REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 148 OF 2013

CIVIL DIVISION

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

BETWEEN

OTIENO, RAGOT & CO. ADVOCATES .....DECREE HOLDER

VERSUS

CITY COUNTY OF NAIROBI ..... JUDGMENT DEBTOR

AND

FAMILY BANK OF KENYA LIMITED ..... GARNISHEE

NAIROBI COUNTY ASSEMBLY SERVICE BOARD ..... 3RD PARTY

RULING

1. The Decree Holder/Judgment Creditor in this matter Otieno Ragot &Co. Advocates had a decree for KShs. 30,610,559/ together with interest at the rate of 14% per annum against the Judgment Debtor City County of Nairobi. The said decree was by consent of both parties, who also agreed to have the decretal sum liquidated in instalments but the Judgment Debtor defaulted to honour the settlement terms as agreed. The Decree Holder therefore set in motion the process of executing for recovery.
2. By an application dated 24th April, 2015 the decree holder sought for execution by instituting Garnishee proceedings against the Judgment debtor's funds then held by its bankers Family Bank of Kenya Limited the Garnishee herein for the release of monies held in account numbers 012-000-037-275, 012-000-035-538 and 012-000-035-***590 (to be concealed when reporting)*** at the Garnishee's Kenyatta Avenue Branch on the belief that they were the Judgment Debtor's accounts. The outstanding amount as at the time of making the application dated 24th April,2015 seeking Garnishee Order Nisi was KShs. 50,987,985/= inclusive of interest.
3. The Garnishee filed a replying affidavit in response to that application through Elvis M. Kuria who deposed that the judgment debtor Nairobi City County was not the holder of the said accounts. Mr Kuria stated that the Garnishee had a scheme for provision of car loans and mortgages for the members of the Judgment Debtor's County Assembly and that the subject accounts related to that scheme and that the funds held in those accounts constituted repayments by individual members of the Nairobi City County Assembly. He further stated that the Garnishee had a lien over the said funds in the accounts as security for the loans advanced. For the said

reasons, Mr Kuria stated that the Garnishee could not release funds from the said accounts.

