



Kipteng v Good Hope Sacco Limited; Co-operative Bank (K) Limited (Garnishee) (Employment and Labour Relations Appeal E013 of 2022) [2023] KEELRC 2693 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2693 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E013 OF 2022
HS WASILWA, J
OCTOBER 31, 2023**

BETWEEN

ANGELINE NAANYU KIPTENG DECREE HOLDER

AND

GOOD HOPE SACCO LIMITED JUDGMENT DEBTOR

AND

CO-OPERATIVE BANK (K) LIMITED GARNISHEE

RULING

1. Before me for determination is the Applicant/ Decree Holder’s application dated 22nd August, 2023, brought pursuant to Order 11 Rule 3(1)(h), Order 23 Rule 1, 1-4 of the Civil procedure Rules, 2020, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act 2010, Article 159(2)(d) of the constitution, the Judicature Act, Section 3(1)&(2) of the High Court (Vacation) Practice and Procedure Rules and all other enabling provision of the law ,seeking for the following Orders;-

1. Spent.
2. That Pending the inter-parties hearing and determination of this Application, this Honorable Court be Pleased to issue an Order Nisi to the Garnishee directing that, all funds it hold in the Judgement debtor’s accounts numbers 0124XXX23360 and 0124XXX2336000 at (Co-operative bank Narok branch) be attached and re attached respectively in satisfaction of certificates of costs issued on the 15th day of August, 2023, of Kshs. 679,873.50, together together with garnishee costs of Kshs. 300,000, plus the interests at the commercial rate of 14% (P.A), from the date of filing the Applications and an Appeal including unsettled unassessed costs of the garnishee in the Senior Principal Magistrate’s Court’s at Kilgoris.



3. That upon the determination of this Application, this Honorable Court be pleased to issue an Order Absolute to the garnishee to pay or transfer to the decree holder amount of Kshs. 679,873.50, together with interest stated in paragraph (2) herein above until payments is made in full.
 4. That the Garnishee be ordered to appear before this Honorable Court to show cause why it should not pay to the decree holder (DH) the funds sufficient to satisfy the aforesaid certificates of costs issued on the 15th August, 2023.
 5. That this Honorable Court be pleased to consolidate both Certificates of costs issued on 15th day of August, 2023 as they relate to the same parties.
 6. That this Honorable Court be pleased to grant leave to the Applicant (Decree holder) to institute contempt of Court proceedings against Isaac Dopoi Kilesi (Chairman Good hope Sacco Ltd) together with Elvis Salaton Olokipai (C.E.O-Good Hope Sacco Limited) for failing to comply with the reinstatement Orders of SPMC at Kilgoris.
 7. That the costs of this Application be borne by the judgement debtor.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Angeline Naanyu Kipteng, sworn on August 22, 2023. The Applicant stated that she obtained judgement and two rulings against the judgement debtor herein and the Certificates of costs were issued on August 15, 2023. That she served the said certificates of costs and demand notice immediately on the judgment debtor but that the money remains unsatisfied to date.
 3. She states that the judgement debtor holds bank accounts Nos. 0124XXXXXX360 and No. 0124806XXXX000 at Narok Branch with the Garnishee and that the said accounts have enough funds to wholly or partially satisfy the said Certificates of costs together with interests accruing therefrom.
 4. The applicant states that this Honorable Court has unlimited Powers and unfettered jurisdiction to make the orders for consolidation of the said Certificates of costs issued on August 15, 2023 for efficient and expeditious disposal of disputes and provide framework for fair and impartial dispensation of justice to the parties.
 5. The applicant is apprehensive that if the orders sought herein are not issued, the instant proceedings will be rendered nugatory to her detriment. She adds that the orders sought will not prejudice the judgement debtor in any way under the law. Conversely, that granting the orders sought herein is not determinative of the garnishee proceedings.
 6. She contends that she has established a prima facie case with high probability of success and the balance of convenience favors granting of the orders sought in this Application. Furthermore, that the granting of the orders sought herein promotes Constitutional integrity and rule of law.
 7. That this Honorable Court has unfettered powers and inherent jurisdiction to make the Orders sought.
 8. In the affidavit, she reiterates that there are no pending proceedings before any court in Kenya in respect of the matter herein that can prevent adjudication of this matter and the execution of the same. Further that the judgement debtor has not given any reason why the certificate of costs is not satisfied.
 9. The Application is opposed by the Garnishee through a replying affidavit deposed upon on September 18, 2023 by Jackson Oire, the legal officer of Co-operative Bank of Kenya Limited.



