



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC CIVIL APPLICATION NO. 796 OF 2004

BLUE SHIELD INSURANCE CO. LTD.....DECREE HOLDER

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....JUDGMENT DEBTOR

AND

NATIONAL BANK OF KENYA.....1ST GARNISHEE

KENYA COMMERCIAL BANK.....2nd GARNISHEE

RULING

1. The decree holder /Judgment Creditor in this matter being Blue Shield Insurance Co. Ltd had a decree for Kshs 10,659,000/= together with costs and interest against the judgment debtor County Government of Mombasa.
2. The said decree was by consent of both parties, who also agreed to have the decretal sum liquidated in installments but the judgment debtor defaulted to honour the settlement terms as agreed. The Decree Holder therefore set in motion the process of executing for recovery.
3. By and application dated 17th January,2018, the decreed Holder sought for execution by instituting Garnishee proceedings against the judgment debtor's fund then held by its bank Nation Bank of Kenya and Kenya Commercial Bank, (herein the first and second Garnishee respectively.)
4. The Decreed Holder further sought for the release of monies held in Account numbers (01050089324300 and A/c numbers 1180783522) in the respective banks Bondeni and Treasury Square Branch on belief that they were the judgment debtor's accounts. The outstanding amount as at the time of making the application dated 17th January 2018 seeking Granishee Order Nishi was Ksh 19,909,774 inclusive of interest
5. In addition, the Applicant sought and order of the court of freeze the fore stated accounts thereby restraining the judgment Debtor from removing or transferring any monies from its account held by the garnishee. The application is premised on grounds set out therein and is supported by the affidavit sworn by its advocate on record.
6. The application was opposed by the judgment Debtor vide a notice of preliminary objection filed on the 17th September 2018. The Respondent contended that

(a) the application offended section 21 (4) of the Government Proceedings Act,

(b) that the application contravenes Order 29 rule 2 (2) of the Civil procedure Rules, 2010 and Article (1) of the Constitution of Kenya, 2010 and in this circumstance, the application was bad in law, incompetent and misconceived.

7. The application was argued orally on the June 17th 2019 but the Respondent also put on record written submission filed on the 6th October 2018 in support of the Preliminary Objection

8. I have considered the submissions made by the parties in support and against the present application as well as the preliminary objection raised. I have also considered the attached authorities which are high court decisions courts with corresponding jurisdiction. However persuasive they are not binding on this court so that it can make an independent decision.

9. Having considered the ground upon which preliminary objection has been raised against the garnishee proceedings, this court is expected to determine whether it passes the test in **Mukisa Biscuits Manufacturing Co. Ltd vrs West End Distributors** to the effect that preliminary objection are points of law or facts raised at the outset of a case or lawsuit by the defence without going into merits of the case. And according to Sir Charles Newbold, P it cannot be raised on what is the exercise of judicial discretion.

10. The garnishee proceedings before this court are brought pursuant to a decree of the court arrived at by the consent of the Decree Holder and the Judgment Debtor herein on 13th June 2007.

11. The preliminary objection is not pleaded from the outset of the suit in defendants defence and it has not been said that any clause in the contract between the plaintiff an defendant has been breached by the garnishee proceedings.

12. Garnishee proceedings are provided for under Order 23 Rules 1,2,3, and 4 of the Civil Procedure Rules and it is not a mandatory provision and therefore it requires the exercise of courts discretion for which a preliminary objection should not be raised (see the case of **Shamz Enterprises ltd vs Isiolo County Government & another (2018) e KLR**

13. The Defendant is a County Government and as submitted in the preliminary objection falls under the Protection of Section 21 (4) of Government Proceedings Act. However the defendant has not taken any steps to discharge the liability as in the consent recorded by the court on 13th June, 2007, despite persuasion persuasion by the decree holder.

14. It is clear from the court record that the decree holder had earlier sought to enforce by issuing notice to show cause against the Court Executive Officer to show cause why payment was not made. Warrants of arrest were subsequently issued against him but were later lifted upon further promise to pay. The executive office since then quit his employment with the Judgment Debtor. To date, the amount is still outstanding.

15. The defendant does not deny owing the Plaintiff. The Judgment Debtor does no it give any proposal of how they intend to pay the decretal sums.

16. In this matters, the Decree Holder has identified monies held on behalf of the Judgment Debtor by the garnishee and I do not think that it would be fair and just to cause them to use another procedure to realize a decree that was entered into by the consent of the parties.

17. In light of Article 159 (2) (d) and Article 48 of the Constitution of Kenya 2010, I am of the view that both judicial review and garnishee proceedings are procedures of execution of a decree. In the decision of the court of Appeal in **Joseph Nyanamba & 4 others vrs Kenya Railways Corporation (2015)**, it was held that section 21, of Government Proceedings Act impendes the provisions of access to justice as provide for by Article 48 of the Constitution.

18. The decision of Hon Mabeya J in **African Commuter Services Ltd vrs The Kenya Civil Aviation Authority & 2 others (2014) e KLR** also fortifies the position in the Court of Appeal decision in Joseph Nyanamba (Supra) where he held:

“That all litigants be treated equally without exception.....the greater public interest require that the applicant be allowed to enforce its and thereby maintain and sustain the constitutional value and principle of governance by the rule of law than uphold narrow interests of allowing a state and public corporations to prevaricate or suspend the sale of land by refusing to obey a court decision”.

19. This court therefore finds that the preliminary objection cannot be sustained for reasons that it breaches the provisions of the Constitution and that it will not bring this matter to an end. The Preliminary objecting is therefore overruled and the garnishee order absolute is hereby issued given that the decretal sum has been outstanding for more than 15 years.

Ruling delivered, signed and dated this 2nd day of August, 2019.

LADY JUSTICE D. O. CHEPKWONY