REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

HCCC. NO. 343 OF 2002

ORION EAST AFRICA…….…….....PLAINTIFF /DECREE HOLDER

VERSUS

MUGAMA FARMERS CO-OPERATIVE UNION LIMITED.....DEFENDANT/J/D

AND

CO-OPERATIVE BANK OF KENYA LIMITED…….….....…GARNISHEE

RULING

TWO APPLICATIONS:

Settings Aside Judgment and Garnishee Proceedings

[1] I have two applications before me. One is for setting aside judgmentand the other is garnishee proceedings dated 27th March, 2014 and 7th March, 2014, respectively. I will first deal with the application for setting aside judgment for obvious reasons; the outcome thereof shall determine the path of the one for garnishee proceedings. I will so proceed.

Setting Aside Judgement

[2] Over 12 years ago, the Court entered judgment in default of defence on 27th August, 2002. Shy 12 years later, on 27th March, 2014, the Defendant filed a Motion seeking to set aside the Judgment of the Court entered on 27th August, 2002 and all consequential orders and the Defendant to be granted unconditional leave to defend the suit to its logical conclusion. The Defendant also seeks that there be a stay of execution of the decree issued on 16th September, 2002 until the final determination of the application or further orders. The Defendant does not stop there. It has also prayed that this suit tobe transferred to the Chief Magistrate's Court Muranga under the provisions of section 18 of the Civil Procedure Act, Cap 21, for hearing and determination. The Defendant stated that the said Chief Magistrate Court is the court within the local limits of whose jurisdiction the Defendant actually resides and/or carries on business and personally works for gain, should the same be reinstated. The Defendant also prayed for the costs of the application. The Application was based on grounds enumerated in the application as well as the affidavit in support byEphantusWanjohi sworn on 27th March, 2014.

[3] The primary grounds can be summed as follows: That once judgment in default of defence

was entered on 27/8/02, the Plaintiff did not serve the Advocates for the Defendant with the Draft Decree for approval as required by the Provisions of Order 21 Rule 8 of the Civil Procedure Rules. That further the Plaintiff did not serve the Defendant with the certificate of costs for approval before the same was presented and certified by the Deputy Registrar as required by Law. It was also urged that after obtaining the Decree and Certificate of Costs, the Plaintiff never applied for execution under the Provisions of Order 22 of the Civil Procedure Rules and further has never served a notice of entry of Judgment at least TEN (10) Days of the entry of judgment to the Defendant. The Defendant also complained that the Plaintiff did not serve it with a Notice to show-cause why execution should not issue after the Judgment was issued. Therefore the effort to recover the decretal sum by the Plaintiff after almost 12 years is a mere afterthought. The Defendant also contended that the interest rate applied by the Deputy Registrar on the overdue amounts under the Decree at 3% per annum was erroneous and excessive as the same should have been levied at the prevailing Court rates, which was not the case in this matter. The Defendant thus claims that it is thus prejudiced because it is being forced to pay an interest rate of 36% per annum on the judgment entered on 27/8/12, which the Deputy Registrar had no power to award. The Defendant thus contends that the claim for Kshs. 163,732,148.43/= is illegal, unconscionable and unacceptable and amounts to unjust enrichment on the part of the Defendant. It was also deposed that after a comprehensive audit was undertaken by the Ministry of Co-operatives on the Defendant's accounts for a bailout package after the Defendant became insolvent, the only amount accruing to the Plaintiff was Kshs. 688, 240/=. According to the Defendant, the Plaintiff failed to provide its bank details for payment to be made and it only had itself to blame for the non-payment of the claimed sum. The Defendant further claims that it has a good defence on record against the Plaintiff's claims that raises triable issues of which it should be allowed to ventilate.

[4] The Motion is contested by the Plaintiff. The Plaintiff filed a replying affidavit sworn by Peter RuoMaina on 12th May, 2014. The major averments are as follows: That the plaintiff is guilty of undue laches; and that the suit has been overtaken by events. In particular, it was averred that when the court entered judgment in default of defence, it was satisfied that the Defendant had entered appearance and that no defence had been entered within the prescribed time. That therefore the judgment was regular. With regard to the interest levied, the Plaintiff averred that 3% per month was correctly levied by the Deputy Registrar, as the Plaintiff's delivery notes contained a condition of sale to the effect that an interest of 3% would be charged on overdue accounts. That further, the Defendant did not raise any objections to the rate of interest as stipulated and did signify their acceptance by affixing its stamp and signature on the delivery notes and invoices upon delivery of goods by the Defendant. It was further deposed that the Defendant has always acknowledged being indebted to the Plaintiff per the sum indicated in the decree and even proceeded on proposals on how to settle the debt as evidenced by its letters dated 20th February, 2003 and 13th February, 2006 to the Plaintiff. In essence, the Plaintiff averred that the Draft defence is a sham. It was further contended that the assertion that the only amount due and owing to the Plaintiff was Kshs. 688,240/= as per its ledger account was erroneous as the documentation exhibited in the Defendant's application and marked as "**EW4"** is unstamped and unsigned and not properly certified. The Plaintiff's case is therefore that no substantial grounds are pleaded for setting aside the interlocutory judgment and reinstatement of the suit. Lastly, defendant contended that it would suffer serious prejudice that is not compensable in costs since the Plaintiff has filed the present execution motion 12 years after the judgment was entered.

