order *nisi* should be made absolute.

15. The judgment debtor urged the court to set aside the garnishee order nisi because it has a pending appeal before the court of appeal.

16. On the other hand, the decree holder argued that the judgment debtor has not obtained a stay of execution pending the appeal either before this court or any other.

17. **Order 42 Rule 6 of the Civil Procedure Rules** provides that: - ***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order...”***

18. From my reading of the ruling of the Court of Appeal in **Civil Application No. E305 of 2020**, there was no stay of the execution of the judgment granted.

19. The judgment-debtor appears to convert its application to set aside the order nisi into an application for stay of execution pending appeal. The attempt is most inappropriate and unfortunate. The accusation by the judgment debtor against the decree-holder of material non-disclosure of the ruling of the Court of Appeal in **Civil Application No. E305 of 2020** are unsubstantiated. In the absence of a stay order, I do not think that the decree holder can be faulted. In any case, the information was on record as confirmed by the court in the ruling delivered on 22nd July 2022.

20. From the foregoing, there is no legal basis for the setting aside of the garnishee order *nisi* of 14th April 2025.

21. It is upon the judgment debtor to move the court appropriately for the consideration of whether a stay should be granted pending appeal. The court can then balance between its right to appeal, the fact that the funds in the subject account are for its business operations and the decree holder's right to enjoy the fruits of its judgment.

22. During mention of the matter on 22nd May 2025, the decree holder's counsel urged the court to the garnishee order *nisi* issued on 14th April 2025 be made absolute as the garnishee had neither appeared nor disputed the debt.

23. **Order 23 Rule 4 of the Civil Procedure Rules** states that: -

“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.”

24. Accordingly, I find that the decree holder’s application is merited.

Disposal

25. In the upshot, I make the following orders: -

- (1) The decree holder’s application dated 14th April 2025 is allowed in terms of prayer 5.**
- (2) More specifically, the garnishee order absolute is hereby issued compelling the Garnishee to pay the sums held in the subject account to the decree-holder towards settlement of the decretal sum and costs of this suit.**
- (3) The judgment debtor shall bear the costs of the said application.**
- (4) The judgment debtor’s application dated 30th April 2025 is dismissed with costs to the decree-holder.**

Dated, signed and delivered at Nairobi this 9th day of October, 2025 through Teams online application.

F. Gikonyo M

Judge

In the presence of: -

Olwande for Plaintiff

Ms. Esami for Nyamu for Respondent

No appearance by the Garnishee

CA - Kinyua