4. After giving serious consideration to the application and the statements of accounts annexed to the affidavit by the Garnishee, Hon. Mabeya J drew an inference that the deposits in account numbers 012000037275 and 012000035590 were call deposits whereby interest is payable on maturity, while account number 012000035538 is a business current account. He as a result found that all the payments made out, presumably the loan and mortgages to the members of the Judgement Debtor's County Assembly, seemed to have been made through the last account and that in view thereof, it was irresistibly clear that the funds in those accounts belonged to no one but the Judgment Debtor.
5. On the Garnishee's argument that it had a lien over the funds in the accounts as security for the loans advanced, the learned Judge held that a party claiming the same ought to establish circumstances under which the same arises and found that the Garnishee had failed to proffer any evidence to show that it had advanced any of its monies to the members of the Judgment Debtor's County Assembly for which the funds in the accounts could act as security.
6. The learned Judge went further to hold that there was nothing to show that the Garnishee was anything than a Manager of the Judgment Debtor's loan and mortgage fund whose funds lay in those accounts and that that did not give the Garnishee any right over the said funds save only as a manager thereof. The learned Judge therefore made the Garnishee Order Absolute and the Garnishee was ordered to forthwith pay to the Decree Holder a sum of KShs. 50,987,985/= to satisfy the decree from the monies attached and held in the three accounts. The said ruling was delivered on 10th July, 2015.
7. Subsequent to the ruling of 10th July, 2015, the 3rd Party Nairobi County Assembly Service Board filed the motion dated 17th July, 2015 seeking to lift and/or set aside the orders made on 10th July, 2015. The grounds advanced therein were that the accounts affected by the Garnishee order nisi belonged to the 3rd Party which was a body corporate under Section 12 of the County Government Act, 2012 and it was therefore a separate and distinct entity from the Judgment Debtor and that it could therefore not be called upon to answer for the debts of the Judgment Debtor City County of Nairobi. It was contended for the 3rd Party that pursuant to Regulation 3 of the Public Finance Management (Nairobi City County Assembly Car Loan and Mortgage Scheme Fund) Regulation 2014, certain funds were established under the 3rd Party known as Nairobi County Assembly Car Loan & Mortgage Scheme Fund. That by a Service Level Agreement dated 30th May, 2014; the 3rd Party entered into an agreement with the Garnishee to have the Garnishee manage funds in respect of the said schemes. It was contended that account numbers 012000035538 for car loan and 012000035543 for mortgage were opened and funds deposited therein. That on 11th June, 2014 and 8th April, 2015, the 3rd Party deposited with the Garnishee a sum of KShs. 254,000,000/= and KShs. 100,000,000/= on call deposit basis which funds the Garnishee is said to have assigned to account numbers 012000035590 and 012000037275 and argued that the funds therein therefore belonged to the 3rd Party and not the Judgment Debtor.
8. On behalf of the Garnishee reliance was placed on Elvis Kuria's affidavit sworn on 2nd June, 2015 and argued that the subject accounts belonged to the Nairobi City County Assembly and that there may be a mistake in having the accounts christened as "**Nairobi City County"** at the time of opening the accounts. It was argued that as a sign of good faith, the Garnishee complied with the orders of 10th July, 2015 and paid over the monies but on **receiving protestation from the 3rd Party, the Garnishee reversed the payment.**
9. On the part of the Decree Holder/ Judgment Creditor, it was argued that the explanation as to the naming of the accounts was an afterthought. That there was a deliberate attempt to mislead the court since what was produced were only excerpts for the period of January, 2014 to June, 2014 yet the account existed before the purported Service Level Agreement of 30th May, 2014. It was further argued that the Judgment Debtor had consented to the accounts being attached on 5th June, 2015 because it knew that the accounts belonged to it. That the correspondence from the Garnishee in respect of the accounts was to the Judgement Debtor and not the 3rd Party.
10. In determining the application Justice Mabeya held that among the things the 3rd Party had to establish were why it did not participate in the Garnishee proceedings and whether or not the funds in the subject accounts belonged to it. On the first point, the 3rd party contended that it did

not know of the existence of the Garnishee proceedings until the 15th of July 2015 and the Judge found that there was evidence on record to show that the 3rd Party knew of the said proceedings before 15th July, 2015 and proceeded to find that the failure to participate was deliberate. On the second point, the Judge on a balance of probabilities found that account numbers 012000035538 and 012000035543 belonged to the 3rd Party there being bank opening forms for the said accounts which were in the name of the 3rd Party. As for account numbers 012000035590 and 012000037275, Justice Mabeya found that the 3rd Party did not produce any evidence of the deposits alleged or any documents as it had in respect of account numbers 012000035538 and 012000035543. The learned Judge raised a query as to why the subject accounts were in the name of the Judgment Debtor and raised the fact that there was no explanation of the alleged mishap on oath. The other issue raised by the Judge was the contradictions on the contentions of the 3rd Party and the Garnishee. The Judge particularly pointed out paragraph 4 of the replying affidavit of Elvis Kuria, the In house Counsel of the Garnishee sworn on 2nd June, 2015 ***"4. that in the said accounts numbered 012000037275 and 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;"*** and the supporting affidavit of Philomena Nzuki, the Principal Accountant sworn on 17th July, 2015 where she deposed that funds in the two said accounts i.e. 012000035590 and 012000037275 were direct deposits to the 3rd Party. Justice Mabeya then drew an inference that the two accounts belonged to the Judgment Debtor. The Judge then on 31st July, 2015 proceeded to review the orders of 10th July, 2015 to exclude account number 012000035538 only from attachment.

