



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 15 OF 2014**

**BETWEEN**

**THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA).....1<sup>ST</sup> PLAINTIFF/DECREE-HOLDER**

**MERCANTILE INSURANCE COMPANY LIMITED.....2<sup>ND</sup> PLAINTIFF/DECREE-HOLDER**

**AND**

**AKARIM AGENCIES COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT/DECREE-DEBTOR**

**AHMED SHEIKH ISSACK.....2<sup>ND</sup> DEFENDANT/DECREE-DEBTOR**

**IBRAHIM S.I KHANYARE.....3<sup>RD</sup> DEFENDANT/DECREE-DEBTOR**

**AND**

**EQUITY BANK LIMITED.....GARNISHEE**

**RULING**

**Introduction and Background**

1. The Plaintiffs/Decree-holders have filed the Notice of Motion dated 11<sup>th</sup> June 2021 seeking the following orders:

1. Spent\*

2. Spent\*

3. The Garnishee, Equity Bank Limited be directed, to within 7 days of an order of this Honourable Court furnish a full account of all monies held in favour of the Judgment Debtor sufficient to pay the sum of Kshs. 115,000,075 and USD 1,442,285.60 plus costs of Kshs. 5,779,751.00.

4. A Garnishee Order absolute be and is hereby issued directed to the Garnishee, Equity Bank Limited to release and/or remit to the Decree-Holders, the sum of Kshs. Kshs. 115,000,075 and USD 1,442,285.60 in favour of the Judgment Debtors in order to satisfy the Decree and Certificate of Costs dated 11<sup>th</sup> March 2021 of Kshs. 5,779,751 together with costs of this application.

5. An order do issue pursuant to **Order 22 Rule 8** of the **Civil Procedure Rules**, attaching the Judgment Debtor's moveable property in the form of shares disclosed in records of the Central Depository & Settlement Corporation (CDSC) and described as:

(a) Account number [...] in the name of Ibrahim Sheikh Issak of Identity Card number 0059698 which holds 15,000 shares in Mumias Sugar Company Limited; and

(b) Account number [...] in the name of Akarim Agencies Company Limited company number 49796 which holds 61,600 shares in Safaricom PLC.

6. Dyer & Blair Investment Bank be and is hereby directed to sale the following shares and thereafter transfer the amount realized to the 2<sup>nd</sup> Decree Holder.

(a) Account number [...] in the name of Ibrahim Sheikh Issak of Identity Card number 0059698 which holds 15,000 shares in Mumias Sugar Company Limited; and

(b) Account number [...] in the name of Akarim Agencies Company Limited company number 49796 which holds 61,600 shares in Safaricom PLC.

7. The Judgement Debtors do and are hereby directed to comply with the Order dated 14<sup>th</sup> March 2014 and provide the following information and/or documents:

(a) Disclose to the Court of the information and location of their assets to the value of Kshs. 350,000,000.00 within 7 days from date of the Order;

(b) Produce a list of all properties in their possession for attachment within 7 days from the date of the Order hereof together with any debts from any person lawfully due to them capable of being attached to satisfy the decree.

8. The 1<sup>st</sup> Judgement Debtor do and is hereby directed to account for the monies that it has received from its Aged Debtors List as at 30 June 2013 amounting to Kshs. 460,165,161.00 within 7 days from date of the Order

2. The application is supported by grounds set out on its face together with the supporting affidavit of Sarah Weru, a Senior Legal Officer of the 2<sup>nd</sup> Plaintiff, sworn on 11<sup>th</sup> June 2021. The Defendants have opposed the application through the replying affidavit of the 3<sup>rd</sup> Defendant sworn on 24<sup>th</sup> June 2021. The Garnishee has also responded to the application through the Replying Affidavit of Caroline Ndung'u, its Operations Manager, Harambee Avenue Branch, sworn on 22<sup>nd</sup> June 2021. The court directed that this application be canvassed by way of affidavit evidence.

