



**Ondaka v Kisii Security Guards; KCB Bank Limited Kisii Branch (Garnishee)
(Cause 35 of 2018) [2022] KEELRC 12961 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12961 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 35 OF 2018
CN BAARI, J
OCTOBER 27, 2022**

BETWEEN

CHRISANTUS OMATO ONDAKA CLAIMANT

AND

KISII SECURITY GUARDS RESPONDENT

AND

KCB BANK LIMITED KISII BRANCH GARNISHEE

RULING

1. Before court is a notice of motion application dated May 6, 2022, and filed in court on June 15, 2022, wherein, the applicant/decreed holder seeks the following orders: -
 - i. Spent
 - ii. That the honourable court be pleased to order that all monies due to the respondent/judgment debtor, in account No 1287816398 or in any other account in the name of the debtor, and held with the garnishee, Kenya Commercial Bank, Kisii Branch, or so much of it as may be sufficient to satisfy the decretal sum of Kshs 429,700/- together with costs of the garnishee proceedings, be attached so as to satisfy the decree herein.
 - iii. The costs of this application be borne by the respondent/judgment debtor.
2. The motion is supported by the grounds on the face of it, and the affidavit of Bernard Nyagaka Ogari. The crux of the motion being that the decreed holder issued warrants to M/s Fortune Auctioneers, which warrants have been returned unexecuted due to unavailability of attachables.



3. The applicant avers that the only available avenue for him to realize the decretal sum, is through garnishee proceedings. He prays that account number 1287816398 be attached and the funds therein released to him to satisfy the decree issued in this matter.
4. The garnishee opposed the motion *vide* a replying affidavit sworn by Chris Motari on July 12, 2022.
5. The garnishee avers that an application of this nature is, as a matter of procedure, prosecuted in two phases; one being through issuance of an order nisi, whose purpose is to direct the garnishee to appear in court on a specified date to show cause why an order should not be issued for payment of the decree holder of the sum owed by the judgment debtor.
6. The garnishee further avers that no orders have been sought against it as no orders was served upon it, and that it was only served with a copy of the instant application. It is the garnishee's position that the present proceedings are fatally defective on account of absence of an order requiring the garnishee to participate in the matter, and hence an order absolute should not be granted.
7. The garnishee finally submits that for reason of lack of a garnishee order nisi served upon it as contemplated by law, and requiring it to disclose information in relation to account number 1287816398, held by the judgment debtor, the garnishee/bank is precluded from disclosing any details relating to the respondent/judgment debtor's accounts by virtue of section 31 of the [Banking Act](#).
8. The application was urged orally on September 19, 2022, where parties adopted their respective grounds as highlighted herein above.

Determination

9. I have considered the motion, the grounds and affidavit in support, the replying affidavit in opposition and the oral submissions by counsels.
10. The issue that fall for determination is whether the decree holder has made a case for grant of a garnishee order absolute for attachment of account number 1287816398 held by the judgment debtor.
11. Garnishee proceedings are provided for under order 23, rule 1 of the [Civil Procedure Rules](#), which states thus: -
 - “(1) A court may, upon the *ex parte* application of a decree- holder, and either before or after an oral examination of the judgment- 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 judgment-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 judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.
 - (2) At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.”



12. It is not disputed that there exists a decree issued in this matter against the judgment debtor, and in favour of the decree holder. However, as correctly submitted by counsel for the garnishee, order 23 requires that a garnishee order nisi is first issued before a prayer for issuance of a garnishee order absolute can be made.
13. The garnishee order nisi is effectively an “injunction” to restrain the bank from paying out money from the account of the judgment debtor. It may also be construed as an order of “attachment” of the money which the garnishee was holding to the order of the judgment debtor.
14. A garnishee order absolute, can thus only be granted where there is prove that the garnishee was holding money to the order of the judgment debtor.
15. For reason that the garnishee herein was not served with a garnishee order nisi, and indeed no such order was obtained by the decree holder, in my view, renders the instant motion fatally defective on account of the garnishee’s inability to effectively respond on whether or not it holds any monies for the judgment debtor. Courts do not make orders in vain.
16. A garnishee order nisi would have enabled the garnishee to demonstrate and/or proved information on whether or not funds are available to meet the decretal sum that is due to the decree holder.
17. I find and hold that the motion herein, is fatally defective and the garnishee order absolute cannot be granted in the circumstances.
18. The motion is dismissed with no orders as costs.
19. Orders of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF OCTOBER, 2022.

CHRISTINE N. BAARI

JUDGE.

Appearance:

Mr. Kimaiyo h/b for Mr. Ogari for the Claimant/Decree Holder

Ms. Onyango h/b for Ms. Anuro for the Garnishee

N/A for the Respondent/Judgment Debtor

Ms. Christine Omollo-C/A