11. It is the orders of Hon. Mabeya J made of 31st July, 2015 that the Garnishee seeks to review by the motion dated 6th August, 2015. When the motion came up for hearing ex-parte under certificate of urgency during vacation on 10th August, 2015, Hon. Justice Onyancha certified the application as urgent and gave an interim stay of execution of the orders of 31st July, 2015 until the rest of the application is heard and determined.
12. Subsequent to the orders of Justice Onyancha of 10th August, the Decree Holder filed the motion dated 12th August, 2015 essentially seeking to discharge the ex-parte order of stay of execution granted on 10th August, 2015. On 1st October, 2015, this court ordered that the two motions be heard together.
13. In support of the Garnishee's motion is the affidavit of Elvis M. Kuria in which he sought to explain the circumstances under which the Garnishee opened and operated accounts belonging to the 3rd Party. He stated that account number 012000035543 was opened for the Nairobi City County Assembly Mortgage Scheme Fund and 012000035538 for Nairobi City County Assembly Car Loan Scheme and that the two accounts were opened for purposes of extending loans to Nairobi City County Assembly members for purchase of homes and motor vehicles. That the 3rd Party made deposits in the accounts for purposes of advancing loans to the members. That the signatories to the two accounts have always been Jacob Muvengei Ngwele and Philomena Kavinya who are the clerk and Principal Accountant for the 3rd Party. That he was informed by the then Manager of Garnishee's Kenyatta Avenue Branch who is now the Regional Manager that when the accounts were opened the branch inadvertently failed to add the words "Assembly Service Board" to the account name for it to read "Nairobi City County Assembly Service Board." That despite the error made in the account name, the accounts have always been operated by the 3rd party's signatories. He stated that all principal loan repayments by the 3rd Party's members are credited into account number 012000035538 and 012000035543 therefore the said accounts belong to the 3rd Party. That subsequent to opening of the two loan accounts, the Garnishee opened two internal accounts 012000037275 and 012000035590 for purposes of administration of the loan funds deposited by the 3rd Party in their main accounts. He stated that the two accounts, 012000037275 and 012000035590 are internal accounts that require no resolution to open and their purposes are for loan administration. That the two accounts not being customer accounts no resolution was required to open them and there was no mandate to show to whom the accounts

belong. That the balances appearing in these accounts are book entries relating to internal accounting procedures. He further to this stated that the names of the customers only appeared internally so as to distinguish customers as there are several such internal funds accounting being operated at the same time. That upon receipt of the Garnishee order, he sought clarification from the Branch Manager who confirmed by an email on 6th August, 2015 that 012000037275 was an internal account, 012000035538 was the main account and that 012000035590 was also an internal account. Mr Elvis further stated that the 3rd Party deposited KShs. 100,000,000/= into the mortgage scheme account number 012000035543 on 2nd October, 2014 which funds were transferred by internal transfer into the internal fund management account 012000037275 on 6th January, 2015. That the said funds at all times belonged to the 3rd Party. That the error in the account name was a bona fide error on the part of the Garnishee and tried to rectify the anomaly.

14. In response to the Garnishee's motion, Jude Ragot Advocate for the Decree holder firm filed a replying affidavit on 8th October, 2015. He contended that because this application is an application for review of this court's decision dated 31st July, 2015 which itself was a decision passed on an application for review, brought by the 3rd Party, on whose behalf and for whose benefit the instant application for review has now been presented by the Garnishee, it is an abuse of the process of the court and is expressly prohibited by the law as set out in Section 80 of the Civil Procedure Act as read with Order 45 rule 6 of the Civil Procedure Rules. That this application does not satisfy the requirements to be met by a Garnishee on an application for review for the reason that no explanation has been given as to what new issue of fact has arisen or why such new fact, if at all, was not able to be brought before the court in its replying affidavit sworn on 2nd July, 2015 when the application for Garnishee Order Nisi was first heard. Further, that the Garnishee did not find it appropriate to bring these issues, if at all, during the hearing of the 3rd Party's application for review and instead relied on the its replying affidavit sworn on 2nd July, 2015 whose facts are the same as those set out for review in the instant application. It was stated by the Judgment Creditor that the application for review by the Garnishee being made for the benefit of the 3rd Party, on the same grounds as those for which the 3rd Party had itself sought review in the motion dated 17th July, 2015 is expressly prohibited by law as offending the principles of res judicata as set out at Section 7 explanation (1), (2), (3), (4) and (6) of the Civil Procedure Act. That the instant application is not made in good faith because on the date when this court delivered its ruling dated 31st July, 2015 the Garnishee sought and was granted leave to appeal against the decision, yet the application that had been dismissed, was not an application that it had filed.

