



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthee v X-Plico Insurance Company Ltd; Prime Bank Limited & another (Garnishee)  
(Cause 1463 of 2018) [2023] KEELRC 669 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 669 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1463 OF 2018  
AN MWAURE, J  
MARCH 16, 2023**

**BETWEEN**

**GEOFFREY MURITHI MUTHEE ..... CLAIMANT**

**AND**

**X-PLICO INSURANCE COMPANY LTD ..... RESPONDENT**

**AND**

**PRIME BANK LIMITED ..... GARNISHEE**

**M. ORIENTAL BANK LTD ..... GARNISHEE**

**RULING**

1. The Applicant filed a Notice of Motion application dated 27<sup>th</sup> January 2023 for orders that:
  - a. Spent
  - b. Spent
  - c. That the proceedings of 30/08/2022 and all the consequential orders herein be and are hereby set aside and the Claimant's application dated 7/07/2022 be heard *de novo* with the 1<sup>st</sup> Garnishee being granted leave to respond to the same.
  - d. In the alternative to prayer 3 above, the Honourable Court be pleased to review and set aside the ruling and order made herein on the 12/01/2013 as against the 1<sup>st</sup> garnishee.
2. The 1<sup>st</sup> garnishee/applicant deposes through its Legal Officer, George Mathui that it never attended court on the 22/08/2022 as its receptionist did not the process the court documents in a proper way by transmitting the same to its legal department for appropriate action and so did not become aware of the matter until the 20/01/2023 when the letter by the claimant's counsel was received informing them of the order of garnishee absolute. The failure by the receptionist to process the documents in



an appropriate way was purely inadvertent, unpremeditated and therefore an excusable mistake. The 1<sup>st</sup> garnishee says that even so the claimant was obligated to notify the 1<sup>st</sup> garnishee when the matter was adjourned to 30/08/2022 from 22/08/2022 but never did so. It is said that the claimant would have been then directed to give such notice before the giving of substantive directions as to the disposal of the application.

3. It is also deposed that the judgment debtor's bank account number 300xxxx157 held with it does not hold any credit balance that would be available for the disposal to meet the decree holder's claim herein and the 1<sup>st</sup> garnishee would have demonstrated this had it participated in the hearing of the application herein.
4. The 1<sup>st</sup> garnishee further deposes that in so far as the claimant did not serve the 1<sup>st</sup> garnishee for purposes of the court appearance scheduled for 30/08/2022, it is an error apparent on the face of the record that substantive proceedings in the matter were taken on the said date and accordingly, there is sufficient reason to warrant a review of the ruling delivered on the 12/01/2023.

### **Response**

5. The claimant/decreed holder in the replying affidavit by Geoffrey Murithi Muthee deposes that the applicant is not properly on record as he has not sought leave to file the instant application out of time which consequently constitutes an abuse of court process. It is also said that the applicant has not annexed the requisite authority to plead on behalf of the 1<sup>st</sup> garnishee bank and consequently has no right within the meaning of the *Oaths and Statutory Declarations Act* Cap 15 to depone such matters without the consent of the board of directors of the 1<sup>st</sup> garnishee.
6. He says that the role of the garnishee is merely to inform court whether there are sufficient funds in the account and not to hold brief for an account holder which they have no instructions to act for. The admitted failure to diarize the matter has nothing to do with the claimant and is purely based on the admitted incompetence's of the 1<sup>st</sup> garnishee and his client is covered under professional indemnity.
7. The claimant further avers that the 1<sup>st</sup> garnishee is yet to avail statement of the bank account as to the funds held by judgment debtor and whether it is sufficient in whole or in part to settle the decretal sum, as per the law and in compliance with the garnishee nisi requirement of the application.

### **1<sup>st</sup> Garnishee's submissions**

8. The 1<sup>st</sup> garnishee relied on the Court of Appeal decision in Civil Appeal no 27 of 1982 where the Court said that 'the court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, 76 BC. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: *Shah v Mbogo* [1969] EA 116,123 BC Harris J. The matters which should be considered, when an application is made, were set out by Harris J in *Jesse Kimani v McConnel* [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in *Mbogo v Shah* [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in *Sebei District Administration v Gasyali* [1968]



EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in *Jamnadas Sodha v Gordandas Hemraj* (1952) 7 ULR 7 namely:

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregular, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

And, because it is a discretionary power it should be exercised judicially.

9. The 1<sup>st</sup> garnishee as a result of the foregoing, says that it merits the reliefs being sought in the application under consideration. The 1<sup>st</sup> garnishee says that the power to set aside *ex parte* proceedings does not cease to apply because a decree has been extracted. That the mere fact that the garnishee order has been made absolute does not preclude the Honourable Court from considering an application for setting aside the order. The Court’s jurisdiction in this regard is clearly exercisable under the provisions of the law invoked in presenting the application.
10. The 1<sup>st</sup> garnishee submits that the supporting affidavit is sworn by an officer and employee of the 1<sup>st</sup> garnishee who depones to be doing so with his employer’s authority. There is no provision in law in terms of which the said deponent was required to exhibit his employer’s authority to swear the supporting affidavit. The claimant referred to the Court of Appeal case in *Makupa Transit Shade Limited & Another versus Kenya Ports Authority and Another* 2015 eKLR where it was stated that ‘the trial court made a finding that such authority need not be filed with the affidavit. It can be filed later. In our view, at no time did it make a presumption that the deponents were privy to Board of Directors’ meetings. We could go further and state that indeed there is no legal agreement that authority to swear an affidavit on behalf of a corporate need to be filed in court. We agree therefore with the finding of the trial court. In our view, the authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been authorized by it. It was therefore sufficient for the deponents to state that ‘they were duly authorized’. It was then upto the appellants to demonstrate by evidence that they were not so authorized.
11. The 1<sup>st</sup> garnishee further submits that on the basis of the evidence placed before court in terms of annexures ‘GWM 3 – GWM 7, the applicant has a proper basis to project in reaction to the claimant’s application for garnishee orders pointing to the fact that it does not hold any funds belonging to the judgment debtor that would be available to satisfy the decree herein. The setting aside of the proceedings of 30/08/2022 and all the consequential orders as sought would not be idle as the 1<sup>st</sup> garnishee has a substantive position to project for consideration, if given the opportunity sought, in relation to the claimant’s application dated 07/07/2022.
12. The claimant/decree holder submits that the failure to respond to the application was on account of mis diarization. Failure by the receptionist to process the court documents is an excusable mistake by his secretary. In the foregoing length narration by the deponent nothing sufficiently explains the reason for the delay in participating in these proceedings for more than 8 months from the date of service since the service of the garnishee Application is not denied by them in any event.
13. The claimant relies on the authority of *Pius Mulwa Masai (suing as the legal representative of the estate of Masai Kbolelya) versus Nzembi Musili & 5 Others* (2021) e KLR, where he says the court referred



to Ringera J decision in *Omwoyo versus African Highlands and Produce Co Ltd* (2002) eKLR which were as follows-

“Time has come for the legal practitioners to shoulder the consequences of their negligent acts like other professional do in their fields of endeavour. The plaintiff should not be made to shoulder the consequences of negligence of the defendant’s advocates. This is a proper case where the defendant’s remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment’. Yes, that is the way. The applicant’s cannot be allowed to keep on taking the Respondent in circles use of the court process.”

14. The claimant further argues that the 1<sup>st</sup> garnishee has not annexed the requisite authority to plead and as a consequence thereof cannot purport to bind the 1<sup>st</sup> Garnishee Order absolute herein for want of proper instructions. The claimant relied on the case of *Peeraj General Trading & Contracting Company Limited, Kenya & Another versus Mumias Sugar Company Ltd* 2016 eKLR where it was stated that ‘The next issue is that there was no Company resolution to institute the instant suit. It is trite that an incorporated body has of necessity to act through agents who are usually members of its board of directors. As held by Hewett, J in *Asia Pharmaceuticals versus Nairobi* (Milimani) HCC No. 391 of 2000.

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect...As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

15. That for want of verification of authority to plead as is settled at law, the said application must fail and the same be dismissed with costs.
16. The claimant submits that the applicant has not sought leave at the juncture of Garnishee Absolute to act on behalf of the 1<sup>st</sup> Garnishee. The Requirement for leave is proper to enable a party to explain itself and the circumstances upon which it could not act within the required timelines as set out by the law. Courts of law are not market places where a party can enter into proceedings without proper decorum. The requirement for leave is aimed at ensuring a speedier disposing of matters without unnecessary delays.
17. The claimant says there is absolutely no tangible reason why participation by the garnishee/applicant has not been sustained within 9 months from the date of service of the Garnishee application. The claimant relied on the case of *Diamond Trust Bank Kenya Ltd versus Kazungu Gogo Mwanzele & Another* (2020) e KLR where the court in relying on the case of *Joyce Bochere Nyamweya versus Jemima Nyaboke* 2016 e KLR in which the Court of Appeal cited *Rhoda Wairimu Kioi versus Mary Wangui* CA Civil Application Nbi 69 of 2004 and said that ‘Leave to appeal will normally be granted where prima facie, it appears that there are grounds which merit serious judicial consideration. We think this is good practice that ought to be retained in order to promote finality and expedition’. ....In the circumstances we find this application is incompetent for reasons that it was filed outside the stipulated time. The same is hereby dismissed with costs. The claimant further argued that the role



of the garnishee is simply to appear in court and show cause why the funds in the judgment debtor's account should not be paid over to the judgment creditor in satisfaction of the judgment debt'.

