



**Miseda v Today's Online Limited & 2 others; Standard Chartered Bank Limited
(Garnishee) (Cause 704 of 2010) [2023] KEELRC 702 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 702 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 704 OF 2010
J RIKA, J
MARCH 17, 2023**

BETWEEN

DAVID NELSON MISEDA CLAIMANT

AND

TODAY'S ONLINE LIMITED 1ST RESPONDENT

MILTON CHOMBA NJANJA 2ND RESPONDENT

LOISE WAHU NJANJA 3RD RESPONDENT

AND

STANDARD CHARTERED BANK LIMITED GARNISHEE

RULING

1. The Claimant obtained *ex parte* Judgment against his former Employer, the 1st Respondent herein, for a total sum of Kshs. 2,075,000, way back on May 20, 2011. This is about 12 years ago.
2. The 2nd and 3rd Respondents were Directors of the 1st Respondent. The 1st Respondent wound up its operations in Kenya, and its 2 Directors, 2nd and 3rd Respondents, relocated to Australia.
3. On September 29, 2022, the Claimant obtained an order nisi, to attach the personal account of the 2nd and 3rd Respondents' held by the Garnishee Bank, in satisfaction of the decretal sum.
4. This elicited the filing of the Notice of Motion by the 2nd and 3rd Respondents, dated October 25, 2022, seeking orders that: -
 - a. The matter is certified urgent.
 - b. Hearing of the Application inter partes for order of garnishment absolute, is stayed.
 - c. Order nisi is stayed or set aside.



- d. Judgment and subsequent decree dated May 20, 2011 is set aside.
 - e. The Respondents are granted unconditional leave to defend.
 - f. The Claimant to serve the Respondents with the Memorandum of Claim and all other Pleadings in the matter.
 - g. Costs be provided for.
5. The Application is founded on the Supporting Affidavit of 2nd Respondent, Milton Chomba Njanja sworn on October 25, 2022, and Further Affidavit, sworn on December 21, 2022.
 6. The Application is strenuously opposed through the Affidavit of the Claimant, sworn on November 17, 2022, and Affidavit of Managing Director of Kilovoo Auctioneers Daniel Mutua, sworn on November 17, 2022. Mutua was instructed by the Claimant, on recovery of the decretal amount.
 7. The 3rd Respondent gave a written authority dated October 26, 2022, to the 2nd Respondent to act on her behalf.
 8. In short, the Respondents state that they are residents of Australia. They came to learn of this Claim and Judgment against the 1st Respondent first, on October 17, 2022, through their Bank Operations Manager, when the Garnishee Bank received order nisi.
 9. They instructed Counsel who established that Summons and Statement of Claim were served upon a company called Access Kenya. The Respondents have never been served with the Summons and Statement of Claim. Decree was processed and served upon Access Kenya. Access Kenya had no authority to receive Summons on behalf of the Respondents. The Respondents submit that they have a good Response to the Claim as evinced in the Draft Statement of Response. They lament further, that the amount held by the Garnishee Bank, of Kshs. 369,470, was raised by the Respondents through a platform named M-changa, towards the payment of the medical bill of the Respondents' sister Emma Wambui, who was at the time hospitalized in Nairobi.
 10. The 2nd Respondent states in his Further Affidavit that he does not know Auctioneer Daniel Mutua, who purports to have met the 2nd Respondent in Australia. The 2nd Respondent did not threaten to have Mutua arrested in Australia, when Mutua broached the subject of debt recovery. The Affidavit sworn by Mutua is full of falsehoods.
 11. The Claimant characterizes the Application as misconceived, mischievous and lacking in merit. He restates his position that the 1st Respondent merged with Access Kenya, through a written agreement. The 2 companies merged their operations. Service was made on the 1st Respondent through Access Kenya. Access Kenya accepted service on behalf of the 1st Respondent, and the Respondents cannot fault service, 11 years later. The 2nd Respondent met Mutua in Australia, and when asked to satisfy the decretal sum, the 2nd Respondent threatened Mutua with arrest, claiming Mutua was operating outside his jurisdiction. The 2nd Respondent was aware of the existing Judgment. The Respondents were served with the Application for garnishment through e-mail, and it is not true that they came to learn about it through their Bank. By July 11, 2021, the Respondent already held the Bank Account at the Garnishee, and it is misleading to allege that the garnished amount represented the proceeds of a fundraising for a medical bill, for a patient who was admitted to hospital from September 29, 2022.
 12. The Garnishee did not participate in the Application filed by the Respondents.



