



**Kilakoi v Olkejuado Water and Sewerage Company; Cooperative Bank (Garnishee)
(Cause 2138 of 2016) [2024] KEELRC 13365 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13365 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2138 OF 2016
SC RUTTO, J
DECEMBER 6, 2024**

BETWEEN

ELIJAH TORET KILAKOI CLAIMANT

AND

OLKEJUADO WATER AND SEWERAGE COMPANY RESPONDENT

AND

COOPERATIVE BANK GARNISHEE

RULING

1. On 10th February 2023, the Court allowed the Claimant/Decree Holder’s Claim in the sum of 1,638,728.00 and awarded interest from the date of filing the suit until payment in full. The Court further awarded the Claimant/Decree Holder the costs of the suit and directed the Respondent/Judgment Debtor to remit the sum of Kshs 1,478,700.00 being the Claimant’s/Decree Holder’s pension to the National Water CPC Staff Superannuation Scheme.
2. The record bears that vide an application dated 17th October 2023, the Decree Holder moved the Court seeking the following principal order:

That this Honourable Court be pleased to issue an order directing the Garnishee to appear before this Court on an appointed date and time to show cause why they should not pay the Judgment Creditor the sum of Ksh2,977,291/- being the decretal sum plus interest from the date of judgment until payment in full.
3. When the Application came up on 31st October 2023, for directions ex parte in chambers, the Court directed the Decree Holder to serve the Respondent and the Garnishee who were given leave to respond to the Application within 14 days upon service. The Court further directed that the Application proceeds for inter partes hearing on 28th November 2023.



4. On 28th November 2023, the Respondent/Judgment Debtor and the Garnishee were not present in court. Further, the Court observed that they had not filed any responses to the Application despite being duly served.
5. Accordingly, and the Court being satisfied with the return of service, allowed the Application dated 17th October 2023 and issued a Garnishee Order Nisi against the Garnishee herein as sought in the Application by the Decree Holder.
6. Subsequently, the Garnishee filed the instant Application seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Court be pleased to set aside the ex-parte proceedings taken and the Garnishee order absolute issued against the Garnishee and all the consequential proceedings thereafter.
 4. That this Honourable Court be pleased to order that the hearing of the Garnishee application filed by the judgment Creditor/Respondent against the Judgment Debtor/Respondent be allowed to commence de novo and the garnishee be granted leave to file a suitable Replying Affidavit.
 5. That the costs of this application be borne by the Judgment Creditor/Respondent.
 6. That the Honourable Court do make such order or further orders as it may deem fit in the circumstances and in the interest of justice.
7. The Application is premised on the grounds appearing on its face and the Affidavit of Lucy Muthama sworn on 13th December 2023. Grounds in support of the Motion are that the Garnishee/Applicant was served with the application but failed to instruct an Advocate to enter appearance and defend them.
8. The Garnishee/Applicant was later served with an order dated 4th December 2023 which the Judgment Creditor has threatened to execute. That the Judgment Debtor's/Respondent's account does not have money as the same is a loan account.
9. It is further averred that the Garnishee/Applicant has a claim against the Judgment Debtor's account since there is a loan that has not been paid.
10. That further, the Garnishee/Applicant's Advocates did not get a chance to oppose the Judgment Creditor's application.
11. In response to the Application, the Decree Holder has filed a Replying Affidavit sworn on 29th July 2024. He deposes that the Garnishee has not produced any loan agreements it entered into with the Judgement Debtor to substantiate their claims that the attached accounts are Loan Accounts.
12. According to the Decree Holder, the Judgment Debtor in its own pleadings aver that the attached Accounts should be reopened to enable them pay their workers' salary. He is aware that the Judgement Debtor in their further attempts to deny him from enjoying the fruits of his Judgment has directed for their funds to be deposited in Mpesa Paybill Number.
13. He is aware that the Judgement Debtor's intention is to have the attached accounts discharged so that the Judgement Debtor can offload the said funds to the said Bank Accounts.
14. It is the Decree Holder's further deposition that the Garnishee has not shown a good Cause to warrant setting aside the Orders issued by this Honourable Court.



15. In rejoinder, the Garnishee filed a Further Affidavit sworn by Lucy Muthama in which she reiterated that the Judgment Debtor's bank accounts in question are loan accounts. The Garnishee maintains that it has a good Defence to oppose the Application for Garnishee absolute since the Judgment Debtor does not have funds.
16. The Judgment Debtor did not file a response to the Application by the Garnishee. It is worth pointing out that on 30th April 2024, Advocates for the Judgment Debtor and the Decree Holder intimated to the court that they were attempting to settle the matter amicably.
17. On 30th July 2024, the Decree Holder's Advocate informed the court that the parties had failed to agree. As such, the Court directed that the Application be canvassed by way of written submissions.

Submissions

18. The Application was canvassed by way of written submissions. Only the Decree Holder filed written submissions, which the court has duly considered.

Analysis and Determination

19. I have considered the Application, the Replying Affidavit by the Decree Holder as well as the submissions on record and to my mind, the singular issue that stands out for determination is whether this Court should exercise its discretion in favour of the Garnishee/Applicant and set aside the orders issued on 4th December 2023.
20. This is a matter that calls for the exercise of the Court's discretion. The guiding principles with respect to exercise of the Court's discretion were established in the celebrated case of *Shah vs Mbogo* [1967] E A 116 and 123B, where it was held that: -

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

21. In this case, the Garnishee has stated that their absence from court on the date when the Application came up for hearing was occasioned by their inadvertent failure to instruct an advocate to enter appearance and defend them. They have attributed the same to the pressure of work. With due respect to the Garnishee/Applicant, that is not a plausible reason for failure to attend Court.
22. Be that as it may, this Application will only benefit from the fact that the Affidavits sworn by Lucy Muthama on behalf of the Garnishee/Applicant have raised issues meriting ventilation in a proper hearing.

Orders

23. Accordingly, the Application dated 13th December 2023, by the Garnishee is hereby allowed. Consequently, the orders issued by this court on 28th November 2023 are hereby set aside.
24. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024.

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STELLA RUTTO



JUDGE

In the presence of:

Mr. Khisa for the Garnishee/Applicant

Ms. Khafafa for the Claimant/Decree Holder

No appearance for the Respondent/Judgment Debtor

Millicent Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

