REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 65 OF 2013

BOARD OF TRUSTEES, NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION (NWCPAC) STAFF

SUPERANNUATION SCHEME …….....PLAINTIFF

VERSUS

MOMBASA WATER SUPPLY &

SANITATION CO. LTD…….DEFENDANT

R U L I N G

Background and outline of historical facts

1. Before the court for determination is a request by the 2nd garnishee for an order that the costs of garnishee proceedings be awarded to it.

2. The historical background of the dispute is not complicated but rather simple and straight forward. The suit was filed on the 29/5/2013 summons issued on the same day and service effected on the same day. Indeed an admirable speed to transact court business. By the 14/6/2013, the defendant according to the plaintiff, but against the court records had neither entered appearance nor filed a defence hence the plaintiff did, by a request for judgment of the same date, request for judgment, which was once again speedily entered on the 19/6/2013 and followed very closely with an application for attachment of a debt which then brought the garnishees to these proceedings.

3. It is worth noting that prior to seeking to execute, and attachment of a debt is an execution process, no taxation had been undertaken nor was any order sought was obtained under section 94 Civil Procedure Act.

4. That notwithstanding the application to attach a debt was duly presented before a judge who on the 16/7/2013 granted a garnishee order Nisi. It would appear that the plaintiff did write to the Deputy Registrar a letter dated 28/6/2013 and requested that the plaintiff's costs be approved, under schedule 68(A) of the Advocates (Remuneration) Order in the sum of Kshs.826,928.23. There are no minutes nor notes in the file record that any judicial officer ever considered that request but there is a certificate of costs dated 10/6/2013 certifying the plaintiffs costs at Kshs.826,928.23, as so requested.

5. I have keenly read the court and established by the 14/6/2013 the defendant had filed an appearance.

Looking at the sequence by which the court papers are filed in the court file, the request for judgment and the affidavit of service in support thereof are immediately on top of the Memorandum of Appearance. It then follows that by the time the request for judgment was made and filed, on the 14/6/2013, an appearance had been made. However even if one gives the benefit of doubt that the appearance had not been placed in the court file when the request was received by the registry, by the 18/6/2013 when the judgment was endorsed and entered by the Deputy Registrar there had been filed an appearance and to this court it was not open for the defendant to request, nor, was it permissible for the Registry staff to endorse the judgment ans for the Registrar to enter the judgment as was done.

6. That alone is enough to say that the judgment entered on the 18/6/2013 was not only irregular but unlawfully entered. Having been so unlawfully entered it follows that all the processes founded on it were also unlawfully undertaken.

7. The generality foregoing notwithstanding, it is important to point out that the Civil Procedure Act, section 94 makes it mandatory that the ascertainment of costs in a suit in the High Court is through taxation by the taxing master. To this court taxation is a judicial function which must be done with traceable record and must be grounded upon some reason. It therefore follows that even under Rule 68A, the Registrar ought to minute the fact that a request was made to him and same has been considered and a decision made.

8. I have pointed out that despite the absence of a bill of costs drawn in terms of Rule 69 of the Advocate (Remuneration) Order, there exists a Certificate of costs. I am not averse to the provisions of paragraph 68A of the Advocate (Remuneration) Order but I hold the view that on the apparent conflict between the substantive section of the statute, Section 94, Civil Procedure Act and the provision of the subsidiary legislation under the Advocates Act, the subsidiary legislation must give way.

9. Thirdly, even if the request for judgment was validly made and entered and noting that an attachment of debt is a formal way of execution, the provisions of the proviso to Order 22 Rule 6 ought to have been complied with but were instead ignored or just circumvented. That provision make it mandatory that in the event of need to execute a default judgment, a notice of atleast Ten (10) day, of the default judgment has been served upon the defendant and a copy of such notice served with the application for execution.

10. The foregoing history point to atleast three glaring breaches and violation of the law by the plaintiff decree-holder which essentially vitiate the process it sought to undertake and paint it as a litigant not keen to comply with the law it seeks to enforce before this court. It leads one to a determination that if any costs were ever incurred by any party to these proceedings then such costs fall for payment not by any other person but by the person who set in motion the otherwise apparent undesirable and unprocedural processes and steps. The foregoing determines the second issue as framed by the plaintiff as to between the plaintiff and the defendant who should pay the garnishees costs if found to be due and payable.

11. That conclusion is equally inevitable and must flow from the effect of the consent recorded between the plaintiff and the defendant and contained in the letter dated 8/8/2013 filed in court on the 29/8/2013. In that consent the judgment, decree, Certificate of costs as well as the attachment of debt by *Order Nisi* entered against the defendant and the 2nd garnishee were all set aside and a judgment entered for the plaintiff in the sum of Kshs.28,512,013.15 and not the Kshs.53,471,059.29. To the court that consent effectively allowed the defendants two Notices of Motion dated the 16/7/2013 and 21/7/2013. In both situations it is the plaintiff and not the defendant nor the 2nd garnishee who worn and therefore pursuant to the provisions of section 27 Civil Procedure Act, unless there are special reasons to be recorded, the plaintiff must pay the costs attendant to the proceedings in which the two succeeded.

12. I have said enough to underscore my finding that it is the plaintiff rather than the defendant to pay any costs, if any is found to be payable to the 2nd garnishee.