10. The deponent confirmed that the bank was served with the application dated August 22, 2023 and subsequent Order Nisi issued on August 24, 2023. However, that the bank is currently unable to fulfill the Order Nisi issued by this Honorable Court because there is another Order Nisi in effect which has frozen the subject accounts.
11. He stated that these orders emanated from the ongoing legal proceedings in both MCELRC NO. 2 OF 2019, Angeline Naanyu -Vs-Good Hope Sacco & The Co-Operative Bank of Kenya Limited, and Kilgoris Civil Appeal No. E006 Of 2022; Co-Operative Bank Of Kenya Limited –Vs- Angeline Naanyu Kipteng & Good Hope Sacco Limited.
12. The deponent stated that the decree holder had filed a garnishee application dated February 8, 2022 seeking to attach accounts 0124XXX23360 & 01248XXX336000, which Court allowed and issued order Nisi on 14th February 2022.
13. It is averred that the applicant herein is now seeking for similar orders, attaching the same accounts which the Court had already issued an Order Nisi.
14. The deponent avers that it filed its response to the said application informing the trial court that the subject accounts are collateral accounts to which the Bank has a lien and right over the amounts in the said accounts, as its security for the loan facility advanced to the judgement debtor, and therefore the same is not subject to attachment.
15. The deponent stated that the court delivered its decision on 8th July 2022 allowing the attachment of the funds in the said account prompting the Garnishee to file an application seeking leave to appeal and stay of execution of the Garnishee Order Absolute.
16. The trial court in Kilgoris allowed the application on 27th November 2022, staying execution of the orders issued on July 13, 2022 and granting the garnishee leave to appeal the Ruling delivered on July 8, 2022. Further that on 9th March 2023, the trial court issued directions to the effect that the Garnishee deposits Kshs. 1,675,271 in court as security pending the hearing and determination of the appeal filed at the High Court Kilgoris serialized as Case No. E006 of 2022. He exhibited the RTGS of 16th march 2023 marked as annexure JO-3.
17. Based on the foregoing, the affiant states that the current proceedings are Sub-judice as the subject matter is currently under consideration in ongoing legal proceedings in Kilgoris ELRC No. 2 OF 2019 and Kilgoris Civil Appeal No. E006 of 2022. Therefore, that the Decree Holder did not provide full and accurate disclosure of the facts in an attempt to forum shop.
18. It is contended that the non-disclosure and misrepresentation appears to be a deliberate effort to initiate legal proceedings over the same subject matter that is already under consideration by the trial and appellate court at Kilgoris Law Courts. That these proceedings run the risk of causing the issuance of conflicting orders by different courts, potentially leading to a situation that will place the Garnishee in a perplexing position as it would be uncertain about which set of orders to adhere to.
19. He states that the uncertainty could potentially expose the Garnishee to the risk of being found in contempt of one court's orders while trying to comply with another court's directives.
20. It is based on the above reasons that the Garnishee urged this Court to dismiss the Applications herein for being sub judice.
21. The applicant filed a rejoinder to the replying affidavit by a further affidavit deposed upon on the September 26, 2023 reiterating his supporting affidavit and in addition stated that the facts stated in her Application establishes sufficient case with a high possibility of success.



