



**Syke Enterprise Limited & another v Moi Teaching and Referral Hospital Staff Pension Scheme & 4 others; National Bank of Kenya & another (Garnishee) (Environment & Land Case 389 of 2015 & 30 of 2016 (Consolidated)) [2024] KEELC 4666 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4666 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT & LAND CASE 389 OF 2015 & 30 OF 2016 (CONSOLIDATED)**  
**JM ONYANGO, J**  
**JUNE 12, 2024**

**BETWEEN**

**SYKE ENTERPRISE LIMITED ..... PLAINTIFF**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL STAFF PENSION SCHEME ..... DEFENDANT**

**AS CONSOLIDATED WITH**  
**ENVIRONMENT & LAND CASE 30 OF 2016**

**BETWEEN**

**MOI TEACHING AND REFERRAL HOSPITAL STAFF PENSION SCHEME ..... APPLICANT**

**AND**

**SYKE ENTERPRISE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JACQUELINE CHEPTEPKEY KORIR ..... 2<sup>ND</sup> DEFENDANT**

**JOHN KORIR ..... 3<sup>RD</sup> DEFENDANT**

**HOTEL HORIZON LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**NATIONAL BANK OF KENYA ..... GARNISHEE**

**EQUITY BANK KENYA ..... GARNISHEE**



## RULING

1. The Decree holder has placed before me a Notice of Motion application dated 13<sup>th</sup> July, 2023 praying for orders that:
  - a. Spent
  - b. Pending hearing and determination of this application interpartes and further orders of this court, the Defendants/Judgment Debtors and the 1<sup>st</sup> and 2<sup>nd</sup> Garnishee be restrained from withdrawing and/or transferring and/or otherwise transacting in any other way to reduce the amount held in the following accounts:
    - i. Account Number 0103xxxxxxxxx in National Bank of Kenya to the credit of the 2<sup>nd</sup> Defendant/Judgment Debtor.
    - ii. Account Number 0102xxxxxxxxx held at National Bank of Kenya to the credit of the 4<sup>th</sup> Defendant/Judgment Debtor.
    - iii. Account Number 026xxxxxxx held by Equity Bank Kenya to the credit of the 4<sup>th</sup> Defendant/Judgment Debtor.
  - c. Pending the hearing and determination of the instant application, a *Garnishee Order Nisi* do issue against National Bank of Kenya, Eldoret Branch ordering all monies deposited, lying and being held in deposit in account numbers 0103xxxxxxxxx to the credit of Jacqueline Cheptepkeny Korir and 0102xxxxxxxxx to the credit of Hotel Horizon Limited, the Judgment Debtors herein, be attached to satisfy the judgment and decree issued on 22<sup>nd</sup> March, 2023 for the sum of Kenya Shillings Nineteen Million, Six Hundred and Fifteen Thousand (Kshs.19,615,000/-).
  - d. Pending the hearing and determination of the instant application, a *Garnishee Order Nisi* do issue against Equity Bank Kenya, Eldoret Branch ordering all monies deposited, lying and being held in deposit in account number 026xxxxxxx to the credit of Hotel Horizon Limited, the Judgment Debtor herein, be attached to satisfy the judgment and decree issued on 22<sup>nd</sup> March, 2023 for the sum of Kenya Shillings Nineteen Million, Six Hundred and Fifteen Thousand ( Kshs. 19,615,000/-).
  - e. Pending the hearing and determination of the instant application, a *Garnishee Order Nisi* do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Garnishee Banks ordering all that monies deposited, lying and being held in deposit in any other accounts with the 1<sup>st</sup> and 2<sup>nd</sup> Garnishee Bank to the credit of the Defendants/Judgment Debtors be attached to answer the judgment and decree issued on 22<sup>nd</sup> March, 2023 issued in favour of the Decree-Holder for the sum of Kenya Shillings Nineteen Million, Six Hundred and Fifteen Thousand ( Kshs.19,615,000/-).
  - f. That the 1<sup>st</sup> and 2<sup>nd</sup> Garnishee Banks do appear before this Honourable Court on an appointed date to show cause why the *Garnishee Order Nisi* should not be made absolute and the sum of Kenya Shillings Nineteen Million, Six Hundred and Fifteen Thousand ( Kshs.19,615,000/-) released to the Applicant/Decree Holder's Advocate.
  - g. That the Court be pleased to make such other consequential orders as are necessary for the execution of the Decree.



