



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC. NO. 343 OF 2002

ORION EAST AFRICA.....PLAINTIFF

Versus

MUGAMA FARMERS CO-OPERATIVE UNION LIMITED.....DEFENDANT

RULING

1. On 26.5.2015 the Hon. Gikonyo J. delivered a ruling after hearing 2 applications;

1. For setting aside the judgment by Judgment Debtor.
2. Another for garnishee proceedings filed by the J/C(degree holder).

2. The Court dismissed the first application and partially allowed garnishee application.

3. The Court held in part allowing garnishee application, thus:

“the best course to take is for the court to order the attachment of the shares and all dividend due on those share on a written order prohibiting the Judgment Debtor in whose names the shares are standing from transferring the same or receiving any dividend thereon. The garnishee is also bound by this prohibitory order and it shall not transfer or pay any dividend on the shares to the Judgment Debtor or any other person. Secondly, I order that all shares and dividend in the name of and due to the Judgment Debtor respectively shall be attached to any answer the decree together with costs of the garnishee proceedings”.

4. The aforesaid order gave birth to Orders extracted on 29.5.2015 signed and sealed by the Deputy Registrar. The aforesaid extracted Orders prompted the judgment debtor (J/D) applicant to lodge the instant application seeking for the extracted orders aforesaid to be set aside and the attachment of the dividends be vacated.

5. The principle grounds set in the motion are that the extracted orders include attachment of dividends and the judge could not have granted the Order of attachment of dividends unless he wanted to do injustice to the Defendant and that the draft order was not forwarded to the defendants advocate for approval.

6. The application is supported by the affidavit of FRANCIS NGONE GATHIGA sworn on 5.10.2015.
7. The application is opposed by the Plaintiff via the affidavit of PETER RUO MAINA sworn on 13.10.2015. The parties agreed to canvas the application via written submissions which they filed and exchanged.
8. During the highlighting, the banks advocate adopted Ms. Gatuuru Advocate for Applicant submissions. The Applicant avers that the Plaintiff application dated 27.3.2014 sought to attach Defendant shares only. However the ruling by the Court included dividends as part of the attachment properties. This prompted the Plaintiff to extract Order including therein the attachment of the dividends against the Defendant.
9. The Defendant submits that the inclusion of the dividends in the order in the ruling and the extracted Orders was and is irregular.
10. Further the Applicant complains that the extracted order was not forwarded to the Defendant side to approve before same was presented for signing and sealing. This, the Defendant counsel submits violated Order 21 Rule 8(2)(3) and 4 of the CPR 2010.
11. Further the Judgment sought to be executed having been procured in default of defence, order 22 Rule CPR 6 dictates that ten days notice of entry of judgment to be issued to the Defendants before execution. The same provisions were violated as no notice was issued.
12. Further the decree was over 12 months old thus the provisions of Order 22 Rule 18 dictates that a Notice to Show Cause why the execution should not be levied ought to have been issued. Thus the provisions were breached as same notice was never issue.
13. Further the decree was older than 12 years and thus under Section 4 of Cap 22 the same was time barred. The Applicant impugns the Replying Affidavit as violating Order 19 for deponing on laws.
14. The Applicant thus prays for the Orders prayed.

The Respondent Case.

15. The Respondent avers that, the Defendant sought to set aside judgment in the instant suit. The Plaintiff at the same time filed an application for garnishee proceedings and both applications were heard together and a ruling made thereof on 26.5.2015.
16. The application to set aside judgment was rejected but the one for garnishee was allowed partially. The Court ordered the attachment of shares and dividends belonging to the Defendant.
17. The Applicant extracted Orders in terms of the Judge's ruling and executed thereafter. The Respondent advocate submits that the Order was extracted in accordance with the ruling of the Judge. He further submits that Order 21 Rule 8(2) is not mandatory as it used the word '*may*'.
18. The Respondent also submit that the Orders of attachment of dividends was made by the Judge. The Applicant cannot be heard to say the Judge had no power to grant the same. This is because the same orders in the ruling are not being impugned via an appeal or a review application.
19. The Plaintiff Counsel submit that the Order is not at variance with the Judge's ruling. The Counsel cited the case of **MICRO ENTERPRISES SUPPORTING PROGRAM TRUST REGISTERED Vs. MAYFORD SAVINGS & CREDIT SOCIETY LTD & 5 OTHERS (2013)eKLR** which held that Order 21 Rule 8 (2) is not mandatory.
20. He also relied in the case of **EXCLUSIVE AFRICAN TREASURES LTD Vs. AFRICAN ECO-CAMPS LTD HCC.378/2008**, where the Court held that "*Order 21 Rule 8 (2) CPR...is not couched in*

mandatory terms. The decree was approved by the Registrar of this Court making it prima facie a valid decree... failure to serve decree on the other side for approval cannot be reason enough to render the decree irregular”.