THE DETERMINATION

[5] The application was canvassed through the oral and written submissions of Counsel to the respective parties. A large part of these lengthy submissions restated what was contained in the affidavits filed by the parties. The arguments are, however, summed up as follows.

Arguments by the Defendant

[6] The Defendant argued that the application before the court was meritorious since it has raised sufficient grounds to set aside the judgment in default of defence and have the suit

reinstated. They argued that failures of counsel should not be visited upon it. The Defendant further argued that it is still keen on defending the suit to its logical conclusion since it had raised a defence with triable issues, key among them being whether there was in existence an agreement for supply of goods between the parties. It was further submitted that Order 10 Rule 11 of the Civil Procedure Rules gave the court discretion to set aside or vary a default judgment upon such terms as may deem just. Learned Counsel for the Defendant further argued that he had a defence with merits and that he had indeed filed the same. At the time of orally highlighting of the submissions counsel submitted that the only debt owing to the Plaintiff as per the Defendant's books was Kshs. 688, 240/= and it was thus a stranger to the sum of Kshs. 1, 956,739.10/= that was being sought by the Plaintiff. He argued that this issue alone was a triable one for the determination by the court. It was thus the Defendant's case that it had been able to demonstrate that his defence had merits, that the Plaintiff would not suffer any prejudice and that there was a plausible explanation for the delay as aforesaid. It was also the Defendant's contention that the Plaintiff had not demonstrated that it would suffer prejudice if the application herein was allowed and that in any event; the mistake of not filing a Defence was a mistake on the part of its former advocates which should not be visited upon it. The Defendant referred the court to several cases amongst them the celebrated case of **Shah vs.Mbogo (1974) E.A.** The common thread in the said cases in support of the Defendant's case was that the main concern of the court must always be to do justice to all parties where a mistake had been inadvertent provided that no irreparable damage was suffered by the opposing party. Copies of the cases he relied on were attached to his written submissions. Lastly, it was submitted that it was in the interest of justice that the Defendant be given an opportunity to defend the suit herein and therefore prayed that the instant application be allowed as prayed.

Arguments by the Plaintiff

[7] Learned Counsel for the Plaintiff on his part argued that the Defendant did not provide any or suitable explanation of the delay in bringing the instant motion after 12 years since judgment was entered into. The Plaintiff also argued that the Defendant was all along aware of the judgment entered against; since the year of 2003 it has always been involved in negotiations with the Plaintiff to settle the decretal amount. The Plaintiff stated that the judgment herein was entered in a regular manner after the Defendant failed to file a defence on entering appearance as required in law. Hence the Defendant's argument that the judgment in default of defence was irregular *ab initio* was devoid of any merit. Additionally, the Plaintiff argued that the draft Defence does not raise any triable issues; it consists of mere denials and extraneous issues. According to the Plaintiff the proposed Defence is just frivolous and vexatious and it was intended to prejudice the fair trial of this matter. The Plaintiff relied on the case of **Patel –vs- E.A cargo HandkingServices (1974) E.A 75** in support of its arguments. Lastly, the plaintiff submitted that it shall be severely prejudiced if the instant suit is reinstated as its business has suffered substantially as a result of the Defendant deliberately withholding what is due and owing to it. The case is at the execution stage, and it is too late in the day for the Defendant to ask the court to set aside the judgment in default of defence. It was also submitted that the parties have been involved in out of court negotiations for the settlement of the debt since the year 2002. Therefore, the Plaintiff has indulged the Defendant for a period of 12 years and has always waited for the Defendant to fulfill its promises and settle the debt. It was only upon the realization that the Defendant was not going to make good its promise that the Plaintiff chose to file the garnishee application. Lastly, the Plaintiff submitted that the Defendant's conduct depicts a litigant who was not keen to defend the suit and the application herein was only meant to delay the cause of justice. The Plaintiff therefore urged the court to dismiss the application with costs.

