



**Kenya Electricity Transmission Company Limited v Spedag Interfreight Kenya Limited & 4 others (Civil Appeal E028 of 2021) [2024] KECA 542 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 542 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E028 OF 2021  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
MAY 24, 2024**

**BETWEEN**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ... APPELLANT**

**AND**

**SPEDAG INTERFREIGHT KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SPEDAG INTERFREIGHT TANZANIA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JYOTI STRUCTURES LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**JYOTI STRUCTURES KENYA LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**KENYA COMMERCIAL BANK KENYA LIMITED ..... 5<sup>TH</sup> RESPONDENT**

*(An appeal against the Ruling and Order of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 30th November 2020 in High Court Civil Case No. 22 of 2018)*

**JUDGMENT**

1. By a plaint dated 21<sup>st</sup> March 2018, the 1<sup>st</sup> and 2<sup>nd</sup> respondents claimed a sum of US\$1,100,486.99 from the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The claim arose from an agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the one hand and the 3<sup>rd</sup> and 4<sup>th</sup> respondents on the other, and in which it was agreed that the 3<sup>rd</sup> and 4<sup>th</sup> respondents would settle the sums due from them to the 1<sup>st</sup> and 2<sup>nd</sup> respondents from the sums due from Kenya Revenue Authority and the appellant to the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Settlement was due in 2017. However, the 3<sup>rd</sup> and 4<sup>th</sup> respondents failed to honour their part of the bargain and, the 1<sup>st</sup> and 2<sup>nd</sup> respondents being apprehensive that the 3<sup>rd</sup> and 4<sup>th</sup> respondents would repatriate any sums paid to them by the appellant, sought to have the said sum attached before judgement.
2. Accordingly, by an application dated 21<sup>st</sup> March 2018 filed together with the plaint, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought a conditional attachment of the sums lying to the credit of the 3<sup>rd</sup> and 4<sup>th</sup>



respondents with Kenya Revenue Authority and the appellant. The court made an order on 10<sup>th</sup> April 2018 conditionally attaching the amounts owing by Kenya Revenue Authority and the appellant to the 3<sup>rd</sup> and 4<sup>th</sup> respondents pending appearance by the 3<sup>rd</sup> and 4<sup>th</sup> respondents to show cause why that attachment ought not to be confirmed. That order was varied on 30<sup>th</sup> April 2018 on application by the 3<sup>rd</sup> and 4<sup>th</sup> respondents to the effect that, pending hearing of the show-cause application, up to a maximum of US\$ 1,100,486.00 due from Kenya Revenue Authority and the appellant be conditionally attached and not be paid out. In the meantime, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an application dated 27<sup>th</sup> April 2018 seeking judgement on admission against the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The appellant also filed an application dated 22<sup>nd</sup> May 2018 to be joined in the proceedings as an Interested Party, and sought discharge of the orders made on 10<sup>th</sup> April 2018 as varied on 30<sup>th</sup> April 2018. In its ruling of 13<sup>th</sup> July 2018 on the appellant's application for joinder, the court found that the appellant had no interest capable of protection, and had no locus on which to have the conditional attachment set aside. In the ruling aforesaid, it was found that the appellant admitted that it owed the 3<sup>rd</sup> and 4<sup>th</sup> respondents sums in excess of US\$4,200,000.