- h. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants/Judgment Debtors do pay the costs of this application.
2. The Application is supported by an Affidavit sworn by Felix Kosgei, the Chairman of the Decree Holder. Mr. Kosgei who averred that judgment in this matter was delivered on 22<sup>nd</sup> March, 2023 in favour of the Decree holder for a sum of Kenya Shillings Nineteen Million, Six Hundred and Fifteen Thousand ( Kshs.19,615,000/-). However, the Defendants have made no efforts to pay the decretal sum despite the Decree Holder's attempts to execute the decree in vain and the entire decretal sum remains unpaid. He deponed that the Decree Holder has discovered that the 2<sup>nd</sup> and 4<sup>th</sup> Defendant have substantial amounts of money in their named bank accounts held by the 1<sup>st</sup> and 2<sup>nd</sup> Garnishee.
  3. He averred that the money held in the said accounts should be attached to satisfy the decretal sum before the Defendants withdraw the funds and make it impossible to execute the decree issued by this court. He urged that the failure to pay the Decree Holder rent in the amount of Kshs.19,615,000/- has put a strain on the Decree Holder's finances and it might grind to a halt if the monies are not remitted to it. That as the successful litigant, the Decree Holder is entitled to enjoy the fruits of its judgment. He averred that the orders sought are in the best interests of justice and it is only fair, just and equitable that they be granted.
  4. The 1<sup>st</sup> Garnishee filed a response vide a Replying Affidavit sworn by Margaret Jepkemoi, its Branch Manager-Eldoret. She explained that the 2<sup>nd</sup> Defendant holds 2 current accounts with the 1<sup>st</sup> Garnishee Bank, being No. 0103xxxxxxxx whose book balance is Kshs.444.32 (CR), and Account No. 0102xxxxxxxx whose book balance is Kshs.2,641,073.20(CR) as at 18<sup>th</sup> July, 2023. She deponed that the Judgment Debtors do not hold any other accounts with the 1<sup>st</sup> Garnishee thus its liability on account of the indebtedness of the Judgment debtors' to the Decree holder should only be to the extent of the aforesaid balances less its costs. She further deponed that the 1<sup>st</sup> Garnishee's costs incidental to this application in the sum of Kshs.100,000/- be deducted from the said accounts prior to establishing the 1<sup>st</sup> Garnishee's obligation to satisfy the Garnishee Order. She deponed that the 1<sup>st</sup> Garnishee is not opposed to the release of the money less its costs aforesaid and subject to any other court orders as may be issued in respect of the Defendant's accounts.
  5. The Judgment Debtor filed a Replying Affidavit, sworn by one of its Directors Prof. Jacqueline C. Korir (the 2<sup>nd</sup> Defendant in the Counterclaim). She deponed that the Application herein ought to be dismissed as it is bad in law, fatally defective and an abuse of court and that it is res judicata, the court having pronounced itself vide the ruling delivered on 16<sup>th</sup> May, 2016, which ruling the Decree Holder is aware of. She deponed that the judgment herein was entered against the Plaintiff only and being dissatisfied with it, the Plaintiff had lodged an appeal against it. She averred that the instant application for freezing the accounts offends Order 22 Rule 7(2) of the *Civil Procedure Rules*. She further deponed that the process of Garnishee as commenced by the Decree Holder offends Order 23 of the *Civil procedure Rules*. She averred that a company is separate from its Directors hence attachment against the 2<sup>nd</sup> and 3<sup>rd</sup> Judgment Debtors' personal accounts is illegal and unlawful. Further, that the execution process is premature and cannot be entertained by the court.

## Submissions

### Decree Holder's Submissions

6. On 27<sup>th</sup> July, 2023 the court directed that the application be canvassed by way of written submissions. Pursuant to these directions, the Decree Holder filed its submissions on 4<sup>th</sup> October, 2023. The Decree Holder's advocate submitted that as a matter of fact, the decretal sum remains unpaid and it is incumbent upon Syke Enterprises Limited to comply and allow the Decree Holder to enjoy the fruits



of its judgment. He submitted that under Order XXI Rule 1 of the Civil Procedure Rules, the court has jurisdiction and authority to attach property of a judgment debtor to enforce a judgment or decree; and Section 38 of the Civil Procedure Act the court may order execution of a decree by the modes set out thereunder.