[8] Having carefully considered the affidavits on record, the submissions by counsel and the various cited authorities, I take the following view of the matter. The Civil Procedure Rules, 2010 contains a provision detailing what would happen in the event a defendant fails to file a defence within the prescribed period. The failure will lead to entry of judgment upon application by a plaintiff as has been clearly captured in Order 10 Rule 4(1) of the Civil Procedure Rules, 2010 as follows, that:-

"Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs."

[9] The record shows a Plaint dated 19th March, 2002 was filed on the same date. The Defendant through the firm of Muraguri&Muraguri entered appearance on 14th May, 2002. No defence was filed at all or within the period prescribed in law. The Plaintiff was entitled to request for judgment against the Defendant and for the court to enter judgement accordingly. However, the court has unfettered discretionunder Order 10 Rule 11 of the Civil Procedure Rules, 2010 to set aside or vary such judgment and all consequential decree or order upon such terms as are just. Setting aside judgment takes the Plaintiff back to the start. The Court should be careful, therefore, to be satisfied that the Plaintiff will not suffer profound prejudice when his judgment is taken away. Therefore, the court must weigh all the circumstances of the case, including the conduct of the Defendant, and that the Court is satisfied that the defendant has offered a plausible explanation as to the delay in filing its Defence within the prescribed period. The only reason that has been offered so far by the Defendant was that the failure to file the defence was a mistake on the part of its previous advocate. And, that in any case, such a mistake is not to be visited upon it. I have considered that argument. Blunders will be made from time to time by counsels and a party may not suffer the penalty of the mistake by advocate. However, in the case of **Savings and Loans Limited -vs- Susan WanjiruMuritu Nairobi (Milimani) HCCS No.397 of 2002**I find a lot of persuasion by the decision of Kimaru, J when he expressed himself as follows:-

"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant." (emphasis added)

[10] I fully agree with the position that it is not enough for a party to simply blame the Advocate without showing tangible steps it took in following up his case. The zeal to have a matter determined in the way a party thinks is best should always come from the party claiming he was diligent. The Defendant has not shown by evidence it was vigilant on its case or the steps it took to find out the status of its case. Nothing is exhibited to show that the Defendant wrote to or made inquiries fromits advocate on the status of the case against it. The Defendant even engaged the Plaintiff on out of court negotiations together with the garnishee herein on the settlement of the decree herein. All evidence shows that the Defendant was aware of the decree through and through. But it chose to temporize on their right to apply to set aside the judgment herein. This is a conduct of most dilatory, negligent and careless litigant. Indeed, to plead innocence as the Defendant is trying to do is an insult to the law and humour of extravagant comedy.

[11] I have also noted the issue raised by the Defendant on the interest of 3% per month on the decretal amount of Kshs. 1,956,739.10/=. According to the Defendant it was erroneous for the deputy registrar to have applied 36% per annum interest on the debt owed by the Defendant to the

Plaintiff. On its part, the Plaintiff claimed that the interest rate applicable to the decretal sum was in order as it was based on the agreement of the parties. Having considered the rival submissions, I am of the following conviction. Section 26(1) of the Civil Procedure Act states as follows:-

> ***"26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.***
>
> ***(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."***

[12] The above law is not obscure; the section gives the court discretion to order interest at any rate it deems reasonable on the principal sum from date of filing suit to date of decree and from any period before the suit was filed and in addition to the aggregate sum adjudged from the date of decree to the date of payment. Interest at the rate of 3% per month on the amount of the judgment may seem excessive. However, the Defendant, instead of applying in good time to have the judgment and decree set aside engaged on negotiations on settlement of the decree. It also slept on its rights for 12 years when it was fully aware of the judgment and decree. Many options lay before the Defendant; it would have even applied for review of the judgment or decree of this court in respect of interest. I find it quite flimsy and dishonest for the Defendant to allege that this was not done because the decree was not served on the Defendant. These were after thoughts in the circumstances of the case. From the various correspondences attached to the affidavit of Peter RuoMaina sworn on 12th May 2014, it is clear that the Defendant was all along aware that it was indebted to the Plaintiff and that a decree had been issued. The Defendant had knowledge of the decree in favour of the Plaintiff and it cannot rely on ignorance or other technical matters. As judgment herein and the decree were passed in a regular manner by the Court under the powers conferred by statute, the interest rate of 3% per month on the amount due under the decree is lawful. The argument by Defendant does not help the Defendant to excite any tenderness or to impel the court to exercise its discretion in favour of setting aside the judgment herein.

