



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE NO.623 OF 2015**

**LUPAIN INVESTMENTS (K) LIMITED.....APPLICANT/DECREE HOLDER**

**VERSUS**

**SITICO PETROLEUM PRODUCTS LIMITED.....RESPONDENT/JUDGMENT DEBTOR**

**AND**

**KENYA PIPELINE COMPANY LIMITED.....GARNISHEE**

**R U L I N G**

This is a ruling on the Decree Holder's application dated 28<sup>th</sup> July, 2017 seeking the following orders:-

1. Attachment of the stocks held in storage by the Garnishee on behalf of the Judgment Debtor to satisfy the decree herein to the tune of **USD\$ 52, 586.00**, interest on the sum at 22% per month until payment in full and costs of the proceedings.
2. That the Garnishee be ordered to appear before this Honorable Court to show cause why it should not release to the Applicant the stock held so as to satisfy the decree.

**Grounds On The Face Of the Application**

1. **THAT** the Decree Holder and the Judgment Debtor through their Directors, entered into a Sale Agreement, hereafter "the Agreement" in which it was agreed that the Judgment Debtor could deliver to the Decree Holder various types of petroleum products amounting to USD\$ 52,586.00.
2. **THAT** dispute arose between the parties after the judgement debtor failed to meet part of the obligations and pursuant to the judgment entered and enforced as a decree of this Honorable Court on 7<sup>th</sup> April, 2016 in favour of the Decree Holder, the Respondent to date has failed and/or neglected to honour the terms of the decree despite demand by the Decree Holder to settle the sums as ordered.
3. **THAT** the Garnishee holds stock in storage for the Judgment Debtor and it is necessary to compel the Garnishee to release the stock held on behalf of the Judgment Debtor so as to execute the warrant of attachment and satisfy the decree herein.
4. **THAT** the Garnishee is within the jurisdiction of this Honorable Court and holds stock in its storage facility on behalf of the Judgment Debtor.

The application is supported by Affidavit sworn by Uruji Japhet Daddido who is the Manager of the Applicant Company herein dated 28<sup>th</sup> July, 2017. He averred that on diverse dates in the month of June 2015, the Judgment Debtor made payments amounting to USD\$ 52,586.00 and the Decree Holder delivered petroleum products amounting to only USD\$ 107,764.27. A dispute arose when the Judgment Debtor failed to meet part of its obligation and the Applicant instituted this suit.

He averred that despite the decree being issued, the Respondent has to date failed and/or neglected to honor the terms of the decree despite demand by the Applicant's Advocate to settle the sum. He averred that they have been unable to compel the Garnishee to release the Respondent's stock in order to execute the warrant of attachment and satisfy the decree. He further averred that there is no other way of ensuring that the Decree Holder will satisfy the orders granted in the decree to enable them enjoy the fruits of the judgment entered in their favor without unreasonable delay.

In response, the Respondent filed Replying Affidavit dated the 3<sup>rd</sup> October, 2017 sworn by Janice Rogo, the Stocks Management Officer of the Garnishee Company. He averred that the Judgment Debtor owes the Garnishee Company USD\$ 88,989.55 being outstanding transportation and storage fees incurred under the transportation and storage agreement. He averred that as at 4<sup>th</sup> April, 2016, the Judgment Debtor owed the judgment company USD\$ 682.12 in surcharges levied on uncollected products in excess of fifteen days. He averred that vide a letter dated 17<sup>th</sup> October, 2016, the Garnishee gave a demand notice to the Judgment Debtor requiring it to pay the amount owing to it of USD\$ 89,604.98.

He averred that in the circumstances, the Judgment Debtor is in fact indebted to the Garnishee company in the sum of USD\$ 171,755.73 and the Garnishee company is entitled under the transportation and storage agreement to dispose of the current stock to recover these outstanding amounts after the disposal. As such, there is no product held by the Garnishee that is available for attachment to settle the debts of the Decree Holder.

Both parties submitted orally and filed their list of authorities. Applicant restated ground on the application and the averments. In oral Submission Counsel for the Applicant submitted that the Judgment Debtor has a decree of this Court and attempts to prosecute have proved futile other than stocks being held by the Garnishee. Counsel for Applicant submitted that the conduct of the Garnishee is not consistent with its claim as they claim to have a claim against the Judgment Debtor but has not taken any positive action in respect of the claim and should not at this stage claim they are being owed by the Judgment Debtor. He submitted that the Decree Holder's claim against the Judgment Debtor is huge and should not be denied fruits of successful litigation.

Counsel for the Garnishee submitted that the Garnishee has demonstrated fee owed by the Judgment Debtor; that the product held by the Garnishee for the Judgment Debtor has been extinguished; that surcharges continue being levied by the Garnishee against the Judgment Debtor. He submitted that the Respondent's averments have not been rebutted and urge Court to rely on the averments. He cited the case of **Awo Shariff Mohammed t/a Mohammed Investment vs Abdul Shariff Abdiram Nairobi HCCC NO.329 of 2003[2007] eKLR** where Justice Azangalala held that the averments in the Replying Affidavit were not answered and he had no option but to accept the averments of the Garnishee.

Further in **Barclays Bank of Kenya Ltd vs Kepha Nyabera & 191 Others Nakuru Civil Appeal No.169 of 2007[2013]eKLR** the Court of Appeal held that the Decree Holder must establish that there is money owing to the Garnishee. He submitted that the Applicant has not established that there is money due and recoverable by the Judgment Debtor from the Garnishee.

In response Counsel for the Applicant submitted that the notice sent by the Garnishee was not sent in the manner provided by the transport agreement and that no legal action has been taken from 17<sup>th</sup> October 2016.

#### **ANALYSIS & DETERMINATION**

I have considered arguments herein. There is no dispute that the Respondent herein has a judgment against the judgement debtor which has not been satisfied.

What is in issue is whether the petroleum products being held by the Garnishee belong to the Judgment Debtor/whether ownership the Garnishee is entitled to the petroleum products thus extinguishing ownership of the products by the Judgment Debtor.

I have perused the petroleum and storage agreement. Clause 22.0 provide for resolution of dispute between the Garnishee and the Judgment Debtor herein. It provide for amicable solution of disputes arising from the agreement and if informal negotiations fail, either party may require the dispute to be referred to the formal mechanisms provided under the Laws of Kenya. Clause 24 provide that notices be given in writing.

The Garnishee attached to the Replying Affidavit notice for recovery of debt amounting to USD 86,604.68 dated 17<sup>th</sup> October 2017. The notice gave the Judgment Debtor 14 days to clear the debt failure which the Garnishee was to terminate existing business relationship and exercise its right under Section 16.3 of the transport and storage agreement.

Clause 16.4 provide for disposal of the Judgment Debtors products to recover amount owing from the invoice.

The Garnishee has not demonstrated any steps taken to recover amount owing from the judgment. There is no evidence of any formal steps taken by the Respondent after failure of informal process to yield fruits. It is therefore evident that the petroleum product being held by the Garnishee still belongs to the Judgment Debtor.

From the foregoing, I find it appropriate to attach the petroleum products held by the Garnishee to satisfy decree held by the Decree Holder herein against the Judgment Debtor.

#### **FINAL ORDERS**

The application herein is hereby allowed. Petroleum products held by the Garnishee be attached to satisfy the decree herein.

**Dated and Delivered at Nairobi this 27<sup>th</sup> day of July, 2018**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

**CATHERINE: COURT ASSISTANT**

**OCHIENG: COUNSEL FOR DECREE HOLDER**

**KAHURA: COUNSEL FOR GARNISHEE**