



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

JUDICIAL REVIEW APPLICATION NO. 11 OF 2016

IN THE MATTER OF: AN APPLICATION FOR

JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT,

CAP 26 & ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: AN APPLICATION BY ROBSON RUSTON TABU

BETWEEN

ROBSON RUSTON TABU.....APPLICANT

-VERSUS-

THE NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION.....RESPONDENT

AND

KCB BANK LIMITED.....GARNISHEE

Coram: Hon. Justice R. Nyakundi

Tindika Advocate for the applicant/decreed holder

Doris Mwangi Advocate for the Respondent

Muriu, Mungai Advocates for the Garnishee

RULING

On 21.3.2020 the applicant **Robson Ruston Tabu** moved this court by way of an ex-parte notice of motion pursuant to Order 23 Rules 1,2,3,4,8,9 and 10 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act seeking the following order:

1. That a Garnishee order Nisi do issue against the Garnishee Kenya Commercial Bank Limited to satisfy the decretal amount herein of Kshs.1,106,894.35 plus interest at Court rates from 31.7.2019 up to date being Kshs.154,965.60 plus costs of the Garnishee, proceedings Kshs.124,137.90/= totalling to Kshs.1,385,897.85 plus further interest at Court rates from 31.3.2020. The payment in full, and all the monies deposited with the Garnishee by the defendant, Judgment debtor in Account no. 1114279978 and or all other Bank accounts held by the respondent/Judgment debtor with the Garnishee in the name of the

respondent.

2. That the aforesaid Garnishee do appear in Court to dispute that it holds the above stated amount or any part thereof for and on behalf of the Respondent/Judgment Debtor and in default this Honourable Court do issue a Garnishee Order Absolute and order execution against the Garnishee for the above stated amount or part thereof as is sufficient to satisfy the Decree herein together with further interest at Court rates from the 31st March, 2020 plus costs of the Garnishee proceedings and a further Order that the said amount be paid to the Applicant/Decree Holder through his Advocates on record by way of Real Time Gross Settlement (RTGS), to wit, Tindika & Company Advocates, Standard Chartered Bank of Kenya Limited, Treasury Square Branch Accounts Number 0102049117200, Bank Code 02, Branch 004, Swift Code SCBLKENX.

In support of the application are grounds on the face of the motion and an affidavit of **Randolph Tindika** with annexures dated 18.3.2020.

Besides this, Learned counsel filed written submissions to buttress the issues touching on the notice of motion. Here, the applicant counsel relying on the principles in **Priscilla Nyambura Njue T/a Nairobi Moscow Airways v Countryside Suppliers Limited & Another Civil Case No. 573 of 2004 {2005} eKLR** and further **African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 Others, Civil Case No. 1208 of 2003 {2014} eKLR** contended that the evidence is legally sufficient to establish for grant of a declaration against the Garnishee to satisfy the decree.

In this proceedings pursuant to Order 23 of the Civil Procedure Rules the respondent filed a replying affidavit dated 23.3.2020 sworn by the Chief Executive Officer – **Geoffrey K. Sang**. The affidavit was directly on point in this regard alleging that due to **COVID – 19 pandemic** all execution proceedings have been suspended as evidenced by annexure GKS1. That the respondent has given numerous, deliberate concise and precise measures to have the decretal sum settled in this matter by seeking for funds to settle the decree. As an appreciation of the efforts being made towards that end, the respondent annexed GK2 – copy of a letter to the office of the Attorney General, GK3 (a) (b) copies of the principal secretary Ministry of Water, Sanitation and Irrigation.

That unless the Court intervenes as a matter of urgency, the respondent account will be attached and its mandate brought to a hasty close with grave disruption to the availability of water. In essence he objected to the issuance of any orders that would settle the decretal sum which has been outstanding for more than twelve years.

On the part of the Garnishee in the affidavit sworn by Mr. Gordon Winani in support of the application he deponed that, indeed they hold an account of the respondent whose current credit balance stands at Kshs.3,347,468.05/= as at 20.3.2020. That in compliance with the Court order a sum of Kshs.1,385,997.85/= has been frozen to await any further directions from the Court.

Determination

The query before the Court is whether it ought to allow the issuance of Garnishee Order Absolute. Before me the operative provisions to be relied upon are as stated in Order 23 of the Civil Procedure Rules and also the inherent powers of the Court to prevent injustice as found in Section 3 and 3A of the Civil Procedure Act.

The pertinent question for the Court is whether the applicant has satisfied the criteria under Order 23 of the rules. The essence of the application is for the Garnishee to attend Court for purposes of showing cause why an order for payment of the debt owed by the Judgment Debtor should not be paid to the ex-parte applicant.

The second stage, takes effect is upon an interpartes hearing once a bank, being a Garnishee demonstrates the liquidity or otherwise of the Judgment Debtor and the ability to satisfy the decree of the Court.

Its at this stage on considerations of the matter the order Nisi may be made absolute depending on the facts and circumstances of the case.

Following, the application and the hearing between the ex-parte applicant and the Garnishee Bank, the question of liability for the sum due to be paid was resolved in favour of the ex-parte applicant under Order 23 of the Act as applied with Section 3A of the Civil Procedure Act.

It suffices to say as held in the comparative authority in **P.P.M.C. Ltd v Delphi Pet {2005} 8 NWLR 928** the Court of Appeal held:

“A Garnishee proceeding although incidental to the Judgment pronouncing the debt owing, the applicants being Judgment Debtors are not necessary party to the said proceedings. The procedure whereby the Judgment Creditor obtains, the order of the Court to attach from any person within the jurisdiction of the Court assets of Judgment Debtor to satisfy the Judgment debt is described as attachment of debt and is one of the several methods of executing Judgment. The proceedings for this separate and distinct action is between the respondent, herein and Guaranty Trust Bank PLC.”

Applying the above principle subject to the provisions of Section 3A there is nothing in the Civil Procedure Rules that shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

In this matter contrary to the respondent assertion it is clear from the record that the Judgment debt has remained outstanding since 30.11.2007.

As the Court observed in **JR No. 11 of 2016** the respondent from the beginning has merely been creating roadblocks by its very nature as a public corporation not to exercise due diligence and good faith in circumstances particularly to the applicant decree to ensure observance of the Law to prevent injustice being occasioned to the successful litigant.

As a debt due and owing to the applicant, its unclear from the respondent as to how long does it desire to keep the applicant away from the fruits of his Judgment.

In the present case the substratum of the Garnishee proceedings has been commenced as a result of non-adherence by the respondent to the writ of mandamus issued by this Court on 19.7.2019.

Had the respondent settled the debt or made proposals acceptable to the applicant, there is no doubt that no attachment under Order 23 of the Civil Procedure rule would have been necessary. Garnishee, in this regard has no objections to the Garnishee Orders being made final as there is discernible debt owing to the Judgment Debtor. It would be plainly unjust for the respondent to hide behind the **COVID – 19 pandemic** in order not pay or give any proposals on how to pay the sum to the Judgment Creditor.

The present case necessitates the invocation of the Court's inherent powers under Section 3A of the Act and Order 23 of the Civil Procedure Rules to prevent injustice befalling the Judgment Creditor, herein the applicant.

As a result, I order that the final Garnishee Order do issue to enforce the underlying debt with costs as premised in the application and corresponding costs countermanded by the Garnishee of Kshs.25,000/=.

It is so ordered.

DATED SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY 2020

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R NYAKUNDI

JUDGE

In the presence of

1. Tindika Advocate for the applicant