3. On 8<sup>th</sup> May 2018, the court delivered a ruling on the 1<sup>st</sup> and 2<sup>nd</sup> respondents' application for judgement on admission and entered judgement against the 3<sup>rd</sup> and 4<sup>th</sup> respondents for US\$ 900,486 with interest thereon and costs. The court further ordered that all sums owed by the appellant and Kenya Revenue Authority be attached and not released otherwise than in settlement of the decree.
4. Following the said judgement, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought to garnishee the appellant's account with the 5<sup>th</sup> respondent in order to recover the decretal sum of US\$1465,506.42 whereupon a garnishee order nisi was issued. The 1<sup>st</sup> and 2<sup>nd</sup> respondents then filed an application dated 24<sup>th</sup> August 2020 seeking to have the garnishee order nisi made absolute. Likewise, the appellant filed an application dated 1<sup>st</sup> October 2020 seeking to be joined in the proceedings as an objector and sought to set aside the garnishee order nisi on the ground that it was not indebted to the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The two applications were canvassed together before the High Court during which the 5<sup>th</sup> respondent, in whose custody the disputed sums were deposited, informed the court that it would abide by the court's orders.
5. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's application was premised on the ground that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were justly and truly indebted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the sum decreed in the suit; that the appellant had confirmed owing the 3<sup>rd</sup> and 4<sup>th</sup> respondents the sum of USD 4,200,000, part of which had been attached pursuant to the court order issued in the suit; that the 5<sup>th</sup> respondent held to the appellant's credit sums in excess of USD 4,200,000 on account of such indebtedness; and that the appellant and the 5<sup>th</sup> respondent were bound to settle the decree for which reason attachment was sought.
6. While opposing the application, the appellant admitted that there were contracts between it and the 3<sup>rd</sup> and 4<sup>th</sup> respondents, but that the same were terminated, and that accounts were yet to be taken between the parties to ascertain what sum was due to the 3<sup>rd</sup> and 4<sup>th</sup> respondents; that all sums were payable in conformity with the terms of the contract between the parties, hence the taking of accounts was necessary; that the appellant is wholly owned by the government, and that it was a public entity whose assets and property were immune from attachment; that it had not been established what sum was owed by the appellant to the 3<sup>rd</sup> and 4<sup>th</sup> respondents; that there was no judgement against the appellant to justify attachment of its property; and that the application as crafted and filed did not concern the appellant and ought to be dismissed with costs.
7. It was further contended by the appellant that the projects undertaken by the 3<sup>rd</sup> and 4<sup>th</sup> respondents were funded by loans, and that both the loan agreement and the contracts demanded financial audits



to determine the sums due and payable; that the appellant had been served with an order issued in Nairobi HCCC No. 38 of 2018 (the Nairobi case) freezing the sum of USD 2,582,978.35 pending hearing and determination of that suit, which was yet to be determined; that the order in the Nairobi case having been served earlier, it took precedence over the order issued in the suit under consideration; that the funds garnisheed were intended for other purposes and not merely to the credit of the 3<sup>rd</sup> and 4<sup>th</sup> respondents; and that the effect of the orders sought would be to risk the appellant losing public funds entrusted to it.

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents took the position that the appellant had adopted a new and contradictory position from that taken earlier on the debt owing, and that the Nairobi case had only frozen a portion of the money held leaving a surplus to meet the decree in question; and that the advocate for the 3<sup>rd</sup> and 4<sup>th</sup> respondents disclosed in court that the appellant's advocate had confirmed its liability to pay, save that the sum due was to be ascertained.
9. In his ruling, the learned Judge (P. J. O. Otieno, J), identified the issue for determination as: whether the appellant was indebted to the judgement debtor and therefore liable to meet the decree by way of attachment of the said debt.
10. The learned Judge found that, by virtue of section 3 of the *State Corporations Act*, the appellant was vested with a corporate character that makes it separate and distinct from the Government that created it or promoted it; that, when Parliament mandated that state corporations be established under the *State Corporations Act* and be vested with corporate identity with power to sue and be sued, it created juristic persons separate and distinct from the Government; that Parliament did not intend to create corporations that take the identity of government department; that, if Parliament intends to give a corporation immunity from execution or any legal process, such immunity must be expressly stated; and that there is no provision in the *State Corporations Act* that cushions the appellant against execution. Arriving at this decision, the learned Judge relied on *Kenya Revenue Authority v Habimana Sued Hemed & Another* [2015] eKLR where it was held that corporations are not immune from execution.
11. The learned Judge found that, in a ruling made on 8<sup>th</sup> May 2019, the issue of the liability of the appellant had been determined; that the debt attached was an admitted debt due from the appellant to the 3<sup>rd</sup> and 4<sup>th</sup> defendants; that a debt is a property of the person owed and that, once it is attached, it matters not that the amount is due from the objector but is held by a third party; and that as a creditor (sic) of the judgement debtor against whom the court orders of 8<sup>th</sup> May 2019 was issued and continues to bind, its property wherever it may lie, is subject to attachment.
12. On the merits of the application, it was found that there was no contest or dispute on the fact that the 5<sup>th</sup> respondent, being the appellant's banker, held money to the credit of the appellant; that, the appellant having been found and held to be indebted to the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the contention that there was no judgement in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to merit a garnishee order nisi being issued was insincere and lacked good faith; that the appellant was merely brought into the proceedings by virtue of being a creditor of the 3<sup>rd</sup> and 4<sup>th</sup> respondents by virtue of it holding a property belonging to the 3<sup>rd</sup> and 4<sup>th</sup> respondents, which is liable to attachment and need not be the judgement debtor; and that none of the assets of the appellant was targeted for execution beyond the debt it owes to the 3<sup>rd</sup> and 4<sup>th</sup> respondent.
13. In his ruling, the learned Judge found that garnishee applications or attachment of debts are regulated by the provisions of Order 23 of the Civil Procedure Rules; that the named garnishee, the 5<sup>th</sup> respondent, failed to either dispute the indebtedness to the appellant or to attend court and, therefore,



