



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 205 OF 2007

BETWEEN

RUTH WAMBUI MACHARIA.....APPLICANT

AND

TIMOTHY MAINA.....1ST RESPONDENT

SAMSON GICHAGA.....2ND RESPONDENT

LAND REGISTRAR.....3RD RESPONDENT

AND

KENYA TEA DEVELOPMENT AGENCY.....GARNISHEE

RULING

The applicant's miscellaneous application to transfer to this Court a suit from the magistrate's court was dismissed with costs to the respondents. Following this dismissal the 1st and 2nd respondents filed a bill of costs which was taxed at Kshs 72,615; they subsequently obtained a certificate of costs of this amount which they sought to recover from the applicant by means of garnishee proceedings that are now the subject of this ruling.

The garnishee proceedings were initiated by a motion dated 17th September, 2012, in which the respondents described themselves as "the decree holders" while the applicant was described as the "judgment debtor"; they applied to have the debts owed to the judgment debtor by the garnishee accruing from her tea produce attached in settlement of the decree against her.

The motion was said to have been brought under **Order 23 Rule 1** of the **Civil Procedure Rules** and was supported by the affidavit of the 2nd decree holder sworn on 11th September, 2012. In that affidavit, the 2nd decree holder swore that the judgment debtor was a small scale tea farmer who delivered her produce to the garnishee with which she was registered as grower no. I.R. 0070011. The garnishee, according to the deponent, was due to receive her 'bonus' payments in the month of October, 2012 for the deliveries of tea she had made to the garnishee. Of the sum or sums due to the judgment debtor, the decree holders want the decretal sum of Kshs 72,617/= attached to satisfy the decree.

On the 19th day of September, 2012, this court issued an order nisi against the garnishee ordering that the debts owing or accruing from the garnishee to the judgment debtor through her grower no. 0070011 be attached to satisfy the decree for the sum of **Kshs 78,617/=** and the costs of the garnishee proceedings.

The garnishee was further ordered to inform the court within seven days of the date of service of the order the sum due from it to the judgment debtor.

In the replying affidavit sworn by Tarsila Wanja on behalf of the garnishee, apparently in response to the order nisi, the garnishee basically denied holding any money on the judgment debtor's account; a copy of the statement of the judgment debtor's account with the garnishee showing the latter's earnings for the year 2009 was exhibited to the deponent's affidavit. The garnishee claimed these earnings had been paid to the judgment debtor through her bank account.

Another copy of the statement of account of the judgment debtor showing that all the earnings due to the judgment debtor had been credited to her bank account was exhibited to a further replying affidavit sworn on behalf of the garnishee on 8th day of April, 2015. It was the garnishee's case that the payments were promptly made in accordance with the agreement between the latter and the judgment debtor.

When the application came up for hearing, Mr Mindo for the applicants relied on the affidavits in support of the motion and simply asked this court to order the garnishee to pay the decree holders whatever amount that was due to the judgment debtor.

In brief answer to the applicants' counsel's submissions, Mr Ngigi for the garnishee urged, as I understood him, that the proper garnishee should have been the bank in which the judgment debtor's tea proceeds were, and are ordinarily deposited, and not the Kenya Tea Development Agency Limited.

Before considering the merits or lack thereof of the applicants' application, it is necessary to consider the rule under which the application is stated to be made; the rule cited is **Order 23 Rule (1)** and **sub-rule (1)** of the rule provides as follows:-

ORDER 23

ATTACHMENT OF DEBTS

1. (1) A court may, upon the ex parte application of a decree holder, and either before or after an oral examination of the judgment debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to 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 may be sufficient to satisfy the decree together with the costs aforesaid.

Although reference in this rule to such terms as "the decree", "the decree holder" and "the judgment debtor" would ordinarily presuppose the conclusion of "a suit" as defined under **section 2** of the **Civil Procedure Act**, the execution proceedings here would apply in equal measure to the order such as the one issued dismissing the applicant's miscellaneous application; this is so because that order conclusively determined the dispute between the parties and to the extent that it awarded costs to some parties in the dispute, it was an executable order that would be subject to execution proceedings as if it was a decree. I suppose it is for this reason that the respondents adopted the identity of "decree-holders" and described the applicant as "the judgment-debtor".

Having said that, it is necessary to consider whether it can be concluded from the available material

before me that the garnishee owed the judgment debtor any debt that would satisfy or answer the decree.

In the affidavit in support of the application for the garnishee order, the respondents were clear that the garnishee held the judgment debtor's tea payments that were due for payment in the month of October, 2012; they were specific as to the nature and amount of debt due from the garnishee and which in their view, was sufficient to settle their claim.

On its part the garnishee demonstrated that all the payments due to the judgment debtor had promptly been transmitted to her bank and thus did not hold any money on the judgment debtor's behalf which could answer the whole or part of the decree. In saying so, the garnishee effectively disputed the debt allegedly owed to the judgment debtor. In the face of such a dispute **rules 4 and 5 of Order 23 of the Civil Procedure Rules** would come into play; these rules provide as follows:-

4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.

5. 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.

Where the debt is not disputed **rule 4** is clear that the court may order execution but where liability is disputed as is the case here, **rule 5** gives the court the discretion to refer the question of the garnishee's indebtedness for trial and determination in the same manner such a question would have been determined in an ordinary suit.

In considering the appropriate direction to take in exercise of the discretion with which this Court is clothed, I am minded that there is uncontroverted evidence that any money due from the garnishee to the judgment debtor, including the sums that the respondents have referred to as "bonus payments" was paid to the latter's bank account. With this kind of evidence, I am persuaded that it would be futile to purport to refer the garnishee's denial of liability for determination in the manner envisaged under rule 5. Noting that an order for such reference is discretionary, I will, for the reason I have given not refer such a question for determination; I would instead decline to make an order absolute to levy execution and in the same breath dismiss the application dated 17th September, 2012. Parties will bear their own costs.

Dated, signed and delivered in open court this 15th day of January, 2016

Ngaah Jairus

JUDGE