13. It was agreed by the Parties that the Application is heard and considered on the strength of their Affidavits and Submissions, the latter which were confirmed to have been filed and served, at the last mention on February 14, 2023.

The Court Finds:

14. The Claimant obtained ex parte Judgment against the 1st Respondent, a company in which the 2nd and 3rd Respondent served as Directors, 12 years back, on May 20, 2011.
15. Subsequently, the Claimant made efforts to execute, but was hampered by the fact that the 1st Respondent had folded up its operations in Kenya, and its 2 Directors, 2nd and 3rd Respondents, relocated to Australia.
16. On September 29, 2022, the Claimant obtained a Ruling lifting the corporate veil of the 1st Respondent, and proceeded to attach money held in the 2nd and 3rd Respondents' Account with the Interested Party. It is noted that from the evidence on record, the 2nd Respondent personally informed the Claimant that the 1st Respondent was no longer in a position to pay the Claimant's salary way back on May 17, 2007.
17. The act of attachment brought the 2nd and 3rd Respondent into the proceedings. They filed the Application dated October 25, 2022, seeking setting aside of the order nisi, setting aside of ex parte Judgment, and grant of unconditional leave to respond to the Claim.
18. The Court is not persuaded that the garnished amount was raised by the Respondents, as medical bill for their hospitalized relative. Hospitalization happened from September 29, 2022. The Application for garnishment is dated July 11, 2021.
19. The Summons and the Statement of Claim were served upon the 1st Respondent, through Access Kenya, who accepted service.
20. The Sale and Commission Agreement dated June 7, 2007, suggests to the Court that there was an ongoing business relationship between the 1st Respondent and Access Kenya, which would reasonably lead the Claimant to conclude that Access Kenya, received the Summons and Statement of Claim, duly authorized by the 1st Respondent, who was no longer active in Kenya, and whose Directors had relocated to Australia.
21. The Agreement was executed by the 1st Respondent, the 2nd Respondent personally, and Access Kenya. The 2nd Respondent was to continue working with Access Kenya, to migrate all the 1st Respondent's Customers and Buildings to Access Kenya. The 2nd Respondent would continue to be a Master Sales Agent for Access Kenya and would bring Customers to Access Kenya on an ongoing basis, selling on Access Kenya's behalf and according to Access Kenya's price list and terms and conditions. Access Kenya continued to operate at the premises formerly occupied by the 1st Respondent, at Harambee Sacco Building in Nairobi. Access Kenya received the Summons and Statement of Claim at the premises, and stamped the Notice of Summons and Memorandum of Claim, acknowledging service.
22. Access Kenya has not filed anything before the Court, contesting receipt of the Notice of Summons and Memorandum of Claim, or disputing its relationship with the Respondents.
23. The agreement involving the 1st Respondent, the 2nd Respondent and Access Kenya, was akin to a business merger as asserted by the Claimant. At the very least, Access Kenya inherited the 1st Respondent's business, including the physical workplace. Access Kenya correctly received the Summons and Statement of Claim, on behalf of the merger.



24. The Court does not doubt that Auctioneer Daniel Mutua, was instructed to assist the Claimant on recovery of the decretal sum, and travelled to Australia where he met the 2nd Respondent to this end. His Application for Australian Visa is exhibited. He has exhibited his email to an Australian contact, debt-collector James Woods, through whom he continued to execute instructions issued by the Claimant, for recovery of the decretal sum. The Court does not think that the documents exhibited by Mutua were manufactured, or that the events narrated in his Affidavit, were contrived.
25. The Respondents were aware of the Proceedings and Judgment. They maintained a relationship with Access Kenya who received and acknowledged receipt of the Summons. There was contact between the 2nd Respondent and the Auctioneer in Australia. The Respondents have known about the Claim for years, and ought to make good their longstanding debt to their former General Manager, the Claimant herein. The Court does not have any reason to reopen its proceedings, 12 years after it gave its Judgment.

It Is Ordered: -

- a. The Application filed by the Respondents dated October 25, 2022 is declined.
- b. Costs to the Claimant.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER THE
MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 17TH
DAY OF MARCH 2023**

JAMES RIKA

JUDGE