- the claim by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was unchallenged; that the issue as to whether or not the appellant was indebted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was decided in the decision of 8<sup>th</sup> May 2018 and could not be reopened.
14. The application by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was allowed while the one by the appellant was dismissed by a ruling delivered on 30<sup>th</sup> November 2020. It was that decision that provoked this appeal.
  15. This appeal is brought on the grounds that the learned Judge erred in law and fact: in finding that the appellant held to the credit of the 3<sup>rd</sup> and 4<sup>th</sup> respondents sums exceeding USD 4,200,000; in disregarding the appellant's evidence on the mode of financing and payment of the contracts between the appellant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents; in failing to consider that the contractual relationship existing between the appellant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents on 10<sup>th</sup> and 30<sup>th</sup> April 2018 when the order of attachment of the appellant's funds was made changed in September 2018 when the contracts between the parties were terminated; in disregarding the appellant's evidence on the post contract procedures for the contracts between the appellant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents; in disregarding the appellant's evidence that the appellant, being a public body, was entrusted with public funds intended for specific Governmental Projects, and that the funds the court ordered to be attached were not held to the credit of the 3<sup>rd</sup> and 4<sup>th</sup> respondents; in applying the court's decision contained in the ruling delivered on 8<sup>th</sup> May 2019 to the objection proceedings before him, whereas the appellant was not a party to the proceedings at the time the decision was made; in finding that the court's decision contained in the ruling delivered on 8<sup>th</sup> May 2019 was binding upon the appellant; in finding that the amount attached was an admitted debt at the time the order of attachment of the appellant's funds was made, whereas the appellant was not a party in the matter; in dismissing the appellant's application dated 1<sup>st</sup> October 2020, and in making the garnishee nisi dated 25<sup>th</sup> August 2020 absolute; and in failing to appreciate the submissions of the appellant in finding in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It was further contended that, in all the circumstances, the findings of the learned Judge were unfounded in law based on the evidence adduced.
  16. It was therefore prayed that the appeal be allowed and the attachment of the appellant's funds be set aside; that the garnishee order nisi dated 25<sup>th</sup> August 2020 and made absolute on 30<sup>th</sup> November 2020 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents be set aside; the appellant be awarded the costs of the appeal and in the court below; and that such other order or reliefs as the court may deem fit and just be granted.
  17. We heard this appeal virtually on the Court's GoTo platform on 29<sup>th</sup> January 2024 when learned counsel, Mr. Mulondo, appeared for the appellant, Mr. Khagram appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and Mr. Kongere appeared for the 5<sup>th</sup> respondent. There was no appearance for the 3<sup>rd</sup> and 4<sup>th</sup> respondent despite due service of the hearing notice upon their counsel on record.
  18. Mr. Mulondo relied on the submissions dated 27<sup>th</sup> October 2023 filed by the firm of Mulondo & Company Advocates LLP, which he briefly highlighted. The appellant's case was that the project financial model agreed between the appellant and the 3<sup>rd</sup> respondent was that the 3<sup>rd</sup> respondent would raise an invoice which was to be approved by the appellant and the respective project financier, and that the money could only be released for payment by the financier; that the said invoices were directly settled by the project financiers and not the appellant; that the project funds, being loans, were held by the financier, and were disbursed directly to the 3<sup>rd</sup> respondent upon approval of the invoices; that, consequently, there were no funds at any given time lying with the appellant capable of being attached in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the appellant was therefore not a garnishee; that the monies in the appellant's accounts were for their own operations and other governmental projects to be undertaken in pursuance of the appellant's mandate; and that the appellant is a public body and a mere