[13] The proposed Draft defence annexed to the Defendant's application does not help either. In the face of what I have said, the Court may not really gauge the merits of the proposed Defencein applications for setting aside and/or varying ex parte judgments. *Laches* has caught up with the Defendant and I have substantially dealt with the issued being claimed to be triable issues by the Defendant.

[14] For completeness of the discourse on setting aside interlocutory judgement, I will not forget to examine the argument by the Plaintiff that it shall be greatly prejudiced if the court were to set aside the judgment in default of defence. The importance of prejudice on a party was discussed by the court in the case of **Agip (K) Limited vs Highlands Tyres Limited [2001] KLR** where **Visram J** (as he then was) stated:-

> ***"…Order 16 Rule 5 of the Rules is not automatic and certain factors have to be considered such as (i) whether the delay is inordinate (ii) whether the inordinate delay is inexcusable and (iii) whether the Defendant is likely to be prejudiced by the delay…"***

[15] Fathom that herein was entered on 27th August, 2002. The instant application was filed on 23rd July, 2014, about 12 years after entry of judgement. There has been such inordinate and prolonged delay in this matter. To make matters worse, the inordinate delay has not been explained at all. It, thus, becomes inexcusable;in such case, and in the circumstance of the case it

is not possible at all to do justice in the case except by refusing the request by the Defendant to set aside the judgment. Taking away the judgment of the Plaintiff in these circumstances will be most unfair and prejudicial to the Plaintiff. See**Ivita Vs Kyumbu [1984] KLR 441** and **Allen Vs McAlpine [1968] 1 ALL ER 543.**

[16] I must emphasize that I have combed through the Affidavit in support of the Application by the Defendant. There is no single deposition attempting to explain why there was delay in bringing the present application. Indeed all that has been alleged was that, after obtaining the Decree and certificate of costs, the Plaintiff never served a notice of entry of the Judgment within the stipulated time frame. I am not persuaded by this line of argument as the various documents contained in the court record show that the Defendant had enough information about and was aware of entry of the judgment herein.In fact, nothing stopped the Defendant from instructing other advocates to challenge the entry of judgment early enough. The Defendant instead chose to shift the blame on the Plaintiff by alleging that it had lost interest in the matter and opted not to execute the decree herein for over 11 years. I am of the view that these assertions do not aid the Defendant's case because they do not sufficiently or at all explain the inordinate delay in applying to set aside the judgment herein. The Defendant should understand that the Plaintiff has a right in the judgment, and so, to be guilty of such inordinate delay and undue laches, the Defendant should consider that setting aside the judgment for no apparent reason will certainly prejudice the Plaintiff and his right to the fruits of its judgment. It ought, therefore, to have taken a serious stand on the matter and explain the inordinate delay in sufficient terms which are reasonable and on which the Court will be inclined to set aside the judgment, the delay and the right of the Plaintiff notwithstanding. Considerable amount of time has passed by and it is not a remote possibility that procuring witnesses and evidence may not be possible or may only be possible but with extreme difficulty and at great expense. Such prejudice is not compensable in costs as it impinges on the constitutional right to fair trial and hearing. Based on the totality of evidence presented by the Defendant, and the law, I am disinclined to exercise my discretion in favour of Defendant. I wish to re-state that, the discretion of the Court was never intended to assist an indolent party who has deliberately sought whether by evasion or otherwise, to delay the course of justice. **See Shah vs. Mbogoh**. In the premises, I dismiss the Defendant's application with costs to the Plaintiff. It is so ordered. Now that the application for setting aside is out of the way, I will move on to determine the application for Garnishee proceedings.

GARNISHEE PROCEEDINGS

[17] The Motion dated 7th March, 2014 has been filed by the Plaintiff who is the decree-holder in this matter. It is what is commonly known as garnishee proceedings. The Motion is expressed to be brought under Section 38 of the Civil Procedure Act, Order 22 Rule 40, Order 23 rules 1, 3 and 10 of the Civil Procedure Rules 2010. The significant prayers are;

i. ***THAT pending the hearing and determination of this application inter parties, the Honorable Court be pleased to issue a prohibitory order restraining the Judgment Debtor and/or Garnishee from transferring all the shares owned by the Judgment Debtor and held by the Garnishee.***

ii. ***THAT the shares owned by the Judgment Debtor and held by the Garnishee be attached to answer the decree for the sum of Kshs. 2,485,058.60/= including interest at the rate of 3% per month from 27th August, 2002 until full satisfaction of the decree together with costs of the suit of Kshs. 121,126.10/= and interest thereon.***