7. Counsel submitted that the funds in the said accounts ought to be attached so that the Judgment debtors do not withdraw them and render execution of the decree impossible. He pointed out that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the 1<sup>st</sup> Judgment debtor's guarantors and judgment was entered against the Defendants jointly and severally. He relied on Kenya Bureau of Standards vs Geo Chem Middle East and Nyandoro & Company Advocates vs National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) (2021) eKLR. Counsel submitted that when a judgment debtor fails to comply with the terms of a judgment, the Decree Holder is entitled to enforce it through procedures provided under the law. That the garnishee process under Order 23 Rule 1(1) empowers the court to order the garnishee to pay as much of the sums owed directly as may be sufficient to satisfy the decretal amount to the Decree Holder and the costs of the garnishee proceedings. He submitted that the Garnishee Order should be made absolute to allow the decree holder enjoy the fruit of its judgment.
8. Counsel also submitted that the 1<sup>st</sup> Garnishee had admitted to holding funds capable of satisfying part of the decretal sum and under Order 23 Rule 4 the court may allow the execution to levy the amount due from it or as much thereof as may satisfy the decree. That there is evidence that the Judgment Debtors have money in its accounts and thus have capacity to satisfy the judgment debt. He urged that if the court does not grant the attachment of the funds timeously, there is the risk that the Judgment Debtor will withdraw the funds rendering execution impossible and occasioning the Decree Holder irreparable harm. He urged that the funds in the named bank accounts be attached to satisfy the decretal amount of Kshs.19,615,000/-. That the 1<sup>st</sup> Garnishee be directed to comply with this order and not allow withdrawals from the said accounts. Further that the 2<sup>nd</sup> Garnishee be put on notice of this application and also directed to comply with the order and not allow withdrawals therefrom. Counsel also urged that the Judgment Debtor bear the costs of this application.

### **Judgment Debtor's Submissions**

9. The Judgment Debtor's submissions were filed on 13<sup>th</sup> December, 2023 and therein its Advocate submitted that account 0103xxxxxxxx is the 2<sup>nd</sup> Defendant's personal account which has no nexus with the Plaintiff/Judgment Debtor. He pointed out that there is a 3<sup>rd</sup> Account of another Director that was not listed. He argued that there is a distinction between the Judgment debtor, a limited liability company, and a legal entity separate from its directors, and that the Directors did not sign any guarantees for the company. He submitted that one of the accounts is in the name of Hotel Horizon Limited, a company that has nothing to do with the debt owing to the Decree Holder, it is therefore wrong to attach its account when no claim was made against it. Counsel argued that the *Garnishee Order Nisi* was issued against accounts of persons and companies who do not owe the Decree Holder directly.
10. It was submitted that any order attaching funds/monies held in any other accounts held by the Defendants/Judgment debtors with the 1<sup>st</sup> and 2<sup>nd</sup> Garnishees would be a nullity as no such order can issue against an account which has not been specifically pleaded and a claim made directly touching on it. Counsel argued that the Judgment Debtor has filed an appeal being Civil Appeal No. E044 of 2023 thus the judgment and the Garnishee order should be stayed pending its determination. That unless the orders of stay are granted the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Judgment debtors will suffer immensely given that



their financial bases have been affected because they cannot access the funds therein. Counsel urged that the Application be dismissed with costs.

### **Analysis and Determination**

11. Having considered the application, Replying Affidavit and rival submissions, the main issues for determination are:-
  - i. Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the Counterclaim can be held liable for the judgment issued against the Judgment debtor
  - ii. Whether the conditions for issuance of a Garnishee Order Absolute have been met

#### **i. Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the Counterclaim can be Held Liable for the Judgment Issued Against the Judgment Debtor**

12. The judgment herein was made against the Plaintiff/1<sup>st</sup> Defendant in the counterclaim who is the Judgment Debtor. The findings of the court in the Judgment delivered on 22<sup>nd</sup> March, 2023 were that:-

“b. The Defendant/Plaintiff in the counterclaim has partially established its counterclaim in accordance with the law and the same is allowed in the following terms:

- i. That the Plaintiff/1<sup>st</sup> Defendant in the counterclaim do pay the Defendant/Plaintiff in the counterclaim Kshs.19,115,000/- (nineteen million on hundred and fifteen thousand) and Kshs.500,000/- (five hundred thousand), as prayed for under prayers (a) and (f) of the Counterclaim.
- ai. The Plaintiff/1<sup>st</sup> Defendant in the counterclaim to pay the Defendant/Plaintiff in the Counterclaim costs.”

