



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 474 OF 2007 (OS)

IN THE MATTER OF SALE OF LAND REFERENCE NUMBER 15502, KWALE DISTRICT

AND

IN THE MATTER OF THE ADVOCATES ACT (CAP 16 LAWS OF KENYA) AND THE SUCCESSION ACT (CAP 160 LAWS OF KENYA)

AND

IN THE MATTER OF AN APPLICATION FOR PAYMENT OF MONEY IN THE HANDS OF AN ADVOCATE

BETWEEN

ORIENTAL COMMERCIAL BANK LIMITED

(Formerly THE DELPHIS BANK LTD).....PLAINTIFF

VERSUS

1. PRADEEP IAN MAKHECHA sued as the

Administrator of the Estate of Hasmukh

Pranjivan Makhecha T/A MAKHECHA &

COMPANY ADVOCATES.....1ST DEFENDANT

2. MAKHECHA & COMPANY.....2ND DEFENDANT

3. CENTRAL BANK OF KENYA.....GARNISHEE

R U L I N G

1. This ruling is on the Motion before me is dated 22/6/2020. It was brought under ***Order 23 Rules 1, 2, and 9 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.***

2. The application sought that the garnishee order nisi made herein on 25/6/2020 be made absolute directing the Garnishee to pay the plaintiff/decree holder a sum of Kshs. 10,106,828/45 within 7 days of the order.

3. The grounds upon which the application was made was set out in the body of the Motion and in the supporting affidavit of **Wilfred Machini** sworn on 22/6/2020.

4. It was the plaintiff's contention that it had obtained a judgment against the 2nd defendant on 12/6/2021 for Kshs. 6,107,132/80 together with costs of Kshs. 335,417/=. That the said amount had escalated to Kshs. 10,106,829/48 due to interest.

