



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 335 OF 1997

M M. APPLICANT

VERSUS

N W. PETITIONER

**HOUSING FINANCE COMPANY OF KENYA LTD..... 1ST
 DEFENDANT/RESPONDENT/INTRUDER**

**KENYA BUILDING SOCIETY LIMITED. 2ND
 DEFENDANT/RESPONDENT/INTRUDER**

**TAIFA AUCTIONEERS. 3RD
 DEFENDANT/RESPONDENT/INTRUDER**

**C A. 4TH
 DEFENDANT/RESPONDENT/INTRUDER**

**KENYA COMMERCIAL BANK LTD. & DVsINTERESTED
 PARTIES/RESPONDENT/INTRUDER**

**CENTRAL BANK OF KENYA.
 GARNISHEE**

RULING

The applicant M M has filed three applications dated 26th October, 2012, 30th November, 2012 and 3rd September, 2014. When the matter came up before Justice Onyancha on the 30th June, 2015, he directed that the applications be heard together.

The first application dated 26th October, 2012 seeks the following orders:-

1. That the application be certified as urgent.
2. That the Honourable court issues garnishee orders against the Central Bank of Kenya for Kshs.311,290/- plus interest and loss of use and enjoyment from March, 2006 to date.
3. That the court orders Central Bank of Kenya to pay as garnishee the additional costs from March, 2006 to date for clearing the debt.
4. That the Honourable Court orders the Central Bank of Kenya to ensure HFCK/KCB hand over to the Appellant/Applicant (decree holder) all his assets, with interest and other mesne profits, together with their projected income as from July, 1997 to the date of handing over.

5. Costs of the application be provided for.

In the second application dated 30th November, 2012, the Applicant sought orders thus:-

1. The matter be certified as urgent.
2. That this Honourable Court reinstates the application dated 26th October, 2012 to be heard on merit.
3. The court varies the earlier rulings by Honourable Justice Mutungi and Honourable Justice Okwengu as regards to the participation and taxation of the Respondents in the matter.
4. That the court orders the Deputy Registrar to issue certificates of taxation against the Respondents for the taxed costs of Kshs.311,290/- and the additional costs incurred plus interest and mesne profits from 2006 to date.
5. That the court grants the Applicant the costs of the application and any other relief that the court deems fit.

In the third and final application dated 3rd September, 2014, the Applicant sought the following orders:-

1. That the court certifies the matter as extremely urgent to be dealt with in the first instance.
2. The court declares that the Kenya Commercial Bank Limited, Housing Finance Company of Kenya, United Kenya Building Society Limited and their subsidiaries are bankrupt and/or insolvent.
3. That the court orders the Central Bank of Kenya to facilitate the execution of the decrees that were issued to the Applicant in line with the application dated 26th October, 2012 and 30th November, 2012.
4. That the court orders the Central Bank of Kenya to suspend the licences of the Kenya Commercial Bank Limited, Housing Finance Company Limited, Kenya Building Society and their subsidiaries licences pending further orders of the High Court.
5. The Respondents to pay costs of the application

In response to some of the Applications, some of the Respondents filed their respective Affidavits and grounds of opposition. The first Respondent also filed its written submissions while the 2nd, 3rd, 4th and 5th Respondents did not file any affidavits or submissions.

I have perused the record and from what I gather, the Appeal herein was filed against a ruling that had been given in a divorce matter in the trial court between M M and N W.

The applicant herein succeeded in the Appeal and he was awarded costs which were assessed at Kshs.311,290/- against N W which costs have never been paid to date.

I would wish to start by considering the application dated 30th November, 2012. The same is brought under Section 3A of the Civil Procedure Act and Article 165 of the Constitution. In this application, the applicant seeks to reinstate the Application dated 26th October, 2012 and the same to be heard on merit. He is also seeking that the court do vary the earlier rulings by Hon. Justice Mutungi and Justice Okwengu as regards participation and taxation herein. He has also sought that the court do order Deputy Registrar to issue certificates of taxation against the Respondents for the taxed amount of Kshs.311,290/- and any additional costs that the Applicant incurred plus costs of the application.

Prayer 2 of the application seeks to reinstate the application dated 26/10/2012. The application dated 26/10/2012 mainly seeks for a garnishee order against the Central Bank of Kenya for Kshs.311,290/- and an order that the Central Bank do pay as a garnishee additional costs from March 2006 to date.

It is also seeking that the court do order Central Bank to ensure HFCK and Kenya Commercial Bank and their agents hand over to the Appellant all the assets together with their projected income from July 1997.