13. The issue herein is quite clearly whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the Counterclaim can be Held Liable for a judgment issued wholly against the Judgment Debtor. The bone of contention is that the accounts named in the instant application belong to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Counterclaim who are its directors and the 4<sup>th</sup> Defendant a separate company. This action has been condemned by the Judgment Debtor on the grounds that a company is a separate legal entity from its directors, thus their personal accounts ought not to be attached to settle the decretal sum. It is argued that if the court allows the attachment of these accounts, it will be going against the principle that a company is in law a separate legal entity from its directors. The principle was established in the case of *Salomon vs Salomon & Co (1897)* AC 22 where Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words:

“The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.”

14. For the avoidance of doubt, the Defendants and or the Judgment Debtors play no part in these proceedings as Garnishee proceedings are essentially between the Decree holder and the Garnishee(s).



See [Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Co. Ltd; Diamond Trust Bank \(Garnishee\)](#) (2020) eKLR where the court held that:-

“The judgment debtor has no *locus* to apply to seek to dismiss the garnishee order in the instant proceedings as the judgment debtor is not a party to the Garnishee proceedings. Garnishee proceedings are separate proceedings between the judgment creditor and the Garnishee, regardless of the fact that the judgment debtor may be examined before or after the making of an order for attachment of debts.”

15. Nevertheless, this court has the following to say on the Judgment Debtor’s and the Defendants’ assertions. Notably, the Decree Holder, argued that it attached the 2<sup>nd</sup> and 3<sup>rd</sup> Judgment debtors’ Account not as a director, but because they signed the Lease as a guarantor of the Lessor, Syke Enterprises Limited, the 1<sup>st</sup> Judgment Debtor. In the Counterclaim dated 24<sup>th</sup> May, 2016 the 2<sup>nd</sup> and 3<sup>rd</sup> Judgment Debtors are described as “guarantors on the Lease dated 6<sup>th</sup> August, 2013”. The [Black’s Law Dictionary](#) 11<sup>th</sup> Edition defines the word ‘guarantor’ as:

“Someone who makes a guaranty or gives security for a debt”.

It further explains that a guarantor’s liability does not begin until the principal is in default.

16. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were sued as guarantors of the company under a guarantee in the lease agreement dated 6<sup>th</sup> August, 2013. The guarantee was to ensure due observance and performance by Syke Enterprises Ltd of the terms and conditions of the said lease, being payment of all rents and utilities under the lease. I have perused at the Lease dated 6<sup>th</sup> August, 2013 and indeed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants signed as both Directors of the tenant and separately on the same document as the guarantors of the tenant. Clause 12(b) of the Lease provides that:

“If at any time during the term this lease is terminated for any other reason whatsoever otherwise than by effluxion of time then immediately upon the happening of any such event this guarantee will be determined and all future liabilities of the guarantor shall cease without prejudice to the landlord’s right to seek indemnity from the guarantor in respect of non-payment of rent or other breaches that will have taken place before the happening of any such event aforesaid.”

17. Being guarantors for the tenant (Judgment Debtor), under the Lease, the landlord (Decree holder) was entitled to go after them for payment of the rent and for other breaches on the part of the tenant. The tenant did default in payment of the rent hence this suit and the court in its judgment determined that the landlord is entitled to the decretal sum of Kshs.19,615,000/-. The amount arose out of a judgment and the question is whether a decretal sum is binding on a guarantor. [Halsbury’s Laws of England](#) 4<sup>th</sup> Edition Vol. 20(1) at para 178 explains that the liability of a guarantor is secondary to that of the principal debtor who in this case is the tenant (Syke Enterprises Ltd). The guarantor is under no liability if the principal debtor’s liabilities are discharged by performance or otherwise, such as where if the principal obligation is changed without the guarantor’s knowledge or if the principal obligation is itself determined.
18. This amount of Kshs.19,615,000/- was not picked from the air without any basis, it is rent arrears and unpaid legal fees arising out of the Lease agreement signed by the Parties and the guarantors herein. The principal obligation which was payment of the rent as agreed was not changed. In fact, the court in its judgment was clear that it was enforcing the agreement made by the parties. In addition, the principal obligation herein being the rent has not been determined/discharged as there are rent arrears yet to



be paid. The guarantors are therefore liable for the principal debtor's failure to pay the rent which as per the judgment is in arrears to the tune of Kshs.19,615,000/- including unpaid legal fees. *Halsbury's Laws of England* 4<sup>th</sup> Edition Vol. 20(1) at para 179 continues to explain that:

“In a claim against the guarantor by the creditor, a judgment or award obtained by the creditor against the principal debtor is not evidence against the guarantor. This is so even if the arbitration award arises from an arbitration clause in the contract which contains the obligations of the principal debtor which are the subject of the guarantee. However, such a judgment or award may bind the guarantor if the guarantee on its true construction covers the liability of the principal debtor arising from the judgment or award itself.”

