



**REPUBLIC OF KENYA**

**IN THE COMMERCIAL & ADMIRALTY COURT AT KISUMU**

**COMMERCIAL CASE NO. 40 OF 2018**

*(Formerly KSM. ELC CASE NO. 204 OF 2017)*

**ARCHDIOCESE OF KISUMU .....PLAINTIFF/JUDGMENT DEBTOR**

**VERSUS**

**ECOBANK KENYA LIMITED .....DEFENDANTS/DECREE HOLDER**

**AND**

**AWAD AUTO LIMITED ..... GARNISHEE**

**RULING**

The application before me is dated 18<sup>th</sup> February 2019.

1. It is an application brought pursuant to **Order 23 Rules 1, 2 and 10** of the **Civil Procedure Rules**.
2. The Applicant is the Defendant, **ECOBANK KENYA LIMITED**, who holds a Decree against the Plaintiff, **ARCHDIOCESE OF KISUMU**.
3. The application seeks, in the first instance, a temporary injunction restraining the Garnishee, **AWAD AUTO LIMITED**, from selling or transferring two properties, being **L.R. NO. 13525/12** and **L.R. NO. 13525/13**.
4. The substantive prayer is for an Order directed at the Garnishee, requiring it to Show Cause why it should not be ordered to pay to the Applicant the sum of Kshs 100,000,000/= or why the two properties, (particularized above) should not be attached to satisfy the debt due to the Applicant, from the Plaintiff.
5. The Applicant also sought orders for the attachment of the same said two properties, in satisfaction of the Decree herein.
6. Both in respect of the prayer for the Garnishee to Show Cause, as well as in respect of the attachment of the two properties, the Applicant specified that its claim be limited to Kshs 100,000,000/=.
7. The other prayer sought by the Applicant was that within 7 days of service of the Order, the Garnishee should inform the Court about the Account Deposits and Monies available from them to the Plaintiff.
8. The application is supported by the affidavit of **ELIZABETH HINGA**, the Applicant's Head – Remedial Management Unit.
9. She explained that the Applicant had given various loan facilities to the Plaintiff, for an aggregate sum of Kshs 170,000,000/=.
10. However, the Plaintiff had defaulted in the repayment of the facilities, leading to the mutual restructuring of the loan facilities, twice.
11. When the Plaintiff continued to be in default, the Applicant took steps to exercise its Statutory Powers of Sale. One such step was the valuation of the securities, which (according to the Applicant) showed that the Open Market Value was Kshs 255,000,000/=, whilst the Forced Sale Value was Kshs 191,250,000/=.
12. As at 30<sup>th</sup> July 2017, the Applicant's records showed that the cumulative outstanding balances due from the Plaintiff was Kshs 503,950,412/21.

13. It is common ground that the parties engaged in negotiations which culminated in a Consent Order pursuant to which the “Settlement Amount” was agreed upon as being Kshs 250,000,000/=.

14. It was a condition of the said Consent that the Settlement Amount would be paid by 30<sup>th</sup> October 2018.

15. It was a further term of the consent that upon default;

**“..... the Settlement Amount shall be reviewed upwards and the original balance due from the Plaintiff to the Defendant shall be reinstated which outstanding balance stood at Kenya Shillings Five Hundred and Twenty Five Million Four Hundred and Ninety Six Thousand Nine Hundred and Twenty Four and Thirty Five Cents**

**(525,496,924.35 cts) (hereinafter called “the Outstanding Amount”) as at 20<sup>th</sup> September, 2018 and which continues to accrue interest at the contractual rate until payment in full.”**

16. In answer to the application the Plaintiff filed a Replying Affidavit through **REV. FATHER MOSES NICHOLAS OMOLLO**, the Vicar General and Trustee of the Plaintiff.

17. He accused the Applicant of deliberately scaring away some two financial institutions who were to facilitate the implementation of the Consent.

18. Fr. Omollo said that the Applicant had;

**“..... deliberately jeopardized all attempts at implementation of the consent.”**

19. Finally, the Plaintiff said that;

**“..... there is nothing to be garnisheed since the purported garnishee holds no funds on behalf of the judgment debtor, and therefore any ensuing order would be an exercise in futility or rather an academic exercise.”**

20. On its part, the Garnishee filed a Replying Affidavit through its Director, **PETER MAINA KING’ORI**.

21. The essence of the garnishee’s response is that it does not have any money.

22. The garnishee blamed the Applicant for jeopardizing its efforts to obtain financing from **EQUITY BANK (KENYA) LIMITED**.

