



Ngigi t/a Ngaywa Ngigi & Kibet Advocates v Xplico Insurance Company Limited; National Bank of Kenya Limited (Garnishee) (Miscellaneous Civil Application 42 of 2019) [2024] KEHC 5412 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CIVIL APPLICATION 42 OF 2019**

**F GIKONYO, J
APRIL 29, 2024**

BETWEEN

**JOSEPH N NGIGI T/A NGAYWA NGIGI & KIBET
ADVOCATES DECREE HOLDER**

AND

XPLICO INSURANCE COMPANY LIMITED RESPONDENT

AND

NATIONAL BANK OF KENYA LIMITED GARNISHEE

RULING

1. The Notice of Motion dated 28/11/2023 and filed on 30/11/2023 is seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased to recall, review, vary, vacate, and/or set aside the decree issued on 02/11/2020 and the consequent warrants of attachment and sale issued on 16/10/2023 together with all other consequential orders and proceedings thereon for being invalid and bad in law.
 4. That this honourable court be pleased to issue an order that the auctioneers' costs, if any, and any other associated costs in the illegal proclamation and execution of the decree issued on 02/11/2020 be borne by the decree-holder.
 5. That costs of this application be provided for.



2. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Chrispus N Maithya on 28/11/2023. The application is premised on sections 1A, 1B & 3A of the Civil Procedure Act, Order 22 Rule 18, and Order 51 of the Civil Procedure Rules, Rule 12 of the Auctioneer Rules, 1997, Article 159(2) of the Constitution.
3. The applicant's case is that by warrants of attachment and sale of movable property issued on 16/10/2023 and served upon the bank on 22/11/2023, the decree-holder has instructed Mr. Harrison Kihara t/a Messrs. Hariki auctioneers to attach and sell movable assets of the judgment debtor and the bank jointly and severally in the execution of decree for money, being the sum of Kshs. 414, 858.
4. The warrants of attachment and sale in execution of the decree of the court dated 02/11/2020 are fatally defective, invalid, and bad in law as the same was issued contrary to the provisions of Order 22 Rule 18 of the Civil Procedure Rules, 2010. By the said provision, the decree-holder was obligated to issue notice upon the bank to show cause why the decree dated 02/11/2020 should not be executed against the bank noting that the application for execution is made more than one year after the date of the decree. The decree-holder has not served the bank with such notice.
5. The garnishee bank was never served with any garnishee nisi together with the motion application. Consequently, the garnishee order absolute was obtained illegally and without regard to procedure.
6. In the premises, the garnishee bank is desirous of defending the garnishee proceedings as it has a plausible defense. However, the garnishee is not able to prepare a draft response as no pleading has been served.
7. On 14/01/2022 garnishee Bank terminated the bank-customer relationship that previously existed between the bank and the judgment debtor by way of a 30 days notice which expired on 14/02/2022.
8. Consequently, the bank cannot constitute a garnishee for purposes of the execution proceedings herein.
9. The bank is now faced with the threat of execution to satisfy debts owed by the defendant judgment debtor. Yet, the garnishee is by law not able to nor required to satisfy any decree when it holds no money or account belonging to the judgment debtor.
10. That, unless the orders sought in the motion application, are granted, the bank will stand to suffer irreparable loss as the decree holder moves to execute the decree issued on 02/11/2020 together with the warrants of attachment of movable property issued on 16/10/2023.
11. It is therefore in the interest of justice that the prayers sought in the application be granted.

Respondent/decree holder's response.

12. The respondent/decree holder opposed the application *vide* replying affidavit sworn by Joseph Ngigi on 14/12/2023 and filed in court on 15/12/2023.
13. The respondent/decree holder contends that he obtained a judgment against the judgment debtor on 02/11/2020 but the judgment debtor failed, neglected, and or refused to settle the decretal sum.
14. Approximately 5 months after obtaining the decree, the decree-holder commenced the execution by way of garnishee proceedings as provided under Order 23 Rules 1 and 2 of the Civil Procedure Rules, 2010.