19. From the above, it is clear that a guarantor may be liable to settle a decretal sum where the guarantee can be construed to cover the liability of the principal debtor arising from the judgment itself. In addition to the above extract, Common Law further dictates that a guarantee of “due fulfilment of any obligation” in respect of the contract includes a guarantee of the obligation to discharge a decretal award. Reference is made to the case of *Cia Sudamericana de Fletes SA vs African Continental Bank Ltd, The Rosarina* (1973)1 Lloyd's Rep 21. In this case, Mocatta J. held that:

“The principal debtor's obligation to meet the arbitration award was an obligation to meet any obligation arising out of the agreement performance of which had been guaranteed, and was therefore covered by a guarantee of ‘any obligation.’”

20. The phrase “in respect of non-payment of rent or other breaches” contained at Clause 12(b) of the lease can be construed to mean that the guarantor is liable where the tenant fails to pay rent or is in breach of the Lease in any other way. The words “any other breaches” are essentially a guarantee of “any obligation”. Therefore, while it is true that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the counterclaim are not liable under the Lease as Directors, they however also voluntarily chose to guarantee the tenant's performance of its obligations under the Lease. As guarantors, they are still liable under the lease they signed in that capacity since the obligations in the Lease they guaranteed have yet to be discharged.
21. The 2<sup>nd</sup> Defendant in the Counterclaim claims that the judgment was issued against the tenant in the Lease, which is Syke Enterprises Ltd and not Hotel Horizon Limited, the 4<sup>th</sup> Defendant in the Counterclaim. She thus opined that the accounts of the said 4<sup>th</sup> Defendant is a company account that also has nothing to do with the Decree holder herein. However, Clause 12 of the Lease allowed the tenant to “change the names by which the premises are commonly known” at any time with prior written consent of the landlord. The tenant therefore had some autonomy in the name under which to run its business, and it chose to do so under the entity known as Hotel Horizon Limited. In addition, the Decree Holder received several cheques from Hotel Horizon Ltd for rent from July 2013 to January, 2016. As noted at Page 6 of the Ruling delivered on 16<sup>th</sup> May, 2016, in the Plaintiff filed in ELC Case No. 389 of 2015, the Plaintiff claimed to be running a hotel on the leased premises known as Hotel Horizon Limited. Further, that in Jacqueline C. Korir's Affidavit of 21<sup>st</sup> October, 2015 she averred that she is a director of Syke Enterprises Limited (the Judgment debtor) and they are the proprietors of Hotel horizon Ltd.
22. The Judge noted that Syke Enterprises and Hotel Horizon Ltd are one and the same entity. The 2<sup>nd</sup> Defendant in the Counterclaim admitted to being a director of both companies, with the Judgment debtor operating the hotel business known as Hotel Horizon, the 4<sup>th</sup> Defendant. The Judge opined that if indeed the Judgment debtor was not connected to the hotel business that is the 4<sup>th</sup> Judgment debtor, it should have produced a sub-tenancy lease. Any allegation that there is any formal separation



between the Plaintiff Company and the entity known as Hotel Horizon Limited, the 4<sup>th</sup> Defendant is therefore false.

## ii. Whether the Conditions for Issuance of a Garnishee Order Absolute Have Been Met

23. Order 23 Rule 1 of the [Civil Procedure Rules](#) provides that: -

“A court may, upon the ex parte application of the 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 salary or allowances 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 costs of the garnishee proceedings; and by the same or subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay the decree-holder the debt due from him to the judgement-debtor or so much thereof as may be sufficient to satisfy the decree together with costs aforesaid.”