custodian of the funds in the accounts. In this regard, the appellant cited the case of Okiya Omtatah Okoiti v James R Njenga & 19 Others [2022] KLR in which it was held that a private entity that receives public funds and other State resources in the performance of its duties is obliged to account for its utilisation. Reliance was also placed on the case of Attorney General v Equip Agencies cited in Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 where the possibility of crippling the operations of the Ministry of Health was taken into account when deciding whether an order for payment ought to be made.

19. It was submitted that, since the contract between the appellant and the 3<sup>rd</sup> respondent was terminated, no payments were approved as the appellant was awaiting completion of the project; that, as a result of the 3<sup>rd</sup> respondent's failure to complete the project, payment could not be approved; that, after the 3<sup>rd</sup> respondent applied for insolvency, the only person entitled to claim sums due to the 3<sup>rd</sup> and 4<sup>th</sup> respondents was the administrator, and not the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that, since there was no privity of contract between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondent, there can be no claim against the appellant; that upon termination of the contract between the appellant and the 3<sup>rd</sup> respondent, an audit of works was to be taken in order to determine the value of the works done with a view of ascertaining whether there was any monies payable to the 3<sup>rd</sup> respondent; that the audit was not capable of taking place due to the changed status of the 3<sup>rd</sup> respondent; that the learned Judge violated the principles of natural justice as the appellant was never given an opportunity to be heard in the applications that were heard and determined between the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the one hand and the 3<sup>rd</sup> and 4<sup>th</sup> respondents on the other. Reliance was placed on Msagha v Chief Justice & 7 Others [2006] 2 KLR 553; and Ahmed Isaack Hassan v Auditor General [2015] eKLR on the need to afford one an opportunity of being heard before prejudicial orders are made against them.
20. It was further noted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents entered into a memorandum of understanding in respect of the debt owed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents without the appellant's participation.
21. Based on the submissions, we were urged to allow the appeal.
22. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the submissions dated 19<sup>th</sup> October 2023 filed by the firm of A. B. Patel & Patel Advocates as highlighted by learned counsel, Mr. Sanjeev Khagram. It was submitted that the only issue for determination in the appeal was whether the appellant's objection to the payment of the decretal sum was valid; that, in the ruling of 13<sup>th</sup> July 2018, the court found that the appellant did not deny owing monies to the 3<sup>rd</sup> and 4<sup>th</sup> respondents for completed works, and that the uncontroverted fact remained that the appellant owed the 3<sup>rd</sup> and 4<sup>th</sup> respondents in excess of Kshs 4.2 billion whereas UBA Bank, the claimant in the Nairobi case, only sought to recover Kshs 2,581,821,000 leaving a surplus of Kshs 1,700,000.00 odd; and that the prayer seeking to set aside the conditional attachment was also declined. Citing section 44 of the Evidence Act, it was submitted that the said decision was conclusive as to the matters set out in that section since no appeal was preferred against it.
23. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the High Court having found that the appellant owed the said monies, it was incongruous for the appellant to object to the garnishee proceedings and contend that it was not indebted to the 3<sup>rd</sup> and 4<sup>th</sup> respondents; that, in the affidavit sworn in support of the application to set aside the conditional attachment dated 22<sup>nd</sup> May 2018, it was confirmed that several projects had been substantially completed, and that, if the appellant was barred from making payments to the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the projects might stall; and that there was no material before the High Court to enable it grant the relief sought by the appellant in exercise of its discretion. The appellant cited the case of Mbogo & Another v Shah [1968] EA 93 on the circumstances under which the exercise of discretion by the trial court may be interfered with on appeal. It was submitted that grounds 1 to 10 in the Memorandum of Appeal raised matters which were neither pleaded nor raised by the appellant