5. It was further contended that the plaintiff had learnt that the Garnishee had been directed to pay the 2nd defendant Kshs.40 million in **HC Misc Appln. No. 296 of 2012 Makhecha & Company vs. Central Bank of Kenya**. That the plaintiff was unaware of any other assets of the defendants that may be available to settle its claim.
6. The application was supported by the 1st defendant vide his replying affidavit sworn on 20/7/2020. He contended that the 1st defendant had been wrongly enjoined in these proceedings the estate of the deceased having executed a Transfer of Management Agreement dated 13th August, 2006 with **Mr. Wambugu Gitonga**, Advocate who took over the management of **Makhecha & Company, Advocates**.
7. That the said advocate had over the years been taxing bills of costs in his favour in respect of fees due to **Makhecha & Company, Advocates**. That since he had pursued costs and had been awarded the same in **Misc. Appln No. 296 of 2012** involving the Garnishee, the application was well founded.
8. The Garnishee opposed the application vide the replying affidavit of **Kennedy Abuga** sworn on 17/7/2020. It was averred that; the Garnishee had already paid the principal sum of Kshs. 23,772,981/90 to the 2nd defendant and the balance being an element of interest, had been appealed against to the Court of Appeal. That if the order is made and the appeal succeeds, the same will be rendered nugatory.
9. **Wambugu Gitonga, Advocate** swore two affidavits on 15/7/2020 and 24/7/2020, respectively. He contended that he was not a party to the proceedings but he had been adversely mentioned by the 1st defendant. That the firm of **Makhecha & Company** had been wound up. He had purchased the assets of the said firm excluding its liabilities. That the sum of Kshs. 6,107,132/80 was a liability incurred prior to the demise of the deceased proprietor of the defunct Law Firm.
10. That in any event, the judgment against the said Law Firm was set aside on 4/4/2019 and there being no judgment in force, the proceedings are pre-mature. That he had since been absolved from the liabilities of **Makhecha & Company** by a ruling made on 25/3/2019 in **HCCC No. 1515 of 2006**.
11. I have considered the depositions and the submissions on record. This is an application to make the Garnishee order Nisi absolute. There are two issues that arise for consideration. Firstly, were there any monies due from the Garnishee to the 2nd defendant that is capable of being garnisheed and secondly, whether the monies due to the 2nd defendant available to be garnisheed under the judgment of this Court.
12. The Garnishee supported by **Wambugu Gitonga Advocate**, contended that the monies due from the Garnishee was in respect of interest on the principal sum that had already been paid. That the Garnishee had since appealed to the Court of Appeal against the order to pay interest. That if the said sum is garnisheed the appeal will be rendered nugatory.
13. I have seen the ruling of Majanja J in **HC. Misc. Appln. No. 296 of 2012**. It was in respect of a claim by **Makhecha & Company**, the 2nd defendant against the Garnishee. It was lodged in 2012. The court held in favour of the 2nd defendant. It is interest of 12% per annum on Kshs. 23,772,981/90 from 15/5/2015 until payment in full. Therefore, the sum must by now be in excess of Kshs. 15 million and capable of settling the plaintiff's claim herein.
14. On the alleged pending appeal being rendered nugatory. The answer thereto is short and clear. I have always known that an appeal does not operate as a stay of execution of any order. Until set aside, that debt is due from the Garnishee to the 2nd defendant. There is no in force any stay order against the said ruling. **Majanja, J** having determined the Garnishees liability to the 2nd defendant in respect of the said sum; the same still stands.
15. **Mr. Wambugu Gitonga** contended that the judgment against the 2nd defendant was set aside and that these proceedings are therefore untenable. That since the 2nd defendant cannot exist independent of its sole proprietor, who died in or about September, 2006, no orders against the 2nd defendant can subsist.
16. It is not disputed that **Mr. Wambugu Gitonga** did purchase the assets of the 2nd defendant in 2007 from the 1st defendant. The purchase did not include the liabilities of the 2nd defendant. He produced evidence to show that he had been exonerated from settling the liabilities of the 2nd defendant in HC P&A 1515 of 2006 on 25/3/2019.
17. I have seen the Judgment of this Court made on 12/6/2015 by Ogola J. The Court observed that although **Mr. Wambugu Gitonga as Makhecha & Gitonga Advocates** entered appearance for the 2nd defendant, no affidavit in opposition was filed against the averments of the plaintiff as to the liability of the 2nd defendant. As a result, the judgment was entered against the defendants jointly and severally. In this regard, the liability of the 2nd defendant to settle that judgment cannot be second guessed.
18. There is no evidence that that judgment was ever appealed against or that **Mr. Wambugu** ever challenged the same on the basis that the 2nd defendant had been wound up and never existed. He cannot now purport to raise those issues here.
19. Further, the matter in respect of which the order of Garnishee order is sought seems to have arisen way before 2001. The aforesaid **HC. Misc. Appln. No. 296 of 2012** was lodged and prosecuted in the name of the 2nd defendant. How was that possible if the 2nd defendant did not exist as Mr. Wambugu contends. One cannot approbate and reprobate at the same time. The 2nd defendant either does exist or it does not. Since it seems that it existed for the purposes of **HC. Misc. Appln. No. 296 of 2012** in respect of which the order absolute is being sought, it will definitely exist for the purposes of executing the same as the orders made in those proceedings were in its favour.
20. **Order 23(1) of the Civil Procedure Rules** 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 ... 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 ...

...

(5) If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined”.

21. In the present case, I have found that there is a lawful order of this Court in **HC. Misc. Appln. No. 296 of 2012** that the garnishee owes the 2nd defendant interest on the sum of Kshs. 23,772,981/90 from 15/3/2012 until the date of payment. I have found that the said amount is in excess of the amount of the decree herein. I have also found that to the extent that there is no order of stay of execution in the said **HC. Misc. Appln. No. 296 of 2012**, the debt is due from the Garnishee to the 2nd defendant.

22. I am alive to the fact that an order under **Order 23** is discretionary and that the said discretion, like in all other discretions, must be exercised judiciously. In **Martin Mwangi Ndirangu v. Invesco Assurance Co Ltd [2020] Eklr**, it was held: -

“The order contemplated by Order 23 is discretionary and the court may refuse to pass such order if it is inequitable. The discretion, however, must be exercised judicially. Where the court finds that there is bona fide dispute against the claim and the dispute is not false or frivolous, it should not take action under this rule”.

23. The Garnishee urged the court to apply the foregoing holding in this case. While I am alive to the fact that the Garnishee has disputed liability by preferring an appeal to the Court of Appeal, that cannot be said to be a *bona fide* dispute. A Court order is lawful until set aside. Since the same has not been stayed or set aside, I refuse to accede to the invitation.

24. In view of the foregoing, I find the application dated 22/6/2020 to be meritorious and I allow the same as prayed in prayer nos. 2 and 3 of the Motion.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2021.

A. MABEYA, FCI Arb

JUDGE