REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

INSOLVENCY CAUSE NO. 1 OF 2019

ONSONGO & COMPANY ADVOCATES.....PETITIONER

VERSUS

AFRICA MERCHANT ASSURANCE CO. LTD.....RESPONDENT

AND

DIAMOND TRUST BANK KENYA LTD.....GARNISHEE

RULING

The application dated 3rd February 2021 was filed by the Garnishee, **DIAMOND TRUST BANK KENYA LIMITED**. The Applicant sought orders to set aside the proceedings taken and the Garnishee Order Absolute, which was issued on 17th November 2020.

1. It was the Applicant's case that the proper procedure was not followed in obtaining the Garnishee Absolute.

2. According to the Applicant, the Garnishee Absolute was served upon it on 19th November 2020.

3. One day prior to the said service of the Garnishee Absolute, a liquidation order had been issued against the Respondent herein, **AFRICA MERCHANT ASSURANCE COMPANY LIMITED**.

4. Therefore, the Applicant said to this Court that if it had been given an opportunity to be heard, it would have brought it to the attention of the Court, that a liquidation order had already been issued against the Respondent.

5. The Applicant also pointed out that the accounts in respect of which the Garnishee Absolute had been issued, did not exist.

6. In the light of those facts, the Applicant holds the view that it would have presented a solid defence to the garnishee application, if the said application had been served upon it.

7. When responding to the application, the Petitioner emphasized that the Garnishee Order Nisi was served upon the Garnishee on 16th November 2020.

8. Secondly, the Petitioner asserted that the Garnishee Absolute was served upon the Garnishee on 17th November 2020.

9. It is well settled that if the Court had issued orders on an application which had not been served upon the Respondent, such an order would have been issued without the said Respondent having been accorded an opportunity to be heard.

10. It is a cardinal rule of law that nobody should be condemned without being accorded an opportunity to be heard. That is why the issue as to service upon persons who are Respondents to legal processes is key. The issue is key because when a Respondent had been served, it is deemed that he had been given the opportunity to answer to the matters raised against him.

11. In this case the Applicant has conceded that email service of due process is now allowed by law. As correctly pointed out by the Applicant, service of documents via email was introduced to the law pursuant to the **Civil Procedure (Amendment) Rules 2020**.

12. I am in agreement with the Applicant, that it is important to reproduce herein the relevant provisions governing service by e-mail, which provide as follows;

"1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.

2. Service shall be deemed to have been effected when the Sender receives a delivery receipt."

13. Although the Respondent did disclose the fact that it effected electronic service, the Applicant has not asserted either that the e-mail address to which the mail was dispatched did not belong to it, or that the Sender did not receive a delivery receipt.

14. In any event, there is proof that the Sender got a delivery receipt, which was designated as *"Ticket No. 1501211113."*

15. Therefore, I find that the Applicant was duly served through electronic mail.

16. A perusal of the delivery receipt reveals that the Garnishee Order Nisi was served on 16th November 2020.

17. Nonetheless, the Applicant submitted that because it is a corporation, service should also have been made in the manner stipulated by **Oder 5 Rule 3** of the **Civil Procedure Rules**.

18. The Applicant cited the case of **AGIGREEN CONSULTING CORP. LIMITED Vs NATIONAL IRRIGATION BOARD CIVIL CASE NO. E252 OF 2019** as authority for preposition that service of summons must, in the first instance, be made on the Secretary, Director or other Principal Officer of the Corporation, before resorting to other modes of service.

19. In that case, the Summons to Enter Appearance were served upon the receptionist.

20. When setting aside the default judgment, Majanja J. noted that the summons were not served on any of the principal officers of the company, and also that the process server failed to offer any explanation why he resorted to serve the receptionist, who was not a principal officer of the corporation.

21. At this point it is important to set out the provisions of **Order 5 Rule 3** of the **Civil Procedure Rules**, which provides as follows;

"Subject to any other written law, where the suit is against a corporation the summons may be served –

(a) on the secretary, director or other principal officer of the corporation;

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) –

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licenced courier service provider approved by the court to the registered address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known address of the corporation."

22. It is noted that whereas electronic service is now allowed, by law, there was no amendment to the provisions of **Order 5 Rule 3** of the **Civil Procedure Rules**.

23. Therefore, as the Applicant herein is a corporation, the Respondent ought to have complied with **Order 5 Rule 7**, as that rule stipulates the specific mode of effecting service upon corporations.

24. As the Respondent did not serve the Applicant in compliance with the relevant rule, the service herein was irregular.

25. However, I do not share the Applicant's contention that whenever any person institutes proceedings against the company, it is the responsibility of the claimant to enquire about the proper e-mail address, at which to effect service.

26. The Rule governing electronic service states that summons;

"…….. shall be sent to the defendant's last confirmed and used E-mail address."

27. If a Defendant has several e-mail addresses which it uses, but it would want service of legal processes to be effected only at a specified address, I hold the view that the onus would be upon such a Defendant to take steps to publicize that fact. A possible mode of publicizing the said fact would be by ensuring that in all its channels of communication, there is always a standard message which informs all the people who the company deals with, that whenever e-mail service of legal processes was to be effected, the claimant should use the specified address.

28. If the Defendant did not give notice of the preferred e-mail address at which it may be served, I hold the view that service would be proper and sufficient if it was effected at the Defendant's last confirmed and used e-mail address.

29. In this case, even assuming that the e-mail service had been proper, I note that it was effected on 16th November 2020.

30. Pursuant to **Order 23 Rule 1 (2)** of the **Civil Procedure Rules**, the Garnishee Order Nisi ought to be served upon the Garnishee at least 7 days before the hearing of the application about whether or not to make the order absolute.

31. I therefore find that the notice was totally insufficient, and also in contravention of the rules.

32. Accordingly, I am in agreement with the Applicant that the issuance of the Garnishee Order Absolute on 17th November 2020 was irregular.

33. As regards the merits of the garnishee order, I find that the bank has an arguable defence to the application. I so find because of the alleged discrepancies between the accounts cited in the order, and the Fixed Deposit accounts that are maintained at the bank.

34. There is also the question regarding the liquidation order made against the Judgment-Debtor. The Court would have to decide whether or not it had any legal impact on the garnishee order. It would thus only be fair that the garnishee be given the opportunity to advance its arguments on the issue before the matter is determined.

35. In the result, the proceedings of 17th November 2020 are vacated, together with the Garnishee Order Absolute.

36. For the avoidance of any doubt, the order does not affect the Garnishee Order Nisi.

37. As the Applicant acknowledged having received *"the matter"*, which it then inadvertently archived, I find that although its application is successful, the Applicant had brought itself into the situation which made it necessary to bring the current application. In other words, even though the e-mail service may not have been regular, in law, it was effected in deed. If, therefore, the Applicant had taken action, instead of archiving the matter, this application may never have become necessary.

38. In the event, I order each party to meet their own respective costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JULY 2021.

FRED A. OCHIENG

JUDGE