15. In the motion seeking to discharge the interim orders granted by Judge Onyancha, Mr. Ragot in his supporting affidavit stated that the Garnishee concealed material facts from the court in the ex parte application. That it had been agreed between the Decree Holder's advocate and Mr. David Otieno that the Garnishee would withdraw the application dated 6th August, 2015 and settle the decretal sum immediately by 8th August, 2015 or by 10th August, 2015. Mr Otieno lamented that when he visited the Garnishee's Kisumu Branch, the Garnishee deliberately made a false report to the Kisumu Central Police Station that he in collusion with Auctioneers were creating disturbance at the Garnishee's Kisumu Branch and he and the Auctioneer Mr. Apollo Felix Owuor were arrested, detained and locked into custody within the Garnishee's premises until 2.50 pm.

16. The Garnishee opposed the Decree Holder's application vide the replying affidavit of Elvis Kuria. He refuted the Decree Holder's allegation that it had not disclosed material facts from the court at the time of hearing of the ex parte application. He stated that as at 6th August, 2015, the Decree Holder had not made an attempt to execute. That all the alleged acts alluded to by the Decree Holder occurred on 8th August, 2015 and 10th August, 2015 which was after the application for stay had been filed and it was impossible to disclose the actions to court. He stated that whereas there were negotiations between the Decree Holder and the Garnishee to settle the matter, it was purely on a without prejudice basis and were not binding unless and until a consent to that effect was recorded. He stated that it was a precondition for any negotiations and settlement that the Decree Holder would not attempt to execute the decree against the Garnishee pending the resolution of the matter but the Decree Holder attempted to execute on 8th August, 2015 and 10th

August, 2015 jeopardising the negotiations and settlement. That since the negotiations did not form a basis of agreement, each party was entitled to take any action it deemed necessary. Mr Kuria refuted all allegations and stated that there was no consent recorded to withdraw the application dated 6th August, 2015. He stated that he was informed by the Manager of the Express Branch in Kisumu one Kennedy Ogol that the people who went to the Kisumu branch to execute were rowdy and unruly and posed a security threat to the bank customers and police presence had to be sought to manage the situation. That when the Garnishee's employees went to the police to seek redress, they were informed that they had to make an official report and that the said report was merely for purposes of ensuring law and order. That he was informed by the branch manager in Kisumu that Mr. Ragot entered the branch on 8th August, 2015 and refused to leave until the decretal sum was deposited in the Decree Holder's account and that the Decree Holder was not prevented from executing the decree. He stated that Mr. Ragot willingly left the branch premises with expectations that the matter would be settled on 10th August, 2015 and that at no time did the General Service Unit Police officers prevail upon him to leave the bank. He contended that the Decree Holder has not provided evidence that he was prevented by the Garnishee from executing the decree as alleged.

