



REPUBLIC OF KENYA

IN THE HIGH COURT OF

AT MILIMANI

MILIMANI LAW COURTS

MISC CIVIL SUIT NO 148 OF 2013

OTIENO RAGOT & CO ADVOCATES.....ADVOCATE

VERSUS

NAIROBI CITY COUNCIL.....JUDGMENT DEBTOR

FAMILY BANK OF KENYA LIMITED..... GARNISHEE

RULING

1. In its Notice of Motion application dated 7th November 2019 and filed on 11th November 2019, the Garnishee sought an order that the court reviews its Ruling/order issued on 31st July 2015 to the effect that the costs that it was to pay were Party & Party costs in the Garnishee proceedings and not Advocate-Client costs. Its application was supported by the Affidavit of its in house Counsel, Sylvia Wambani that was sworn on 7th November 2019.

2. It contended that it was partisan in the proceedings herein and that its objective was only to safeguard its customer's deposits as mandated by the Banking Act and other Banking Regulations.

3. It pointed out that the Judgment Debtor was the Advocate's client and it was thus not liable and/or obligated to utilise funds belonging to depositors to pay the costs that were taxed against the said Judgment Debtor. It pointed out that the said Judgment Debtor closed its account with it and that if it paid the sum of taxed costs in the sum of Kshs 1,062,109/=, it would not be able to recover the same from it (the Judgment Debtor). It averred that the Judgment Debtor had other assets from which the Advocate could execute to recover its costs.

4. It added that in any event, the Advocate had to take out a Certificate of Costs and/or taxation and have it adopted as a decree of the court before it could execute the same against it.

5. In opposition to the said application, on 15th January 2020, Omoiti W. Philip, swore a Replying Affidavit on behalf of the Advocate herein. It was filed on even date together with a Notice of Preliminary Objection that was also of the same date.

6. The Advocate contended that on 10th July 2015, the court issued a Garnishee Order Absolute ordering the Garnishee to pay it a sum of Kshs 50,987,985/= being the decretal sum and interest accrued thereon, which the Garnishee duly paid. It averred that the Garnishee did not pay the costs of the suit and costs of the Garnishee proceedings as had been ordered in the Garnishee Order Absolute in a Ruling of Mabeya J that was delivered on 31st July 2015 on the ground that the same were payable by the Judgment Debtor herein.

7. It pointed out that the Garnishee's application seeking to review the orders by Mabeya J was dismissed by Aburili J on 24th November 2015 and that the present application was thus *res judicata*.

8. It averred that the Garnishee had not demonstrated any evidence that it would suffer any substantial loss but that in any event, if there was any loss, then the same would have been due to its own making for having failed to preserve the Judgment Debtor's accounts for purposes of settling the costs and costs of the Garnishee proceedings.

9. It was its contention that the Garnishee did not explain why it filed the present application seventeen (17) days after the Ruling was delivered. It termed it as a ploy to delay it from enjoying the fruits of its judgment and therefore urged this court to dismiss the present application with costs to it.

10. The Garnishee submitted that circumstances had changed since the Garnishee Absolute Order was made in that the Judgment Debtor closed accounts with it. It did not rely on any case law to support its case.

11. On its part, the Advocate relied on Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) and the cases of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport & Infrastructure [2015] eKLR**, **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another** amongst several other cases to buttress its argument that the present application was *res judicata* and urged this court to uphold its Preliminary Objection dated 15th January 2020. It also relied on the case of **Mukisa Biscuit Manufacturers Ltd vs West End Distributors Limited [1969] E.A. 696** in this regard.

12. In respect of the present application, it submitted that the Garnishee had not demonstrated that the earlier orders ought to be reviewed as envisaged in Section 80 of the Civil Procedure Act. It referred this court to the case of **Stephen Githua Kimani vs Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** where it was held that a review will only be granted on strong grounds. It also placed reliance on the case of **Suleiman Murunga vs Nilestar Holdings Limited & Another [2015] eKLR** where it was held that an application where an order to be reviewed was not annexed therein was defective.