3. The facts of this matter are common cause. By a sales agency agreement dated 30<sup>th</sup> March 1994, the 1<sup>st</sup> Plaintiff appointed the 1<sup>st</sup> Defendant as an agent to sell air tickets. Under the agreement, all the money collected by the 1<sup>st</sup> Defendant from ticket sales was to be held in trust for the 1<sup>st</sup> Plaintiff. In addition, the 1<sup>st</sup> Defendant was required to keep records and accounts together with supporting documents which were to be given to the 1<sup>st</sup> Plaintiff. On 20<sup>th</sup> January 2014, the Plaintiffs filed suit against the Defendants before the court seeking judgment against the Defendants jointly and severally for Kshs. 115,633,360.60 and US\$ 1,446,906.06; an order for accounts and inquiries to enable the Plaintiffs trace and recover the Defendants' assets and a permanent injunction to restrain the Defendants from dealing with their assets to the extent of the amount claimed. The Plaintiffs claimed that the 1<sup>st</sup> Defendant sold air tickets for the amount claimed but failed to account and remit the proceeds of sale and fraudulently diverted the same. The Defendants filed a defence denying the Plaintiffs' claim and filed a counterclaim against the Plaintiffs.

4. In the intervening period, the Plaintiffs had filed an application dated 17<sup>th</sup> January 2014 seeking an order for Accounts, arrest to provide security, delivery of documents and or records, preservation orders, a temporary injunction and freezing orders. By a ruling dated 11<sup>th</sup> March 2014, the court partly allowed the application and made orders for the tracing of the Defendants' assets; directing the Defendants to disclose to the court information and location of their assets to the value of Kshs. 350,000,000.00; a freezing order restraining the Defendants from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with their properties including any shares held in any company in accordance with the records of the CDSC, cash held in bank accounts in any bank and land owned by the Defendants, jointly or severally, within Kenya to the amount of Kshs. 350,000,000 which would be sufficient to satisfy any judgment that may be obtained against the Defendants. Further, the freezing order was to subsist until determination of the suit. The court declined the prayer for accounts and production of records of all transactions for sale of tickets and held that the same was to abide at trial.

5. The Defendants were aggrieved with this ruling of the court and filed an application seeking a stay of the court's orders pending hearing of the determination of the intended appeal in **Akarim Agencies Co. Limited & 2 Others v IATA and Mercantile Insurance Agencies NRB CA Civil Application No. 51 of 2014**. By a ruling dated 27<sup>th</sup> June 2014, the Court of Appeal allowed the Defendants' application for stay. The Court of Appeal heard and delivered Judgment in the main appeal on 25<sup>th</sup> November 2016 in **Akarim Agencies Co. Limited & 2 Others v IATA and Mercantile Insurance Agencies NRB CA Civil Appeal No. 106 of 2014**. The appellate court did not find any fault with the order of the court restraining the Defendants from selling, disposing or transferring their properties pending the hearing and determination of the suit. It set aside the order directing the Defendants to disclose assets and found that the 2<sup>nd</sup> Plaintiff, in its capacity as the insurer, had already settled the 1<sup>st</sup> Plaintiff's claim of Kshs 115,633,360.60 and USD 1,446,906.06.

6. The court resolved the main suit and delivered its judgment on 19<sup>th</sup> July 2019 where it held that the Plaintiffs had proved their case against the Defendants. It entered judgment for the Plaintiffs against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally for Kshs. 115,000,075.00 and USD 1,427,285.00 in addition to costs, which were taxed at Kshs. 5,779,751.00. The Defendants lodged an appeal; **Akarim Agencies Company Limited & 2 Others v International Air Transport Association (IATA) and Mercantile Insurance Company Limited NRB CA Civil Appeal No. 395 of 2019** which is still pending before the appellate court. With the above rendition and context, I now turn to the instant application.

