



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISC. APPLICATION NO. 148 OF 2013**

**IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 LAWS OF KENYA**

**OTIENO RAGOT & CO. ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY .....JUDGMENT DEBTOR/RESPONDENT**

**AND**

**FAMILY BANK OF KENYA LIMITED .....GARNISHEE**

**AND**

**NAIROBI COUNTY ASSEMBLY SERVICE BOARD .....THIRD PARTY**

**RULING**

1. On 10<sup>th</sup> July, 2015, this court delivered a ruling in which it made a Garnishee order absolute directing that the Garnishee do pay to the Judgment creditor a sum of Kshs.50,987,985/- from A/c Nos. 012-0000-37275, 012-0000-35538 and 012-0000-35590, respectively to satisfy the decree made herein against the Judgment Debtor
2. Pursuant thereto, Nairobi County Assembly Service Board (hereinafter “The 3<sup>rd</sup> Party”) took out a motion on notice dated 17<sup>th</sup> July, 2015 under Sections 1A and 3A of the Civil Procedure Act, Section 12 of the County Government Act, 2012 and Order 23 Rules 6 & 7 of the Civil Procedure Rules. In that motion, the 3<sup>rd</sup> party sought to lift and/or set aside the Garnishee order absolute aforesaid. The motion was supported by the Affidavit of Philomena Nzuki sworn on 17<sup>th</sup> July, 2015.
3. The grounds upon which the application was grounded were; that the accounts affected by the Garnishee order belong to the 3<sup>rd</sup> party; that the 3<sup>rd</sup> party is a body corporate under Section 12 of the County Governments Act, 2012 which is a separate and distinct body from the Nairobi City County; that the 3<sup>rd</sup> party cannot be called upon to answer for the debts of the Judgment debtor and that the 3<sup>rd</sup> party was never involved in the Garnishee proceedings.
4. Referring the court to the Affidavit in support, Mr. Karanja, learned Counsel for the 3<sup>rd</sup> party submitted that pursuant to Regulation 3 of the Public Finance Management (Nairobi City County Assembly Car Loan and Mortgage Scheme Fund) Regulations 2014, certain funds were established under the 3<sup>rd</sup> party known as the Nairobi County Assembly Car Loan & Mortgage

- Schemes fund. That in pursuance thereof, by a Service Level Agreement dated 30<sup>th</sup> May, 2014, the 3<sup>rd</sup> party entered into an agreement whereby the 3<sup>rd</sup> party placed funds in the hands of the Garnishee to manage the same in respect of the said schemes. That pursuant thereto, on 4<sup>th</sup> June, 2014 the 3<sup>rd</sup> party opened A/c Nos. 012-0000-35538 and 012-0000-35543 being the car loan and mortgage schemes fund, respectively. That on 11<sup>th</sup> June, 2014 and 8<sup>th</sup> April, 2015 the 3<sup>rd</sup> party deposited with the Garnishee a sum of Kshs.254,000,000/- and 100,000,000/= on call deposit basis which funds the Garnishee assigned to A/c Nos.012-0000-35590 and 012-0000-37275, respectively. It was therefore submitted that on the basis of the foregoing, the funds in the accounts the subject of the order of 10<sup>th</sup> July, 2015 belong to the 3<sup>rd</sup> party and not the judgment debtor and the application should be allowed.
5. Although the Garnishee did not file any response to the application, the court allowed Mr. Mwangi learned Counsel for the Garnishee to address the court. He relied on the Replying Affidavit of Elvis Kuria sworn on 2<sup>nd</sup> June, 2015 and submitted that the subject accounts belonged to the Nairobi City County Assembly and that there may have been a mistake in having the accounts christened as “Nairobi City county” in Exhibit “EMK1” at the time of their opening. He denied the Judgment creditor’s accusations that there was collusion between the Judgment debtor, the 3<sup>rd</sup> party and the Garnishee to defeat the orders of 10<sup>th</sup> July, 21015. He indicated that, as a sign of good faith, the Garnishee had initially complied with the order of 10<sup>th</sup> July, 2015 and paid over the monies but on receiving the protestation from the 3<sup>rd</sup> party reversed that payment. Counsel urged that the application be allowed.
  6. Opposing the application, Mr. Ragot learned Counsel for the Judgment creditor relied on the Replying Affidavit of Brian Otieno sworn on 23<sup>rd</sup> July, 2015 and submitted that; the accounts that were attached belong to the Judgment debtor as per the evidence produced by the Garnishee in the Replying Affidavit of 2<sup>nd</sup> June, 2015; that the explanation being given as to the naming of the accounts was an afterthought; that there was a deliberate attempt by the Garnishee to mislead the court as the statement of accounts produced were for the period January, 2014 to June, 2015 yet what was produced were only excerpts for that period; that the accounts existed much earlier than the service level agreement of 30<sup>th</sup> May, 2014. That the Judgment debtor had consented to the accounts being attached on 5<sup>th</sup> June, 2015 because it knew that the accounts belonged to it. Counsel further submitted that the correspondence from the Garnishee in respect of the accounts was to the Judgment debtor and not the 3<sup>rd</sup> party. He concluded that the 3<sup>rd</sup> party had not obtained leave before filing the present application as the Garnishee proceedings had terminated by the order of 10<sup>th</sup> July, 2015. Counsel therefore urged that the application be allowed.
  7. In rejoinder, Mr. Karanja submitted that the 3<sup>rd</sup> party did not require leave to bring the current application; that the Account Opening Forms produced by the 3<sup>rd</sup> party disclosed that the subject accounts belonged to the 3<sup>rd</sup> party and not otherwise. On his part Mr. Mwangi submitted that the consent of 5/6/15 was as between the Judgment debtor and the Judgment Creditor and was therefore not binding on the other parties. Mr. Karanja and Mr. Mwangi urged the court to allow the application.
  8. I have carefully considered the Affidavits on record and the submissions of Counsel. I have also considered the authorities relied on. This is an application by a 3<sup>rd</sup> party for the setting aside of the Garnishee order absolute of 10<sup>th</sup> Jul, 2015. In such an application, I think the 3<sup>rd</sup> party has to show why it did not participate in the Garnishee proceedings and that the funds in the subject accounts belong to it and not otherwise.
  9. On the first point, the 3<sup>rd</sup> party contended that it was never involved in the Garnishee proceedings as it was unaware of its existence until the 15<sup>th</sup> July, 2015 when the Garnishee informed it about its decision to transfer the sum of Kshs.51,287,985/- from the subject accounts to the Judgment Creditor. From the evidence on record, there is nothing to show that the 3<sup>rd</sup> party was aware of the proceedings before 15/7/15 as contended. I am satisfied with the explanation given that the failure to participate in the objection proceedings was not deliberate.
  10. The question is, do the funds in the subject accounts belong to the 3<sup>rd</sup> party? There is no doubt in my mind that by virtue of Section 12 of the County Government Act, 2012 the 3<sup>rd</sup> party is a body