17. At the hearing of these two applications learned counsel Mr. Ragot the proprietor of the Decree Holder firm of advocates represented the firm whereas Mr. Wena advocate represented the Garnishee, with Mr. Murage advocate appearing for the Judgement Debtor and Mr. Karanja acting for the 3rd Party. Mr. Wena argued that EMK 5 which was a letter from the clerk of the 3rd Party shows that money was deposited in the account therefore money belonged to the 3rd Party. That should the money be released, the Garnishee will be exposed to a suit by the 3rd Party. That the accounts were inadvertently opened in the names of the Judgment Debtor but that the signatories for the said accounts are the 3rd Party's Clerk and Principal Accountant. On the Decree Holder's application, Mr. Wena submitted that the Garnishee is not guilty of non disclosure to the court. That the application was filed in August 2015 when all Judges were in Mombasa for the annual colloquium and the Garnishee had no way of knowing of any orders made. He stated that the negotiations between the Decree Holder and the Garnishee were held on a Saturday and could only be binding if recorded in court as a consent.

18. In response, Mr. Ragot argued that the application for review was made by the 3rd Party and the learned Judge Hon Mabeya found that the 3rd Party had only succeeded on one of the accounts held by the Garnishee. That the application herein which is a second application for review is prohibited under Order 45 rule 6 of the Civil Procedure Rules which provision he maintained prohibits a second review on a decision that had already been reviewed. Counsel for Decree Holder submitted that it did not matter who brings the second application so that the Garnishee's argument that it seeks to protect the money of the 3rd Party in the motion dated 6th July, 2015 is to Mr. Ragot neither here nor there. He argued that the Garnishee having admitted that it is making an application for the benefit and on behalf of the 3rd Party cannot file the same application on the same issue which Hon Mabeya J had pronounced himself on thereby rendering the court functus officio. Mr Ragot argued that no new issue and explanation had arisen to warrant a review for a second time. Counsel for the Decree Holder/Judgment Creditor cited **Mburu Kinyua v. Gachini Tuti (1976-1980) KLR 790** where the court held that res judicata applies in equal measure in applications. On the merits of the application, it was argued by Mr Ragot that the ruling by Judge Mabeya had reviewed earlier orders and the learned Judge had exhaustively considered the application for review by the 3rd Party, wherein the learned Judge raised pertinent issues touching on the two accounts which he refused to exclude from attachment. That the learned Judge found that the 3rd Party did not avail account opening documents to support the averment that the accounts were not the Judgment Debtor's. That the Garnishee had not shown who made the errors in opening the accounts in a wrong name. He further stated that in the affidavit of Elvis Kuria, the deponent mentions the Regional Manager but that the said Manager did not swear an affidavit. That Order 19 rule 3 provides that affidavits can only be sworn on interlocutory applications. That no leave of court was sought to swear an affidavit on information on such a final application. Counsel Cited **Intermart Manufacturers Limited v. Akiba Bank Limited & 2 Others NBI High Court Civil Case No. Nai 619 of 2003** where Hon. Warsame J (as he then was) struck off part of an affidavit relying on information. Mr Ragot stated that EMK 8 is a correspondence from

Maina who said that the request for change in the account names could not be affected because there was no sufficient documentation to justify the change. Counsel posed a question as to why if the 3rd Party claimed that the money belonged to it, the Bank officials had refused to amend the particulars to reflect the 3rd party name instead of the Judgment Debtor's. He referred the court to PN4 which he said was a letter to the Judgment Debtor stating that its accounts were attached, which issue he stated the learned Judge Mabeya addressed. He argued that although it is stated the 3rd Party says it deposited KShs. 100 Million on 2nd October, 2014 whereas in the instant application, it is said that the deposit was made on 8th January, 2015. He argued that there was no justification for review since this is the third time the 3rd Party and the Garnishee are unable to explain themselves. That the Garnishee sought leave to appeal against the ruling of 31st July, 2015 but have not done so to date.