13. On whether or not the garnishee is entitled to any costs, I have taken into account the provisions of Order 23 in totality and in particular Rule 1. The law is that the court May in the garnishee *Order Nisi* or by a subsequent order, direct the garnishee to appear before the court and show cause why he should not

pay to the decree holder the debt due from him to the judgment debtor or ***so much thereof as is sufficient to satisfy the decree together with costs as aforesaid:***

14. This provision begs the question as to how the garnishee order should be worded. It is unfortunate that the current Appendices forms to the Civil Procedure Act do not have the format of a garnishee *Order Nisi* unlike the Repealed Rules which had the format.

15. I have had the benefit of looking at the template so provided under the repealed rules and it leaves me with no doubt that everytime a garnishee is brought to the proceedings its fees must be catered for and it has the right to retain such fees, which it is the duty of the court, issuing the garnishee order to assess and indicate same in the decree order Nisi.

16. That template provides in part:-

> **"It is ordered that the garnishee (after deducting there from ……shillings for his costs of this application) do forthwith pay to the decree holder …….shillings the debt due from the garnishee to the judgment debtor, and in default thereof execution to issue for the same".**

17. The Rules committee in no doubt placed upon the garnishee a duty to pay the judgment debt as disclosed in the garnishee order Nisi and if not to show cause why if should not. It is therefore not right to contend that the garnishee should have merely sent to court or the decreeholder the sum of Kshs.18,154,937.95 by way of a letter of bank remittance without the benefit of a counsel to attend court and say why the full decretal sum is not payable. This requirement is not made unavailable because the decree holder opted to craft his own version of an order Nisi. Infact that unilateral decision to extract the garnished order Nisi as it did was the more reason for the garnishee to seek legal representation if not to interpretate the order but to seek clarifications of, among other things, to have the garnishee discharged upon payment of the only sum it held which was short of satisfying the decree.

18. In the instant case, it is not denied, neither is it deniable, that the 2nd garnishee did instruct and retain counsel who not only filed papers but also attended court and therefore incurred costs. Those costs must be met by the person who necessitated the participation of the garnishee in the proceedings.

19. I find that the 2nd garnishee did incur costs necessitated unduly, by the plaintiff and the garnishee is entitled to payment of its costs, as said before, and I now reiterate, the same are payable by the plaintiff.

<u>When is the costs payable?</u>

20. An argument was advanced by the plaintiff that if any costs are found to be due then the same ought to be taxed and paid at the conclusion of the case. Without stating the law, I hold the view that reliance was being made upon Order 51 Rule 11 (2) which provides:-

> **"Unless the court otherwise orders, for special reasons to be recorded, costs awarded upon anoriginating summons, applications or other process shall be taxed only at the conclusion of the suit".**

21. I appreciate the provision to limit the number of times and bills of costs to be filed in one matter between the parties to one and at the conclusion of the dispute between them. In this matter there can only be one dispute, at this juncture between the 2nd garnishee and the person adjudged to be liable for the payment of costs. That dispute ends the movement the court determines the person so liable. It is therefore not correct to contend that the garnishee application is an interlocutory application that has to await the full determination of the suit.

22. It is to the court a terminal application, as far as the garnishee is Concerned, because once disposal off, the garnishee retains no further interest in the proceedings. Infact the way the templates for garnishee order Nisi and absolute are grafted there ought not to be a formal taxation where the garnishee holds money and opts to pay. Those costs ought to be ascertained before the order is issued and recoverable

before payment by the garnishee.

23. I find that the costs of the garnishee need not to wait the final resolution of the dispute between the decree holder and the judgment debtor.

24. But the circumstances prevailing in this file even defeat the contention by the plaintiff. I have herein before adverted to the consent letter dated 8/8/2014 and filed in court on 20/5/2014. The consent over and above referring the matter for arbitration and therefore removing it from the court says at No. 7:-

> **"The defendant to pay costs of this suit to be agreed and if not agreed to be taxed."**

25. This provision in the parties own agreement point to the fact that nothing in the nature of a substantial is pending determination by the court at all. I find that this is a classicus of a situation where the parties advocates have totally run away from their obligation to help the court meet its overriding objective by looking at the facts as they are. Since 2014, this little issue of costs to the garnishee has been given undue attention and underserved tenure in court when the law when applied to the facts is overly clear.

26. Having so said, and noting that the Deputy Registrar failed to have a garnishee order Nisi duly extracted, and noting that the garnishee has purported to include a bill of costs in his submissions, and with the overriding objective of the court in mind and the need to avoid undue technicalities and to save court's time, I direct that:-

> **The 2nd garnishee does lodge a bill of costs and the instructions fees be charged pursuant to schedule VI Paragraph A 14 and not Paragraph A 1(b) as adverted to by the garnishee.**

27. And I pray that, in future, and henceforth, the Deputy Registrar and Counsel shall be vigilant to have the garnishees costs ascertained and disclosed in the garnishee order Nisi or absolute, as the case may be, to avoid unduly employment of courts time like has happened here.

28. Such bill be lodged and served within 10 days from the date of this ruling.

29. The costs of the proceedings upto today are awarded to the 2nd garnishee and made payable by the plaintiff/decree holder.

Dated and delivered at Mombasa this 23rd day of June 2017.

HON. P.J.O. OTIENO

JUDGE