corporate different and distinct from the Nairobi City County. For that reason, the 3<sup>rd</sup> party cannot be called upon to answer for the debts of Nairobi City County and vice versa.

11. In the Supporting Affidavit, the 3<sup>rd</sup> party asserts that the funds in the subject accounts belong to it. It produced the Account Opening Forms dated 4<sup>th</sup> June, 2014 as “PN3” in respect of Account Nos. 012-0000-35538 and 012-0000-35543. It also produced a service level agreement dated 30/5/14 pursuant to which the Garnishee was to manage the Car Loan and Mortgage funds belonging to the 3<sup>rd</sup> party. This position was supported by the Garnishee who insisted that the funds in the accounts belong to the Nairobi City County Assembly.
12. I have looked at the service level agreement produced as “PN-2”. Clause 6(a) of the agreement provides as follows:

**“6. THE PARTNER’S OBLIGATIONS**

***It will be the obligation of the partner:-***

- a. ***To place a deposit with Family Bank into two designated NAIROBI CITY COUNTY SERVICE BOARD Accounts for car loan and mortgage at Kenyatta Avenue Branch – Nairobi. This money will be for on-lending to Honourable members of Nairobi City County who have been vetted and recommended.”***

It is clear from the foregoing, that the name of the accounts to which the funds the subject of the Service Level Agreement were to be deposited was that of the Nairobi City County Service Board.

13. In paragraph 8 of the Supporting Affidavit, the 3<sup>rd</sup> party contended that two accounts, A/c Nos. 012-0000-35538 and 012-0000-35543, for car loan and mortgage, respectively were opened with the Garnishee pursuant to the said agreement. At pages 45 and 46 of the Exhibit “PN3” are the Bank Opening Forms for the said accounts. They are both dated 4/6/15. They are shown to belong to the Nairobi City County Assembly Service Board, the 3<sup>rd</sup> party. Although they are not authenticated by the Garnishee by way of stamping or signature, I am prepared to hold that on a balance of probability, the said forms may have been the ones used to open the two accounts and that those two accounts belong to the 3<sup>rd</sup> party and not the judgment debtor.
14. In paragraph 9 of the Supporting Affidavit the 3<sup>rd</sup> party contends that on 11<sup>th</sup> June, 2014 and 8<sup>th</sup> April, 2015, it deposited a sum of Kshs.254million and Kshs.100million with the Garnishee who assigned the funds to Account Nos. 012-0000-35590 and 012-0000-37275, respectively. The 3<sup>rd</sup> party did not produce any evidence of such deposits or any account documents as it had in respect of A/c Nos. 012-0000-35538 and 012-0000-35543.
15. I have seen “Exhibits JMG1” produced in the Replying Affidavit of Elvis M. Kuria sworn on 2<sup>nd</sup> June, 2015. The A/c Nos. 012-0000-37275 and 012-0000-35590 are christened “Nairobi City County Mortgage” and “Nairobi City County Car Loan Scheme Funds”, respectively. The question that arises is, if the accounts belonged to the 3<sup>rd</sup> party, why were they in the name of the Nairobi City County? There was no answer to that question or any explanation on oath, either by the 3<sup>rd</sup> party or the Garnishee. The attempt by their Counsels to explain the discrepancy away from the bar that it might have been a mistake at the time of opening of the accounts cannot do. Such a serious fact can only be explained by an officer from the Garnishee and on oath. In any event, if it was a mistake as contended, is it that such mistake had not been detected ever since June, 2014 to date and corrected? I am afraid the court and all and sundry have to go with what the documents expressly state what they are, i.e. that the accounts are in the names of Nairobi City County and not otherwise in the absence of any credible evidence to the contrary.
16. The other fact is that, the 3<sup>rd</sup> party stated on oath in paragraphs 9 and 10 as follows:-