13. It therefore submitted that as the Garnishee had failed to demonstrate that it had discovered new and important matter that was not within its knowledge or could not have been produced at the time of the Ruling was made, or there was a mistake apparent on the face of the court record and having made its application after an unreasonable delay with no justifiable reason and failing to attach the Ruling to be reviewed, the present application was defective and ought to be dismissed.

14. In view of the possibility of disposition of the matter on a point of law right at the outset, this court therefore found it prudent to address the Preliminary Objection in the first instance. Notably, the Garnishee did not submit on the said issue.

15. As was held in the case of **Mukisa Biscuit Manufacturers Ltd vs West End Distributors Limited** (Supra) that was relied upon by the Advocate herein:-

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a preliminary objection may dispose of the suit”

16. Notably, Section 7 of the Civil Procedure Rules stipulates as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been substantially raised, and has been heard and finally decided by the court.”

17. A perusal of the Ruling of Mabeya J of 10th July 2015 showed that he stated as follows:-

“Before me is a Notice of Motion dated 24/4/15 by the Applicants brought under Order 23 Rule 5(1) to (4), (8), (9) and (10) of the Civil Procedure Rules. The same seeks to make the Garnishee Order Nisi absolute and for the release of the monies attached to the Applicants (sic) advocates in satisfaction of the decree that is in favour of the Applicant....In the premises, I allow the application. The Garnishee Order Nisi is hereby made absolute whereby the Garnishee is to pay forthwith to the Applicants (sic) advocates, a sum of Kshs 50,987,985/= to satisfy the Decree herein from the monies attached and held in a/c Nos 012-0000-37275, 012-0000-35538 and 012-0000-35590 respectively. The Garnishee will also pay the costs of the application (emphasis court).”

18. In her Ruling of 25th November 2015, Aburili J stated as follows:-

“45. In the end I find the application by the Garnishee was not merited both at the *exparte* stage and at the *interpartes* hearing and accordingly I would allow the decree holder’s application and discharge the *exparte* orders made in its favour.

46. The upshot of all the above is that the Garnishee’s application for review is hereby dismissed with costs to the Decree Holder/ Judgment Creditor (emphasis court).

47. On the costs of the application by the decree holder, I decline to award any costs”

19. In her Ruling of 16th August 2018, Hon Mbacho dismissed the Garnishee’s Preliminary Objection filed on 28th June 2016 in which it had argued that it was only obliged to pay the sum that was attached in the Garnishee Order Absolute dated 10th July 2015 in the sum of Kshs 50,987,985/= and that the Decree Holder’s Bill of Costs should be taxed as against the Judgment Debtor and not against it.

20. It did appear to this court that the contestation that was before Mabeya J leading to his decision on 31st July 2015 and which the Garnishee had sought to review was that the monies in the accounts belonged to third parties and not to the Judgment Debtor herein. Its application to review his said decision of 31st July 2015 was dismissed by Aburili J.

21. It was evident from the prayers in the present application that the Garnishee was not averse to paying the Advocate, costs. However, it took the view that it ought to pay the Advocate Party and Party Costs in the Garnishee proceedings and not Advocate-Client costs. It

therefore sought the court's intervention to review the order of 31st July 2015 to reflect the position it had adopted.

22. As can be seen hereinabove, in his Ruling of 10th July 2015, Mabeya J directed that the Garnishee pays costs of the Advocates' application dated 4th April 2015. On her part, in her Ruling of 16th August 2018, Hon Mbacho found and held that the Advocate – Client Bill of Costs was against both the Judgment Debtor and against it and then directed that the said Bill of Costs be fixed for hearing.

23. After carefully analysing this matter, it was clear to this court that the present application was thus not *res judicata* for the reason that the question of which costs were payable by the Garnishee was never addressed by any court. The Advocate's Preliminary Objection was therefore not merited.

24. Turning to the substantive issue, this court agreed with the Advocate that the present application was defective for want of annexing the order sought to be reviewed as was held in the case of **Suleiman Murunga vs Nilestar Holdings Limited & Another** (Supra) for which the court was left with no option but to dismiss the same. Indeed, the failure by the Garnishee to annex the order it sought to be reviewed was very challenging to the court as the file was very voluminous and the court had to comb through the file to look at it.