23. According to Peter King’ori, officers from **ECOBANK KENYA LIMITED** engaged Equity Bank through constant phone-calls and emails. As a result of the said communication, the garnishee had not received the finances which it had hoped to get from Equity Bank.

24. When canvassing the application, the Applicant pointed out that the garnishee has not yet paid the balance of the purchase price to the Plaintiff.

25. It is common ground that pursuant to the Sale Agreement dated 10<sup>th</sup> October 2017, the balance of the purchase price ought to have been paid within 150 days from the date of the transfer of the property to the garnishee.

26. All the parties to this application acknowledge that the garnishee has not yet paid the balance of the purchase price.

27. In effect, the garnishee is still indebted to the Plaintiff.

28. The Applicant asked the court to order that a Garnishee Order Absolute should issue, because the garnishee is indebted to the Plaintiff Judgment-Debtor.

29. In my considered view, the main issue for determination is whether or not the Court can issue a Garnishee Order Absolute when it is clear that the garnishee is not holding funds which it owes to the Judgment-Debtor.

30. The Court notes that the properties purchased by the garnishee were apparently transferred before the parties to this suit entered into the Consent Judgment.

31. In the circumstances, the said properties were not made the subject of the Consent Judgment.

32. I find that it was not material whether or not the properties that the garnishee had purchased were or were not the subject of the consent order. I so find because if the properties were already the subject of the consent, the parties would have said something about them.

33. In garnishee proceedings, it is not necessary that the garnishee be party to any agreement between the Decree-Holder and the Judgment-Debtor.

34. The only nexus necessary is as between the Judgment-Debtor and the garnishee; the latter must be holding money which he owes to the Judgment-Debtor.

35. As the garnishee would be holding funds which he owes to the Judgment-Debtor, he is said to be indebted to the said Judgment-Debtor.

36. When the court issues a Garnishee Nisi, the effect of it is to attach the money which are in the hands of the garnishee.

37. After the Garnishee Order Nisi is served upon the garnishee, the said garnishee may be required 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 the costs of the garnishee proceedings.

38. Pursuant to **Order 23 Rule 3** of the **Civil Procedure Rules**;

***“Service of an order that debts due to a judgment- debtor liable under a decree shall be attached, or notice thereof to the garnishee in such manner, as the court may direct, shall bind such debts in his hands.”***

39. To my mind, that implies that when the garnishee does not have money in his hands, the same cannot be attached.

40. That situation can be likened to one in which a Court Broker who is assigned a Warrant for Attachment, fails to find any attachable goods belonging to the Judgment-Debtor. In those circumstances, the Court Broker cannot execute the Warrant of Attachment in anticipation of the Judgment-Debtor coming into possession of property, after the date of execution.

41. Whilst the garnishee is yet to pay to the Judgment-Debtor the balance of the purchase price, I find that that is not because the garnishee was holding onto the requisite funds.

42. The garnishee was hoping to come into funds, through loans which it had applied for, but which it had not yet received.

43. There cannot be any certainty that the loan facilities which the garnishee has sought, will be made available to it.

44. In the circumstances, if the court were to give an order for the attachment of a debt which was not yet in the hands of the garnishee, such an order may be in vain.

45. This court declines to act in vain. I therefore reject the application for a Garnishee Order Absolute.

46. I also reject the application for the attachment of the two properties which the garnishee had purchased, because there is no basis in law, to warrant an attachment of properties registered in the name of a person who was not a Judgment-Debtor in this suit.

47. The Applicant appears to have been aware that the garnishee did not have the requisite funds in its hands. I so find because that would explain the request made by the Applicant that the garnishee be ordered to provide the court with information about the

***“Account Deposits and Monies available from them to the Plaintiff.”***

48. In conclusion, I wish to make it clear that this decision does not diminish or in any other way impact the consent orders herein.

49. Furthermore, as and when funds come into the hands of the garnishee or any other person who is indebted to the Plaintiff, there would be no bar to another application for garnishee.

50. Finally, as costs follow the event, the Applicant will pay to the Respondent and the garnishee, the costs of the application dated 18<sup>th</sup> February 2019.

**Dated, Signed and Delivered at Kisumu**

This 23<sup>rd</sup> day of **July** 2019

**FRED A.OCHIENG**

**JUDGE**