in the court below, while the other matters alluded to were the subject of previous rulings made by the High Court. On the authority of *Kenya Commercial Bank Limited v Osebe* [1982] KLR 292; *Securicor [Kenya] Limited v EA Drapers Limited & Another* [1987] KLR 338; and *Kenya Hotels Limited v Oriental Commercial Bank Ltd* [2019] eKLR, it was submitted that the appellant cannot be permitted to raise those issues in this appeal.

24. Mr. Kongere, learned counsel for the 5<sup>th</sup> respondent, informed us that his client would abide by the outcome of this appeal.
25. This appeal revolves around garnishee proceedings. Order 23 rule 1 of the Civil Procedure Rule Provides that:

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.

26. What this means is that, other than salary or allowance to which the provisions of Order 22 rule 42 of the Civil Procedure Rules apply, a decree holder who has reason to believe that another person (called the garnishee) is indebted to the judgment-debtor and that the garnishee is within the jurisdiction, the decree holder may apply for the attachment of all such debts due from the garnishee to the judgement debtor in order to answer the decree together with the costs of the garnishee proceedings.
27. Such an application is made ex parte supported by an affidavit of the decree holder or of his advocate. The affidavit must state that a decree has been issued and the amount that remains unsatisfied. In the same order attaching the debts or by a subsequent order, the garnishee may be ordered to 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. In other words, the garnishee who owes the judgement debtor sums in excess of the amount due to the decree holder is only obliged to pay to the judgement debtor the sum that the judgement debtor owe to the decree holder. On the other hand, where the garnishee owes a lesser amount than the amount owed by the judgement debtor to the decree holder, he can only pay the amount that he owes the judgement debtor and is not obliged to pay more than he owes. He is not a judgement debtor and, therefore, is not bound to settle the decree against the judgement debtor from his own money. That was the position adopted by the predecessor to this Court in *Petro Sonko & Another v H A D B Patel & Another* [1953] 1 EACA 99 where the Court, while holding that a garnishee cannot accelerate the time for payment of a debt, and that, where the debt is not due, there is nothing to be attached. The Court explained that:

“A judgement creditor cannot by means of attachment stand in a better position as regards the garnishee than the judgement debtor did, ‘he can only obtain what the judgement debtor could honestly give him.’”



