



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL DIVISION & ADMIRALTY DIVISION**

**CIVIL SUIT NO 174 OF 2016**

**FAMILY BANK OF KENYA.....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING**

1. If a Court were to find that a Defence raises even a single reasonable Defence that it must disallow an Application to strike out the Defence and allow a matter to proceed to Trial on merit.
2. The Notice of Motion dated 16<sup>th</sup> September 2016 is for Striking out of the Statement of Defence filed on 24<sup>th</sup> June 2016 and entry of Summary Judgement in accordance with the Plaint filed 13<sup>th</sup> May 2016. It is brought by Family Bank of Kenya (Family Bank or the Plaintiff) against City Council of Nairobi (The County or the Defendant).
3. Many of the facts leading to the Dispute herein are agreed. Otieno Ragot & Co. Advocates (the Advocates) had a claim for legal fees against the County and sought to recover it through Miscellaneous suit NO. 148 of 2013 (Otieno Ragot & Company Advocates vs. City Council of Nairobi now city County of Nairobi). On 12<sup>th</sup> March 2014 the disputants to the legal fees entered a Consent in which the County Government agreed to pay the sum of Khs.50,987,985/- together with costs and interest to the Advocates.
4. The amount was not settled and the Advocates moved the Court for attachment by way of Garnishee proceedings. On 5<sup>th</sup> May 2015, the High Court issued a Garnishee Order nisi against the Bank attaching monies in Account numbers 012000037275, 012000035538 and 012000035590 to answer the Decree of Khs.50,987,985. That order was made absolute on 10<sup>th</sup> July 2015.
5. On 31<sup>st</sup> July 2015, the High Court reviewed its order and excluded bank Account Number 01200035538 from the attachment. An application for further Review of the Garnishee Order was declined by Hon. Aburili J. on 24<sup>th</sup> November 2015. This paved the way for payment to be made by the Bank to the Advocates as follows:-
  - (i) Kshs.50,987,985/= on 25<sup>th</sup> November 2015
  - (ii) Kshs.2,721,652.91 on 18<sup>th</sup> November 2015.
6. It is the case of the Bank that the two Accounts which were attached belonged to Nairobi City County Assembly Board and not the County. In a Plaint dated 13<sup>th</sup> May 2010 and filed on the same day, the Bank avers, inter alia, that the sums paid to the Advocates did not belong to the Defendant but exclusively to the Plaintiff. The Bank seeks the sum of Kshs.53,709,637.91 and interest thereon at prevailing Commercial rates from the County.
7. The Bank takes the position that the County's Statement of Defence filed and dated 24<sup>th</sup> June 2016 is evasive and consists of mere denial.
8. The Court has considered arguments made in Court by Counsel for the respective parties.
9. As I turn to consider the Motion one issue is not clear to this Court. The gist of the case by the Bank is that the Garnishee orders was an attachment of money in Account Numbers 012000037275 and 01200035590 belonging to Nairobi City County Assembly Board but domiciled or with the Bank. The Bank also asserts that it settled the Decretal amount from its own funds. What was not explained is why the

Bank had to pay out the money from its own funds and not the deposits that may have been in the two accounts that were under attachment.

10. Anyhow, the prospects of the Bank's claim will hinge, perhaps substantially, on how the liability of a Garnishee or a claim of a third Person in Garnishee proceedings is to be resolved.

11. When served with the Garnishee orders, the Bank as Garnishee disputed its liability to the County ostensibly because the attached accounts belonged to Nairobi City County Assembly Board and not the County which was the judgement debtor. Order 23 Rule 5 provides for trial of liability of a Garnishee in the following terms:-

“If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined”.

12. And where there is an allegation, like that made by the Bank, that the attached debt belongs to a third person and not the Judgment Debt, order 23 Rules 6 and 7 provides for the Resolution of such a third person claim as follows:-

“6. Whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court may order such third person to appear, and state the nature and particulars of his claim upon such debt.

7. After hearing the allegations of any third person under such order, as in rule 6 mentioned, or of any other person who by the same or any subsequent order the court may order to appear, or in case of such third person not appearing when ordered, the court may order execution for levying the amount due from the garnishee, together with the costs of the garnishee proceedings, or order any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person or make such other order as the court shall think fit”.

13. In the Application for Review dated 17<sup>th</sup> July 2015 the Nairobi County Assembly Service Board lay claim of the attached accounts and sought that the Garnishee Order absolute be lifted. In the Ruling that determined that Motion, Hon. Mabeya J. noted that the Motion was brought under the auspices of Order 23 Rules 6 and 7 amongst other provisions. The proceedings set up by the Motion was therefore a Trial of a claim by a Third person.

14. The Ruling of 31<sup>st</sup> July 2015 was a verdict on this claim and the Honourable Judge expressed himself as follows:-

“21. My view of the matter is that these two accounts of 012-0000-37275 and 012-0000-35590 do not belong to the 3<sup>rd</sup> party. They belong to the Nairobi City County as exhibit “JMGI” expressly shows. I therefore reject the 3<sup>rd</sup> party's contention. There is no evidence on record to show that the funds in those accounts belong to the 3<sup>rd</sup> party.

22. Accordingly, I find that the 3<sup>rd</sup> party has succeeded in respect of A/C No. 012-0000-35538 but not in respect of A/C Nos. 012-0000-37275 and 35590. The order of 10<sup>th</sup> July, 2015 is accordingly reviewed to exclude A/c No.012-0000-35538 from the attachment. Consequently, the application is dismissed costs to the Judgement Creditor”.

15. The Third party did not appeal or seek a Review of that Decision, instead the Bank sought its Review by way of a Motion dated 10<sup>th</sup> August 2015. After considering various arguments made for and against the Review Application Hon. Aburili J. held as follows:-

“40. It is also paradoxical that the Garnishee could erroneously open an account in a wrong person's name and still refuse to correct the alleged error by saying that there was no sufficient documentation to warrant a change in the particulars, yet approach the Court seeking to protect the interests of the same party who alleges that the money belongs to it when the account is not in that party's name.

41. In the end, I find that there is no reason or ground, leave alone any sufficient reason for this court to review the orders of Hon. Mabeya J. made on 10<sup>th</sup> July, 2015”.

16. There is therefore an existing Court finding that the two attached Accounts namely 012-0000-37275 and 35590 belonged to the County and not the Nairobi County Assembly Service Board. My understanding is that it is from these two accounts that the Advocates decree was to be settled. The Service Board has not complained about this. It is therefore unclear why the Bank had to pay from its own resources if it indeed did so.

17. It is a Triable issue that the Bank can lay a claim against the County for the amount paid out when it is not apparent that it had an obligation to settle the Decree from its own funds and not from the funds, if any, that may have been in the two attached accounts. The Banks case in the Garnishee proceedings was not that there were no funds in the attached accounts but that the account belonged to the Service Board and not the County. This is how Aburili J. understood it,

“The Garnishee's case is essentially that there is evidence that the attached accounts do not belong to the Judgement Debtor and that if it releases funds to the Decree Holder, it will be in breach of Fundamental Banking Regulations which could cause the Garnishee to lose its Banking License as a consequence of which a large number of depositors will be greatly prejudiced”.

18. This is not one of those clear cases that deserve a curt and summary determination. The Notice of Motion dated 16<sup>th</sup> September 2016 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 9<sup>th</sup> day of February 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Ndolo h/b Kenduiywa for Plaintiff

N/A for Defendant

Dennis - Court Clerk