



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLN NO. E1103 OF 2020

BETWEEN

STEPHENS KITHI NGOMBO

T/A STEVE KITHI & CO ADVOCATES.....1ST APPLICANT

PROPKEN (MAURITIUS) LIMITED.....2ND APPLICANT

AND

CHINA WU YI (KENYA) COMPANY LIMITED..... RESPONDENT

AND

STANDARD CHARTERED BANK KENYA LIMITED..... GARNISHEE

R U L I N G

1. There are two Preliminary Objections before me for determination; one dated 17/11/2020 filed by the respondent and the other dated 19/11/2020 by the applicants. The court directed that the two be canvassed by way of written submissions.
2. The background to the dispute is that vide *Mombasa Civil Suit No. 89 of 2019*, the applicants obtained judgment against the respondent for Kshs. 1,017,120,831/-. As at 31/8/2020 the respondent had not satisfied the decretal sum then standing at Kshs.2,577,597,458/-. Pursuant thereto, the applicants took out this miscellaneous application by way of an undated Motion on Notice filed sometimes in September, 2020 and sought to garnishee the respondent's account with the Garnishee.
3. The respondent opposed the said Motion vide the replying affidavit of **Zicheng Luo** sworn on 3/11/2020 together with the preliminary objection dated 17/11/2020. The respondent contended that under *Order 22 Rules 5 and Order 23 Rule 9 of the Rules*, this court lacks jurisdiction to entertain the application. That this is not the court that passed the decree that is sought to be enforced. In any event, there was no certificate from the court that passed the decree setting forth that satisfaction of the decree had not been obtained by execution within the jurisdiction of that court.
4. The applicants responded to the replying affidavit vide a lengthy Further Affidavit of **Stephens Kithi Ngombo** sworn on 9/11/2020. They contended that the respondent had not responded to the main issue which was, that the applicants hold a decree against it which was yet to be satisfied.
5. Together with the aforesaid further affidavit, the applicants filed a notice of preliminary objection dated 19/9/2020 contending that the respondent's Advocates were in breach of *Rule 9 of the Advocates Practice Rules* in so far as the replying affidavit was signed by **John K Wambugu** in purported compliance with *section 33 of the Advocates Act*.
6. I have considered the record and the preliminary objections. In *Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013*, the Supreme Court of Kenya reiterated the principle in *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696*, to the effect that: -

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.

7. The Respondent has challenged the jurisdiction of the court on the basis that the Garnishee proceedings ought to have been filed in Mombasa where the judgment and decree was issued. On the other hand, the applicants contend that this court is of similar and concurrent jurisdiction to the court in Mombasa and that it is convenient that the said application be heard and determined before this court.

8. **Order 22 Rules 4,5 and 6 of the Rules of the Civil Procedure Rules** provides:-

“4) The court sending a decree for execution by another court shall send—

a) a copy of the decree;

b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and

c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

5) The court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the court, for any special reasons to be recorded under the hand of the judge, requires such proof.

6) Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

9. In my view, the meaning to be given to the foregoing **Rules** is that a decree is first to be executed by the court that passes the decree. A decree-holder can only apply to the court that passed the decree for execution unless the said court desires that the same be executed by another court. This has the meaning that the option of having the decree executed by another court other than the one that issued it, lies with the court that passed it and not the decree-holder.

10. In this regard, there is no room whatsoever for any execution to be proceeded with in any other file other than the suit file itself. That is for good reason. The proceedings are supposed to be undertaken in the same file for the totality of the case to be understood. It will be highly irregular to open multiple files in respect of one suit for purposes of execution. It will be difficult for the court to understand the position of the matter.

11. In the present case, there are multiple allegations to the effect that; a similar garnishee application was dismissed by the Mombasa court, that there are applications pending in the main suit, that there are injunction or stay orders in force. This court cannot verify the same without having the record itself.

12. While I agree with the applicants that this court’s jurisdiction cannot be ousted on geographical or territorial grounds, the parties have already submitted themselves to the territorial jurisdiction of the Mombasa court. That is where they belong. I disagree with the applicants’ contention that this court’s competence is to be borne by the fact that the respondent’s account is branched in Nairobi.

13. For avoidance of doubt, this court’s jurisdiction is ousted for the reason that the applicants were mandatorily required by the provisions of **Order 22 Rule 6 of the Rules** to apply for execution in the court that passed the decree.

14. In view of the foregoing, I find that it was an abuse of the process of the court for the applicants to have lodged the present application before this court. The Mombasa court had the jurisdiction to entertain the application even though the Garnishee and the subject account is in Nairobi.

15. Accordingly, I find the preliminary objection by the respondent to be meritorious and I allow the same. I need not determine the objection by the applicants as it is of no consequence since the proceedings herein are bad in law. I strike out the Motion with costs to the respondents and order the file to be closed.

DATED and DELIVERED virtually this 18th day of February, 2021.

A. MABEYA, FCIArb

JUDGE