



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 282 OF 2016

THURAYA TELECOMMUNICATIONS CO.....DECREE HOLDER/APPLICANT

VERSUS

INDIGO TELECOM LIMITED.....JUDGMENT DEBTOR/RESPONDENT

AND

NATIONAL INDUSTRIAL CREDIT BANK (NIC BANK).....GARNISHEE

RULING

1. This ruling relates to a notice of motion application dated 28th November 2018, brought under the provisions of; Order 23 of the Civil Procedure Rules 2010 Section 1A, 1B & 3A of the Civil Procedure Act and all enabling provisions of the law.

2. The Applicant is seeking for orders as here below reproduced;-

(i) That for reasons for to be recorded service of process on the judgment debtor under these proceedings be dispensed with for the purposes of this hearing and determination of prayers 2 & 3 hereof;

(ii) That the Honourable court be pleased to make in the first instance a garnishee order nisi against National Industrial Credit Bank commonly known as NIC Bank, the garnishee herein, being USD account number xxxxxxxxxx and and Kshs. account number xxxxxxxxxx held in its junction branch ordering that all monies deposited, lying and being held in deposit by the garnishee respectively to the credit of Indigo Telecom Limited the Respondent/Judgement debtor herein be attached to answer the decree for the sum of USD 525,221.47 being the amount in respect of which judgment was entered in favour of the decree holder herein plus costs of Kshs. 1,004,415.63 together with interest thereon in the terms of the draft order annexed hereto.

(iii) That the garnishee do appear before this court on an appointed date and time to show cause why it should not release to the Applicant's Advocates the sum of USD 525,221.47 plus costs of Kshs. 1,004,415.63 or any sums held on behalf of the judgment debtor in the disclosed bank accounts or any other account operated by the judgment debtor, in satisfaction of the decree herein.

(iv) That the Applicant be at liberty to apply for any such further orders/directions as the Honourable court may deem fit and just to grant.

(v) That the costs of the application be borne by the Respondent/judgment debtor.

3. The application is premised on the grounds on the face of it and an affidavit dated 28th November 2018, sworn by Hiram Gachugi Nderitu, an Advocate of the High court of Kenya, practicing in the law firm of Hiram Gachugi & Company Advocates, who has the conduct of this case on behalf of the decree holder (herein "the Applicant"). He deposed that on 16th September 2016, the Applicant obtained a default judgment against the Respondent in the sum of USD 525,221.47, plus costs of Kshs. 1,004,415.63 and interest thereon. On 26th April 2018, the Honourable court allowed the Respondent's application to liquidate the decretal sum by installments of USD 29,178, the order was explicit that, in the event of default of payment by the Respondent of any one payment, the entire decretal amount shall become due and payable. However, the Respondent has not complied with the order.

4. The Applicant has learnt that the garnishee is in possession and custody of the Respondent's funds held at its Junction's branch on the

dollars account number xxxxxxxxxx and shillings account number xxxxxxxxxx and in other Respondent's accounts. Therefore it only fair that the sums held by the garnishee in the disclosed accounts or any other be attached to satisfy the decree herein together with costs of this Garnishee proceedings.

5. However, the Respondent opposed the application through a replying affidavit dated 20th December 2018, sworn by its Finance Manager Mr. Jonathan Mutua Makau who deposed that the affidavit in support of the application is incompetent and should be struck out as it has been sworn by the Applicant's Advocate on contentious issues in dispute. Further, the Applicant has failed to disclose that on 28th November 2018, it attached the Respondent's goods at its offices, namely: trading stock with a book value of USD 44,415.55, movable assets with cost price of USD 90,188.78 and a net book value of USD 5,570.52, including two (2) ETR machines belonging to KRA; and a rented copier belonging to Copy Cat Limited. Subsequently the goods were sold in a purported public auction.

6. That the Applicant did not issue to the Respondent with any notice for proclamation of the said goods prior to and during the said attachment. Further, the and has failed to disclose to the Honourable court and the Respondent, the proceeds of the purported auction and the extent to which the same was applied towards the satisfaction of the decree. As such it is not possible for the Respondent and the court to ascertain the extent of satisfaction of the decree. In the circumstances it will be unjust for the court to order attachment of the Respondent's monies as prayed for before the Applicant can provide an account of the proceeds of the purported auction.

7. It was further averred that, the Applicant's debt was incurred by the Respondent in the normal course of business and is directly related to the Respondent's claim in the suit; Milimani HCCC 391 of 2015 Indigo Telecommunications Limited -vs- Independent Electoral and Boundaries Commission scheduled for hearing on 5th March 2019.