28. There are two stages in garnishee proceedings. The first stage is the ex parte stage where an order is issued attaching the debt held by the garnishee to the credit of the judgement debtor. At that stage, the garnishee is not directed to pay any money to the judgement debtor since the exact amount, if any, held by the garnishee to the credit of the judgement debtor is not known. The order made at this stage is known as a garnishee order nisi. The second stage is where the garnishee appears 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. It is only after the second stage that the court may direct the garnishee to settle the whole amount due under the decree if the garnishee holds to the credit of the judgement debtor a sum equal to or in excess of the decretal sum, or the sum held by the garnishee to the credit of the judgement debtor where the amount owed is less than the decretal sum. The order issued at this stage is known as garnishee order absolute.
29. Where the garnishee fails to appear, or appears but fails 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, a garnishee order absolute is made, and it is at that stage that the garnishee becomes liable to settle the decretal sum owed to the decree holder by the judgement debtor. See *Mulji Kanji Mehta v Karsandas Pitamber & Brothers* [1958] EA 694.
30. However, it is not a question of entering judgement against the garnishee but the making of the decree nisi absolute. This was explained in *Petro Sonko & Another v H A D B Patel & Another* [1955] 1 EACA 23 where the Court expressed itself as hereunder:
- “With due respect, we must say that the use of this loose and inaccurate phraseology [of entering judgement instead of making decree nisi absolute against the garnishee] was most unfortunate and has probably contributed to subsequent confusion and argument. What the learned Judge should have done, on the issue before him, was to find that the garnishees were indebted to the judgement- debtor in the sum of Shs. 2,000 and then to make absolute the rule nisi attaching the debt.”
31. The procedure and the objective of garnishee proceedings was explained by the East African Court of Appeal in *Jagat Singh Bains v Halimabibi* [1957] EA 13 where it was held that, for the purposes of garnishee nisi, an affidavit based on information and belief is sufficient provided the sources of information or grounds of belief are stated; that the belief of the deponent does not have to be justified in fact, and it is sufficient that it be reasonable and bona fide; that the court must be satisfied, before it makes the order absolute, of the existence of a debt in praesenti: that a debt which the judgement debtor could sue for if he chose, and an unliquidated claim for damages cannot, save perhaps in an exceptional case, be attached; and that garnishee proceedings being inquisitorial, the purpose is to find out whether the garnishee is indebted to the judgement debtor, and not merely whether he owes a particular debt.
32. At this point, we must pause and emphasise that the garnishee is that third party who is indebted to the judgement debtor and is being called upon to settle the judgement debtor’s liability to the decree holder to the extent of his liability to the judgement debtor. In the case before us, the judgement debtors were the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Though the parties described the 5<sup>th</sup> respondent as the garnishee, that was a misdescription since the 5<sup>th</sup> respondent was not indebted to the 3<sup>rd</sup> and 4<sup>th</sup> respondent. Its liability was to the appellant to whose credit it was holding the money. In these proceedings, strictly speaking, the garnishee was the appellant against whom the claim of indebtedness to the 3<sup>rd</sup> and 4<sup>th</sup> respondent was made.



- However, nothing turns on that point since the 5<sup>th</sup> respondent did not dispute the contention that the appellant had funds deposited with the 5<sup>th</sup> respondent.
33. In this appeal, it was submitted that the status of the 3<sup>rd</sup> respondent changed when it made a request for insolvency before the National Company Law Tribunal in Mumbai, and the contract terminated as a result of the said proceedings; that the 1<sup>st</sup> and 2<sup>nd</sup> respondent ought to have obtained the consent of the administrator prior to commencing proceedings against the 3<sup>rd</sup> and 4<sup>th</sup> respondents; and that, similarly, the approval of the court ought to have been sought. In this regard, reliance was placed on *Ngángá v Cytonn High Yield Solutions LLP* [2022] KEHC 3368 (KLR) in which the purpose of seeking leave was explained, namely to ensure that a company under administration is not subjected to a multiplicity of actions. The appellant also cited section 522 of the *Insolvency Act*, 2015 as well as the case of *Lambart Lwanga Ogochi & 4 Others v Ponginangipalli Venkata Ramana Rao* [2022] eKLR as espousing the objectives of administration. According to the appellant, once the administration takes effect, the interest of the creditors takes priority and any monies payable to the 3<sup>rd</sup> respondent would be paid to the administrator for the benefit of creditors as a whole and not to the 3<sup>rd</sup> respondent as was held in the case of *Re HP Gauff Ingenuire GMBH & Co. KG – JBG* [2021] eKLR. Reliance was also placed on *Invesco Assurance Company Limited v Kinyanjui Njuguna & Company Advocates* [2020] eKLR for the proposition that, once a company is under administration, all its assets and liabilities are vested in the administrator and, hence, the debt owed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents can only vest in the administrator. We were urged to find that, by dint of the insolvency of the 3<sup>rd</sup> respondent, monies owed to them are payable to the administrator.
34. This submission, sound as it may appear, is unfortunately made by the wrong party. The appellant, being a garnishee, cannot question the propriety of the proceedings in which the judgement was obtained. If the judgement debtor or the administrator in insolvency fails to take action to challenge the judgement or the mode of execution adopted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, it is not for the garnishee to come to the rescue of the judgement debtor in garnishee proceedings. The garnishee's role in the proceedings is limited to placing before the court the debt (if any) it owes the judgement debtor. It cannot question the process under which the judgement was obtained against the judgement debtor. It is in that light that we understand the holding in *Lubega v City Council of Kampala* [1975] EA 148 where the Court doubted if the garnishee had any locus standi in praying for money to be refunded to the liquidator and stated that, if any party had a standing, it would have been the liquidator, not the garnishee.
35. According to the appellant, no contractual relationship existed between it and the 1<sup>st</sup> and 2<sup>nd</sup> respondents and, therefore, it is not liable to them; and that the 1<sup>st</sup> and 2<sup>nd</sup> respondent should not look to the appellant for payment of monies owed to them by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. In this regard, the appellant cited the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR for the proposition that a contract affects only the parties to it and cannot be enforced against non-parties, and submitted that, since the contract between the 3<sup>rd</sup> respondent on the one hand and the 1<sup>st</sup> and 2<sup>nd</sup> respondent expressly stated that no subcontractor would look to the employer (the appellant herein) for the performance of the contractor's obligation, the 1<sup>st</sup> and 2<sup>nd</sup> respondents could only claim their payment from the 3<sup>rd</sup> respondent and not the appellant. This submission was based on the case of *Zenith Steel Fabricators Limited v Continental Builders Limited & Another* [29018] eKLR where it was held that the contractor is responsible for the subcontractor's payments. While citing the doctrine of privity of contract, the appellant cited the case of *Savings & Loan (K) Limited v Kanyenje Gakombe & Another* [2015] eKLR to support its submission that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Being third parties, it was



contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot enforce their right to payment against the appellant, and hence the learned Judge erred in finding that the sum in question be paid by the appellant.

36. In our view, garnishee proceedings are special proceedings which do not contemplate the existence of a contractual relationship between the judgement creditor and the garnishee. Strictly speaking, they are not even execution proceedings since the property of the garnishee is not in jeopardy in such proceedings. In garnishee proceedings, the decree holder steps into the shoes of the judgement debtor and demands that the payment due from the garnishee to the judgement debtor be paid to the decree holder or judgement creditor instead. That is the only relationship between the garnishee and the judgement creditor or decree holder. Accordingly, the issue of privity of contract, strictly speaking, has no place in garnishee proceedings since the liability of the garnishee to pay the decree holder is not contractual, but kicks in by operation of law.
37. It was further submitted that the learned Judge violated the principles of natural justice as the appellant was never given an opportunity to be heard as to whether it was indebted to the 3<sup>rd</sup> and 4<sup>th</sup> respondents. It was noted that, on 8<sup>th</sup> May 2019, the court delivered a ruling attaching sums of money in the appellant's accounts. The appellant complained that it was never given an opportunity to be heard in the applications heard and determined between the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the one hand and the 3<sup>rd</sup> and 4<sup>th</sup> respondents on the other. The applications alluded to by the appellant were those seeking judgement against the 3<sup>rd</sup> and 4<sup>th</sup> respondents and by the 3<sup>rd</sup> and 4<sup>th</sup> respondents seeking the withdrawal of conditional orders made by the court, and for striking out the plaint on the ground that the same was filed while the 3<sup>rd</sup> respondent was undergoing administration.
38. In our considered view, the appellant, as a garnishee, only came into the picture after judgement was entered against the 3<sup>rd</sup> and 4<sup>th</sup> respondents, and only upon being called upon to satisfy that judgement. Before then, the appellant had no role to play in any proceedings between the principal parties to the suit. Its participation in the suit before the commencement of the garnishee proceedings was not required, and it was not expected to be heard in those proceedings since it was a non-party thereto. Neither was it in the contemplation of either the parties or the court that the appellant would be roped into the proceedings. In fact, the appellant's attempts to join the proceedings was dismissed by the learned Judge on the ground of lack of locus standing, and no appeal was preferred against that decision.
39. In this case, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> respondents sued the 3<sup>rd</sup> and 4<sup>th</sup> respondents and obtained a judgement against them. That judgement remained unsatisfied. The only question was whether the appellant was indebted to the 3<sup>rd</sup> and 4<sup>th</sup> respondents, and to what extent. The appellant contended that it was not indebted to the 3<sup>rd</sup> and 4<sup>th</sup> respondent since the accounts between them was yet to be taken in order to determine whether or not there was any sum due and owing from the appellant to the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
40. In its application dated 22<sup>nd</sup> May 2018 seeking to be joined to the proceedings, the appellant filed an affidavit sworn by Duncan Macharia, its Company Secretary and Senior Manager Legal Services, in which it was deposed:
  11. That KETRACO has entered into contracts with the 1<sup>st</sup> Defendant (read 3<sup>rd</sup> Respondent) as one such specialist company towards building transmission lines from Isinya to Suswa, from Lessos to Kabarnet, from Nanyuki to Nyahururu, from Olkaria to Narok, from Sotik to Bomet, from Mwingi to Ichiara and Kieni as well as Mwingi to Kitui, Wote and Sultan Hamud. The projects are nearing completion.