21. In any event the Respondent submits that even if the same was served, the Applicant has affirmed that it would not have approved the same. On the issue of challenging Judge Gikonyo’s ruling in this matter, the Respondent relies on **GREENFIELD INVESTMENTS LTD & ANOTHER vs. STATE REPUBLIC OF KENYA & OTHERS PET NO.292/2012**, where the court held that ‘*..the court cannot purport to sit as a supervisor or superintendant of a concurrent court and purport to determine by way of a appeal (by whatever other name called) a decision of such a court”*’.

22. The Respondent thus submits that this court cannot overturn the ruling of Gikonyo J. as sought herein.

23. Order 22 Rule 18 CPR on issuance of Notice to Show Cause prior to execution was raised in garnishee proceedings and the Court dealt with the same. Thus the issue is res judicate. And so is the issue of the decree being over 12 years. The court dealt with the same issue.

24. The Respondent also submitted that the Replying affidavit is proper and regular. Thus prays for dismissal of the application with costs.

Issues

25. After going through application, affidavit and the submissions I find the following issues arising;

1. **Whether the ruling by Judge Gikonyo on ordering the attachment of the dividend can be set aside by this court?**
2. **Whether failure to forward extract orders to the Defendant for approval under Order 21 Rule 8(2) CPR is fatal to the extracted Order?**
3. **Whether the application is res judicate?**

26. The ruling by Judge Gikonyo in a ruling of 26.5.2015 ordered the attachment of shares and the dividends. The application for garnishee of 7.3.3014 did not seek to attach dividends. The court thus clearly added dividends in the order for attachment.

27. The Applicant has not sought whether via review or appeal to impugn the aforesaid order. Under the holding of **Greenfield Investment Ltd** case Supra; ‘*This court cannot supervise or superintend the decision of a concurrent court. This court has no jurisdiction and under **OWERS OF MOTOR VESSEL LILIAN ‘s’ VS. CALTEX OIL (K) ltd (1959)Eklr**, Jurisdiction is everything and without it the court cannot make one more step*’. Thus on the complaint over the order by Gikonyo J. in as much the same decision is not impugned via an appeal/or review, this court has no jurisdiction and thus cannot deal with same in the instant application.

28. On the failure to forward extract order to the Defendant to approve prior to the filing same for Deputy Registrar to sign and seal, the provisions of Order 21 Rule 8(2) CPR provides the procedure and process to be adopted.

29. Order 21 Rule 8(2) provides;

‘Any party in a suit in the High Court may prepare a draft decree and submit it for approval of the other party(s) to the suit who shall approve it with or without amendment, or reject it, without an undue delay; and if the draft is approved by parties, it shall be submitted to the Registrar who if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly’.

30. **MICRO ENTERPRISES** Case Supra and **EXCLUSIVE AFRICAN TREASURE LTD** Case Supra held that the aforesaid provisions are not mandatory and the failure to seek approval by the other side is

not fatal to the decree since the Deputy Registrar has to be satisfied that the Order/Decree has been drawn in accordance with the ruling/judgment.

31. The court is persuaded by the above authorities though they are not binding to this court.

32. On the issue that there was no notice to the Defendant upon entry of judgment in default of defence, the court noted the Respondent submissions that same was raised during the hearing of application to set aside the judgment and the garnishee proceedings and so is the issue of failure to issue Notice to Show Cause prior to execution. Also the issue of the alleged lapse of decree on account of effluxion of 12 years since the entry of judgment was raised in above 2 applications.

33. The Court notes that at the time of garnishee proceedings the court observed that page 1 paragraph 2 of the ruling of 26.5.2015, the judgment was “shy of 12 years”. The Court also dealt with the issue of non issuance of the notice after entry of judgment and also Notice to Show Cause.

34. The court cannot deal with the same issues without violating the provisions of Section 7 of Cap 21. The same issues can only be raised in an appeal not before this Court or in a review in appropriate case.

35. As pertains to the alleged breach of Order 19 CPR by Respondent affidavit, the Court has perused the same and found same to comply with order 19 Rule 3 CPR. In any event, even if there were irregularities, same would be cured by Order 19 Rule 7 of the CPR.

36. The Court thus finds no merit in the application herein and makes the following Orders;

1. **The application is dismissed.**
2. **Costs to the Respondent.**

Dated, signed and delivered in court at Nairobi this 17th day of February, 2016.

.....

C. KARIUKI

JUDGE