



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 18 OF 2018**

**DIRECTLINE ASSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**SIMON CHEGE NGUGI .....RESPONDENT**

**LAWRENCE MURIUNGI GICHUNGE.....INTERESTED PARTY/APPLICANT**

**AND**

**DIAMOND TRUST BANK (KENYA) LTD..... GARNISHEE**

**RULING**

The interested party/Applicant has moved this court by way of the notice of motion dated the 10<sup>th</sup> day of February, 2020, under the inherent jurisdiction of this court and order 23 of the civil Procedure rules, and has sought the following orders;

1. This application be heard exparte in the first instance due to reasons of urgency.
2. The consent order given/recorded/filed in court on 22/01/2020 and the order given on 28/01/2020 and issued on 31/01/2020 be set aside/vacated.
3. An order nisi do issue against the garnishee attaching the deposit held by the garnishee in favour of the appellant and the respondent in the sum of Kshs. 8,666,737/= plus accrued interest pending hearing of this application.
4. An order absolute do issue against the garnishee attaching a sum of kshs. 4,000,000/= from the sum of kshs. 8,666,737/=(above) to satisfy decretal sum, costs and interest due from the respondent and the appellant to the third party in the following suits;
  - a) Nairobi CMCC No. 4526 of 2013
  - b) Nairobi Hcca. No. 18 of 2018
  - c) Nairobi Hcca. No. 106 of 2015
  - d) Nairobi Hc. Misc. Application no. 45 of 2015
  - e) Nairobi CMCC No. 5527 of 2015
5. The firm of R. W. Chege & Co. be stopped from releasing the sum of kshs. 8,666,737/= to the respondents pending hearing of this application and further orders.
6. Costs of these proceedings and of the garnishee be provided for.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by Nelson Kaburu Felix, on the 10<sup>th</sup> day of February, 2020.

The deponent avers that the respondent owes the third party (applicant) decretal sum, costs and interest in various matters as listed herein above.

He depones that the appellant was ordered to deposit a sum of Kshs. 8,666,737 with the Garnishee as security for the decretal sum in the proceedings herein pending appeal, which amount was duly deposited. He states that the appellant and the respondent have colluded to withdraw both the money and the appeal, without involving the applicant so as to defeat his claim without making a provision for him in the consent.

It is for these reasons that the applicant has urged the court to issue a garnishee nisi and absolute and the consent order be set aside. He has also sought a further order to bar the respondent's Advocate from paying out the money if the same has already been released to them.

The Respondent has opposed the application vide a replying affidavit sworn by Rosemary Wangari Chege, Advocate on the 14th day of February, 2020. She has deponed that the application is incompetent and not based on any known law of the land; that the Applicant has not obtained any order enforceable against the Respondent; that the Respondent is not involved in the conduct of all the litigation in other matters that the Applicant alleges to be owed; that the security in issue was deposited by the Garnishee in this case specifically to secure the decree in favour of the respondent and that the applicant has no locus to hinder a settlement between the appellant and the respondent for the dispute between them.

The Garnishee and the Appellant did not file any Responses to the application.

When the application came up for hearing on the 17<sup>th</sup> day of February, 2020, parties made oral submissions in court. Mr. Naiku for the Appellant chose to make no submissions but left it to the court whereas there was no appearance on the part of the Garnishee despite having been served with a hearing notice.

On his part, counsel for the Applicant submitted that the Interested Party was a party in the proceedings before the trial court and in the appeal, having been joined to the proceedings by the respondent and that both the Appellant and the Respondent know his interest. He referred the court to the submissions filed on the 22<sup>nd</sup> February, 2018 by the Appellant. He contended that by virtue of that interest, the applicant ought to have been involved in the consent resolving the matter arguing that it was illegal to go behind the applicant and file a consent.

He submitted that since the Applicant has proven that he has a decree he is entitled to the orders sought. He made reference to Halsbury's Laws of England and to the case of **Jones vs. Thompson** (1858) EB &E.

On her part, counsel for the Respondent submitted that as a matter of law, Garnishee proceedings are taken out in a matter in which the judgment or order for the payment of money is given or made. She argued that the applicant ought to have made the application in the case in which he has a decree.

Counsel contended that the applicant has been paid money by the Appellant and the only dispute was the difference of 3 million and the extra amount of kshs. 1,593,623/=. She asserted that the Respondent herein has no liability to pay any money as all the money in the decree was to be paid by the Appellant, she referred to CMCC No. 5527/2015 in which the Respondent obtained orders to the effect that the appellant herein was liable to pay the entire award in that matter. She averred that under the same judgment, the court gave an award of damages to the Respondent in kshs. 7,528,238/= plus costs of kshs. 370,810/= and the appellant being dissatisfied with that judgment filed the appeal herein and sought stay of execution which the court granted on conditions out of which, guarantees were made specifically in favour of that decree.

She submitted that the Appellant being no longer interested in pursuing the appeal has reached a consent with the respondent and they have agreed to release the security to the respondent arguing that the appellant and the Respondent have agreed as to the dispute between themselves and the applicant is at liberty to pursue his claim.

The court has considered the application, the affidavit in support of and in opposition to the same, together with the oral submissions made by the respective parties.

The Applicant has sought for orders that the consent order given on the 28<sup>th</sup> January, 2020 and issued on the 31<sup>st</sup> January, 2020 be set aside/vacated among other orders.