22. She reiterated that she has the right to access this Honorable Court to safeguard her rights and to defend her Application herein and the Order Nisi issued by this Honorable Court on 24th day of August 2023 and the Order Absolute issued by the trial Court at Kilgoris from being rendered useless and nugatory.
23. It is her case that she filed this application to avert the continuing threat to and violations of the trial Court's Orders and this Honourable Court Orders by the Garnishee and Judgement Debtor. Also that there is need to order and/or direct the Garnishee herein to tender in this Honorable Court Judgement Debtor's Bank statements for the attached and reattached accounts.
24. The Applicant is apprehensive that the funds in accounts numbers 01246XXX3360 and 012480XXX36000 held by the Garnishee might have wholly or partially been withdrawn by the Judgement debtor in collusions with the Garnishee, after the Orders Absolute was issued on the July 13, 2022 by the trial Court at Kilgoris and after they were served with the Order Nisi issued by this Court on the August 24, 2023, with the main aim of defeating the cause of justice and rendering the instant Application useless, irrelevant, baseless and nugatory.
25. It's her proposal that in order to obviate miscarriage of justice, the Garnishee ought to be directed and or ordered by this Court to produce in Court the judgement's debtors detailed visible and certified Bank statements of both accounts as at February 1, 2022 to date. She adds that the said bank statements will shed more light on whether the said funds were withdrawn and for appropriate penal contempt orders be issued against the Garnishee's authorizing officer Narok Branch and the Chairman and CEO of Good Hope Sacco Limited and the Order Nisi issued by this Court be made absolute.
26. The applicant stated that the Garnishee is fully aware that the Order Nisi as they were served upon it, a fact which it did not oppose in his replying affidavit. Furthermore, that the garnishee has not opposed the application, which should thus be allowed as prayed.
27. It is reinstated that the best way the Garnishee can show cause why they cannot satisfy the Order Nisi of this Honorable Court is by displaying or demonstrating the Judgement Debtor's Bank statements of the said accounts.
28. It is contended that the Garnishee is concealing material facts that are crucial and relevant in adjudication and determination of this matter intentionally to bar her from realizing the fruits of her judgement.
29. It is averred that the Garnishee's disposition in its Replying Affidavit in paragraph 4 is misplaced, unsupported by any evidence and without any legal basis as it failed to furnish this Honorable Court with tangible evidence and/or prove of such assertions, as it did not disclose the Judgement Debtor's accounts details and status as to what sum of money is remaining in the said account No. 012480xxxxx000 which was made Absolute by trial Court, after it had deposited in the said Court Kshs. 1, 675 271 on the March 16, 2023.
30. She states that even though the Judgement Debtor's Bank accounts mentioned above was made absolute on the 13th day of July 2022, no Orders and /or directions were issued by the trial Court discharging the said Judgement Debtor's account No. 0124XXXXX360, and until the Order Nisi of this Honorable Court was made, the same Orders and directions have not been issued discharging the said Judgment Debtor's account.
31. She states that at the time the Judgement Debtor's Bank Account No. 0124XXX2336000 was attached and made absolute by the trial Court at Kilgoris, the said account was holding the sum of Kshs. 20, 510,751.57, but that the Garnishee's Advocates informed the court that the balance was Kshs. 910,751.57 and no Orders were ever made or issued discharging the said account. This is a clear



- indication that, the Garnishee and the Judgement Debtor herein are colluding to frustrates the orders issued by the trial court and this Court.
32. The Applicant stated that the assertions of the Garnishee that the present Application is sub judice is misplaced, misrepresented and misguided as the garnishes proceeding at the trial Court and the current proceedings are different and distinct.
 33. She elaborated that the application before this Court is solely meant to pursue costs that have been assessed by the Deputy registrar of this Honorable Court but not any other proceedings in this Court or any other competent Court. The Garnishee proceedings at trial Court were made Absolute and thus the trial court is functus officio.
 34. She stated that alleged lien by the garnishee on the the Judgement Debtor's Bank accounts is not supported by any evidence contrary to her claim that is well supported and emanates from the Court.
 35. She stated that the the Garnishee's Memorandum of Appeal filed in the High Court of Kenya at Kilgoris, is legally untenable, and was filed in the wrong forum. In any case that it has not been prosecuted 9 months, therefore that it has reached its deadlock and cannot be resurrected. Consequently, the orders and /or prayers sought therein are unavailable having been compromised by non-existing Memorandum of appeal.
 36. The applicant stated that she opposed the said Memorandum of Appeal vide a Preliminary Objection dated March 13, 2023. which the said Garnishee has never opposed and or challenged despite being served. She thus believed that, the same had come to its end.
 37. She states that the orders of the court were specific as to time in which the Memorandum of Appeal was to be filed. That the Garnishee (Appellant) did not comply with the said Court Orders and directions as (14) days lapsed with no extension of time sought by the said Garnishee.
 38. The applicant states that in the Replying Affidavit dated 22nd July, 2022 sworn by Elvis Salaton Ololkipai who is the Chief Executive Officer of the Good Hope Sacco Limited, made it clear at paragraph (5) "that appellant has a generally goof financial standing".
 39. From the foregoing reasons and facts stated herein above, the applicant urges this Court to make a finding and hold that, the deposition by the CEO of the Judgement Debtor are true and correct and they are able to satisfy wholly the entire costs as assessed pronto. She also urged this court to adopt and consider the electronic evidence in form of a Compact Disc(CD) and certificate.
 40. She stated that the Garnishee's Replying Affidavit has no triable issues against the instant Application and the arguments raised by the deponent therein are baseless, without ground and does not hold water at all. Also that the staying Orders being begged by the said Garnishee are no more and thus no staying Orders are available to the Garnishee.
 41. In conclusion, she urged this Court to make the Order Nisi Absolute as it is uncontested and further pray that this Honorable be pleased to issue an Order of the costs of the Garnishee proceedings at the Kshs. 300,000.00 as the same was not included in the prayer (3) of the Notice of Motion.
 42. Pursuant to the Court's directions issued on September 28, 2023, the Garnishee filed a further affidavit deposed upon on the September 29, 2023 by Lucy Muthama, the garnishee's Legal office.
 43. It is averred that at all material times, the relationship between the Bank and the Judgement Debtor was that of a Lender- Borrower where the Bank advanced a loan facility of Kshs. 191 Million to the Judgement Debtor, on condition that the Judgement Debtor was to open and maintain a collateral account which would solely be used as the bank's security and utilized in the event of default.