15. *vide* the notice of motion application dated 30/03/2021, the decree-holder moved the court seeking garnishee orders attaching the judgment debtor's funds in the accounts held by the garnishee/applicant herein.
16. The decree-holder was issued with the garnishee order nisi on 31/03/2021, which orders were served and received by the applicant herein on 31/03/2021.
17. At the time of service of the garnishee order nisi on 31/03/2021, the garnished account no. 01037xxxxx510 had an available balance of Kshs. 585,163.45.
18. The applicant filed a replying affidavit sworn by Richard Orora the applicant's bank manager on 21/05/2021.
19. The court upon hearing all the parties, delivered a ruling on 20/09/2021 making the order issued absolute thus compelling the applicant herein to pay the decretal sum.
20. The 1st respondent averred that the applicant was on 31/03/2021 served with the garnishee order nisi together with notice of motion application dated 30/03/2021 and the said documents were duly received as evidenced by the applicant's official stamp thereon.
21. execution of the decree passed on 02/11/2020 was commenced after 5 months by way of garnishee proceedings as provided under Order 23 Rules 1 and 2 of the *Civil Procedure Rules*, 2010.
22. The relationship between the applicant and the 2nd respondent was still subsisting as of 20/09/2021 when the court made the garnishee absolute and ordered them to satisfy the decretal sum and therefore the allegation that the applicant does not constitute a garnishee for execution is misleading.
23. The applicant herein did not move the court for either review and /or appeal against the ruling delivered on 20/09/2021.
24. After the applicant herein failed to pay, the decree-holder instructed M/S Nextgen auctioneers to commence the execution of the garnishee orders absolute to recover the decretal sum.
25. In May 2022, M/S Nextgen auctioneers in a bid to execute the orders of 20/09/2021, issued a proclamation notice upon the applicant herein.
26. Later M/S Nextgen auctioneers returned the warrants of attachment and sale unexecuted thereby necessitating re-issuance to M/S Hariki auctioneers.
27. On 16/10/2023 warrants of attachment and sale of movable assets belonging to the 2nd respondent and the applicant, jointly and severally, were re-issued to M/S Hariki auctioneers.
28. The garnishee was on 22/11/2023 issued with a proclamation notice and 7 days notification in compliance with rule 12 of the *Auctioneers Rules*, 1997.
29. The decree-holder averred that the warrants of attachment and sale of movable property issued to M/S Hariki auctioneers on 16/10/2023 are valid as the execution proceedings of the decree were commenced before the lapse of 1 year period by way of garnishee proceedings.
30. Despite having sufficient funds, the applicant failed and or ignored to attach the decretal amount from the garnished account contrary to the orders of the court.
31. The applicant herein has never appealed on the garnishee order made absolute 20/09/2021.



32. As a result of the garnishee/applicant's failure to adhere to lawful orders of this court that necessitated instructing of auctioneers and any costs associated should therefore be borne by the garnishee/applicant.
33. That allowing this application will prejudice the decree-holder who has rightfully acquired its judgment and who stands at a risk of being kept from enjoying its fruits for an indefinite period.
34. The decree-holder averred that it is in the interest of justice that the applicant's application be dismissed with costs.

Of supplementary affidavit

35. The decree-holder filed a supplementary affidavit sworn by Harrison Kihara Ngunjiri on 14/12/2023.
36. He averred that on 16/10/2023, he received instructions from M/S Joe Ngigu & Company Advocates LLP to proceed with the execution.
37. On 22/11/2023 he issued a proclamation of attachment of the applicant's movable property as per the schedule therein upon the applicant in compliance with rule 12 of the *Auctioneer's Rules*, 1997.
38. The warrants of attachment and sale of movable assets issued together with the proclamation were done lawfully contrary to the allegations made in the instant application.

Of further affidavit

39. The garnishee/applicant filed a further affidavit sworn by Chrispus N. Maithya on 05/02/2024.
40. The deponent averred that consequent to the court's ruling on 20/09/2021, on 14/01/2022 the garnishee bank terminated the bank-customer relationship that previously existed between the bank and the judgment debtor by way of a 30-day notice which expired on 14.02.2022. no decree had been executed until May 2022, whereupon M/S Nextgen auctioneers took out warrants of attachment. This was approximately 8 months after the ruling and at that time, the bank-customer relationship had been terminated.
41. The consequence of terminating the relationship that previously existed between the bank and the judgment debtor by way of a 30 days' notice which expired on 14/02/2022 was that the bank held no funds to the credit of the judgment debtor capable of satisfying the decretal sum. Therefore the bank cannot constitute a garnishee for purposes of the execution proceedings herein. Further, the bank is now faced with the threat of execution to satisfy debts owed by the defendant judgment-debtor. Yet, the garnishee is by law not able to nor required to satisfy any decree when it holds no money or account belonging to the judgment debtor.
42. On 08/12/2023 the commissioner of insurance *vide* a public notice placed the judgment debtor under statutory management under section 67(c 0, (2),(i) of the *Insurance Act*. Thereafter, a moratorium was issued by the policy compensation fund under section 67(c), (10) of the *Insurance Act*.
43. In the foregoing circumstances, the application by the garnishee bank does not interfere with the judgment and or decree in favour of the decree-holder. The decree-holder will still hold his decree and will be able to pursue the judgment debtor for recovery of the decretal amount.
44. Unless the orders sought in the motion are granted, the bank will stand to suffer irreparable loss as the decree-holder moves to execute the decree issued on 02/11/2020 together with the warrants of attachment of movable property issued on 16/10/2023.



