



REPUBLIC OF KENYA



KENYA LAW
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**Kimonye v Kenya Meat Commission; Co-operative Bank Ltd (Athi River) (Garnishee)
(Cause 465 of 2017) [2023] KEELRC 2994 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2994 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 465 OF 2017
JK GAKERI, J
NOVEMBER 23, 2023**

BETWEEN

JAMES KIMONYE CLAIMANT

AND

KENYA MEAT COMMISSION RESPONDENT

AND

CO-OPERATIVE BANK LTD (ATHI RIVER) GARNISHEE

RULING

1. This is the Decree-Holder's *Ex Parte* Notice of Motion dated 15th September, 2023 seeking orders that:-
 1. Spent.
 2. Spent.
 3. The Garnishee do appear before this court on an appointed date and time to show cause why the Garnishee Order *nisi* so issued should not be made absolute and that the sum of Kshs.10,711,124.35 or so much thereof as may be sufficient to satisfy the Decree and further costs of these Garnishee Proceedings.
 4. Costs of this application be provided for.
2. The *Ex parte* Chamber Summons filed under Certificate of Urgency is expressed under Order 23 Rules 1, 2 and 3 and Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 and is based on the grounds set out on its face and the Supporting Affidavit sworn by Mr. Duncan Otieno, Advocate on 15th September, 2023 who deposes that subsequent to delivery of judgement on 17th November, 2021, the Respondent has on two occasions failed in its application for a stay of execution.



3. Consequently, the Decree holder filed his Bill of Costs on 19th April, 2022 and a ruling was delivered on 8th September, 2023. The Bill of Costs was taxed at Kshs.802,208.31.
4. The affiant states that since November 2021, the Respondent has been frustrating the Decree-holder so as not to enjoy the fruits of his judgement and the decree remains unsatisfied, sum of Kshs.10,711,124.65 and the Judgement-Debtor Account No. xxxx at Co-operative Bank, Athi River Branch has sufficient funds to wholly satisfy the Decree.
5. That it is in the interest of justice that orders sought be granted.

Garnishee's Response

6. In its Replying Affidavit sworn by Felistus Wambua on 6th October, 2023, the Garnishee confirms that the Judgement-debtor operates and maintains account No. xxxx at the Athi River Branch and as at 29th September, 2023, the book balance in the account was Kshs.12,134,099.92 sufficient to satisfy the decretal sum and had no objection of the issuance of Garnishee Order absolute to satisfy the decretal sum.
7. The Garnishee prays for costs in defending the proceedings.

Judgement-Debtor's response

8. In a Replying Affidavit sworn by the Judgement-Debtor's Chief Legal Officer on 6th October, 2023, the affiant depones that the Respondent is a State Corporation established under the [*Kenya Meat Commission Act*](#) with exclusive rights to purchase, slaughter and sell cattle and small stock, acquire, establish and operate abattoirs, meat works, cold storage concerns, refrigeration and export of meat and the Claimant was its former Managing Commissioner and obtained judgement against the Judgement-Debtor.
9. The affiant deposes that there is a pending Appeal and Application for stay at the Court of Appeal and a hearing date is awaited and the record of appeal has been filed.
10. That the Garnishee Order Nisi granted on 27th September, 2023 freezing Account No. xxxx effectively shut down the Judgement-Debtor's operations as it is its main operations account.
11. That the freezing of the Judgement Debtor's account is erroneous as it has occasioned hardship to the Judgement Debtor, suppliers, farmers, staff and business operations at large as it cannot buy stock or make payments.
12. The affiant depones that the Judgement Debtor is a fully functional State Corporation with capacity to honour the decree after determination of the appeal.
13. That execution by way of Garnishee is premature owing to a reference which acts as a stay of execution slated for hearing on 21st November, 2023.
14. That the Respondent has a huge counter-claim against the Claimant/Decree holder and did not ventilate its case.
15. That if the amount was paid and the appeal succeeds, the Judgement Debtor would suffer irreparable damage as the Decree-holder had no known assets or means to refund the same.
16. The affiant deposes that granting the Orders sought would amount to condemning the Judgement Debtor unheard contrary to the principles of natural justice.