24. From the above provision, it is clear that a decree holder has a right to move the court vide an ex parte application seeking orders to have monies held by a third person (“garnishee”) to the credit of judgment-debtor to be attached to answer the decree together with costs of the garnishee proceedings. However, the applicant in such an application has a duty to prove/demonstrate by affidavit that:-

- a. There is a decree which has been issued and is still unsatisfied to a certain amount
- b. There is a debt due from the Garnishee to the Judgment Debtor is capable of being attached to answer the decree.

25. Without a doubt, there is a decree in favour of the Decree holder and the same remains unsatisfied. What remains to be determined is whether there is a debt due from the garnishee capable of being attached to answer the decree. The procedure in garnishee proceedings is set out at Order 23 of the [Civil Procedure Rules](#) and was well explained in [Mengich t/a Mengich & Co. Advocates & Another vs Joseph Mabwai & 10 Others](#) [2018] eKLR where the court stated as follows:-

“Garnishee proceedings is done in two different stages. The first stage is for the *Garnishee Order Nisi*, while the second stage is for the garnishee order absolute. At the first stage, the judgment creditor makes an application *ex parte* to the court that the judgment debt in the hands of the third party, the garnishee, be paid directly to the judgment creditor unless there is an explanation from the garnishee why the *order nisi* should not be made absolute. If the judgment creditor satisfies the court on the existence of the garnishee who is holding money due to the judgment debtor, such third party (garnishee) will be called upon to show cause why the judgment debtor’s money in its hands should not be paid over to the judgment creditor, and if the court is satisfied that the judgment creditor is entitled to attach the debt, the court will make a *Garnishee Order Nisi* attaching the debt.

The essence of the *order nisi* is to direct the garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the judgment debtor. It is a requirement that a copy of the *order nisi* must be served on the garnishee and judgment debtor at least 7 days before the adjourned date for hearing. The second stage is for the garnishee order absolute,



where on the adjourned date, the garnishee fails to attend court or show good cause why the *order nisi* attaching the debt should not be made absolute, the court may subject to certain limitations make the garnishee order absolute. The garnishee, where necessary also have an option of disputing liability to pay the debt.

The primary object of a garnishee order is to make the debt due by the judgment debtor available to the decree holder in execution without driving him to the suit.”

26. The Application herein was filed on 13<sup>th</sup> July, 2023 and was brought before Hon. Obaga J who on 17<sup>th</sup> July, 2023 made the *Garnishee Order Nisi ex parte* and the order was issued/extracted on 18<sup>th</sup> July, 2023. The essence of the *order nisi* is to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon it for payment to the Decree holder the amount of debt owed to the Judgment debtor. Order 23 also provides that a copy of the *Garnishee Order Nisi* must be served on the Garnishee and Judgment Debtor at least 7 days before the adjourned date for hearing. One Vincent Ogutu, a Court Process Server swore an Affidavit to the effect that he served the Application herein and the *Garnishee Order Nisi* on both the 1<sup>st</sup> and 2<sup>nd</sup> Garnishee on 19<sup>th</sup> July, 2023. In the said Affidavit of Service, he deponed that upon service to the 1<sup>st</sup> Garnishee, the documents were received and his return copy stamped.
27. The second stage is when the *order nisi* is confirmed and a garnishee order absolute is made. As per procedure, on the hearing date, if the Garnishee fails to attend court or show good cause why the *order nisi* attaching the debt should not be made absolute, the Court may, subject to certain limitations make the garnishee order absolute. It is at this stage that the Garnishee, may dispute or oppose its liability to pay the debt. Once the garnishee order absolute is made, it operates to make the debt due from the garnishee to the Judgment Debtor available to the Decree holder.
28. In the 1<sup>st</sup> Garnishee’s Replying Affidavit sworn by its Branch Manager-Eldoret he indicated that the 2<sup>nd</sup> Defendant holds 2 current accounts with the 1<sup>st</sup> Garnishee Bank, being No. 0103xxxxxxxxx whose book balance is Kshs.444.32 (CR), and Account No.0102xxxxxxxxx whose book balance is Kshs.2,641,073.20(CR) as at 18<sup>th</sup> July, 2023. The 1<sup>st</sup> Garnishee’s liability on account of the indebtedness of the 2<sup>nd</sup> Defendant to the Decree holder is only be to the extent of the aforesaid balances less its costs she placed at Kshs.100,000/-.The 1<sup>st</sup> Garnishee attached bank statements with regards to the two accounts and although the Judgment debtor filed a response, it did not dispute this information.
29. In my view, the 1<sup>st</sup> Garnishee has tendered sufficient evidence as to the extent of its indebtedness to the Judgment debtor’s guarantor which sum could be attached to satisfy the decretal sum. The 1<sup>st</sup> Garnishee is not opposed to the release of the money less its costs aforesaid or otherwise as the court may order in respect of the Defendant’s accounts. Consequently, I find absolutely no bar, legal or equitable, preventing this court from confirming the Garnishee Order Nisi in line with the provisions of Order 23 Rule 4 of the *Civil Procedure Rules* which provides 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 costs of the garnishee proceedings; and the order absolute shall be in Form 17 or 18 of Appendix A, as the case may require.”
30. When it comes to the 2<sup>nd</sup> Garnishee, from the Affidavit of Service sworn by the process server, he deponed that it’s Bank Manager received the documents and perused them but refused to sign or stamp