iii. ***THAT this Honorable Court be pleased to make a Garnishee Order Nisi against the Co-operative Bank of Kenya Limited, the Garnishee herein, ordering that all the shares owned by the Judgment Debtor and held by the Garnishee be attached to answer the decree for the sum of Kshs. 2,485,058.60/= including interest at the rate of 3% per month from 27th August 2002 until full satisfaction of the decree together with costs of the suit Kshs. 121,126.10/=and interest thereon.***

iv. ***THAT the Honourable Court be pleased to make an order directing the Garnishee to appear before this Court on an appointed date and time to show cause why all shares owned by the Judgment Debtor ad held by itself should not be attached so as to settle the decretal amount of Kshs. 147,634,773.36/= as at 1st March, 2014 together with costs of the suit of Kshs. 121, 121.10/=.***

v. ***Costs of this application.***

[18] The Plaintiff relied on the grounds on the application as well as the supporting and further affidavit of Peter RuoMaina sworn on 7th March, 2014 and 12th May, 2014 respectively. The Plaintiff contended that it has final and binding decree against the Defendant that is capable of execution arising from judgment in default of defence entered into by the Court on 16th July, 2002 in the sum of Kshs. 2,485,058.60/= together with interest as the rate of 3% per annum until full payment is made. Further, the Plaintiff's bill of costs was taxed at Kshs. 121,126.10/= by the Deputy Registrar of this court and a certificate of taxation was subsequently issued. It was deposed that the Defendant has failed to settle the decretal sum which as at 1st March, 2014 stood at Kshs. 147, 634,773.36/=.

[19] The Plaintiff stated that the garnishee holds shares on account of the Defendant which are sufficient to settle the decretal sum. The Plaintiff also contended that the Garnishee by its letter dated 8th January, 2014 intimated to Counsel to the Plaintiff that it would pay the Decretal sum owing from the proceeds of the next dividend payment, subject to the Regulatory and Shareholders approvals on the annual dividends based on the judgment debt of Kshs. 1,956,739.10/=. The Plaintiff is apprehensive that if it waits for the annual dividends to be paid out on 30th June, 2014, the proceeds of the dividends shall not be sufficient to settle the decretal sum. It was also the Plaintiff's assertion that in the event that the shares held by the Garnishee on account of the Defendant are sold out before the Judgment Debtor settles the amount owed the Plaintiff, it would be extremely difficult for it to recover its money.

[20] The Garnishee filed and served the Replying Affidavit sworn by Rosemary MajalaGithaiga on 2nd April, 2014. The Garnishee Bank argues that it does not carry on the business of investment banking, or stock brokerage and therefore did not hold any shares on behalf of the Defendant/ Judgment Debtor. They further argued that there was no way; the Bank was a garnishee to the judgment debtor as alleged in the application. The deponent went on to state that the Bank was initially formed with a view to ease financial transactions in the co-operative movement, but was now a public listed company with individuals being invited to subscribe to and hold its shares according to the rules and regulations of the Nairobi Stock Exchange and the regulatory framework afforded by the Capital Markets Authority. It was also pointed out that the Defendant does not hold any shares in the Bank as per the Bank's share register. As such, there was no relationship or legally enforceable debt between the Judgment Debtor and the Bank. Therefore, the applicant does not meet the legal threshold for an order for garnishment as against the Bank to attach any purported shares. Accordingly, it was contended that given the circumstances of the case, no garnishee proceedings were capable of being maintained against the Bank. They urged further that, the bank could not be able to comply with any directions or orders sought herein and that the application before the court was a pure fishing expedition by decree/holder in an attempt to trace the assets of the Defendant.

[21] The Defendant also filed an affidavit sworn on 16th April, 2014 byEphantusWanjohi, who has been described as the Defendant's General Manager. The Defendant avers that the garnishee application before the court is devoid of merit as the Defendant has never owned any shares in the garnishee bank as alleged in the application. In the premises, therefore, there was no relationship in the nature of a creditor and debtor between the Garnishee Bank and the Defendant. It was further averred that the Defendant has sought to set aside the Judgment and Decree issued by this court on 27th August, 2012 and hence instituting garnishee proceedings at this point was an exercise in futility on the part of the Plaintiff. The Defendant also contended that it disclosed in its

books a sum of Kshs. 688,204/= as owing and was to be paid to the Plaintiff, as far back as 2011/ 2012 by the Government. Further, the Defendant urged that the Plaintiff failed to furnish the Defendant with its bank details. Therefore, the Defendant was solely responsible for the non-payment of the Debt. In sum, the Defendant asserted that the garnishee proceedings were unnecessary and the Plaintiff's application ought to be dismissed.