44. She maintained that the two bank accounts number were collateral accounts. On Account number 0124XXXXX360 the Judgement Debtor deposited Kshs. 1,300,000, while on Account number 0124606XXX6000 the Judgement Debtor deposited Kshs 13,310,751 .57
45. Moreover, that these collateral amounts were formalized by way of a Charge on cash which gave the Bank a lien over the said accounts. To support this, she annexed the Charge on Cash Account Opening forms dated August 6, 2018 marked as LM-2.
46. The legal officer, elaborated on the contents of the said charges and stated that under clause 7.4 of the Charge on cash Account form, the Bank retained the right to debit the account and to recover any indebtedness by the Judgement debtor.
47. She reiterated that these collateral accounts are not current accounts or transactional accounts and the amounts deposited therein are purely security for repayment of the loan advanced to the Judgement Debtor which the Bank at all times has a lien over and retains the first right of claim.
48. With regard to the pending court proceedings, the affiant stated that the Decree Holder in a bid to execute against the Judgement debtor for the decretal sum of Kshs. L, 675,271.00, filed a garnishee application dated February 8, 2022 in Kilgoris MCELRC No. 2 of 2019 seeking to attach funds held in the collateral accounts; 01246XXX3360 & 01248XXX336000 listed above.
49. Consequently, the court issued order Nisi on February 14, 2022 over the said collateral accounts. The bank opposed the application and indicated to the trial court that he garnishees accounts are not available for attachment as they serve as the Bank's security and a Decree Holder cannot claim, as to do so will dislodge contractual terms between parties.
50. Despite raising this issue at the trial court, the court on July 8, 2022, made the Order Nisi Absolute declaring that the funds in the collateral account could be used to satisfy the Decree Holder's claim against the Judgement Debtor.
51. Dissatisfied with the Court's ruling, the Bank sought and was granted leave to appeal. However, the court granted conditional stay pending appeal directing the Bank to deposit the garnishee amount being Kshs. 1, 675,271.00 with the court.
52. It is averred that while the bank was in the process of complying with the order for conditional stay, the Decree Holder kept sending threatening emails to the Bank to the extent that they wanted to proclaim and attach the Bank's assets, forcing the bank to comply deposit its own funds in Court on March 16, 2023 as security to secure leave to appeal the trial Court's ruling with the intent of later debiting the collateral accounts. She annexed RTGS slip for March 16, 2023 as annexure LM-5.
53. She clarified that as per the RTGS narrative, the funds were deposited to Kilgoris Court Branch from Co-operative Bank of Kenya Finance Department and not from the Judgement Debtor' account as alleged. This, she states serves as clear proof that the funds originated from the Bank and not from the judgement debtor's account as alleged, a further confirmation that the funds in the accounts remained intact.
54. By way of juxtaposition, she stated that as at October 28, 2014 collateral account number 0124XXX23360 had Kshs. 1,300,0000.00 and as at June 10, 2023, the account still had the 1,300,000.00 which proves that no funds were debited from the collateral accounts and proving that the Bank used funds from its own coffers.
55. Upon obtaining leave to Appeal, the Bank proceeded to file its Memorandum of Appeal and requested for the judgement and proceedings so as to file its record of appeal.