on the return copy alleging that it “did not have that account”. Notably, the 2<sup>nd</sup> Garnishee upon being served with the *order nisi* ought to have appeared and filed a response giving the court this information. In addition, it was obligated to inform this court whether it holds any other account on behalf of the Defendants herein, but it did not do so.

31. As I have already stated, the 2<sup>nd</sup> Garnishee did not file any response to the application either acknowledging or disputing the debt. In fact, even the statement made to the process server was not that the 4<sup>th</sup> Defendant did not hold an account at the bank, just that they did not have the listed account at their bank. They did not deny knowing or having the 4<sup>th</sup> Defendant as their client. This means that it is possible they hold accounts for the 4<sup>th</sup> Defendant, just not the account listed herein. Further, that it did not have any objections in relation to the any such accounts being attached to satisfy the decretal sum. In the circumstances, I find that pursuant to Order 23 Rule 4, the 2<sup>nd</sup> Garnishee acknowledged that the 4<sup>th</sup> Defendant held accounts with the bank. As to the failure by the 2<sup>nd</sup> Garnishee to file a response or appear on the date of the hearing, in *Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Co. Ltd; Diamond Trust Bank* (*supra*) the court held that:-

“It is the position of the law that in garnishee proceedings the garnishee banks are only required to appear before the court to acknowledge or dispute the debts. In the present case, the garnishee bank did not appear or file a response and in the absence of evidence to the contrary, I find that they acknowledged that the respondent held accounts with them and it was not necessary for the court to question them and cross examine them as they did not have any objections in relation to the attachment.”

32. The only conclusion that this court can draw is that the 2<sup>nd</sup> Garnishee admitted the claim of the applicant and that the nisi orders issued on 17<sup>th</sup> July, 2023 ought to be confirmed against it as against any account that it holds on behalf of the 4<sup>th</sup> Defendant.
33. As to the contention that the current application is *res judicata*, the same was raised in the Replying Affidavit sworn by the 2<sup>nd</sup> Defendant whom this court has already indicated has no audience in these proceedings. However, the ruling of 16<sup>th</sup> May, 2015 was with respect to items that were seized in execution for distress for rent and amendment of pleadings, not garnishee proceedings. The prayer for freezing of accounts was not dealt with and the Hon. Judge held that no basis had been laid for the same.
34. Accordingly, the court hereby makes the following orders:-
- a. The *Garnishee Order Nisi* made on 17<sup>th</sup> July, 2023 is hereby made absolute and execution hereby issued against National Bank of Kenya Limited the 1<sup>st</sup> Garnishee directing it to pay the amounts in Account No. 0102xxxxxxxxxx whose book balance is Kshs.2,641,073.20(CR) or so much thereof towards the satisfaction of the decree and costs of these Garnishee proceedings.
  - b. A Garnishee Order absolute is hereby issued against the 2<sup>nd</sup> Garnishee Bank ordering all that monies deposited, lying and being held in deposit in any other accounts with the 2<sup>nd</sup> Garnishee Bank to the credit of the Defendants and/or the Judgment Debtor be attached to answer the judgment and decree issued on 22<sup>nd</sup> March, 2023 issued in favour of the Decree-Holder for the sum of Kenya Shillings Nineteen Million, Six Hundred and Fifteen Thousand ( Kshs.19,615,000/-).
  - c. The Garnishees shall recover their costs from the sums in the said accounts.



- d. The Decree Holder shall recover the costs of these garnishee proceedings from the said accounts.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12<sup>TH</sup> DAY OF JUNE 2024**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

Mr. Terer for the 1<sup>st</sup> Garnishee

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistant: Brian

