



**Africa Merchant Assurance Co Ltd v Karigi t/a Mugendi Karigi & Co  
Advocates; Kenya Commercial Bank & another (Garnishee) (Civil Appeal  
E050 of 2022) [2024] KEHC 1712 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1712 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E050 OF 2022  
LM NJUGUNA, J  
FEBRUARY 23, 2024**

**BETWEEN**

**AFRICA MERCHANT ASSURANCE CO LTD ..... APPELLANT**

**AND**

**MORRIS MUGENDI KARIGI T/A MUGENDI KARIGI & CO  
ADVOCATES ..... RESPONDENT**

**AND**

**KENYA COMMERCIAL BANK ..... GARNISHEE  
SAFARICOM PLC ..... GARNISHEE**

**RULING**

1. The respondent/applicant has filed notice of motion dated December 7, 2023 seeking orders that:
  - a. Spent;
  - b. Spent;
  - c. That at the inter-parties hearing of this application, the garnishee order Nisi be made absolute and the monies attached be released to the respondent/applicant to satisfy the decretal debt owing at the time of determination of these proceedings; and
  - d. The costs of this application be borne by the appellant.
2. The application is premised on the grounds set out on its face and in the supporting affidavit.
3. The bill of costs dated June 12, 2023 was taxed at Kshs. 410,850/=. Being dissatisfied with the ruling on taxation, the appellant filed an appeal which was heard and determined in favour of the respondent/



- applicant and the court issued a decree dated November 20, 2023. Through the present application, the respondent/applicant seeks to execute the said decree through the garnishees. The 1<sup>st</sup> garnishee through its service quality and compliance manager filed a replying affidavit stating that the appellant's account held at the Nextgen Mall branch indicates a ledger balance of Kshs. 1,413,505.37/= and is encumbered by another garnishee nisi order for the sum of Kshs. 1,234,491.02/=. That the appellant's account is restricted from transactions of any nature by a court order from Kakamega Small Claims Court in claim no. E115 of 2023 issued on October 11, 2023. That the account does not have sufficient amount to recover the decretal sum in this matter.
4. The 2<sup>nd</sup> garnishee filed its replying affidavit where the senior merchant officer stated that the appellant's account in paybill number 545400 is encumbered by another garnishee order arising from Makindu Miscellaneous Application no. E004 of 2023 for the sum of Kshs. 966,318/= which remains unsatisfied due to insufficient funds. That the 2<sup>nd</sup> garnishee should be discharged from satisfying the outstanding decretal amount since the named account does not have the decretal sum and has nothing to yield up. The 2<sup>nd</sup> garnishee was discharged from the proceedings, having demonstrated that it is not holding the appellant's money in paybill number 545400 enough to satisfy the decree.
  5. The appellant also filed a replying affidavit through which its legal manager deposed that it had filed an application in CMCC No. 75 of 2020 seeking review of the judgment in the case which resulted in the impugned ruling and therefore the instant appeal. That the said application has not been determined and there are no interlocutory orders in place but the application was scheduled for hearing on January 11, 2023. That since there is already in place a decree nisi by this court securing the sum with the garnishees, it was its averment that the appellant is willing to pay the decretal amount only after the review application is heard and determined in order to avoid conflicting orders.
  6. The application was canvassed by way of written submissions.
  7. The respondent/applicant submitted that the 1<sup>st</sup> garnishee stated that the appellant account indicates a ledger balance of Kshs. 1,413,505.37/= of which Kshs. 1,234,491.02/= is locked through another garnishee nisi order in Kakamega Small Claims Court claim no. E115 of 2023. That a copy of the said decree was provided but it did not indicate any other purposes like lawyer's fees, Amaco E083 and Ngong CMCC E19A of 2022 as stated in the bank statement of the locked account.
  8. That no other court order has been produced to show that the account does not have the funds. He relied on the provisions of order 23 rule 1 of the Civil Procedure Rules and the case of *Ecobank Ltd v. True North Construction Company Ltd & another* (2018) eKLR where it was held that the purpose of garnishee proceedings is to enable a decree-holder to enjoy the fruits of his judgment. Reliance was also placed on the case of *Ngaywa Ngigi & Kibet Advocates v. Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee)* (2020) eKLR.
  9. It was his argument that a garnishee nisi order is an interim order and it does not stop another court from issuing similar orders. For this argument, he cited the case of *Martin Mwangi Ndirangu v. Investo Assurance Co. Ltd* (2020) eKLR. That unless the 1<sup>st</sup> garnishee can prove that the garnishee order nisi in Kakamega Small Claims Court claim no. E115 of 2023, or any other garnishee nisi orders in another suit to the same account, were made absolute, this court should grant the orders as prayed.
  10. The appellant submitted that from the onset, the application is an abuse of the court process given that there is a pending application for review of the judgment of the trial court. That it is in the interest of justice that this court exercises caution and avert issuance of conflicting orders in light of the review proceedings. That this court should defer the proceedings herein until the review application is heard and determined because if the review application is successful, the decretal amount may not be



recovered. The appellant stated that it is ready to pay the decretal amount after the review application is determined.

11. The 1<sup>st</sup> garnishee submitted that the appellants account has been restricted by an order Kakamega Small Claims Court claim no. E115 of 2023 where the court barred the releasing/ authorizing any withdrawals/ transfers/ payment of funds out of the said account. That the net amount available in the account is not sufficient to satisfy the decretal amount fully and therefore, it is not in a position to comply with the orders.
12. From a perusal of the application and submissions by the applicant, the issue for determination is whether the garnishee order nisi should be made absolute.
13. The 2<sup>nd</sup> garnishee was discharged from the proceedings when the respondent/applicant notified the court of his intention to discontinue proceedings against it. The 1<sup>st</sup> garnishee through its replying affidavit stated that the appellant's account holds Kshs. 1,413,505.37/= of which a total of Kshs. 1,234,491.02/= is locked. In the exhibit marked CM-1 the net available balance on the account is Kshs. 179,014.35/=. According to the 1<sup>st</sup> garnishee, the money was locked following a garnishee nisi order in Kakamega Small Claims Court claim no. E115 of 2023. However, according to the exhibit marked as CM-2 the 1<sup>st</sup> garnishee details the reasons for locking various amounts and none of them references the small claims case.
14. However, I have perused the court order issued on 11<sup>th</sup> October 2023 and found that the same stated in part:

“...pending hearing and determination of the application herein, a garnishee nisi is issued barring the garnishee from releasing/ authorizing any withdrawals/transfers/payments of funds out of account number 1208962558 held in the judgment debtor's name...”.

The said order did not specify the amount to be locked. The interim garnishee nisi herein was issued on December 11, 2023, two months after the small claims order was issued. This order is still enforceable even though the 1<sup>st</sup> garnishee indicated availability of a net amount of Kshs. 179,014.35/=.

15. In my view, the order of the small claims court takes precedence given that it came first in time and it bars all transactions on the said account. The order has not been reviewed, discharged or set aside. Orders of the court are solemn and are not issued in vain. In the case of *B. v. Attorney General* [2004] 1 KLR 431 that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

16. On the appellant's argument that there is a pending review application before the trial court, I have taken the liberty of perusing CMCC No. 75 of 2020 proceedings. I have found that at the time of writing this ruling, the review application was determined in favour of the respondent/applicant *vide* ruling dated January 16, 2024. Therefore, the proceedings herein need not be deferred any longer.
17. Therefore, I find that the application lacks merit and is hereby struck out with no order as to costs.
18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**



**JUDGE**

.....for the Respondent/Applicant

.....for the Appellant

.....for the 2<sup>nd</sup> Garnishee