I have perused the court record and I note that a similar application to the one dated 26/10/2012 had been

dealt with by Justice Visram. The said Application is dated 7/1/08 and he granted the orders to the effect that the Applicant be paid a sum of Kshs.311,290/- owed to him by N N which money was in Respondent's account with HFCK. The money was to be attached to answer the decree and the judgment debtor was to be served with the order to show cause why the decree holder should not be paid the said amount. It is not clear from the record whether this was done or not.

The Applicant has not shown why he is applying for similar orders against the Central Bank of Kenya yet the record shows that he was granted the orders way back in the year 2008. The best course of action for him would have been to pursue Housing Finance and in the event that the orders were/or not obeyed he is at liberty to take out contempt of court proceedings or any other remedy that he deems fit in the circumstances.

In the premises, it would not serve any useful purpose for this court to reinstate the application dated 26/10/2012 as the orders sought therein were granted to the Applicant earlier in these proceedings.

In prayer 2 of the application dated 30/11/2012, I have looked at the ruling by Justice Mutungi dated the 18th day of January, 2007. The Honourable Judge noted in his ruling that the Kenya Commercial Bank and Mr. Arisa were only brought to the taxation by error as they were never parties to the case and that there is no law that allows a non party to be dragged into taxation. He released the two parties from taxation saga and noted that the taxation certificate had already been appropriately corrected by the taxing master.

I have also looked at the ruling by Justice Okwengu delivered on the 23rd day of March, 2010. In the said ruling, Justice Okwengu agreed with the findings by Justice Mutungi that the Applicant could not execute the decree on costs against parties who were not parties to the Appeal. As I had pointed earlier on in the ruling the appeal herein was between the applicant and N W and no other party and he cannot seek to enforce the decree on costs against any other person/entity that was not a party to the appeal. I wholly agree with the findings by Honourable Justices Mrs. Okwengu and Mr. Mutungi and I would have no reason to vary their rulings.

In prayer 3, the Applicant seeks that the court do order the Deputy Registrar to issue Certificate of Taxation against the Respondents. I note from the record that an amended certificate of taxation was issued on the 12th day of March, 2006 and two certificates cannot be issued in the same matter.

Lastly, with regard to the Application dated 3rd September, 2014, grounds of opposition were filed on the 3rd day of December, 2015 by the firm of Njoroge Regeru & Co. Advocates appearing for the Central Bank of Kenya. They have opposed the said Application on the following grounds: -

The orders sought against it cannot issue in view of the express provisions of the law in respect of Garnishee proceedings, supervision of Commercial Banks and financial institutions under the Banking Act and the provisions of Kenya Deposit Insurance Act.

1. The Applicant has not demonstrated insolvency of the Commercial Bank to warrant intervention by the Central Bank of Kenya.
2. There is no judgment and decree against any of the named financial institutions that necessitates intervention by the Central Bank of Kenya.

I have considered the submissions made by the Applicant and the counsel for the Respondent in support of and in opposition to the Application and with respect to prayer 2 of the same. Counsel for the Respondent submitted that the Central Bank of Kenya is not a party to the Application as it has not been enjoined as per the requirements of the Civil Procedure Act. She further submitted that Part 7 of the Banking Act provides for Inspection and Control of Financial Institutions by the Central Bank and that the Applicant has not produced any decree or order against any financial Institution necessitating the Central Bank to act against such a Bank. According to her there are clear rules on winding up a Bank and the same have to be followed and that the Applicant has not shown inability of any banking institution to

meet its financial liabilities.

The Applicant raised the issue of a replying affidavit and the grounds of opposition for reason that they were filed late and he urged the court to strike them out. In reply to this particular issue counsel for the Respondent urged the court to rely on Article 159(2) (d) of the Constitution and excuse the late filing of the said documents.

I have considered the Application and the submissions by the parties herein and with regard to the grounds of opposition it's only fair that the same are admitted out of time as it is in the interest of justice to do so. I have exercised my discretion pursuant to Sections 3A, 3B and 1A of the Civil Procedure Act and Article 159 (2) (b) of the Constitution.

As to the merits of the Application, I find that the orders sought against the Central Bank of Kenya cannot issue as it has not been properly enjoined as a party to the suit and the reasons given for seeking the orders are not valid in law for the court to grant the orders sought.

I, therefore, find no merit in the Application dated 3rd September, 2014. In the upshot, the two applications dated 30th November, 2012 and 3rd September, 2014 are both dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 25th day of February, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Applicant*

..... *for the Petitioner*

..... *for the Defendants*

..... *for the Garnishee*