



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1708 OF 2013

FRANCIS KAIGA.....CLAIMANT

VERSUS

INSTITUTE FOR SECURITY STUDIES.....RESPONDENT

ECO BANK (K) LIMITED.....GARNISHEE

RULING

Introduction

1. On 9.11.2018, I entered Judgment for the Claimant against the Respondent for the sum of Kshs.663,181.20 plus costs. After the costs were determined, the Claimant, obtained warrants of attachment through an Auctioneer but the goods proclaimed belonged to a third party who successfully objected to the execution. Thereafter, the claimant filed the Notice of Motion dated 31st May 2019, under Orders 23 Rule 1 & 2 of the Civil Procedure Rules seeking the following orders:

a) THAT pending the hearing and determination of the instant application, *garnishee order nisi* do issue against Eco Bank Kenya Limited, Valley Arcade Branch ordering that all monies deposited, lying and being held in deposit in Kenya shillings Account Number 0230015018845001 and USD Account Number 023015018845001 to the credit of **INSTITUTE FOR SECURITY STUDIES**, the Judgment Debtor herein be attached to answer the Decree issued on 19.3.2019 together with interest and costs awarded to the claimant.

b) THAT 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 801,868.20 plus interest at the commercial rate released to the Claimant's Advocate herein and further costs of these Garnishee proceedings.

c) Costs of the application be provided for.

2. The application is supported by the Affidavit sworn by the claimant on 31.5. 2019 and is premised on the following grounds:

a) That the claimant obtained judgment of Kshs.801,868.20 plus interest against the respondent.

b) That the respondent has deliberately declined to settle the decretal sum, interest and costs even after the Decree and Certificate of costs were extracted and served on her.

c) That the judgment debt remains unsatisfied and the total outstanding amount is Kshs.801,868.20 plus interest from the date of judgment.

d) That the respondent holds Kenya shillings Account Number [xxxx] and USD Account Number [xxxx] in the Garnishee Bank and he believes that the accounts are well funded and have sufficient funds to satisfy the decreed sum, costs and interest.

e) That unless the order sought is granted the respondent is likely to transfer the funds from the said accounts with intention to frustrate the process of the court.

f) That he is entitled to realise and enjoy the fruits of his judgment.

3. The application was heard *ex parte* on 31.5.2019 when it was placed before the Duty Judge under certificate of urgency and a *garnishee order nisi* was granted. The *garnishee order nisi* is still in force against the Garnishee Bank not to release any funds from the attached accounts.

4. The respondent opposed the application by filing Grounds of opposition on 19.6.2019 including that:

a) The application is fatally defective and void *ab initio* for being premised on confidential and privileged information relating to her bank account at the Eco Bank Kenya Limited, obtained illegally and unethically.

b) That the court has a duty to protect both parties and to ensure that it does not aid or abet the illegal acts of a party who breaks the law.

c) That the *garnishee order nisi* was not justified because the claimant did not explain how he obtained her bank account details.

d) That the court has a duty to protect the confidentiality of bank/client relationship.

e) That the Dollar account bank details provided in the application do not belong to the respondent.

Submissions

5. Mr. Masaviru urged the application for the claimant. He reiterated the respondent has sufficient funds in the attached accounts at the Garnishee Bank but has deliberately failed to settle the decree issued by this court, costs and interest totalling to Kshs.801,868.20. That after serving the Garnishee Bank with the application herein, it did not attend court to dispute its liability to the judgment debt or deny that the attached accounts and the funds therein belonged to the respondent. That on the contrary, it wrote a letter to the claimant's advocates admitting that it is withholding Kshs.801868.20 from the judgment debtor's accounts as ordered by the court pending the determination of the application. Consequently, he prayed that the *garnishee order nisi* be made *absolute*.

6. As regards the grounds of opposition by the respondent, the counsel submitted that the Judgment Debtor has no role to play in Garnishee proceedings and that requirement to examine him under Order 23 Rule 1 is overtaken by events since the order nisi has already been granted and the Garnishee Bank admitted that it is holding sufficient funds that can satisfy the decree of the court. That the issue as to how the information about the respondent's account was obtained is irrelevant and this is not the forum to deal with that issue. That all what is important was for the Garnishee to confirm that there were funds in the accounts and they belonged to the respondent judgment debtor.

7. Mr Mwaura opposed the application on behalf of the respondent judgment debtor. He submitted that the role of the judgment debtor in garnishee proceedings is provided for under Order 23 rule 1 of the Civil Procedure Rules (CPRs), that is, he should be orally examined either before or after granting the *garnishee order nisi*. He therefore contended that the order cannot be made absolute until the judgment debtor is orally examined.