[22] The Plaintiff filed a further affidavit by Peter RuoMaina sworn on 12th May, 2014 in reply to the Replying affidavits by the garnishee and the Decree Holder. According to the Plaintiff, the Garnishee admitted in its letter to the Plaintiff dated 29th January, 2002 that the Defendant/Judgment Debtor is a key shareholder of the Bank. The Garnishee cannot, therefore, renege on that position and argue that the Decree holder does not hold any shares in the Garnishee Bank. The Plaintiff further averred that the Garnishee through its Group Marketing Director wrote to the Decree holder and stated that the Garnishee had intervened in the matter and the Defendant/Judgment Debtor had agreed that the decretal amount will be satisfied from the dividends until full satisfaction. In addition, it was deposed by the Plaintiff that the, Garnishee Bank through its letter to the Plaintiff/Judgment-Holder dated 16th December, 2013 confirmed that the Bank had held talks with the management of the Defendant who had in principle agreed to satisfy the decree against them through the proceeds of its dividends declared by the Bank. They further posit that, the Garnishee Bank also wrote a letter to learned counsel to the Plaintiff/ Judgment-holder giving an irrevocable undertaking to pay to the Decree Holder, the decretal amount of Kshs. 1,956,739.10/=, from the proceeds of the next dividend payment upon full reconciliation on or before 30th June, 2014 subject to the Regulatory and Shareholders approvals on the annual dividends. Accordingly, it was the assertion of the Plaintiff/ Judgment Holder that the aforementioned letters are sufficient proof that the Judgment Debtor holds shares in the Garnishee Bank. Therefore, the garnishee application is properly before the court, as the decree has not been set aside and the Plaintiff has established that the garnishee was indeed indebted to the Judgment Debtor.

[23] Except the Defendant, the Plaintiff and the Garnishee canvassed the application by way of written submissions. The Plaintiff filed written submissions on 23rd May, 2014. Learned counsel to the Plaintiff, Miss. Nyaga argued that Order 23 Rule of the Civil Procedure Rules, 2010 provides for the attachment of debts due to the Judgment- debtor from any person in satisfaction of the decree against the Judgment- debtor. There is a valid decree held by the decree holder that was issued by the court on 27th August, 2002. Miss Nyaga, submitted that the same was extracted and served on the Defendant/Judgment-Debtor. The said decree had not been set aside. She further pointed out that the Plaintiff/Decree-Holder has been able to demonstrate that the garnishee holds shares on the account of the Judgment debtor. She stated that, through its various correspondences, the judgment debtor and the garnishee have always indicated their willingness to settle the decree herein from the proceeds of the dividends of its shares that would have been declared by the garnishee at the close of the 2013/2014 financial year. Miss Nyaga submitted that the application before the court was meritorious as the value of the shares held by the garnishee on account of the judgment debtor was sufficient to settle the decretal sum of this suit. She also replied to the submissions made by the Garnishee Bank; she was of the view that the instant application was not of an omnibus nature as alleged; and the decree holder has not sought an order of transfer of shares as contended. She stated that the request before court is for the attachment of the shares which is done through a prohibitory order. A prohibitory order only prevents further dealing of the shares by the Judgment Debtor. According to learned counsel, once the prohibitory order has been issued, the judgment debtor can choose to pay the amount due and owing to the Decree holder or decline to do so. Miss Nyaga was of the persuasion that the shares held in the garnishee account of the judgment debtor are held to the credit of the judgment debtor and therefore amount to debt; it is of monetary value. In conclusion, the Plaintiff urged the court to allow the prayers sought in the application.

[24] The Garnishee Bank filed its written submissions dated 16th June, 2014 and reiterated the contents of its Replying Affidavit. In a nutshell, the Garnishee Bank's learned Counsel Mr.

Akhulia, argued that the Garnishee application is an omnibus application since the same seeks various orders. On the one hand, the Plaintiff seeks the attachment of shares of the Defendant in the garnishee bank, while on the other, it is asking the court to transfer such shares in its favour to satisfy the decree. According to counsel, pleadings should be specific, and this kind of pleading is an abuse of the court process. Mr. Akhulia made further submission that the Decree Holder has failed to establish there is a debt owing to the Judgment Debtor. He also submitted that strictly speaking, Order 23 Rule 1 concerns a debt to be attached in terms of an amount of money. And shares do not fall in the ambit of a debt for purposes of garnishee proceedings.