## **Analysis and Determination**

7. From the prayers in the opening paragraph of this ruling, the application before the court is an application for execution of the judgment and decree of this court. Although the Defendants have mounted an appeal to the Court of Appeal, neither this court nor the appellate court has issued a stay of execution. Thus, the Defendants' argument that the court ought to allow the appeal to be heard and determined first has no basis in the absence of an order staying execution pending appeal.

#### **Furnishing of accounts by the Garnishee**

8. The Plaintiffs seek a prayer that the Garnishee be directed, to within 7 days of an order of this Court, to furnish a full account of all monies held in favour of the Defendants, sufficient to pay the sum of Kshs. 115,000,075 and USD 1,442,285.60 plus costs of Kshs. 5,779,751.00.

9. The object of Garnishee Proceedings is to enable a Decree-holder to reach a debt due to the Judgment-debtor from the Garnishee as may be sufficient to satisfy a decree. Garnishee proceedings are in their very nature proceedings where the garnishee is required to prove whether or not it is indebted to the Judgment-debtor. Ordinarily, the Decree-holder only makes allegations of the garnishee's indebtedness based on sound evidence whereupon the burden of proof shifts to the garnishee to prove otherwise. In order 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 (see *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* EMBU HC Misc. Civil App. No. 73 of 2018 [2020] eKLR and *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co. Ltd; Diamond Trust Bank Kenya Ltd (Garnishee)* MKS HC Misc. Civil App. No. 405 of 2017 [2020] eKLR).

10. The Garnishee has already stated in its deposition that the dollar A/C no.[...] and Kenya Shillings A/C No.[...] are in the name of the 1<sup>st</sup> Defendant and not the 1<sup>st</sup> Plaintiff and that said accounts have a balance of USD 350.57 and Kshs. 28,106.34, respectively, as at 15<sup>th</sup> June 2021. Indeed, I believe this was an error by the Plaintiffs capable of rectification and with no prejudice being occasioned upon the Defendants. The Garnishee further deponed that the 1<sup>st</sup> Defendant does not hold any other accounts with it and that the aforementioned accounts are not sufficient to fully satisfy the amount owed to the Plaintiffs.

11. The Garnishee has attached statements of account in support of this position of the balances in the said accounts held by the 1<sup>st</sup> Defendant. **Section 176** of the *Evidence Act* creates a presumption in favour of the Garnishee Bank as follows:

*176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.*

12. Since there are no other statements of accounts to dislodge this position by the Garnishee, I am satisfied that a full account has been provided by the Garnishee and as it stands, the balances held by the Garnishee are insufficient to satisfy the decree herein. It then follows that Prayers 3 and 4 of the Plaintiffs' application cannot be granted in light of the Garnishee's disclosure.

#### **Attachment and Sale of the Defendants' moveable property in the form of shares**

13. The Plaintiffs seeks to attach the Defendants' moveable property in the form of shares. While the Plaintiff has filed a Notice of Motion for that purpose, the proper manner of applying execution is provided for under **Order 22 rule 6** of the *Civil Procedure Rules* which provides as follows:

**[Order 22, rule 6.] Application for execution.**

*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: [Emphasis mine]*

14. The **Form No. 14** is the application setting out the details required under **Order 22 Rule 7(2)** to be provided by the Decree-holder in tabular form. Once the application has been made in the proper form has been filed, the Deputy Registrar exercising delegated authority under **Order 49 rule 7(1)(x)** issues a prohibitory order and thereafter settles the terms of sale under **Order 22 Rule 40** which states as follows:

**[Order 22, rule 40.] Attachment of share and other property not in possession of judgment-debtor,**

*40. (1) In the case of—*

*(a) a share in the capital of a corporation; or*

*(b) other movable property not in the possession of the judgment-debtor.*

*for the attachment of which specific provision is not made by these Rules the attachment shall be made by a written order prohibiting —*

*(i) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon; or*

*(ii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.*

15. I shall however disregard this procedural misstep as the Defendants are not prejudiced. In any case, they do not dispute that they own the subject shares whose ownership has in fact been confirmed by the letter dated 7<sup>th</sup> May 2021 from CDSC hence there is no reason why Prayers 5 and 6 of the application should not be granted.