8. In addition, the counsel submitted that the application is invalid and must fail because it is premised on illegally obtained information and it should be rejected. That the information about the respondent's bank accounts is privileged and confidential and it was obtained by the applicant through breach of confidentiality.

Analysis and determination

9. After careful consideration of the application, affidavit and the oral submissions by counsel, there is no disputes that the court granted *garnishee order nisi* against the Garnishee Bank on 31.5.2019. There is further no dispute that the Garnishee has not opposed the application to make the *garnishee order absolute* but instead it has admitted that it is holding money in the respondent's accounts at the bank which is sufficient to satisfy the decree of the court herein and it is holding it pending the determination of the application. The issues for determination are:

a) Whether the application is incompetent because it is founded on illegally obtained privileged and confidential information.

b) Whether the respondent judgment debtor must be examined orally before the garnishee order is made absolute.

c) Whether the application has merits and should be allowed.

Whether the application is incompetent

10. The claimant did not disclose how he how he obtained the details of the respondent's bank accounts at the Garnishee Bank. The respondent alleged that the information related to her bank accounts is privileged and confidential and it was obtained illegally because the claimant never made any application in court to have the details availed. The burden of proof is upon the respondent to prove

on a balance of probability that the said information was obtained illegally in breach of confidentiality. It is upon her to prove that the information was illegally given to the claimant by the Garnishee bank before the application was made. In this case she did not do so and I hold that the alleged illegality in obtaining the said information is a factual issue that has not been proved by the counsel's submissions from the bar.

Oral examination of the judgment debtor.

11. Order 23 Rule 1 provides that:

“(1) A court may, upon the ex parte application of the 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 salary or allowances 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 costs of the garnishee proceedings; and by the same or 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 costs aforesaid.”

12. It is clear from the foregoing rule that a *garnishee order nisi* can be made either before or after an oral examination of the judgment-debtor. I believe such oral examination is meant to verify the existence of attachable debts from third parties and alert him of execution through garnishee proceedings. In this case the claimant was not examined by the court which granted the *garnishee order nisi*. However, after the order was made, the judgment-debtor was served and appeared in court through counsel on 13.6.2019 and 20.6.2019. The counsel was heard in opposition to the application herein and did not dispute the existence of the attached bank accounts and the fact that the funds therein was held to the credit of the judgment-debtor. Although the counsel contended that the order should not be made absolute before oral examination of the judgment-debtor, he did not specify on what matters was the oral examination necessary in assisting the court decide whether or not to make the *garnishee order nisi* absolute. Consequently, I return that in this case the judgment-debtor need not be orally examined before the *garnishee order nisi* is made absolute.

Whether the application has merits

13. The claimant has proved that since the court passed decree and costs determined by the Deputy Registrar of the court, the judgement-debtor has not settled it and it continues to accrue interest; that the judgement-debt is now Kshs.801,868.20 plus interest and costs of the garnishee proceedings; and that the garnishee Bank herein is holding funds to the credit of the judgment debtor, in the attached accounts, that is sufficient to satisfy the said outstanding judgment-debt. Under order 23 rule 2 of the CPRs, a credit in deposit account in a bank is attachable by a garnishee order.

14. Finally, the claimant has proved that he served the application herein upon the garnishee bank and it did not appear in court on 13.6.2019 and 20.6.2019 when the application came up for hearing and instead wrote the letter dated 17.6.2019 confirming the availability of funds in the judgment-debtor's accounts in her custody which is sufficient to satisfy the outstanding judgment debt of Kshs.801868.20. Considering all the materials presented to the court by both sides, I am satisfied on a preponderance of evidence that the application has merits and it should be allowed as prayed.

Conclusion and disposition

15. I have found that the respondent has not proved that the application is incompetent for being founded on illegally obtained confidential and privileged information. I have further found that the claimant was represented by counsel to oppose the application after the *garnishee order nisi* was made and as such there is no need of oral examination of the judgment-debtor and there is no prejudice to be suffered if she is not orally examined under Order 23 Rule 1. Finally, I found that the application has merits and allowed it to the extent that:

a) The garnishee order nisi issued herein is made absolute.

b) The sum of kshs. 801,868.20 plus interest at court rates and the costs of these garnishee proceedings be and is hereby released by the garnishee to the claimant's Advocates herein forthwith, from deposits held by the garnishee in the attached accounts to the credit to the judgment-debtor, namely, Kenya shillings Account Number [xxxx] and USD Account Number [xxxx].

It is so ordered.

Dated, Signed and Delivered in Open Court at Nairobi this 21st day of June 2019

ONESMUS N. MAKAU

JUDGE