



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION

MISC CASE NO. 639 OF 2009

IN THE MATTER OF THE ARBITRATION ACT, 19965

AND

IN THE MATTER OF AN ARBITRATION BETWEEN

ERAD SUPPLIERS 7 GENERAL

CONTRACTS LIMITEDCLAIMANT/DECREE HOLDER

VERSUS

NATIONAL CEREALS 7 PRODUCE

BOARDRESPONDENT/JUDGMENT DEBTOR

KENYA COMMERCIAL BANKGARNISHEE

RULING

1. On 11th and 13th February, 2012, respectively this court issued a decree Nisi against Kenya Commercial Bank Ltd (“the Garnishee”) for a sum of US\$6,140,859/80 in execution of the decree of this court made on 7th February, 2012. The Garnishee appeared in court on 15th February, 2012 and requested for more time. The application to make the decree Nisi absolute was therefore adjourned to the 22nd February, 2013.
2. In the meantime, on 13th February, 2013, the Kenya Revenue Authority (“the Interested Party”) served the Garnishee with two agency notices under Sections 96(1) of the Income Tax and 19(1) of the VAT Act. In the notices, the Interested Party purported to appoint the Garnishee an agent of the Judgment-debtor for a total sum of Kshs.309,150,482/- being tax liability of the Judgment-debtor to the Interested Party. The Garnishee wrote to the Interested Party on 21st February, 2013 (though the date appears as 21/1/2013) advising that the funds in its possession were being held pursuant to the Decree Nisi pending the conclusion of the Garnishee proceedings. The Garnishee informed that Interested Party that:-

“The application to make the Garnishee order absolute is scheduled for arguments on 22/2/2013 and there is need for you to instruct your Counsel to appear in court to urge your position with

respect to the funds that we hold to the credit of NCPB.”

3. On the 22/2/2013, the Interested Party did not bother to attend. The matter was however adjourned to 27th February, 2013. It would seem that the Interested Party did not bother to know what happened on 22nd February, 2013. Come the 27th February, 2013, Mr. Chacha Odera appearing for the Garnishee disclosed to the court that the amount being held by the Garnishee to the credit of the Judgment-debtor was Kshs.297,386,505/-. He also disclosed the existence of the Agency Notices dated 13th February, 2013 by the Interested party and that the Garnishee had informed the Interested Party of the Garnishee proceedings but had not bothered to appear. Being satisfied that the sum of Kshs.297,386,505/- was being held by the Garnishee pursuant to the Garnishee orders of 11th and 13th February, 2013, the court made the decree absolute, absorbed and discharged the Garnishee from any liability under the said Agency Notices by the Interested Party.
4. On 1st March, 2013, the Garnishee received fresh Agency Notices dated 28th February, 2013 from the Interested Party for a total sum of Kshs.467,852,552/- in respect of the Judgment debtors liability to the Interested party and Kshs.156,600,000/- in respect of the Decree-holder. The Garnishee was in a limbo as to who to obey, the court order of 27th February, 2013 or the Interested Party.
5. It would seem that on 7th March, 2013, the Decree-holder came to the Judicial Review Division of this court and obtained orders staying those Agency Notices in HC Misc Appl. No. 87 of 2013. Those proceedings are still pending. On 13th March, 2013, the Decree-holder also obtained leave to commence contempt proceedings against the principal officers of the Garnishee for failure to comply with the order of 27/2/2013. The contempt proceedings are due to come up on 18/3/13. It is against this background that the Garnishee took out a motion on Notice which was certified as urgent on 13th March, 2013.
6. In that motion, which was argued before me this morning, the Garnishee seeks that both the Interested party and the Decree-holder do state their respective claims in the sum of Kshs.297,336,505/- held by it pursuant to the decree absolute issued by this court on 27th February, 2013 and seeks the Courts directions in view of the aforesaid conflicting claims. The Garnishee stated that it has no interest with the said sum but it has been threatened with an attachment of its account with Central Bank if it releases the said sum to the Decree-holder.
7. On its part, through the Affidavit of Grace Wakhungu sworn on 13th March, 2013 and the submissions of its Counsels Mr. Ahmednasir leading Mr. Saende, the Decree-holder contended that it has a lawful decree which has not been satisfied, that the decree absolute clearly absorbed the Garnishee from liability on the claims by the Interested Party and that the actions of the Interested Party amounted to an abuse of its powers under the law.
8. The Interested party on its part informed the court through the Affidavit of Asha Salim of 14th March, 2013 that the Judgment-debtor owes it taxes totaling over Kshs.467million, that the application for waiver of those taxes by the Judgment-debtor was rejected by the Ministry of Finance. Mr. Ontweka, learned Counsel for the Interested Party took the court through the history of the Judgment-debtor's tax liability which dated back to 2010. He showed the court the correspondence that has passed between the Judgment-debtor and the Interested Party including those dated 8/1/2013, 10/1/2013, 13/12/2012, 29/10/2012 and 8/11/2012 together with tax schedules. The Interested Party therefore contended that its Agency Notices were in good faith and were not meant to scuttle the Decree-holder's efforts to execute the decree it had obtained in its favour. It also urged that since its claim is statutory, the same takes precedence.
9. Article 47 (1) of the Constitution grants persons (including corporations) a right to fair administrative action. That article provides:-

“47(1) Every person has the right to administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair.” (Emphasis supplied)

The question before me is who between the Decree Holder and the Interested Party is entitled to the sum of Kshs.297million now held by the Garnishee. The chief officers of the Garnishee are facing

contempt proceedings from the Decree-holder whilst the Garnishee itself faces a loss of Kshs.297,336,505/- due to be debited to its account with the Central Bank of Kenya in favour of the Interested Party if it complies with the court order of 27th February, 2013. I think the Garnishee and its officers are entitled to the protection of the law. I believe Article 47(1) comes into their aid. The question is are the actions of the Decree-holder and the Interested Party within the law. Are they within Article 47(1) of the Constitution?

