



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO. 93 OF 2011**

**IN THE MATTER OF: PARCEL OF LAND NOS. MN/1/13483; MN/1/15351 AND MN/1/15275**

**AND**

**IN THE MATTER OF: BANK ACCOUNT NUMBERS SV 1520400816 & TD 15267000443—**

**FINA BANK, MOMBASA, NKRUMAH ROAD BRANCH.**

**AND**

**IN THE MATTER OF: THE ANTI CORRUPTION & ECONOMIC CRIMES ACT NO. 3 OF 2003**

**BETWEEN**

**KENYA ANTI-CORRUPTION COMMISSION.....DECREE HOLDER/APPLICANT**

**VERSUS**

**JAMES MWATHETHE MULEWA.....1<sup>ST</sup> JUDGMENT DEBTOR/RESPONDENT**

**SHARKAT COMPANY LIMITED.....2<sup>ND</sup> JUDGMENT DEBTORS/RESPONDENT**

**GUARANTY BANK (KENYA) LIMITED.....3<sup>RD</sup> RESPONDENT**

**OLABOYO VERACRUZ..... 4<sup>TH</sup> RESPONDENT**

**ANGELA CHEPKEMOI KOECH.....5<sup>TH</sup> RESPONDENT**

**SAIDA A.AL-AFIF.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling disposes application dated 30/7/2020 brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law.

2. The Applicant prays for the following orders: -

*a) That this honourable court be pleased to issue an order for the 3<sup>rd</sup> Respondent to release to court the sum of Kshs. 3,391.89 cts held in the 1<sup>st</sup> Judgment Debtor's account No. 0215/001/5002/000 and Kshs. 19,756,906.49 cts held in the 1<sup>st</sup> judgment Debtor's term deposit account reference number 0215/0117452/001/5212/017 both accounts held with the 3<sup>rd</sup> Respondent forthwith.*

*b) That costs of this application be in the cause.*

3. The application is premised on the grounds set out thereon and is supported by Affidavit sworn on 15/12/2020 by the 3<sup>rd</sup> Respondent's Legal Officer **Josephine Wanjiru Gachuru**. The deponent thereto avers that pursuant to the judgment delivered by the court on 18/9/2017, the decree holder made a formal application dated 23/1/2019 *inter alia* seeking that a notice to show cause do issue against the 4<sup>th</sup> -6<sup>th</sup> Respondents as to why the decree should not be executed against them, and an order to compel them to release the funds held in the 1<sup>st</sup> Judgment Debtor's account held with the 3<sup>rd</sup> Respondent.

4. It is averred that the application dated 23/1/2019 was dismissed for want of procedure provided under Order 22 Rule 18 of the Civil Procedure Rules. Therefore, despite numerous demands from the Decree holder, the 3<sup>rd</sup> Respondent is unable to release the sums held in the 1<sup>st</sup> Judgment debtors account since there is no court order directing the said sums be released to the Decree Holder.

5. It is the Applicant's case that its relationship with the 1<sup>st</sup> Judgment debtor is purely a bank-customer relationship and therefore, it does not wish to be caught up in the execution proceedings. Consequently, the 3<sup>rd</sup> Respondent deems it fit for the sums in its custody to be released to court forthwith so that the Court can make a determination on whether or not the sums should be released to the Decree Holder.

### **The Response**

6. The motion is opposed by the Decree Holder/Respondent vide Notice of Preliminary Objection and Grounds of Opposition both dated 7/9/2020 as follows:

*a) That the application is misguided, misconceived, and legally untenable.*

*b) That the application is fatally incompetent and incurably defective in light of paragraph 14 and 15 of the Ruling delivered by the Court on 16/10/2019.*

*c) That the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents lack locus standi to file and/or prosecute the application dated 30/7/2020.*

*d) That the application as filed contravenes the express provisions of Section 1A, 1B, 3A 28, 34(1) and 38 (a) of the Civil Procedure Act, Order 22 rule 1(1) (b) of the Civil Procedure Rules 2010.*

*e) That the Application is an afterthought and an utter abuse of the Court process intended to derail the expeditious part settlement of Decree by the Decree Holder.*

### **Submissions**

7. The Applicant filed submissions on 23/10/2020, the 1<sup>st</sup> Judgment Debtor's submission were filed on 22/10/2020 while the Decree Holder filed submissions on 19/10/2020.

### **Determination**

8. I have considered the issues raised by the parties to this application. The issues for determination are:

*a) Whether the Applicant has the locus standi to file the present Application*

*b) Whether the Applicant is entitled to the reliefs sought.*

*(a) Whether the Applicant has the locus standi to file the present Application*

9. Learned counsel for the Applicant **Ms. Akonga** cited **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, where the Court of Appeal held that inherent jurisdiction of the Court may be not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties.

10. It is evident from the Applicant's submissions that it indeed concedes that this Court vide ruling delivered on 16/10/2019 stated that the 3<sup>rd</sup> to 6<sup>th</sup> Respondents were wrongfully enjoined. Nonetheless, the Applicant herein invokes the inherent powers of this Court by urging the Court to allow it to release the funds in its possession to the Court and once the Court receives the said funds, then appropriate orders will be made accordingly.

*(b) Whether the Applicant is entitled to the reliefs sought.*

11. In **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [supra]** the Court of Appeal had occasion to consider inherent jurisdiction and stated:

*“The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14 as follows;*

*“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” See also Meshallum Waweru Wanguku (supra)*

*This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.”*

12. The Applicant has come to Court seeking to be relieved from the yoke of litigation that involves the Decree Holder and the 1<sup>st</sup> Judgment debtor. The Applicant no longer wants to be in a state of anxiety and desires to have the funds release to Court so that the Court may deal with the same as it considers fit to do. This Court has inherent residual jurisdiction to make orders that may be necessary for the ends of Justice, and to enable the Court maintain its character as a court of Justice. I believe this is a proper case in which the Court should invoke its inherent powers since it is undesirable that the Applicant should be kept in perpetual anxiety, when clearly, the funds in the Applicant’s custody and control can be released to the Decree holder by this Court. The Court of Appeal in **Nicholas Mahihu v Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** held that the Court has the duty to ensure that its orders are at all times effective.

13. It is to be observed that the Judgment entered herein on 18/9/2017 for the Decree Holder has never been realized. It would therefore not be proper to order the Applicant to deposit in this Court money whose owner has been determined by this Court in the Judgment of 18/9/2017 which Judgment has not been overturned, and the execution of the same Judgment has not been stayed.

14. Accordingly, therefore, I order that the 3<sup>rd</sup> Respondent to forthwith release to the Decree Holder the sum of **Kshs. 3,391.89/=** held in the 1<sup>st</sup> Judgment Debtor’s account **No. 0215/001/5002/000** and **Kshs. 19,756,906.49/=** held in the 1<sup>st</sup> Judgment Debtor’s term deposit account reference number **0215/0117452/001/5212/017** both accounts held with the 3<sup>rd</sup> Respondent.

Each party to bear own costs herein.

**Dated, Signed, and Delivered at Mombasa this 27<sup>th</sup> day of April, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Makori for Applicant

Mr. Otieno holding brief Wameyo for 1<sup>st</sup> Respondent

Ms. Peris Court Assistant