Directions of the court.

45. The application was canvassed by way of written submissions. The garnishee has filed. The 1st respondent and the 2nd respondent have not filed.

Garnishee submissions

46. The garnishee submitted that at the time m/s nextgen auctioneers took out warrants of attachment the bank customer relationship had been terminated. any accounts that were held to the credit of the judgment debtor stood closed upon the termination of the relationship between the judgment debtor and the garnishee bank. Under no circumstances should the garnishee bank be compelled to pay any monies for in any event it has no money held to the credit of the judgment debtor. It is legally erroneous to transfer explico's debt to the garnishee bank. The garnishee relied on the cases of *Barclays Bank Of Kenya Ltd v Kepha Nyabara & 191 Others & Another* [2013] eKLR, *Maurice M. Munya & 148 Others (Suing On Their Own Behalf And On Behalf Of The Other Members Of Beneficiaries Of The Kenya Ports Authority Pension Scheme v CFC Stanbic Bank Limited (Formerly Stanbic Bank Of Kenya Limited)* [2019] eKLR
47. The garnishee submitted that warrants of attachment of movable property in execution of the decree for money issued to Hariki auctioneers are erroneous for they indicate Explico Insurance Co. Ltd and the National Bank of Kenya as judgment debtors. To that extent, the said warrants are invalid and should be set aside.

Analysis And Determination

48. This court has considered the application, grounds thereof, supporting affidavit, and annexures. this court has also considered the replying affidavit sworn on 14/12/2023, the supplementary affidavit sworn on 14/12/2023, the further affidavit sworn on 05/02/2024, and the garnishee's written submissions.

Issues

49. The issue for determination is

i. Whether Garnishee herein is liable to satisfy the Garnishee absolute where the Garnishee judgment debtor relationship has been terminated.

50. In this application, the Garnishee /applicant seeks to set aside the ex-parte proceedings taken as well as the Garnishee order absolute issued against it. It is their case that they were not served with the proceedings for the garnishee application. They further state that they have a defense on merits with a triable case and ought to have their day in court. The reason given for the applicant's failure to respond to the garnishee proceedings is that they were not served.
51. Order 23 Rule 1 of the *Civil Procedure Rules*, 2010 on attachment of debts provides that:

“1 (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. Third, the above rule contemplates the existence of a decree for the amount claimed. Generally, Garnishee proceedings is done in two different stages.

52. Thus there are two stages involved in Garnishee proceedings. The first stage is for the garnishee order nisi to issue *ex parte* upon receipt of an application by the decree holder while the second stage is for the garnishee order absolute. At the first stage, the judgment creditor makes an application *ex parte* to the Court that the judgment debt in the hands of the third party, the Garnishee, be paid directly to the judgment creditor unless there is an explanation from the Garnishee why the order nisi should not be made absolute.
53. If the judgment creditor satisfies the Court on the existence of the Garnishee who is holding money due to the judgment debtor, such third party (Garnishee) will be called upon to show cause why the judgment debtor's money in its hands should not be paid over to the judgment creditor. If the Court is satisfied that the judgment creditor is entitled to attach the debt, the Court will make a garnishee order nisi attaching the debt.
54. The essence of the order nisi is to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the judgment debtor. It is a requirement that a copy of the order nisi must be served on the Garnishee and judgment Debtor at least 7 days before the adjourned date for hearing.
55. The second stage is for the garnishee order absolute, where on the adjourned date, the Garnishee fails to attend court or show good cause why the order nisi attaching the debt should not be made absolute, the Court may, subject to certain limitations make the garnishee order absolute.
56. The Garnishee, where necessary also has an option of disputing liability to pay the debt. The primary object of a garnishee order is to make the debt due by the debtor of the judgment debtor available to the decree-holder in execution without driving him to the suit.
57. This court has perused the court record and observed that the decree holder/1st respondent obtained the *ex parte* Garnishee Order Nisi which was issued on 31/03/2021. The Garnishee Order Nisi issued by the court in paragraph b(b) specifically provided that the Garnishee does appear before the court on 19/04/2021 to show cause why it should not pay a sum of Kshs. 274, 900 plus costs of the garnishee proceedings from one or more of the judgment debtor's accounts cited to the decree-holder/ 1st respondent.
58. The garnishee/applicant *vide* replying affidavit sworn by Richard Orora on 21/05/2021 raised two pertinent depositions; i) that some of the stated accounts have no funds; and ii) the only monies held in the accounts are subject of garnishee orders issued earlier to equally deserving parties. The garnishee further deponed that the garnishee is a stranger to account number 020xxx0290 as the same is not owned by the judgment debtor and account numbers 01103xxxxx35502 and 01103xxxxx35504 are non-existent or in the name of the judgment debtor or at all.
59. The garnishee in its supplementary affidavit attached a schedule of payment showing who, when, and how they have paid. He acknowledged that account numbers 01103xxxxx35511, 01103xxxxx35510, 01103xxxxx35508, and 011037xxxxx5501 were in JD's name at the bank's Westlands branch and had ledger balances of kshs. 213,763/=, kshs. 53,615.53/=, Kshs.10,974.45/= and kshs. 308,491.50/= respectively s at the time of service of the garnishee order nisi.