### Issues for Determination

18. The main issue for determination is whether the proceedings of 30/08/2022 should be set aside and the claimant's application be heard de novo with the 1<sup>st</sup> garnishee being granted leave to respond. The court will consider the issue in light of what has been submitted on the delay to file the application, whether leave was necessary before filing the application as well as the effect of failure to annex the authority to plead.
19. The 1<sup>st</sup> garnishee says that it became aware of the garnishee absolute late on the 20/01/2023. This was because the earlier court documents for attending court on the 22/08/2022 was not processed as required and did not reach its legal department. But, it also says that the matter was given another date of 30/08/2022 which the 1<sup>st</sup> garnishee says that it ought to have been notified about but this was never done. Non service for the mention date of 30/08/2022 has not been disputed by the claimant/judgment creditor.
20. Crucially, the court considers that the 1<sup>st</sup> garnishee should not assume the liabilities of a judgment debtor as its liability is limited only to the extent of accounting and releasing the total amount, they are holding on behalf of the judgment debtor. Also, the 1<sup>st</sup> garnishee contends that it does not hold any credit balance that would be available for disposal to meet the decree holder's claim.
21. The court has been asked to set aside the ruling dated the 12<sup>th</sup> January 2021 for the reason that the garnishee 1 missed to attend the hearing on 22<sup>nd</sup> August 2022 due to an advertent mistake of their receptionist. They aver that therefore case was scheduled to be heard on 30<sup>th</sup> August 2022 but were not served. They therefore apply for setting aside the ex parte ruling since it was granted ex parte.
22. It is trite law that setting aside an ex parte judgement or order is discretionary on the part of the court and must be exercised judiciously and upon reasons as was well stated in the case of *CMC Holdings Ltd vs Nzioki* (2004) eKLR 173. The court went further to hold that such discretion must not be used where the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertency accident or error.
23. The first question to consider is whether judgment or ruling in this case was procedurally entered. The court had ordered garnishees and respondents to file their submissions on 22<sup>nd</sup> August 2022. The 1<sup>st</sup> garnishee did not appear and did not put a response. On 13<sup>th</sup> October 2022 the parties confirmed they filed their submissions and ruling date was fixed for 12<sup>th</sup> January 2023. The first garnishee did not file any submissions or response and did not appear in court. Hence the ruling was delivered on 12<sup>th</sup> January 2023.
24. The court on close scrutiny of the file finds there was no affidavit of service that first garnishee was informed of the mention date on 13<sup>th</sup> October 2022 in order to file their submissions on that ground alone the court can grant the 1<sup>st</sup> garnishee the benefits of doubt and set its orders as persuaded by the case of *Gulf fabricators vs. County Government of Siaya* Civil Appeal No 10 of 2019 where the court held that:

“leave to enter judgment against the defendant was never served upon the defendant and therefore entry of judgment against the defendant was by all means irregular and must be set aside...”



“the court went further to say “ on that ground alone I would allow the application by the defendant dated 15<sup>th</sup> May 2018 seeking to set aside the judgment entered in favour of the plaintiff/applicant”.

25. Similarly the claimant/decreed holder has brought the issue that the applicant did not seek leave of the court to file this application which was filed nine months since he was served with decree nisi. This is a generalised pleading as the claimant/decreed holder has not given evidence of when he served the decree nisi and the time which was provided therein to put a response. The court is not expected to make orders or findings in an abstract environment and it was crucial of the claimant decreed holder to demonstrate the failing by the 1<sup>st</sup> garnishee to obtain leave to plead out of time.
26. The claimant/decreed holder has also complained that 1st garnishee did not obtain authority to plead on behalf of the company. The court is guided by article 159(d) of the Constitution of Kenya 2010 which provides that justice will be administered without undue regard to procedural technicalities.
27. Employment and Labour Relations Court is guided by Employment and Labour Relations Court (procedural) rules 2016. Section 25(4) of Employment and labour relations court (procedural) rules 2016 provide that:

“The court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall if appropriate avoid legal technicalities and formalities.”
28. Section 38 of the said Employment and Labour Relations Court (procedural) Rules 2016 also provide that the court may regulate its own procedure.
29. In other words this court is not tied to procedural regulation of Civil Procedure Rules except where otherwise stated.
30. The 1st garnishee’s advocate did file a notice of appointment of advocate and it is the court’s view that they have legal right to proceed in the matter just like the respondent and the 2<sup>nd</sup> garnishee. The court sympathizes indeed with the decreed holder for the uncertainty of having to wait for the outcome of the fruit of his judgment a bit longer but then the wheels of justice do turn slowly.
31. Considering that the 1<sup>st</sup> garnishee was not updated and served with the hearing notice of 13<sup>th</sup> October 2022 and in that process misused all the other proceedings and being persuaded that our constitution provides that the state shall ensure access to justice for all persons the court will allow 1<sup>st</sup> garnishee to have his opportunity to be heard.
32. This honourable court is inclined to grant order 2 & 3 of the notice of motion application dated 27<sup>th</sup> January 2023 and in particular it is ordered that pending hearing and determination of application herein inter parties there be a stay of execution of garnishee order absolute dated 12/10/2022 as against 1<sup>st</sup> garnishee applicant.
33. Equally the proceedings of 30/8/2022 and all consequential orders herein be set aside and the claimant’s application dated 7/7/2022 be heard de novo with 1<sup>st</sup> garnishee being granted leave to respond on the same.
34. The garnishee is ordered to file their submissions within 14 days and come for mention on 27/3/2023 to give a date for Ruling so that there will be no further delay.
35. Costs will be in the cause.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH 2023.

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ANNA N. MWAURE

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JUDGE

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

ANNA N. MWAURE

JUDGE