19. On the Decree Holder Judgment Creditor's application, Mr Ragot argued that the exparte orders were obtained by fraudulent concealment of material facts to the court. That there was an undertaking that the Decree Holder was to be paid but instead the Garnishee came to court exparte to obtain orders of stay of execution of the Garnishee Order. Mr Ragot referred the court to the tele-conversations ("D.O. 7" and "D.O. 2") and cited **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others, Court of Appeal No. 210 of 1997**, **Lochab Transport Ltd v. Kenya Arab Orient Insurance Ltd**, **HCC No. 3586 of 1985** and **William Ochieng Mahinya v. Kenya National Assurance Co., HCC No. 289 of 1995** to advance the Decree Holder's case on the alleged undertaking and the duty to disclose material facts before obtaining ex parte orders.
20. Mr. Karanja submitted that the Nairobi City County Assembly Board deposited KShs. 254 Million on 11th June, 2014 and KShs. 100 Million was deposited in account number 012000037275 which accounts he stated belonged to the 3rd Party. He stated that the 3rd Party was not aware that the Garnishee had confused the account name.
21. In response to Mr. Ragot's submissions, Mr. Wena counsel for the Garnishee submitted that EMK2 and EMK3 were clear and spoke for themselves. That Article 159 of the Constitution of Kenya empowers court to decide matters without undue regard to procedural technicalities. He stated that the Garnishee had internal correspondence and that there was no undertaking as the negotiations remained so until consent was recorded.
22. Mr. Ragot pointed out that the 3rd Party says money was deposited on 8th April, 2015 and EMK 6 shows it was deposited in account number 012000035543 and that the said account was never attached. That it does not match the deposit of 8th April, 2015 as it appears on account number 012000037257 having been deposited on 8th January, 2015. He stated that as at October, 2014, the 3rd Party had never given the Garnishee KShs. 100 Million. He argued that Article 159 does not apply here since it is not a panacea to all issues. That the issues raised were of substance and further that the ruling of Mabeya J raised substantial inconsistencies which can only be resolved by evidence. He argued that Article 159 was not meant to breed disorder and stated that the Garnishee sought to appeal and cannot return to the same court to seek an appeal over the same facts that were relied on by the 3rd Party, in the name of protecting the interests of the Third Party.

Determination

23. The motion dated 6th August, 2015 by the Garnishee falls for consideration under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The said provisions stipulate as follows:-

"S. 80. Any person who considers himself aggrieved—

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon."

24.The applicable procedural law is ***Order 45 which provides that***

45. 1. (1) Any person considering himself aggrieved—

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

3. (1) where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

4. (1) where the application for a review is heard by more than one judge and the court is equally divided the application shall be dismissed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

5. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

6. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

25. From the above provisions, It follows therefore that the court can on an application only review its order, if there is an error apparent on the face of the record, if there is discovery of new material or evidence that was unavailable after exercise of due diligence at the time of making the order sought to be reviewed and finally, for sufficient reason.
26. To succeed in its application for review of the orders of Mabeya J, the Garnishee must meet the said requirements. The Garnishee's case is essentially that there is evidence that the attached accounts do not belong to the Judgement Debtor and that if it releases funds to the Decree Holder, it will be in breach of Fundamental Banking Regulations which could cause the Garnishee to lose its banking licence as a consequence of which a large number of depositors will be greatly prejudiced.
27. However, it is clear to me that from the summary of the case that I have set out above in detail, the reasons advanced by the Garnishee neither fall under error apparent on the face of the record nor discovery of new material or evidence that could not be with the Garnishee at the time of hearing of the previous application for review before Mabeya J. Since no such error or new matter has been disclosed. Iam therefore left to decide on whether there is sufficient ground or reason to review the ruling of Hon Justice Mabeya.
28. It is noteworthy that in the reasons advanced in the application dated 17th July, 2015 which application sought review of the order of 10th July, 2015 granting Absolute Garnishee order Nisi, are the same reasons as the ones advanced here and that both applications are for review. It is for that reason that Mr. Ragot firmly held the opinion that this application is barred under Order 45 rule 6 of the Civil Procedure Rules and that it is also res judicata. It is therefore important to determine as the first issue, whether or not this application is barred as opined by counsel for the Decree Holder that it is res judicata.
29. Order 45 rule 6 of the Civil Procedure Rules stipulate ***that no application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.*** The motion dated 17th July, 2015 sought to review the orders of 10th July, 2015. In the said application Judge Mabeya found that the 3rd Party had no sufficient evidence to prove that account numbers 012000035590 and 012000037275 belonged to it and therefore reviewed the earlier orders, only excluding account number 012000035538. In arriving at the said conclusion, the learned Judge exhaustively considered and analysed the record and affidavit as well as documentary evidence availed and annexed to those affidavits. The Garnishee although not served with the 3rd Parties application for review, the learned Judge made a finding that it was nonetheless aware of the 3rd Party's protest at the attachment of the accounts held by the Garnishee and therefore that the Garnishee ought to have participated in those proceedings to shed more light but that it chose not to.
30. The instant application now seeks review of those orders of Hon Justice Mabeya which act is agreeably barred by Order 45 rule 6 of the Civil procedure Rules. A similar observation was made by the Court of Appeal in **George Gikubu Mbuthia v. Housing Finance Company Ltd & 2 others [2009] eKLR** that:-