8. The Respondent averred that out of good faith and after due consideration of all its financial circumstances including its normal trading debt, it made an offer to settle the decretal sum, therefore the filing of this application is premature, ill-advised and should be struck out.

9. Finally it was argued that the application is thus without basis and should be dismissed with costs as the Applicant is guilty of material non-disclosure, therefore it is not deserving of any orders.

10. The garnishee filed a replying Affidavit dated 11th January 2019, sworn by its head of legal department, Mr. Waweru Mathenge, who confirmed that, the Respondent holds the two bank accounts as stated herein and at the date of filing the application, the amounts in the account number xxxxxxxxxx was; USD 14,827.42 , in the and Ksh 872,713.55 held in the account number xxxxxxxxxx. In the circumstances, the garnishee cannot fully only satisfy the decree but to extent the funds held in the account.

11. However, the Applicants filed a further affidavit dated 19th March 2019, sworn by Hiram Gachugi Nderitu and averred that after taxation of the Applicant's party and party costs in the main suit, the law firm 11th November 2018 instructed; M/S Moran Auctioneers to trace the Respondent's immovable assets and commence execution proceedings to recover, the decretal sum and interest thereon. On 28th November 2018, the Auctioneers proclaimed and attached the Respondent's moveable property at it's office premises and disposed of the same in a public auction held on 8th December 2018. The Respondent did not redeem its attached property nor challenged the execution proceedings in any court of law. That the public auction realized a sum of Kshs. 621,500, which was not sufficient to satisfy the party and party costs herein, let alone the decretal sum and interest.

12. The deponent argued that the alleged schedule of attached goods produced by the Respondent, is a fabricated falsehood which is meant to deceive the court that its offices held property valued in excess of USD 124,604. Thus, the averments under paragraphs 6, 7, 8, 9, 10 and 11 of the replying affidavit, are false and are mere red herrings meant to obfuscate the real issue. That, the decree is not satisfied.

13. After filing their respective responses to the application, the parties disposed of the application by filing submissions, whereby the Applicant submitted that, the default judgment herein obtained against the Respondent on 16th September is unsatisfied. That the garnishee has confirmed that, the Respondent has funds in the two accounts and the garnishee has no claim over those funds, therefore the funds should be released to the Applicants.

14. The applicant termed the Respondent as a penchant of abusing the process of this court as evidenced by the failure to comply with the orders to liquidate the decretal amount in installments of USD 29,178 which orders subsists to date and argued that the Respondent has failed to demonstrate through cogent evidence that it has settled the decretal sum.

15. The Applicant submitted that under the overriding objective under Sections 1A (2) of the Civil Procedure Act, the courts are now enjoined to give effect to thereto in the exercise of its powers under the Act or in the interpretation of any of its provisions and under Section 1B, thereof.

16. However, the Respondent reiterated that, the Advocate who has sworn the supporting and further affidavit has deposed to contentious issues not in his knowledge. That it is trite law and practice that an Advocate cannot and should not depose or engage himself or herself in the realm of evidence in a matter in which he or she is appearing more particularly in exercise of deposing on contentious issues thereon. Reference was made to Rule 9 of the Advocates Practice Rules.

17. The Respondent further relied on the case of; Francis Kimutai Bii v Kaisugu (Kenya) Ltd [2016] eKLR where the court quoting the case of; Regina Waithira Mwangi Gitau vs Boniface Nthenge (2015) eKLR, stated as follows;

“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination in the case which is he handling merely as an agent which practice is irregular.”

18. The Respondent also relied on the case of; *Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997* to buttress its argument herein that there is on material non-disclosure of the proceeds of sale of the auction and submitted that in this case, the court stated as follows:-

“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. ----- and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...”

19. The Respondent reiterated that, no evidence of any proclamation notice has been produced and it should be noted that Rule 12 of the Auctioneers Rules requires the proclamation to be served on the judgment debtor or an adult person residing or working in the Judgment debtor’s premises. Therefore the Applicant has unclean hands due to the non-disclosure and lack of evidence of proclamation which essentially invalidates the purported auction.

20. Finally the Respondent argued that the grant of the garnishee orders prayed for will adversely affect its operations, and expose it to great difficulties in meeting its financial obligations being a capital intensive business, it requires a constant supply of capital to run its operations.

21. The garnishee filed submissions, basically restating the contents of its replying affidavit. I have considered the arguments advanced herein and the submissions filed and I find that the only issue to determine is whether the Applicant has met the threshold for the grant of the orders sought for herein.