[25] He continued to submit; that the Garnishee Bank did not have any relationship with the Judgment Debtor which may be termed as a debtor–creditor relationship, and holds no amount of money that may be considered as a debt in the context of garnishee proceedings. In light of the foregoing, learned counsel was of the view that the shares are in no way an existing debt to either the Garnishee or Judgment Debtor as they do not equate to sums owed by the Garnishee. Mr. Akhulia was of the opinion that the Plaintiff/Decree Holder ought to have utilized Order 22 rule 40 of the Civil Procedure Rules. The Garnishee Bank cited various cases in support of its submissions including **AwoShariff Mohamed t/a Mohammed Investments-vs-AbdulkadirShariffAbdirahim& 5 Others Nairobi HCCC 329 of 2003**, **Busuru Richard Mark t/a Busuru R.M. Partners Architects –vs- B.A Omuse t/a Omuse Afro Anglo Investments (2007) eKLR**, **Rajput –vs- Barclays Bank of Kenya Ltd & 3 Others (2004) 2KLR 393**. In conclusion, the Garnishee urged the court to dismiss the application with costs to the Garnishee as the same raises no possible cause of action as against it.

DETERMINATION ON GARNISHEE PROCEEDINGS

[26] I have considered the material placed before the court as well as the written and oral submissions made by learned counsels for the respective parties. I agree from the outset, that the application herein is set in an omnibus fashion as the Plaintiff/Decree-Holder attempts to get two different orders in an attempt to have the decree satisfied by the Defendant. On the one hand, the Plaintiff wants an order of attachment of the shares of the Defendant/Judgment Debtor, held in the Garnishee bank through the issuance of a prohibitory order under Order 22 rule 40 of the Civil Procedure Rules, 2010. On this, see prayers (b) and (c) of the application. On the other hand, it has also made a request that the court makes an order *nisi* against the co-operative bank, ordering that all shares owned by the Judgment Debtor and held by the garnishee be attached to answer to the decretal sum under order 23 of the Civil Procedure Rules, 2010. On this, see prayers (d) and (e) of the application. It is also noteworthy that the prayers are not made in alternative of each other as Learned Counsel to the Plaintiff attempted to explain in her submissions. The orders sought are also governed by different rules and are adjudicated upon different judicial principles and yardsticks. Courts have frowned upon omnibus applications. See what Ringera J (as he then was) stated in the case of **PYARALAL MHAND BHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004**that;

> ***"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."***

[27] Strict application of the law would demand that I dismiss this application. However, although the instant application may not be epitome of elegant drafting, the Court still has the discretion under article 159 of the Constitution to examine and determine the application on merit. I will so proceed. I propose to first examine the issue of whether this court can issue a garnishee order nisi against the Co-operative Bank.

Order nisi

[28] Order 23, rule 1 (1) of the Rules provides as follows;

> ***"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 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 costs aforesaid."***

[29] From the foregoing provision of the law, Garnishee proceedings are taken out in an action in which the judgment or order for the payment of money is given or made. As such, Garnishee proceedings are made within the process of execution seeking to enforce a money judgment or decree by the seizure or attachment of the debts due or accruing to the judgment debtor and which form part of his property. See ***Halsbury's Laws of England 4th Edition Vol 17 at Page 325 para 525***. The Co-operative Bank has disputed liability and contended that the Plaintiff/Decree Holder has failed to establish that it owes a debt to the Judgment Debtor. The key question, therefore, is; whether the decree holder has established indebtedness of the garnishee to the Defendant as to make an order for payment. For the court to make such determination, I shall refer to the depositions and the submissions of the counsels before court.

[30] The Plaintiff's contention is that the Defendant holds shares in the Garnishee bank that can be used to satisfy the decretal sum due and owing to it. Co-operative bank denied this fact; a question arises as to whether shares can be equated to an existing debt. I think not. Despite the fact that shares possess monetary value, I find that the same do not amount to a recognizable debt existing between the Garnishee Bank and the Defendant. It would, however, be different if the Plaintiff/Decree-Holder proves that the shares have borne dividends due and payable to the Defendant, and the proceeds thereof are yet to be released to the Defendant. In those circumstances, the dividends are held on the account of and are owed to the judgment-debtor; it could be a subject of a garnishee order nisi for attachment.

[31] I have gone into those lengthy facts to demonstrate that the decree holder has not placed sufficient evidence before me demonstrating that the garnishee is holding a sum due to the defendant which would be available for attachment to satisfy the decree. Granted those circumstances, I am of the considered opinion that the garnishee proceedings have come before their time. This court cannot therefore issue orders making the garnishee order nisi, under a cloud of or on speculation. The order in the circumstances that commends itself to me is to deny the plaintiff's/decree holder's prayer (d).