"The order dismissing the review application was appealable as of right under Order XLII of the Civil Procedure Rules but the appellant did not lodge an appeal against it. The Civil Procedure Rules do not provide for filing of a second review application and when the superior court dismissed the review application, its jurisdiction was exhausted and the court thus, became functus officio."

31. Iam in total agreement with the above decision which sets out the provisions of Order 45 Rule 6 of the Civil Procedure Rules to the extent that indeed, the orders of Hon Mabeya J could only be appealed against and not a second review being sought on the same facts by the Garnishee who admittedly is seeking to protect the interests of the 3rd party whose application for review touching on the subject Bank accounts was considered and dismissed on merits.
32. If I am to be found to be wrong in that aspect, i have given considerable thought to the other facet

thus, the fact that Judge Mabeya determined the issue of whether or not the accounts belonged to the 3rd Party exhaustively. These are the same issues I have in essence been called upon to determine. Considering the said issue in my most considered opinion will be tantamount to sitting on my brother's or this court's own judgment on appeal. In ***National Bank Of Kenya Limited v Ndungu Njau*** **(1997) eKLR** (Kwach, Akiwumi & Pall, JJ.A.) the Court of Appeal stated:-

"...In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in Appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

33.Section 7 of the Civil Procedure Provides as follows:-

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

34.The motion dated 17th July, 2015 may not have been brought by the Garnishee but as I have stated earlier, the Garnishee ought to have advanced its case then considering that it knew of the existence of the motion dated 17th July, 2015 brought by the 3rd Party seeking to protect what it alleged to be its funds held by the Garnishee from being attached by the Decree Holder(See; Explanation 4 of section 7 of the Civil Procedure Act). I am on this point fortified by the decision of Waki JA in **Apondi v.Canuald Metal Packaging [2005] 1 EA 12** where the learned judge stated as follows:

"***A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to the other parties and an abuse of the Court process to allow litigation by instalments".*** (Emphasis mine)

35.Secondly, the issues raised in the two motions seeking review are substantially the same and have

been determined fully and competently by a judge of this court. On this point I wish to restate the holding in the decision of **Mburu Kinyua** (supra) cited by Mr. Ragot. that:-

"The decision was appealable as of right under Order XLII, rule 1 (c), but no appeal was made. On 17th May, 1976 a formal decree embodying the ex parte judgment was issued. On 14th July, 1976, a second application was made, again under Order IXA, rule 10, for the ex parte judgment to be set aside, together with the decree. This second application was filed by a different advocate from the one who filed the first application. The second application was heard by the same judge and was dismissed by him on 23rd November, 1976 as being res judicata by reason of the decision in the first application. From the second decision the appellant appealed...He can only successfully file second application if it is based on facts that were not known to him, his second application will be dismissed as res judicata."