60. The garnishee however deposed that bank account number 011037xxxxx511 was attached by an application for garnishee dated 9th December 2020 filed in Mombasa RMCC NO. 1899 of 2019-Abdall Mohammed Ali vs Explico Insurance Company Limited – attaching a sum of kshs. 1,833,617.49/=. The parties entered into a consent in the said Mombasa RMCC NO. 1899 OF 2019 for settlement of the application for garnishee by release of the funds held in the account for partial settlement of the decree therein. Therefore the bank will no longer be holding funds to the credit of the judgment debtor in the bank account no. 01037xxxxx5511.
61. The garnishee stated that it was holding a total of kshs. 373,081.48/= to the credit of the judgment debtor in account number 01037xxxxx5511 and 0103xxxxx5510. However, the judgment debtor filed a similar application for garnishee dated 30/03/2021 in Kiambu hc misc. appl. No. 98 of 2020 Joel Ngigi v Explico Insurance Company Limited against the same judgment debtor attaching the same bank accounts which have been attached in this suit.
62. That the total sums held by the bank to the credit judgment debtor in the bank accounts 0110xxxxx510 and 01103xxxxx5508 is kshs. 64,589.98. therefore, an order garnishee absolute can only be made in terms of kshs. 64,589.98/=.
63. *vide* a ruling delivered on 20/09/2021, this court observed that at the time the decree nisi issued herein was served upon the garnishee there was no any other garnishee order upon the moneys in issue. The consent in Mombasa RMCC 1899 of 2019 is dated 17/05/2021 therefore there was no garnishee order which existed before the one issued herein. Further the claim by the garnishee that there were earlier garnishee orders upon the accounts herein was not supported by any documents. This court found that at the time of the issuance and service of the garnishee order nisi, the funds in the accounts stated were available for attachment through garnishee orders herein.
64. It is not true that the garnishee was not served or did not participate in the garnishee proceedings. The garnishee participated but failed to challenge the garnishee order nisi.
65. In the case of *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* [2020] eKLR the Court stated as follows:
- “Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment creditor only makes allegations of the garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has to produce strong, sufficient, and convincing evidence that the funds in its hands or the debt is not due or payable”
66. The garnishee had the burden of proving the judgment Debtor’s account held with them lacked enough funds to satisfy the garnishee absolute. the garnishee failed to discharge this burden.

Conclusions

67. The garnishee has not been honest in its averments in court or in its dealing with the orders of this court. The explanations given by the garnishee are contrived to mislead the court or achieve an otherwise ominous object; not to vindicate the law or satisfy the decree herein. The applicant has not come to court with clean hands. The court of equity would ordinarily fold its hands and say to such suitor; ‘Sorry, you cannot benefit from own wrong’; and will leave you where it found you.
68. Ultimately:



- i. The garnishee's application dated 28/11/2023 is dismissed.
- ii. The costs of the Application shall be borne by the Garnishee.

69. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION,
THIS 29TH DAY OF APRIL, 2024.**

.....

HON. F. GIKONYO M.

JUDGE

In the Presence of:-

Kariuki for Applicant

Kering for Respondent

Mr. Otolu - C/A