25. Having said so, this court found it prudent to look at the merits or otherwise of the present application as opposed to dismissing the same on a technicality for the reason that Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates courts to administer justice without having undue regard to procedural technicalities.

26. It did appear to this court noted that the Garnishee did not appeal against the aforesaid Ruling of Hon Mbacho that was delivered on 16th August 2018 and consequently, on 25th October 2019, Hon Wandia, the Taxing Master, taxed the Advocates/ Client's Bill filed on 23rd February 2016 at Kshs 1,062,109/=. The execution of this amount is what led to the filing of the present application.

27. In the final decision of the Taxing Master, Hon Wandia, there was no indication of who was to pay the costs. Indeed, she was under no obligation to state expressly who would pay the monies as it followed that person against whom a bill of costs had been taxed was the one that was required to pay the taxed costs.

28. This court took cognisance of the fact that the Garnishee did not appeal and/or take any action to have the decision of Hon Learned Taxing Master Hon Mbacho set aside and/or vacated. As the Garnishee did not appeal against the decision of Hon Mbacho, this court restrained itself from addressing its mind to the merits or otherwise of her decision as it could not enter into the arena and prosecute the Garnishee's case which would be prejudicial to the Advocates herein. Indeed, the nature of litigation in our jurisdiction is adversarial.

29. Suffice it to state that the learned Hon Mbacho ought not to have made a determination of the Preliminary Objection as she had no jurisdiction to do so. The same ought to have been heard by the High Court. Indeed, the mandate of a taxing master is well set out in Rule 13A of the Advocates (Remuneration) Order in which it is stated that:-

“For the purpose of any proceeding before him, the taxing master shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers and documents and to direct and adopt such proceedings as may be necessary for the determination of any matter in dispute before him.”

30. In respect of the merits or otherwise of the Garnishee's application for review, this court did not find any ambiguity in the decision of Mabeya J of 10th July 2015 as it was clear that he limited the payment of costs by the Garnishee to the costs of the application. His Ruling and that of Aburili J did not order the Garnishee to pay the Advocate-Client Costs.

31. Further in his Ruling of 31st July 2015, Mabeya J stated as follows:-

“Consequently, the application is dismissed with costs to the Judgment Creditor (emphasis court).”

32. The use of the words **“garnishee proceedings”** in the extracted order of 10th July 2015 in mind of this court related to the proceedings from when the Garnishee became a party to the proceedings and not from the time of institution of the proceedings herein. There was no indication in the Rulings of the aforesaid learned Judges that the Garnishee was to pay costs for the garnishee proceedings.

33. In fact, this court did not see any order specifically stating that the Garnishee ought to pay party and party costs as it has sought in its present application. If there was such an order, then the court did not see it and the Garnishee did not attach the same to the application for ease of reference and/or for consideration. Perusal of the court orders that had been issued previously only showed that the Garnishee had been **condemned to pay costs of applications** (emphasis court).

34. Notably, an order, decree or judgment can only be reviewed the conditions set out in Order 45 Rule 1(1) of the Civil Procedure Rules have been met. The same provides that:-

“Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced

by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

35. After carefully looking at all the orders that were issued by different courts that heard this matter *vis- a- vis* the conditions set out for review of order under Order 45 Rule 1(1) of the Civil Procedure Rules, this court did not find that there was any merit in reviewing the order of 31st July 2015 as it was not ambiguous. Further, the Garnishee did not demonstrate that there was discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced by it at the time when the order was made, or that there was some mistake or error apparent on the face of the record, or that there was any other sufficient reason as required Order 45 Rule 1(1) of the Civil Procedure Rules.

DISPOSITION

36. For the foregoing reasons, the upshot of this court’s decision was that the Garnishee’s Notice of Motion application dated 7th November 2019 and filed on 11th November 2019 was not merited and the same is hereby dismissed. As this court had also found that the Advocate’s Preliminary Objection dated 15th January 2020 was not merited, the same be and is hereby dismissed. Each party will pay its own costs of the aforesaid Notice of Motion application and the Preliminary Objection.

37. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of November 2020

J. KAMAU

JUDGE