There is now dearth of authorities on the law governing the setting aside of consent judgments or orders and I may highlight a few of them to illustrate the approach attendant to the issue at hand. In the case of **Flora N. Wasike vs. Destimo Wamboko (1988)eKLR** the court of appeal stated;

*“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out.”*

In **Kenya Commercial Bank Limited vs. Specialized Engineering Company Limited (1982)KLR 485** Harris, J correctly held, inter alia, that

*“1. A consent order entered into by a counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”*

Lastly, in the case of **Board of Trustees' National Social Security Fund vs. Michael Mwalo (2015) eKLR** the Court of Appeal stated;

*“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order of a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court.”*

The interested Party/Applicant herein alleges that the Appellant and the Respondent have colluded to withdraw Kshs. 8,666,737/= which the Garnishee herein, Diamond Trust Bank (Kenya) Limited is holding in favour of the Appellant and the Respondent as security without involving him, yet he has decrees against the Respondent in excess of Kshs. 3 million.

The brief background of this matter is that, the interested party sustained injuries in a Road Traffic Accident which occurred on the 5<sup>th</sup> day of May, 2009 involving two motor vehicles being KBB 105M and KBB 854G both of which were insured by the Appellant herein under separate policies.

The Interested Party filed Civil Suit Number 4526/2013 in the Chief Magistrate’s Court at Nairobi against the registered owners of the two motor vehicles aforesaid and obtained judgment of kshs. 4,201,674/= against them jointly and severally out of which the Appellant paid a sum of Kshs. 3 million pending Appeal but declined to pay Auctioneers charges.

Due to the Appellant’s failure to pay Auctioneers charges, the Interested Party took out warrants of execution of the balance of the judgment sum pursuant to which, the Respondent’s motor vehicle KBM 090B was attached by Lifeline Auctioneers in execution of the decree on 12<sup>th</sup> August, 2015 for the sum of kshs. 1,682,151/=. As a consequence, the Respondent suffered loss and damages for loss of user of the motor vehicle. He filed civil suit number 5527/2015 against the Appellant herein and the interested party in which, he sought damages against the Appellant and a declaration that the Appellant was in breach of contract with the Respondent. He also sought orders for the release of motor vehicle KBM 090B which had been attached by Lifetime Auctioneers.

The matter was heard and finalized and judgment entered for the Respondent for loss of user for a total of Kshs. 7,462,000/=. The court also awarded costs of the suit to both the Respondent and the Interested Party herein who was also an Interested Party in Civil Case Number 5527/2015. In addition to the damages aforesaid, the court also found the Appellant has a contractual obligation to the Respondent under the Insurance Policy that it held for the Insurance of Motor vehicle KBB 854G independent from that held in respect of motor vehicle KBB 105M which was also involved in the same accident.

The Appellant herein was not satisfied with the said judgment and has appealed to this court.

In an application for stay of execution dated the 19<sup>th</sup> January, 2018, the court granted a stay on condition that the Appellant provides a Bank Guarantee for the decretal sum payable to the Respondent.

The Appellant and the Respondent filed a consent on the 22<sup>nd</sup> January, 2020 compromising the appeal in the following terms;

- a. The order issued on 31<sup>st</sup> March, 2018 staying execution of the Decree pending the hearing of the Appeal be vacated and judgment be entered in favour of the Respondent against the Appellant.
- b. The Appellant do pay to the Respondent the sum of Kshs. Nine Million Four Thousand Six Hundred and Fifty Five Shillings and Fifteen Cents only (Kshs. 9,004,655.15cts), in full and final settlement of the Decree in Nairobi CMCC No. 5527/2015 and in full and final settlement of this Appeal.

This consent was adopted as the order of the court by the Deputy Registrar on the 28<sup>th</sup> January, 2020. This is the order which the interested party seeks to have set aside.

This court has considered the reasons relied on by the interested party in his application. First and foremost, he seeks to set aside a consent order and I have already analyzed the law relating to the setting aside of consent orders. Though he has alleged collusion on the part of the appellant and the respondent, the court notes that the sum which is secured by the bank guarantee, was to secure the decretal sum in case number 5527/2015. I have had a chance to peruse the decree that was issued in that case and the same is in favour of the Respondent. Though the applicant is an interested party, his only interest in that suit are the costs that he was awarded and the same are payable by the Appellant.

The Applicant has sought a garnishee order to issue against the garnishee, attaching a total of Kshs. 4 million from the sum of Kshs. 8,666,737/=.

Order 23 of the Civil Procedure Rules deals with attachment of debts otherwise known as garnishee proceedings.

Order 23 Rule 1(1) of the rules provides;

*“A court may, upon the exparte 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 {other than the salary or such third person} (hereinafter called “Garnishee”) 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 it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with costs aforesaid.”*

From the foregoing provision of the law, garnishee proceedings are taken out in an action in which the judgment or order for the payment of money is given or made. As such, garnishee proceedings are made in the process of execution seeking to enforce a money judgment or decree by the seizure or attachment of the debts due or accruing to the judgment debtor and which form part of his property. Under the same provision, there has to be an 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. In this case, the court has been urged to make an order attaching Kshs. 4 million but it has not been told how the figure was arrived at, how much has been paid if at all. No decree has been attached. The court is persuaded by the Respondent's submissions that the interested party has no claim against the Respondent and therefore the alleged issue of collusion between the Appellant and the Respondent is unfounded.

The Appeal herein was filed by the Appellant against the Respondent and the Interested Party. The Appellant and the Respondent have agreed to compromise the dispute between them and the most the interested party can ask for, are the costs of the Appeal after which he can pursue the Appellant to recover the balance of the decretal sum, costs in 5527/2015 and the costs of this Appeal, if the same is awarded.

I find that there are no grounds which would justify the setting aside of the consent order. In the premises, the application is bereft of merit and I order that it be and is hereby dismissed with costs to the Respondent.

**Dated, signed and delivered at NAIROBI this 27<sup>th</sup> day of February, 2020.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent