REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.1822 OF 2000

ORION EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

TETU COFFEE GROWERS CO-OPERATIVE SOCIETY

LIMITED (IN LIQUIDATION).....DEFENDANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED.....GARNISHEE

R U L I N G

Before this Court is the Notice of Motion dated **6th June 2018** by which the Plaintiff/Applicant seeks orders

> **"1. THAT the Garnishee does appear before this Court on a date appointed by the Court and furnish its share register and a record of all shares in the name of the Defendant/Judgment Debtor which were attached by an Order of this court on 4th December 2001.**
>
> **2. THAT the Garnishee be made to show Cause why the shares should not be sold to answer the decree together with the costs of the garnishee proceedings.**
>
> **3. THAT the costs of this application be borne by the Garnishee."**

The application was premised on **Article 159(2)** of the **Constitution of Kenya 2010, Sections 1A, 1B & 3A** of the **Civil Procedure Act, Order 50 Rule 1 of the Civil Procedure Rules** and all enabling provisions of the law. It was based upon the grounds on the face of the application and supported by the affidavit of **PETER RUO MAINA** a Director of the Plaintiff sworn on **6th June 2018**.

The **CO-OPERATIVE BANK OF KENYA LIMITED**, (the Garnishee herein) filed the Grounds of Opposition on **13th June 2018**. The Garnishee sought to oppose the Notice of Motion dated **6th June 2018** on the following grounds:-

> **"1. The Application is misconceived, frivolous and bad in law.**
>
> **2. The Bank is not a Garnishee within the contemplation of Order 23 of the Civil Procedure Rules.**
>
> **3. The Application as drawn and filed and the prayers therein are an abuse of the Court process and a collateral attack on the decision of the Court rendered vide rulings dated 6th October 2017 and 25th May 2018 which have not been appealed against by the Plaintiff."**

Following directions that the application be disposed of by way of written submissions the Plaintiff/Applicant filed their written submissions on **20th July 2018**, while the Garnishee filed their written submissions on **13th August 2013**. The matter then came up for highlighting of those written submissions on **19th September 2018. MR KAMAU** Advocate urged the application on behalf of the Plaintiff/Applicant whilst **MR KICHE** submitted on behalf of the Garnishee.

BACKGROUND

The genesis of the present application is the judgment which was delivered by this Court on **14th February 2001** in favour of the Decree - holder against the Defendant for the sum of **Kshs.1,907,000/=** plus costs of the suit and interest. The costs awarded to the Decree – holder were subsequently taxed at **Kshs.371,095/=.**

On **26th October 2001** the Plaintiff applied to execute its decree under **Order 21 Rule 67** (attachment of shares) and **Order 22(1) and (10)** (attachment of debts) of the Civil Procedure Rules (now repealed). Following the above stated application the parties entered into a consent in the following terms:-

> "**BY CONSENT**
>
> **The decree – holder to attach shares whose market value is equivalent to the amount in the decree herein plus costs and interest held by the Co-operative Bank of Kenya Ltd on the Judgment Debtors account and sell the same through an authorized stock broker in order to realize the decree herein.**
>
> **Today's costs to the decree holder."**

That consent was duly adopted as an order of the Court on **4th December 2001.** The court then ordered the **"attachment and sale of shares"** held by the Garnishee Bank on account of the judgment debtor in order to satisfy the decree. The Garnishee Bank was notified of the above Order and was requested to urgently facilitate the sale of said shares to satisfy the decree.

The decree-holder contends that despite numerous efforts made over the last sixteen (16) years to enforce those orders of attachment and sale, the Garnishee has persistently failed and/or neglected to facilitate the sale of said shares. The Decree – holder contends that the consent order having never been set aside remains a valid and enforceable Order of the Court. Accordingly the decree – holder filed this present application seeking to have the Garnishee furnish its share register and a record of all shares held in the name of the judgment – debtor being **Tetu Coffee Growers Co-operative Society Ltd** (in liquidation) as at **4th December 2001** and further that the said Garnishee be called upon to show cause why said shares should not be sold to satisfy the decree together with the costs of these garnishee proceedings.

In his submission counsel for the decree – holder cited the ruling by **Hon Justice Sewe** of **6th October 2007** wherein she confirmed that the consent order for attachment and sale of the shares was **"valid and good for enforcement,"** and contended that the Garnishee was bound by that Order for attachment and sale.

In opposing the present application the Garnishee points out that on **9th November 2001** by an Order issued by **Hon. Justice Mbaluto** (as he then was), they were discharged from the proceedings. The Garnishee contended therefore that the consent Order of **4th December 2001** having been reached **after** the Garnishee had been discharged from the proceedings and said consent having been reached between the decree – holder and the judgment debtor it did not involve the Garnishee Bank at all, and therefore could not bind them.

It was further submitted for the Garnishee that on **24th May 2017** the decree – holder issued to the Garnishee a Notice to Show Cause why execution should not proceed. The Garnishee in response to that Notice to Show Cause filed a Notice of Preliminary Objection dated **5th June 2017** which Preliminary Objection was upheld by **Justice Olga Sewe** in her ruling delivered on **6th October 2017**. In that Ruling the Hon. Judge cited the fact that the decree – holder had failed to comply with the procedure set out in **Order 22 Rule 40(1)** of the Civil Procedure Rules on attachment of shares as a reason for her dismissal of the Notice to Show Cause.

Subsequent to the Ruling of **6th October 2017** on **13th November 2017**, the Plaintiff filed another application seeking to review the Ruling of **6th October 2017** on the ground that there was an error apparent on the face of the record. Once again in her Ruling delivered on **22nd May 2018**, **Justice Olga Sewe**, dismissed the application for review on the grounds that the decree – holder's case appeared hinged on the Court's appreciation of facts and the law therefore the right course of action for the decree – holder would have been to file an appeal against the Ruling of **6th October 2017**. The decree – holder still did not file any appeal but instead filed this present application which Garnishee contends is frivolous and an abuse of the Court process and is for dismissal. Counsel for the Garnishee further submitted that a share is not a debt which is amenable to Garnishee proceedings.

ANALYSIS AND DETERMINATION

I have given careful consideration to the present application, the affidavit on record the submissions filed by both counsel and the relevant law.

It is not in dispute that judgment in this matter was entered in favour of the Plaintiff. A decree was extracted. By consent of the parties an attachment and sale order was issued in order to satisfy that decree.

Counsel for the Garnishee has submitted that the consent order cited by the Plaintiff/Applicant cannot compel it as they had already been discharged from the proceedings **prior** to the consent being entered into. It was further submitted that the Garnishee in any event had no relationship with the judgment debtor which could be termed as debtor creditor relationship and held no money which could be considered a debt in the context of Garnishee proceedings.

The above arguments were canvassed in the Preliminary Objection dated **5th June 2017**, and the court made its determination on the matter. That argument is therefore **"res judicata"** and this court will not pronounce itself again on the same issue.

In the Indian case of **LALCHAND – VS – RADHA KESHAN AIR 1977 SC 789** which was cited with approval in the case of **IEBC –VS- MAINA KIAI & 5 OTHERS [2017] eKLR** it was held that:-

> **"The practical effect of the res judicada doctrine is that it is a complete estoppel against any suit that runs a foul of it, and there is no way of going around it not even by consent of the parties because it is the court itself that is debarred by jurisdictional injunct from entertaining such a suit."**

Suffice to say that it has been held that a share does not constitute a debt which is subject to Garnishee proceedings.

In **ORION EAST AFRICA –VS – MUGAMA FARMERS CO-OPERATIVE UNION LIMITED & ANOTHER (2015) eKLR Justice F. Tuiyott** held as follows:-

> **"Despite the fact that shares possess monetary value, I find that the same do not amount to a recognizable debt existing between the Garnishee Bank and the Defendant. It would however be different if the Plaintiff/Decree- holder proves that the shares have borne dividends due and payable to the Defendant and the proceeds thereof are yet to be released. In those circumstances, the dividends are held on account of and are owed to the judgment – debtor, it could be a subject of a Garnishee order nisi for attachment".**

Counsel for the Plaintiff/Applicant has cited the finding by **Justice Sewe** in her Ruling dated **6th October 2017** in support of his contention that the shares held by the Garnishee Bank are indeed available for sale in order to satisfy the decree. I have myself perused the said Ruling in which my learned sister found as follows:-

> **"…that the consent order of 4th December 2001 is valid and good for enforcement.."**

However counsel conveniently failed to proceed to cite the rest of the said Ruling where the Honourable Judge found merit in the Garnishee's argument that there exists a prescribed procedure governing the attachment of shares. This procedure is set out in **Order 22 Rule 40(1)** of the Civil Procedure Rules, which provide as follows:-

> **In the case of**
>
> **(a) A share in the capital of the corporation; or**
>
> **(b) Other movable property not in the possession of the judgment – debtor for the attachment of which specific provision is not made by these Rules the attachment shall be made by a written order prohibiting –**
>
> > **(i) In the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereof: or**
> >
> > **(ii) In the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment – debtor".**

The law therefore is that in relation to shares an "**attachment and sale**" order may only be satisfied by adhering to the procedure set out in **Order 22 r 40(1)** that is by means of a prohibition order. It is only once a prohibition order is made and registered against the shares that there can be deemed in law to be an effective attachment of those shares.

The Decree – holder sought to rely on the case of **ORION EAST AFRICA –VS – MUGAMA FARMERS CO-OPERATIVE UNION LIMITED & ANOTHER** (supra) in support of its contention that shares held by the bank are subject to attachment and sale. However the **"Orion"** decision is distinguishable from the present on in that in the latter the Court had already issued a written prohibition order. This is evident from the holding in that case that:-

> **"The best course to take is for the Court to order the attachment of the shares and all dividends due on those shares <u>on a written order prohibiting the Defendant in whose name the shares are standing from transferring the same or receiving any dividend thereon</u>. The Garnishee is also bound by this prohibitory order and it shall not transfer or pay any dividend on the shares to the Defendant or to any other person** [emphasis supplied].

The final orders in the **Orion case** were made in the following terms:-

> **"To enable the Court make the final orders herein, it directs that the Bank does furnish to this Court a copy (or copies) of the Share Register of Co-op holdings showing the shares held by the Judgment - debtor therein <u>as at 26th May 2015 when the prohibition order was made</u> and at the date of this order** [emphasis supplied].

A clear reading of these final orders shows that it is only upon a prohibition order having been issued, that order seeking to compel the bank to furnish copies of Share Registers showing the shares held by the judgment – debtor would lie. In the absence of a Prohibition Order issued under **Order 22 r 40 (1)** this present application is not tenable. The decree-holder herein has made no prayer for a prohibition order in terms of **Order 22 r 40(1).**

There can be no challenge to the validity of consent entered into between the parties on **4th December 2001.** Indeed the Garnishee's do not seek to negate this consent at all. As the decree – holder asserts the order for attachment and sale of the shares remains valid and enforceable. What is in contention is the mode of attachment of those shares. The decree holder seeks to enforce the consent order by way of this application. However **Order 22 r 40(1)** for the Civil Procedure Rules clearly sets out the manner in which execution is to proceed in respect of shares held on behalf of the judgment – debtor.

The Plaintiff/Applicant has not made any move to adhere to this laid down procedure. The decree – holder has jumped the gun in filing this application. They have ignored the laid down procedure rendering this present application premature. Instead they have opted to engage the Court in a plethora of applications. First the Plaintiff/applicant filed Notice of Motion dated **2nd November 2017** seeking to have the Court vary and/or review its Ruling of **6th October 2017**. This application was heard and was dismissed by **Justice Sewe** in her Ruling of **25th May 2018**, in which learned Judge held:

> **"In the premises, it cannot be said that there is an error apparent on the face of the record, as the Plaintiff's case appears to be hinged on the Court's appreciation of the facts and the laws. Where that is the case, the best course for a parties to take is to file an appeal as a wrong view is no ground for a review.."**

The Plaintiff/Applicant **did not** file any appeal against either the Ruling of **6th October 2017** or the Ruling delivered on **25th May 2018.** Instead they filed yet another application being the present one before the Court. My view is that this application is a rehash of the application dated **5th June 2017**. It is the same animal wearing a different skin. This Court does not have appellate jurisdiction over another High court Judge. It baffles me why the Plaintiff/Applicant is reluctant to proceed under **Order 22 Rule 40(1)** but choses instead to waste the court's time by filing applications which are similar in nature. I find that this application amounts to an abuse of court process. I find no merit in the present application and I dismiss the same in its entirety with costs to the Garnishee.

Dated in Nairobi this 16th day of October, 2018.

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JUSTICE MAUREEN A. ODERO

Ruling delivered at the Nairobi High Court this 26th day of October 2018.

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JUDGE