



**Mulekyo and Company Advocates v Athi Water Works Development Agency;
Cooperative Bank of Kenya Limited (Garnishee) (Environment & Land Miscellaneous
Case E097 of 2022) [2024] KEELC 443 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E097 OF 2022
EK WABWOTO, J
JANUARY 31, 2024**

BETWEEN

MULEKYO AND COMPANY ADVOCATES APPLICANT

AND

ATHI WATER WORKS DEVELOPMENT AGENCY RESPONDENT

AND

COOPERATIVE BANK OF KENYA LIMITED GARNISHEE

RULING

1. This is a ruling in respect to the Notice of Motion Application dated 18th September, 2023 filed by the Applicant under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 23(1), 23(2), 23(3) and 51 of the *Civil Procedure Rules*. The Application was accompanied by a supporting affidavit sworn by Anthony M. Mulekyo Advocate where the Applicant sought the following orders:
 - a.Spent.
 - b. That an order be and is hereby issued ordering the attachment of the monies sufficient to answer the decretal sum herein held on behalf of Athi Water Works Development Agency(judgement debtor) by the Co-operative Bank of Kenya Limited, Upperhill Branch the garnishee in Bank Account Number (particulars withheld) and (particulars withheld).
 - c. That order nisi be served upon the garnishee.
 - d. That the Honourable Court be pleased to order the garnishee to release Ksh 17,389,089.20 to the decree holder to settle the Decree and Certificate of taxation herein issued on 17th July 2023 and 2nd December 2022 respectively.



- e. That the cost of this application be granted to the Applicant/Decree holder herein assessed in the sum of Ksh 25,500/=
2. In their supporting affidavit sworn on 18th September 2023, it was deposed that the despite numerous reminders after issuance of the certificate of taxation, the judgment debtor has declined to settle the sum of Ksh 17,389,089.00 pending herein. The Applicant also filed an affidavit sworn on 30th October 2023 in support of the application. It was averred that the garnishee herein had admitted being capable of honouring the decree herein and the objection by the Respondent lacks merit.
 3. The application was opposed by the Respondent vide a Replying Affidavit dated 19th October 2023, sworn by Eng. Joseph Kamau, the Respondent deposed that it is a National State Agency and subject to direct supervision by the National Assembly and thus the funds held in all of its accounts by the garnishee are part of the Consolidated Fund which can only be withdrawn after approval by the Controller of Budget.
 4. The garnishee also filed a Replying Affidavit dated 18th October 2023 sworn by Jackson Oire its Legal Officer where it was averred that the Respondent accounts were well funded and has sufficient funds to pay the decretal sum.
 5. Having considered the application and the affidavits filed together with the oral submissions made by counsel for the parties it is clear that the pertinent issue for determination by this court is whether the Application dated 18th October 2023 is merited and deserving of the orders sought.
 6. Order 23(1) of the [Civil Procedure Rules](#) stipulates the requirements for an order of attachment:
 - “(1) A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment- debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid”
 7. In the instance case, I have noted that the judgement debtor does not deny owing the decree holder save for reiterating that they are a National State Agency wherein their expenses and overall expenditure are not exempt from the consolidated fund and as such any of its withdrawal ought to be approved by the Controller of Budget.
 8. In addressing the aforementioned issue, is worth noting that the proceedings currently before this court are garnishee proceedings.
 9. Order 23 of the [Civil Procedure Rules](#) provides the statutory anchoring for Garnishee proceedings. Rule 1 of the Order provides for the issuance of a Garnishee ex parte Order Nisi, while Rule 4 provides for a Garnishee Order Absolute. In the case of Miscellaneous Civil Application 405 of 2017 [Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Co. Ltd;Diamond Trust Bank \(Garnishee\)](#) [2020] eKLR



while citing the case of *Choice Investments Ltd vs Jeronnimon (Midland Bank Ltd, Garnishee)* [1981]

1 All ER 225 the court stated that:

“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 vs Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow vs 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 vs 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.”

10. Equally in the case of *Otieno Ragot & Co Advocates vs City Council of Nairobi* [2015] eKLR it was stated that;

“Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the Garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.”

11. On the issue of the Respondent being a government agency and therefore subject to *Government Proceedings Act*, this court is not convinced that by that fact alone, the accounts of the Respondent cannot be attached. There are various ways and reasons as to why entities are deemed government entities. It has never been a reason that they are deemed government agencies so as to escape satisfying legal liabilities which are due. The Respondent herein is a water works development authority established under section 65 (1) of the *Water Act* 2016 and a body corporate capable of suing and being sued in its own name.



12. Execution proceedings are lawful proceedings provided for under the law. Where a decree has been obtained by a party he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with. It does not matter that the funds are for other purported purposes in a garnishee application. All that matters is that the funds in the hands of the garnishee are sufficient to settle the Judgment debt.
13. In the instance case, there is an existing certificate of taxation that was issued on 2nd December 2022 in favour of the applicant for Ksh 17,389,089.20 which has not been settled. There is also judgment against the Respondent for the said amount and further the garnishee herein has confirmed the availability of funds to settle the decree. Consequently, this court doesn't not see any other justifiable reason to decline the orders sought.
14. In conclusion, this Court hereby finds that the Notice of Motion Application dated 18th September, 2023 is merited and the same is hereby allowed in the following terms;
 - a. An order is hereby issued directing the garnishee to release the sum of Ksh 17,389,089.20 to the decree holder held at Cooperative Bank, Account number (particulars withheld) and (particulars withheld) within thirty days from today.
 - b. Each party do bear its own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Mulekyo for the Applicant/Decree Holder.

Mr. Onyancha for the Respondent /Judgment Debtor.

Ms. Kibaba for the Garnishee.

Court Assistant; Caroline Nafuna.