36. It is also striking that Elvis Kuria's allegations in the affidavit which information he got from the regional branch manager is not supported by affidavits of the said regional branch manager in contravention of Order 19 (3) (1) which expressly provide that:-

"Order 19 (3) (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

37. That affidavit therefore remained a mere allegation. It is also not clear why the said affidavits of the branch manager was never filed and the Garnishee did not bother to offer an explanation for the omission.
38. Further, the record is clear that Mr. Kariuki counsel for the Garnishee sought 14 days leave to appeal against the ruling of 31st July, 2015. In view of that fact it can only be inferred that this application has been brought to defeat justice and to abuse the process of this court. It is an attempt to litigate by instalments which is abhorred by law. In the case of **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** the former East African Court of Appeal stated as follows:

> **"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."**

39. In the case of **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

> "**A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about**

that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

40. It is also paradoxical that the Garnishee could erroneously open an account in a wrong person's name and still refuse to correct the alleged error by saying that there was no sufficient documentation to warrant a change in the particulars, yet approach the court seeking to protect the interests of the same party who alleges that the money belongs to it when the account is not in that party's name.
41. In the end, I find that there is no reason or ground, leave alone any sufficient reason for this court to review the orders of Hon Mabeya J made on 10th July, 2015.
42. On the Decree Holder's motion, I have given due consideration to the dispositions therein. While the Decree Holder claims that negotiations were entered into, the evidence tendered is not sufficient since the contents of the negotiations were never provided. It would therefore be hard for the court to determine whether or not any professional undertaking was made. However, It is noteworthy that the Garnishee never even mentioned the fact that there were negotiations between the parties yet they acknowledge after the decree holder had brought to the fore those facts that there was an attempt to negotiate for a settlement and that the decree holder even undertook not to execute. The issue of non disclosure was discussed as follows in **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated that:-

"It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement…In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance

was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus pentitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed…In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so…It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

43. It is unclear why the Garnishee opted not to mention the said fact of negotiations and the undertaking by the Decree Holder not to execute which could have had a bearing on the outcome of the application to Hon. Onyancha J.
44. It is worth noting that by the time the Garnishee sought to vacate the Decree Absolute, the decree holder's legitimate claim to the funds held by the Garnishee had already crystallised and therefore the decree holder would be left with no remedy for no fault of his own, or is being compelled by the Garnishee to initiate other offshoot litigation to realize the fruits of any positive order from the court. The decree holder's claim as against the J/D through Garnishee Order Absolute having crystallised, it is the Garnishee that must meet the consequences of Garnishee proceedings against them, which order remains in force against them to date and must therefore be given effect. The Garnishee took the risk of not producing any accounts opening documents by the 3rd Party as observed by Hon Mabeya J and the fact that the 3rd Party is said to have deposited funds in the said accounts does not in itself amount to the interested party being the account holder.
45. In the end, I find that the application by the Garnishee was not merited both at the exparte stage and at the interpartes hearing and accordingly I would allow the decree holder's application and discharge the exparte orders made in its favour.
46. The upshot of all the above is that the Garnishee's application for review is dismissed with costs to the Decree Holder/Judgment Creditor.
47. On the costs of the application by the decree holder, I decline to award any costs as the said application was heard together with the Garnishee's application and as the decree holder could as well have raised those issues of non disclosure in their replying affidavit, which could have served the same purpose since the matter was being heard expeditiously.

Dated, signed and delivered in open court at Nairobi this 24th day of November, 2015.

R.E.ABURILI

JUDGE

On 24th November, 2015 at 2.30 PM

Coram: R.E ABURILI J

CA: Samuel

Judgment read and pronounced in open court in the presence of:

Mr Deya holding brief for Mr Wena for the Garnishee applicant

Mr Karanja for the Third Party

Mr Ragot for the Decree Holder/ Judgment Creditor

N/A for Judgment Debtor

R.E ABURILI

JUDGE

24TH November, 2015