Prohibitory Order

[32] I shall now examine the merits of prayer (b) and (c) of the application dated 7th March, 2014. The prayers urge the court to issue a prohibitory order restricting the Judgment Debtor and/or garnishee from transferring all the shares owned by the Judgment debtor and held by the Garnishee. And also asks that the shares owned by the Judgment Debtor and held by the Garnishee be attached to answer the Decree issued in favour of the Plaintiff/Judgment holder. These requests relate to shares in a corporation, and, therefore, Order 22 Rule 40(1) comes into play. The Order states as follows -;

"40. (1) In the case of—

a. ***a share in the capital of a corporation; or***
b. ***other movable property not in the possession of the judgment-debtor, for the attachment of which specific provision is not made by these Rules the attachment shall be made by a written order prohibiting—***

i. ***in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon; or***
ii. ***in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor."***

[33] The law is that attachment of shares in execution of a decree is only by means of a prohibitory order.Once the prohibitory order is made and registered against the shares, there is effective attachment in law. The Decree holder deposed that the Garnishee Bank holds shares owned by the Judgment Debtor that can satisfy the Decretal Sum. The Garnishee, however, disputes this and asserts that the Plaintiff/Decree-Holder has not produced any evidence, such as a share register, to show that the Defendant holds any shares in the Garnishee Bank. A careful consideration of the rival submissions confirms that the garnishee was not candid from the beginning on this issue. The Plaintiff/Decree-Holder through the letter dated 29th January, 2002 and marked as **"PRM-1"**, plus the letter dated 31st December 2013 marked as **"PRM -2"** as well as the letter dated 8th January, 2014 marked as **"PRM-4"** all by the Garnishee Bank to the Plaintiff and/or its advocates showed that the garnishee holds shares in the aforesaid bank. I will not consider the letter annexed to the application and marked as **"PRM -3"** as the same was written by the Bank's Company Secretary to the Plaintiff on a without prejudice basis.

[34] The documents availed before Court show the judgment debtor holds shares in the bank and further, the Judgment Debtor was willing to satisfy the decree against them from the proceeds of the dividends declared by the Bank Garnishee. However, I note that although there was admission on the part of the Defendant/Judgment-Holder and the Garnishee on the existence of the shares, none of the parties has disclosed the amount of shares held by the Defendant/Judgment Debtor or the value thereof. The Plaintiff merely made a general statement that the shares held in the garnishee Bank are sufficient to satisfy the decree. But, going by the letter marked as **"PRM -4"** annexed to the further affidavit of Peter RuoMaina, the Garnishee Bank had given an irrevocable undertaking to pay the Plaintiff a sum of Kshs. 1,956,739.10/= upon approval of annual dividends by the Regulator and shareholders during the end of the financial year ending 30th June, 2014. This clearly shows that dividends were sufficient to cover the decretal amount of Kshs. 1,956,739.10/=. The Court, on the information produced by the parties, has no way of determining whether the value of the shares so held by the garnishee bank in favour of the Defendant/Judgment Debtor is capable of settling the entire decretal sum of this suit. I will not, therefore, decide on the adequacy of the share to pay the entire decretal sum unless I engage in pure speculation. In the premise, therefore, it will be premature to order application of the shares toward full satisfaction of the decretal sum. The best course to take is for the Court to order the attachment of the shares and all dividends due on those shares on a written order prohibiting the Defendant in whose name the share 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 Defendant or any other person. I,therefore, grant prohibitory order in terms of prayer (b).

[35] Secondly, I order that that all shares and divided in the name of and due to the judgment-debtor respectively, shall be attached to answer the decree together with the costs of the garnishee proceedings. And by this same order, order the garnishee to appear before the court on a date I shall fix to provide the record of all shares and dividend in the names of and due to the judgment-debtor, respectively, and to show cause why the shares should not be sold and dividend paid towards to answer the decree together with the costs of the garnishee proceedings. The information sought should be able to give the Court the amount of shares and dividends held on

the account of the judgment-debtor and whether it is sufficient or so much thereof as may be sufficient to satisfy the entire or part of the decree and costs of the garnishee proceedings.I order the Garnishee Bank to appear before and provide the information ordered to this court within 30 days of this ruling. I grant also grant prayer (e) of the application. The application dated 7th March, 2014 is partially successful, and so, I will order that each party shall bear its own costs in the matter. It is so ordered.

Dated, signed and delivered in open Court at Nairobi this 26th day of May 2015.

F. GIKONYO

JUDGE