22. The application herein is brought under the provisions of Order 23 of the Civil Procedure Rules (herein “the Rules”), which provides as follows:-

“(1) A court may, upon the ex parte 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 allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “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”

23. From the above provisions, the prerequisites thereof are that; the decretal sum is not disputed, the decree remain unsatisfied and the garnishee has no claim of prior interest over the funds it holds. These issues are not in dispute herein.

24. However, the Respondent has raised a concern over three substantive issues namely: the competence of the affidavits sworn by the Applicant’s Advocate, the process of attachment of the Respondents goods and subsequent sale thereof and/or accountability of the funds realized from the sale and the pending proceedings.

25. As regards the first issue of the Advocate descending into the arena of litigation and deposing to contested issues, the law is settled that a lawyer who appears as an Advocate should not submit the lawyer’s own affidavit to or testify before a court or tribunal except as to purely formal or uncontroverted matters. It is a long established rule that, a lawyer should not be both counsel and witness in a case. (*See R vs Deslauriers, 1992 CanII4022 (MB CA)*).

26. Be that as it were, I have considered the contents of the subject affidavits and find that the first affidavit supporting the application contains information of the following facts; there is a judgment on record and the sum thereof, that the Respondent filed an application dated 26th April, 2018, seeking to be allowed to pay the decretal sum by installments and it was allowed as aforesaid and that the Applicant has discovered the Respondent has funds in the accounts held at the garnishee’s bank. In my considered opinion these are matters not contentious as they are on record. Therefore, the court can take judicial notice thereof. Therefore, the affidavit in support of the application is not offensive.

27. However, as regards the further affidavit, I find that, the deponent under paragraph 4, 6, 7 and 8 thereof, has not deposed to the matters not within his knowledge. These are matters within the knowledge of the auctioneers. But it has been vindicated by the affidavit of the Auctioneer Jovan Kariuki t/a Moran Auctioneers which has been annexed to the further affidavit. The Auctioneer annexed a copy of notification of sale and the advertisement of the sale of the Respondent’s goods. I therefore find that, the issue raised by the Respondent in relation to the affidavit sworn by the Applicant’s advocate is not tenable.

28. The next issue relates to the process of proclamation and attachment of the Respondent’s goods which the Respondent argues was illegal and in blatant disregard of the law. That the proceeds of sale of their goods should have been sufficient to pay off the decretal sum. The Respondent faults the list of assets allegedly seized from their premises. In relation to this issue, the Auctioneer has indicated through the notification of sale the goods attached and sold and the Respondent should have noted the description of the goods in the schedule of moveable property as indicated in the notification of sale of the property. I note from a copy thereof, that the CEO of the Judgment debtor declined to acknowledge service of the notification of sale and a copy was left at the Respondent’s premises. Probably, if the CEO had the goods attached would have noted. I also note that, attached to the further affidavit, is a letter dated 17th December 2018, written by the Auctioneer to the Applicant’s lawyers giving the breakdown of the sum realized from the sale and how it was utilized. The Respondent has not challenged this evidence. In that regard, I also find that the Respondent argument is untenable.

29. Finally, although the Respondent argues that there are pending proceedings in the HCCC No. 391 of 2015, and that the Applicants are willing to settle the decretal sum upon the determination of that suit, the Respondent has not demonstrated the nexus between that suit and its obligation to discharge the liability herein.

30. To revert back to the issue herein, it suffices to note, the saying that “Every man is entitled to the fruit of his labour”. Thus the trite principle is that, the court has a duty to ensure that a successful litigant reaps the fruits of his successful litigation. Therefore, where a judgment debtor fails to comply with the terms of a judgment, then the judgment creditor is entitled to enforce the judgment through the suitable procedure depending on the nature of the judgment.

31. Thus, for a money decree, the garnishee proceeding come into play and by this, a judgment creditor/garnishor can obtain an order of the court attaching some money in the hands of a third party/garnishee, which belongs to the judgment debtor. The order compels the garnishee to pay over such funds to the garnishor to satisfy the judgment debtor's indebtedness.

32. I have considered the facts herein and I find that, the Applicants have proved that they have a decree which has not been satisfied, and the amount therein is not in dispute. There is evidence from the garnishee herein that they hold funds in their bank in the subject accounts which belong to the Respondent. The garnishee has no claim over these funds.

33. In that regard, I find that the application herein has merit and I allow it in terms of prayer (3) and (6).

34. It is so ordered.

Dated, delivered and signed in an open court this 30th day of May 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Omolo for Mr. Gatugi for the Plaintiff/ Decree holder

Ms. Mumma for Mr. Muthui for the Defendant/Judgment debtor

Ms. Kawira for Mr. Kabaiku for the Garnishee

DennisCourt Assistant