***“(9) On 11<sup>th</sup> June, 2014, the Board deposited with the Bank a total sum of Kshs.254,000,000/- on call deposit terms and the bank assigned the funds to account 012000035590.***

***(10) On 8<sup>th</sup> April, 2015, the Board deposited with the bank a further sum of Kshs.100,000,000.00 on call deposit terms and the bank assigned the funds to Account 012000037275.”***

17. Looking at “JMG1” in respect of A/c No. 012-0000-37275, the first entry is on 08<sup>th</sup> January, 2015 wherein there was a deposit of Kshs.100million. As regards A/c No. 012-0000-35590, the first entry is on 11<sup>th</sup> June, 2014 of a deposit of Kshs.254million. If the said deposits were made by the 3<sup>rd</sup> party, where are the deposit documents as in A/c Nos.012-0000-35538 and 35543? Why were the accounts still christened “Nairobi City County Mortgage & Loan Scheme Fund” and not in its name as per the service level agreement? The deposit on A/c No. 012-0000-37275 was on 8<sup>th</sup> January, 2015 and not 8<sup>th</sup> April, 2015 as sworn in paragraph 10 of the Supporting Affidavit. Surely, if the account belonged to the 3<sup>rd</sup> party, it could not have mistaken the date it made the deposit as the documents of deposit in its possession, which were never produced, would have guided the 3<sup>rd</sup> party accordingly.
18. The lack of documentation as to the opening of Account Nos.012-0000-35590 and 37275; the discrepancy in the alleged date of deposit of the funds in the latter account; the names of the account holder for the said two accounts, gives credence to the submissions by Mr. Ragot that the Garnishee knew that the actual owner of the account was Nairobi City County and that is why in the correspondence produced by the 3<sup>rd</sup> party, the Garnishee was addressing all the issues relating to the said accounts to the Nairobi City County and not the 3<sup>rd</sup> party.
19. Another issue which militates against the contention by both the 3<sup>rd</sup> party and the Garnishee about the funds in the subject accounts, is the apparent contradictions in their cases. In his Replying Affidavit of 2<sup>nd</sup> June, 2015, Elvis M. Kuria an in house counsel of the Garnishee swore ***at paragraph 4:-***

***“4. That in the said Accounts numbered 012000037275, 012000035538 and 012000035590 domiciled at Kenyatta Avenue Branch the secured funds held therein constitute repayments from the individual members of Nairobi City County Assembly on the car and Mortgage Scheme the bank manages on its behalf.” (Underlining mine)***

20. On the other hand, Philomena Nzuki, the Principal Accountant of the 3<sup>rd</sup> party swore in her Supporting Affidavit of 17<sup>th</sup> July, 2015 that the funds in the two said accounts, to wit, A/c Nos.012-0000-35590 and 012-0000-37275 were direct deposits by the 3<sup>rd</sup> party. If these two parties are the ones in exclusive dealing of the said accounts, how can there be such a marked contradiction as to the funds in those accounts?
21. My view of the matter is that these two accounts of 012-0000-37275 and 012-0000-35590 do not belong to the 3<sup>rd</sup> party. They belong to the Nairobi City County as exhibit “JMG1” expressly shows. I therefore reject the 3<sup>rd</sup> party’s contention. There is no evidence on record to show that the funds in those accounts belong to the 3<sup>rd</sup> party.
22. Accordingly, I find that the 3<sup>rd</sup> party has succeeded in respect of A/c No. 012-0000-35538 but not in respect of A/c Nos.012-0000-37275 and 35590. The order of 10<sup>th</sup> July, 2015 is accordingly reviewed to exclude A/c No.012-0000-35538 from the attachment. Consequently, the application is dismissed costs to the Judgment Creditor

DATED and delivered at Nairobi this 31<sup>st</sup> day of July, 2015.

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**A. MABEYA**

**JUDGE**