



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CIVIL SUIT NO. 28 OF 2015**

**BETWEEN**

**ACTIONRICH INVESTMENT COMPANY LIMITED.....PLAINTIFF**

**AND**

**JOSEPH OTIENO ONYANGO.....1<sup>ST</sup> DEFENDANT**

**EVANS ODERO NYAKIGO.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, KISUMU LAND REGISTRY.....3<sup>RD</sup> DEFENDANT**

**AND**

**KENPIPE CO-OPERATIVE SACCO SOCIETY LIMITED ..... GARNISHEE**

**AND**

**KENPIPE HOUSING SAVINGS AND CREDIT SOCIETY LIMITED.....OBJECTOR**

**RULING NO. 3**

1. There are two applications for consideration dated 3<sup>rd</sup> June 2016 before the court for consideration.
2. The first application by Kenpipe Co-operative Savings and Credit Society Limited, (“*Kenpipe Sacco*”), the garnishee, seeks, *inter alia*, the following orders;

*(c) That this Honourable court do make an order that the purported execution and proclamation levied upon the objector’s properties constituted an act of trespass to property.*

*(d) That this Honourable court do make an order that the purported execution and proclamation levied upon the objector’s properties on 30<sup>th</sup> May 2016 by Maywood Auctioneers be declared illegal, unlawful, irregular, null and void and the same be lifted with all consequential orders therefrom.*

3. The second application by Kenpipe Housing Co-operative Society (“*Kenpipe Housing*”) seeks, *inter alia*, the following orders;

(b) That this Honourable Court be pleased to grant an order of stay of proclamation and attachment of the Garnishee/applicant's property by the 2<sup>nd</sup> defendant ..... of the ruling delivered on 18<sup>th</sup> May 2016 pending hearing and determination of this application.

(c) That the warrants of attachment issued on 24<sup>th</sup> May 2016 and all other consequential steps therefrom be declared, irregular, null and void and set aside forthwith.

4. The events leading to the two applications herein are as follows. On 7<sup>th</sup> July 2015, the plaintiff, Actionrich Investment Company Limited ("**Actionrich**"), filed this suit seeking, amongst other orders, a refund of Kshs. 18,087,000/- from the 1<sup>st</sup> and 2<sup>nd</sup> defendants as part of consideration for the purchase of a parcel of land being **L.R NO. KISUMU/DAGO/3527**. **Actionrich** also filed an urgent application praying that for an order directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to furnish security by depositing Kshs. 18,087,000/- in court or to give a guarantee for the same amount from a reputable bank. After hearing the application, Chemitei J., made the following orders on 1<sup>st</sup> December 2015:

1. *The 1st and 2nd Defendants jointly and severally do refund within 7 days from the date herein the sum of Kshs. 18,087,000/- forthwith to the plaintiff.*

2. *Alternatively, the defendants within 7 days from the date herein do deposit to this court a bank guarantee from a reputable commercial bank for the sum of Kshs. 18,087,000/-*

3. *Costs of this application to the applicant.*

4. On 31<sup>st</sup> March 2016, the **Actionrich** filed an application citing **Kenpipe Sacco** as garnishee seeking to attach Kshs. 18,087,000/- being an amount due from **Kenpipe Sacco** to the 2<sup>nd</sup> defendant from the sale of another parcel of land being **EAST KISUMU/DAGO/449**. In response to the application, **Kenpipe Sacco**, through its Chairman, Richard Aketch, confirmed that **Kenpipe Sacco** entered into an agreement with the 2<sup>nd</sup> defendant for the purchase of the said parcel of land but that there had been unresolved issues at the Kisumu Land Registry which hindered issuance of title hence it was likely that the contract would be terminated. It took the position that it was under no obligation to pay the balance of the purchase price. On 18<sup>th</sup> May 2016, after hearing the application, Chemitei J., granted the following orders;

a. *The sum of Kshs. 18,087,000/- be deducted from the purchase consideration of Kshs. 28,000,000/- by the garnishee to the 2nd defendant.*

b. *The garnishee be at liberty to pay to the defendants the balance of Kshs. 10,000,000/- after complying with (a) above.*

c. *Costs of this application to the plaintiff payable by the defendants.*

5. Following the order (b) issued in its favour, the 2<sup>nd</sup> defendant applied for execution and sale of **Kenpipe Sacco's** property by an application for execution dated 23<sup>rd</sup> May 2016. Warrants of attachment and sale were issued and it is the execution thereof that precipitated the two applications.

6. In the first application, **Kenpipe Sacco** introduced **Kenpipe Housing** as the garnishee and referred to itself as the objector. Its Finance Manager, Kenneth Hinga, deponed that it claimed is that it has never been a party to the suit as it is a separate legal entity and thus its property cannot be subjected to execution.

7. In the second application, **Kenpipe Housing**, referred to itself as the garnishee. Its Chairman, Richard Aketch, deponed that **Kenpipe Housing** entered into an agreement to purchase **LR No. EAST KISUMU/DAGO/449** from the 2<sup>nd</sup> defendant and that in accordance with the agreement, the release of the balance of the purchase price to the 2<sup>nd</sup> defendant was subject to completion of the sale process and granting of vacant possession. It contended that it **Kenpipe Housing** was obliged to pay the sum of Kshs. 18,087,000/- due to **Actionrich** before settling the Kshs. 10,000,000/- which was in any event

subject to the agreement and that the 2<sup>nd</sup> defendant had no expectation of immediate payment of Kshs. 10,000,000/-. It also informed the court that in April 2016, the Land Registrar registered the transfer and issued **Kenpipe Housing** with a title and that it was in the process of securing a loan by charging the property in order to pay the balance of the purchase price upon securing vacant possession.