17. That the Decree holder stands to suffer no prejudice should the orders sought be denied.

Decree Holder's submissions

18. In urging that the Decree-Holder was entitled to Kshs.10,711,124.35, reliance was made on Order 23 Rule 1(1) of the [Civil Procedure Rules, 2010](#) on Garnishee Proceedings.
19. Counsel submitted that the Garnishee had confirmed a credit balance in the Judgement Debtor's account and willingness to comply with court orders and the court may issue an order absolute guided by the decision in [Nyandoro & Co. Advocates v National Water Conservation and Pipeline Corporation; Kenya Commercial Bank Group Ltd \(Garnishee\)](#) (2021) eKLR.
20. Counsel submitted that although a record of Appeal had been filed at the Court of Appeal, the same did not operate as an automatic stay of execution.
21. That as the Judgement Debtor is not party to the Garnishee Proceedings and had no locus standi to apply for dismissal of the Garnishee Proceedings as held in [Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co. Ltd; Diamond Trust Bank \(Garnishee\)](#) (2020) eKLR.
22. On the alleged erroneous freezing of the Judgement Debtor's Account, reliance was made on the decision in [Tom Ojienda & Associates v National Land Commission; National Bank of Kenya & another \(Garnishee\)](#) (2022) eKLR.
23. Counsel urged that the Garnishee Order Nisi be made absolute.

Judgement Debtor's submissions

24. As to whether the garnishee nisi should be set aside, counsel urged that the court had discretionary power to do so as held in *Patel v E.A Handling Services Ltd* (1974) EZ 75 as well as *Maina v Muriuki* (1984) KLR 407.
25. Counsel reiterated the hardships the Judgement Debtor was subjected to by the freezing of its account urging that it will ultimately honour any decree after determination of the appeal and there was no risk at all.
26. Reliance was made on the sentiments of the court in [Richard Nchapi Leiyagu v IEBC & 2 others](#) (2013) eKLR to underscore the essence of the right to a hearing and urge that granting the orders sought would be tantamount to condemning the Judgement Debtor unheard for actions of its former counsel and the applicant should not suffer due to a mistake of its counsel as held in [Alphonse Mwendwa Nyalita v Caroline Wanyua Mwendwa & another](#) (2021) eKLR among others.
27. Counsel insisted that there was a pending appeal and application for stay at the Court of Appeal, and the Garnishee Proceedings were therefore premature and the Judgement-Debtor would suffer irreparable loss if the amount was paid and the appeal succeeds.
28. Counsel prayed for the setting aside of the Garnishee Order *Nisi*.

Determination

29. The singular issue for determination is whether the Decree-Holder's *Ex parte* Notice of Motion dated 15th September, 2023 is merited.
30. Before delving into the main issue, it is essential to highlight the background to this ruling.



31. When the *Ex parte* Notice of Motion came up for directions on 27th September, 2023, the court granted Prayer No. 2, the effect of which was to freeze the Judgement Debtor’s Account No. xxxx at the Co-operative Bank, Athi River and hearing was slated for 2nd October, 2023 on which date the Respondent and the Garnishee’s counsel’s sought and were granted 7 days to file responses.
32. However, on 5th October, 2023, the Judgement-Debtor filed a Notice of Motion dated 3rd October, 2023 seeking the setting aside of the Garnishee Order Nisi and after hearing counsels on 9th October, 2023, they agreed to compromise the Notice of Motion dated 3rd October, 2023 and the Garnishee Order Nisi was temporarily stayed pending the determination of the Garnishee and a reference by the Judgement-Debtor filed on 14th September, 2023.
33. Directions on the filing of responses and submissions to the Garnishee and the reference were given and confirmed on 2nd November, 2023 when a ruling date was fixed.
34. The law on Garnishee Proceedings is well settled.
35. The essence of garnishment was aptly captured by Mativo J. in [*Mengich t/a Mengich & Co. Advocates & another v Joseph Mabwai & 10 others*](#) (2018) eKLR as follows;