56. The affiant stated that the main issues raised in Kilgoris Civil Appeal No. E006 of 2022 are inter alia whether the funds in the collateral accounts, being 0124XXX23360 & 01248XXX336000, and being the Bank's security for a loan, can be used to satisfy a decretal sum in a garnishee application; whether claim by a Decree Holder against a Judgement Debtor can rank in priority over the claim by the Bank over its own security and whether the Bank's first right of claim and contractual rights can be dislodged by a Decree Holder's claim that came in 2nd in time.
57. The affiant stated that, with regard to the money deposited in Court as security to obtain stay of execution, a reconciliation was initiated to enable the Bank, recoup the funds from Judgement Debtor's account in the Narok Branch which is the custodian of the subject accounts pursuant to the provisions of clause 7.4 of the Charge on cash account opening forms.
58. She stated that it is practice within the Bank internal operations that internal reconciliations are completed quarterly and in this instance the reconciliation was scheduled to mature in June 2023 and approved at the Head office sometime in June 2023. A debit command for the said recouping of funds was initiated where the debit would be effected on 15th September 2023 over Account Number 0124XXX23360 where Kshs. 1,300,000.00 was debited & 4th September 2023 over Account Number 01248XXX336000 where Kshs. 375,270.49 was debited and for a total of Kshs. 1,675,270.49.
59. She stated that at the time this Honorable Court issued its order Nisi, the debit command on the Judgement debtor's account had already been initiated and on September 1, 2023 the Bank recovered the garnished amount being Kshs. 1 300 000.00 from account 0324XXX23360 and Kshs. 375 70.49 from account 01248XXX336000.
60. Therefore, that as at October 4, 2023, the closing balance over account 012460623360 is Kshs. 0.00 whilst in account 012460XXX36000 is Kshs, 535,461.08. On that note it was stated that it is evident that the Judgement Debtor's Account holds insufficient funds to satisfy the entire Garnishee Order Nisi without overdrawing the accounts.
61. It is the garnishee's case that in the event this court directs the Bank to settle the garnished amounts in the present application, the court will be putting the Bank in the position of the judgment debtor and un-sitting it from its position as a garnishee. The Bank, as a garnishee, should never have to bear a liability of a judgement debtor as that would simply be unjust.
62. The affiant also stated that the accounts are presently under the name "Narok Teachers Sacco" and not "Good Hope Sacco Limited." This is due to the fact that the accounts were initially registered and opened as "Narok Teachers Sacco," and though it was later changed to "Good Hope Sacco Limited". A recent system update at the Bank automatically reverted it to the original name, "Narok Teachers Sacco." However, these names are used interchangeably and refer to one and the same accounts.
63. The affiant also stated that the application before this Honourable court is subjudice contrary to Section 6 of the *Civil Procedure Act* for the reasons that this Honourable court is set to determine an application on whether funds in the collateral accounts Nos. 0124XXX23360 & 012460XXX36000 should be garnished, when this is the same issues raised in Kilgoris High Court Civil Appeal No. E006 of 2022.
64. Accordingly, she stated that section 6 of the *Civil Procedure Act* calls for stay of these proceedings until the earlier application is heard and determined. She prayed in the alternative for this court to dismiss the Decree Holder's application for being sub-judice.
65. I have considered the averments and submissions of the parties herein.



66. What comes out of the pleadings is that there has been similar applications for garnishee proceedings before Kilgoris High Court CA No.E006/2022 where orders were issued against the garnishee in a similar matter.
67. Details of the case that led to the garnishee orders being issued have not been disclosed to this court by the applicants.
68. It therefore is clear that the issues in this court are also before the High Court in Kilgoris and therefore subjudice.
69. I will therefore decline the invitation to issue garnishee orders as prayed and order execution to proceed in any other form.
70. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Angeline Naanyu – present

Njeru for Garnishee – present

Court Assistant – Fred