8. The 2<sup>nd</sup> defendant opposed both applications thought his replying affidavit sworn on 9<sup>th</sup> June 2016. He confirmed that he entered into a sale agreement with **Kenpipe Housing** for the sale of his parcel of land for a consideration of Kshs. 31,000,000/-. He contended that the **Kenpipe Sacco** and **Kenpipe Housing** could not assert that they were separate entities to avoid liability because at the time of signing the sale agreement, **Kenpipe Housing** was represented by *Milimo, Muthomi & Co. Advocates* which firm also represented **Kenpipe Sacco** in the garnishee proceedings where the counsel on record accepted that there was an agreement for sale between the 2<sup>nd</sup> defendant and the garnishee. The 2<sup>nd</sup> defendant took issue with the fact that *Milimo, Muthomi & Co. Advocates* who were acting for **Kenpipe Sacco** opposed the application for garnishee orders knowing very well that **Kenpipe Sacco** was a separate entity from **Kenpipe Housing** thereby misleading the Court.

9. Counsel for the 2<sup>nd</sup> defendant's submitted that the order given by the court for the garnishee to pay him after paying the plaintiff was merely directional as to the order of making payments as opposed to dictating the time and obligation for making the payments. The 2<sup>nd</sup> respondent further averred that the garnishee could not peg payment of the balance of the purchase price on obtaining vacant possession as the sale agreement provided that the vacant possession was to be given after payment of the balance of the purchase price.

10. Counsel for the 2<sup>nd</sup> defendant submitted that the order made for payment could be executed as a decree by way of execution and that there was no legal impediment to its execution. He further submitted that as **Kenpipe Housing** is not a party to the suit and having failed to apply to for joinder, its application to be dismissed.

11. The plaintiff, 1<sup>st</sup> defendant and the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file any formal responses to the application. Their respective counsels did not take any position on these matters and left the issues for the court to decide.

12. From the history of the case I have set out above it is not in dispute that the basic claim herein is by the plaintiff claiming Kshs. 18,087,000/- principally against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. This claim was subject of the orders issued by Chemitei J., on 1<sup>st</sup> December 2015 and 18<sup>th</sup> May 2016 securing the subject matter.

13. The 2<sup>nd</sup> defendant's execution proceedings against **Kenpipe Sacco** are premised on the order of 18<sup>th</sup> May 2016, stating that the, "*garnishee be at liberty to pay the defendant the balance of Kshs. 10,000,000/- after complying (a) above,*" [*Emphasis mine*]. My reading of the order is that the garnishee, that is **Kenpipe Sacco**, was liberty to make payment only after settling the sum due to the plaintiff. The order did not direct **Kenpipe Sacco** to pay the 2<sup>nd</sup> defendant either immediately or at all. I take this view because the orders were the result of an application filed by **Actionrich** seeking to enforce the earlier order issued in its favour. Further, the use of the word "*liberty*" demonstrates that the learned judge, while securing the plaintiff's interests, did not intend to interfere with the contractual relationship between the 2<sup>nd</sup> defendant and **Kenpipe Housing**, which was neither party to the application or the suit.

14. In other words, if the vendor, **Kenpipe Housing**, failed to pay the 2<sup>nd</sup> defendant the balance of the purchase price, the 2<sup>nd</sup> defendant is entitled to pursue its own remedies for breach of contract against the **Kenpipe Housing** rather than latch on an order made in favour of the plaintiff in garnishee proceedings against **Kenpipe Sacco** in a suit where it has not sought any relief either against the plaintiff or any other parties to the suit.

15. I also note from the record that although the application for execution was lodged in court on 23<sup>rd</sup>

May 2016, the same was not minuted in the proceedings as an application for consideration by the Deputy Registrar. There is no indication that the application was allowed before the warrants of attachment were issued. Had the learned Deputy Registrar considered the application, these proceeding could have been obviated. This is an irregularity which also compels me to set aside the execution proceedings.

16. Having reached this conclusion, I allow the both the applications dated 3<sup>rd</sup> June 2016 filed on behalf of **Kenpipe Housing Co-operative Society** and **Kenpipe Co-operative Savings and Credit Society Ltd** and order as follows;

a. **The warrants of attachment issued on 24<sup>th</sup> May 2016 in favour of the 2<sup>nd</sup> defendant and all consequential steps taken to execute and recover the sum of Kshs. 10,000,000/- from Kenpipe Co-operative Savings and Credit Society Ltd and Kenpipe Housing Co-operative Society or any other person whatsoever be and are hereby set aside.**

b. **The 2<sup>nd</sup> defendant shall bear of the applications and execution.**

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of July 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Wafula instructed by Millimo, Muthomi & Company Advocates for the applicants.

Mr Nyamweya instructed by N.E. Mogusu & Company Advocates for the 2<sup>nd</sup> defendant.

Mr Omwenyo instructed by Oruenjo Kibet and Khalid Advocates for the plaintiff.

Mr Onguso instructed by Onsongo and Company Advocates for the 1<sup>st</sup> defendant.

Ms Langat instructed by the Office of the Attorney General for the 3<sup>rd</sup> and 4<sup>th</sup> defendants.