#### **Compliance of the Court's orders dated 11<sup>th</sup> March 2014**

16. The Plaintiffs seeks an order that the Defendants comply with the order dated 11<sup>th</sup> March 2014 by disclosing to the Court information and location of their assets to the value of Kshs. 350,000,000.00 together with any debts from any person lawfully due to them capable of being attached to satisfy the decree.

17. The Court of Appeal in **Civil Appeal No. 106 of 2014** set aside the order of disclosure and following the final determination of the suit in the Plaintiffs' favour, the orders, being interim in nature, can only be deemed to have been discharged. Moreover, the court cannot compel the Judgment-debtor to produce information without a basis. This is why the **Order 22 Rule 35** of the **Civil Procedure Rules** grants the court power to summon the Judgment-Debtor or any officer of a company to attend before it and be examined on whether any or what debts are owing to the judgment debtor, and whether the judgment debtor has any means of satisfying the decree (see **Ramaben Ramnikal Patani and Others v Garden Chambers Limited ML HCCOMM No. 896 of 2009 [2009] eKLR**). Prayer No. 7 fails.

#### **Accounting for the monies that the 1<sup>st</sup> Defendant has received from its Aged Debtors List as at 30<sup>th</sup> June 2013 amounting to Kshs. 460,165,161.00**

18. In Prayer No. 8, the Plaintiffs seek an account in respect of the Aged Debtors List as at 30<sup>th</sup> June 2013 amounting to Kshs. 460,165,161.00. In my view, this prayer ought to have been raised at trial and not the stage of stage as doing so will be running afoul of **Explanation 4** of **section 7** of the **Civil Procedure Act** which provides that, "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to be a matter directly and substantially in issue in such suit."

19. The court requires parties to a litigation to bring forward their whole case and will not, except in special circumstances, permit the same parties to open the same subject of ligation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case (see **Mburu Kinyua v Gachini Tuti [1978 - 80] 1 KLR 780**). By the Plaintiffs' own deposition, this aged debtors list has been with the 2<sup>nd</sup> Plaintiff since 6<sup>th</sup> August 2013 and as such, they ought to have applied for accounts or taken any directions during the hearing of the suit. As the matter has now been concluded the court cannot re-open another avenue for litigation.

#### **Conclusion and Disposition**

20. In conclusion, Plaintiffs' application dated 11<sup>th</sup> June 2021 succeeds only to the following extent:

(a) *THAT the Garnishee Order nisi issued on 13<sup>th</sup> June 2021 be and is hereby discharged.*

(b) *THAT an order be and is hereby issued attaching the Judgement Debtor's moveable property in the form of shares disclosed in records of the Central Depository & Settlement Corporation (CDSC) and described as:*

(i) *Account number [...] in the name of Ibrahim Sheikh Issak of Identity Card number 0059698 which holds 15,000 shares in Mumias Sugar Company Limited; and*

(ii) *Account number [...] in the name of Akarim Agencies Company Limited company number 49796 which holds 61,600 shares in Safaricom PLC.*

(c) *THAT Dyer & Blair Investment Bank be and is hereby directed to sell the aforesaid shares and thereafter transfer the amount realized to the 2<sup>nd</sup> Decree Holder.*

(d) *THAT that Defendant shall pay the costs of the application.*

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Kigata instructed by Wamae and Allen Advocates for the Plaintiffs.

Mr Adano instructed by Wetangula, Adan, Makokha and Company Advocates for the Defendants

Ms Watitu instructed by Gathara Mahinda and Company Advocates for the Garnishee.