“Garnishee Proceedings otherwise known as ‘garnishment’ is a judicial process of execution or enforcement of monetary judgement whereby money belonging to a judgement-debtor in the hands or in possession of a 3rd party known as “Garnishee” (usually a bank), is attached or seized by a Judgement Creditor, the “Garnisher” in satisfaction of a judgement sum or debt. By its nature, Garnishee Proceedings is “sui generis” and different from other court proceedings although it flows from the judgment that pronounced the debt. Generally, 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.”
36. Order 23 Rule 1 of the [*Civil Procedure Rules*](#), 2010 provides that:-
 1. A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgement-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 judgement-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22 Rule 42 owing from such third person (hereinafter called the “Garnishee”) to the Judgement-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same any 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 the costs aforesaid.
37. Similarly, Order 23 Rule 4 provides that;
 4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgement-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 the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of the Appendix A as the case may require.



38. In the instant application, the garnishee has not objected to the Garnishee Proceedings and has indicated willingness to comply with court orders and in the applicant's submission there is no hinderance to the issuance of a garnishee order absolute as held in *Nyandoro & Co. Advocates v National Water Conservation and Pipeline Corporation; KCB Group Ltd (Garnishee)* (*Supra*) where the Decree-holder had fulfilled all the requirements of Order 23 Rule 1 of the *Civil Procedure Rules*, 2010 and Mativo J (as he then was) made the Garnishee *Nisi* absolute.
39. The Judgement-Debtor on the other hand maintains that this court ought to exercise its discretionary powers to ensure that substantive and not procedural justice is attained as ordained by Article 159(2) (d) of *the Constitution* of Kenya, 2010 and as exemplified in legions of decisions.
40. It requires no emphasis that the order envisioned by Order 23 of the *Civil Procedure Rules* is discretionary as exquisitely captured by Mativo J. (as he then was) in *Mengich t/a Mengich & Co. Advocates & another v Joseph Mabwai & 10 others* (*Supra*) as follows;
- “Seventh, the order contemplated by Order 23 is discretionary and the court may refuse to pass such order if it is inequitable. The discretion however, must be exercised judicially. Where the court finds that there is a bona fide dispute against the claim and the dispute is not false or frivolous, it should not take action under this rule. Before me, the Respondents disputed the amounts . . .”
41. It is not in dispute that the Respondent is a State Corporation established under the *Kenya Meat Commission Act*, and as confirmed by its Chief Legal Officer in his Affidavit sworn on 6th October, 2023, it is a fully functioning entity and the deponent affirmed that the Respondent has the wherewithal to ultimately honour any decree.
42. It is equally common ground that the Respondent has already filed an appeal and an application for stay of execution is pending before the Court of Appeal awaiting a hearing date owing to backlog.
43. Finally, the Respondent also cited the hardship it was subjected to when the Garnishee Order *Nisi* was issued and before its temporary lifting to facilitate its ordinary operations. However, the foregoing notwithstanding, the court is alive to the fact that the Decree-holder has a judgement in his favour against which no adverse order have been made and is entitled to enjoy the fruits of his judgement.
44. More significantly, however, and as adverted to elsewhere in this ruling, the court is enjoined to administer substantive justice in consonance with the principles of efficiency and expedition in dispute resolution.
45. Being cognisant of the fact that Respondent/Judgement-Debtor has a not only a pending appeal but an application for stay of execution before the Court of Appeal and a reference before the court, the court is of the view that exercising its discretion in favour of the Decree-holder would not facilitate just, efficient, expeditious and proportionate resolution of the dispute between the parties.
46. Accordingly, the court is not persuaded that it would be opportune to make the Garnishee Order *Nisi* made on 27th September, 2023 Garnishee Order absolute.
47. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF NOVEMBER 2023

DR. JACOB GAKERI

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 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 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.

DR. JACOB GAKERI

JUDGE

