



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCC CASE NO.20 OF 2016

SHAMZ ENTERPRISES LTD.....PLAINTIFF

VS

ISIOLO COUNTY GOVERNMENT.....DEFEENDANT

AND

CONSOLIDATED BANK OF KENYA LTD.....GARNISHEE

RULING

The plaintiff and defendants herein entered into consent judgement on 25th day of November 2016. Subsequently, costs were taxed by the Deputy Registrar at Kshs. 1,381,545 and issued a Certificate of costs dated 30th June 2017 Judgment was entered for the decretal sum of Kshs 26,662,500/- in favour of the plaintiff as against defendants decree issued on 6th day of July 2017.

When the defendant failed and/or neglected to pay the decretal sums the plaintiffs counsel filed on application under certificate of urgency dated 19th July 2017 pursuant to Order 23, Rules 1,2,3 and 4 of the Civil Procedure Rules seeking that the credit balance in the Judgement Debtors accounts 10111203000081 and 101112030000 held at Consolidated Bank of Kenya at Isiolo Branch respectively, be attached to satisfy the decree issued herein in the sum of Kshs 28,044,045/= in favour of the applicant together with costs of the proceedings.

That the Garnishee Consolidated Bank of Kenya Ltd does appear before the court to show cause why the credit balance in the aforesaid accounts should not be paid over to the applicant to satisfy the decree together with costs of these proceedings.

That an appearance of the Garnishee or upon default to appear, a garnishee order absolute be issued to compel the Garnishee to release the attached sums to satisfy the decree issued herein.

The application is supported by the grounds on the face of the application and supporting affidavit of the decree Holders Director who averred that despite consent judgement being entered in their favour the defendant had defied requests to make payments and the plaintiffs advocates letter dated 23rd June 2017 which has not receive a response from the defendant.

It was further averred that the defendant was acting in contempt of a consent judgement and is determined to act with impunity.

That it was in the interest of justice that the court enforces the decree against the defiant defendant as the plaintiff had been subjected to severe economic suffering for such along time given the outstanding amount is quite substantial and the court should step in to stop the injustice.

On 20th July 2017, Justice Gikonyo directed that the application be served on the Garnishee and fixed matter for mention on 26th July 2017.

On 26th July 2017, Mr Munene Advocate holding brief for Mr Kithi Advocate for the defendant confirmed service had been effected but Mr Kithi required 14 days to seek instructions a he wished to raise a preliminary objection. Mr Ingutya Advocate for plaintiff/Decree holder on the other hand argued the application was filed under certificate of urgency and that the court should preserve the interests of the cause as the defendant entered into consent one year ago.

The court gave the defendant and Garnishee 14 days to respond to application but garnishee order nisi was issued as per prayer 2 of the Notice of Motion. Hearing was fixed for 21st September 2017.

On 21st day of September 2017, Mr Marete Advocate for the Garnishee said they were not ready as they had difficulties obtaining statements. Mr Dulu for Kithi for Defendants said he had instructions the matter was coming up for mention and that Mr Kithi had filed preliminary objection which he sought to be canvassed by way of written submission within 7 days.

On 15th November 2017 when matter came up to confirm written submissions had been filed, the defendants counsel filed submissions in.

Having considered the grounds upon which preliminary objection has been raised against the garnishee proceedings this court is to determine whether it passes the test in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors to the effect that preliminary Objection are points of law or fact 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 that it cannot be raised on what is the exercise of judicial discretion.

The garnishee proceedings before this court are brought pursuant to a decree of the court arrived at by the consent of the plaintiff/Respondent and the Defendant/Applicant herein on 28th November 2016.

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 and defendant has been breached by the garnishee proceedings. 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.

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 28th November 2016, despite letters of demand being send to them.

The defendant does not deny owing the plaintiff. The defendant does not give any proposal of how they intend to pay the decretal sums.

In this matter the Respondent has identified monies held on behalf of the defendants by the Garnishee and I don't think that it would be fair and just to cause them to use another procedure to realise a decree that was entered into by the consent of the parties. In light of Article 159(2)(d) and Article 48 of the Constitution of Kenya 2010 I'm of the view that both Judicial Reviewed Garnishee proceedings are procedures in execution of a decree. In the decision of the Court of Appeal in Joseph Nyanamba & 4 others vs Kenya Railways Corporation [2015] it was held that S.21 of Government Proceedings Act impedes the provisions of access to justice as provided by Article 48 of the Constitution.

The decision of Hon Mabeya J in African Commuter Services Ltd vs The Kenya Civil Aviation Authority & 2 others [2014] eKLR also fortifies the position in The Court of Appeal decision in Joseph Nanyamba (Supra) where he held:

“That all litigants be treated equally without exceptionthe greater public interest requires that the applicant be allowed to enforce its and thereby maintain and sustain the constitutional value and prince 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.”

This court therefore finds that the preliminary objection cannot be sustained for reasons that it breaches the provisions of the constitution and also that it will not bring this matter to an end. The Preliminary objection is overruled and the garnishee order nisi is made absolute.

HON A.ONG'INJO

JUDGE

Ruling delivered, dated and Signed in court this 22nd Day of February 2018.

In the Presence:-

M/s Mulando Oundo & Muriuki Advocate for Garnishee – N/A

Plaintiff:- Mr Ingutya Advocate for Plaintiff

Defendant:- M/S Kithi & co Advocate for Defendant – N/A

HON A.ONG'INJO

JUDGE