12. That if KETRACO is barred from making any payment to the 1<sup>st</sup> Defendant because of a debt claimed by the Plaintiffs, all the contracts for construction being undertaken by the 1<sup>st</sup> Defendant shall grind to a halt because goods and material to be imported cannot be procured from abroad, and local goods and services cannot be procured. The conditional funding provided by the government of India and the African Development Bank for these projects shall be cancelled and the incomplete projects shall remain as “white elephants””
13. That it is therefore not just, nor in the public interest that projects which are almost complete be frustrated to enforce private rights and in the process, the Government’s efforts to provide citizens with the economic and social rights contemplated in Article 43 of the Constitution are frustrated.
41. From the foregoing depositions, the appellant was seeking to lift attachment order issued against it in respect of the debts due from the appellant to the 3<sup>rd</sup> respondent so as to pave way for it to make payments to the 3<sup>rd</sup> respondent in order to enable the 3<sup>rd</sup> respondent continue with the project.
42. In his ruling on the application dated 13<sup>th</sup> July 2018, the learned Judge expressed himself as hereunder:

“I have looked at the material placed before me by the Applicant [read appellant] and those by the plaintiff including the pleadings filed. The applicant, to start with, does not deny owing to the defendant money but is not free to say how much it owes. When confronted with the revelation made in the Nairobi suit in which it bases its application here, the counsel was fast [sic] to decline commenting on what is disclosed to be owed. That leaves the facts revealed by Mr. Fred Chumo, an employee of UBA Bank Kenya Ltd that the Applicant owes 4.2. Billion while the bank only seeks to recover some 2,581,821.00, uncontroverted. That uncontroverted fact would leave a surplus of Kshs.1.7. billion as still owing to the defendant from the Applicant after the bank makes full recovery.”
43. In that ruling, it was found as a fact that the appellant herein, which was the applicant in that ruling, did not deny owing any money to the 3<sup>rd</sup> and 4<sup>th</sup> respondents. According to the material placed before the learned Judge, the appellant owed the 3<sup>rd</sup> and 4<sup>th</sup> respondents 4.2 Billion and, after taking into account the sum due to UBA Bank, there would still be Kshs 1.7 billion left. This ruling was not challenged either on review or appeal.
44. We agree with the learned Judge that the appellant was adopting conflicting positions in arguing its case. If there was any sum due and owing from it to the 3<sup>rd</sup> respondent, it ought to have stated so expressly, and ought to have disclosed that sum to the court as a sign of good faith. It instead adopted an ambiguous position by, on the one hand insisting that it ought to be permitted to pay the 3<sup>rd</sup> respondent, and on the other hand, contending that the accounts between it and the 3<sup>rd</sup> respondent were yet to be taken. In our view, once there is evidence that a garnishee is indebted to the judgement debtor, it is upon the garnishee to disclose to the court the extent of its indebtedness since the decree holder would not be in a position to know the exact extent of the indebtedness.
45. In those circumstances, we do not see how the learned Judge can be faulted for arriving at the impugned decision.
46. We find no merit in this appeal, which we hereby dismiss with costs.
47. Orders Accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY, 2024.**



**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCI Arb.**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

*I certify that this is the true copy of the original  
signed*

**DEPUTY REGISTRAR**