10. The undisputed facts are that the Decree-holder has a decree in its favour, the decree absolute of 27th February, 2013 bestowed upon it the right to receive the sum of Kshs.297,336,505/- from the Garnishee. The Interested Party on its part states that it is owed taxes dating back to 2007 by the Judgment-debtor, that under Section 96(1) and 19(1) of the Income Tax Act and the V.A.T Act respectively, it is entitled to issue Agency Notices to the Garnishee. That it is entitled therefore to receive the monies it has demanded from the Garnishee. The question I need to answer is, since the Garnishee is entitled to fair administrative action, are the acts of the Interested party and the Decree-holder reasonable and procedurally fair? The Decree-holder has pursued its claim against the Judgment-debtor since 28th November, 2007 as per the Award of the Arbitrator. The Decree-holder has been in this court since 2009 to enforce that award. The matter has been in the Court of appeal and back in this court until the 27th February, 2013 when finally the court earmarked the said sum of Kshs.297,336,505/- held by the Garnishee as payable to it in part-settlement of the decree in its favour. Has the Decree-holder in those circumstances acted reasonably and procedurally fair? I will come to this later.
11. On its part, the Interested Party has been pursuing its claim administratively. The Income Tax Act Section 96(1) and V.A.T Act Section 19(1) permit the Interested Party to issue and serve the notices it did upon the Garnishee. Mr. Ontweka stated that those Notices were issued on 13th February, 2013 and 28th February, 2013 after the Ministry of Finance declined to exempt the Judgment-debtor from paying those taxes. However, the letter declining the exception was not shown to the court. Can it then be said that the Interested party is acting reasonably and procedurally fair in issuing the notices of 28th February, 2013 having been informed by the Garnishee that the monies being held by the Garnishee were a subject of a decree Nisi and the Interested Party having failed to come to court before or when the decree Nisi was being made absolute? I do not think so. The rule of law requires that all persons including those in authority do act within the law. Once a court has decreed on a matter, no person should contradict the court order or decree without the permission of that court. Courts are there to enforce the law. If citizens are allowed to interpret the law and enforce what they consider to be their rights to the exclusion of the court, that would be a recipe for anarchy. When the Interested Party was informed that the monies held by the Garnishee was so held pursuant to a court order and for the benefit of the Decree-holder and not the Judgment-debtor, I think it was imperative on it to have come to court and seek clarification instead of breathing fire and threatening the Garnishee. I am minded to note that in paragraph 9 of the Supporting Affidavit BATISTA TAMBITI OKADO swore that the Interested Party had threatened to attach the Garnishee's Account with the Central Bank of Kenya if the Garnishee complied with the court order. Asha Salim who is said to have issued the threat did not deny or respond to that allegation. Why issue such threats instead of following the due process? If the Interested Party felt that it was aggrieved by the order of 27/2/2013, why did it not come to court to set it aside?
12. In view of the foregoing, I do not think that the interested party was acting in a reasonable and procedurally fair manner in the issuance of the notices dated 28th February, 2013. Conversely, I think the Decree-holder was acting reasonably and procedurally fair in pursuing enforcement of the court order made in its favour.
13. There is a principle in equity that states that when two equities are equal the first in time prevails. Both the Decree-holder and the Judgment-debtor have rights against the monies held by the Garnishee to the credit of the Judgment-debtor. However, the Decree-holder had the court order that the said sum be held to its credit on 11th and 13th February, 2013, well before the Interested Party issued its Agency Notices. The monies no longer belonged to the Judgment-debtor. Those Agency Notices were no consequences. The Decree-holder's right to those monies was therefore first in time.

14.As regards the Agency Notices of 28th February, 2013, they were issued in bad faith. The interested party knew or ought to have known that the court had issued a decree absolute in favour of the Decree-holder. Even if it did not attend court on the 27th February, 2013, every citizen of this country is deemed and expected to know all that goes in the courts of this Republic. More so, when a party has been informed of the existence of some proceedings it cannot feign ignorance. In this regard, those notices do not affect the right of the Decree-holder to receive the monies from the Garnishee as decreed on 27th February, 2012.

15.On 23rd January, 2013, Hon. Kamau J delivered herself in this case thus:-

“In conclusion, I want to state that Article 48 says that justice shall not be impeded and under Article 159, that it shall not be delayed. It is time for the Respondent to have this Chapter of stay of execution of the decree issued on 9th March, 2012 in the superior court closed and for it to exercise the rights that have accrued and vested in it as was similarly found in Samuel Kamau Macharia & Another –Vs- Kenya Commercial Bank ltd & 22 others (2012) eKLR.”

In that case, the Court of Appeals stated as follows:-

“The judgment conferred absolute rights on the respondents. Those rights have now accrued and vested. The rights cannot be taken away in the absence of express provisions of the law.”

16.I fully subscribe to that statement. The Garnishee should not be vexed any further. So is the Decree-holder on its decree. I accordingly, direct that the monies held by the Garnishee be paid to the Decree-holder forthwith.The Garnishee is hereby absorbed and discharged from any liability whatsoever under any Agency Notices if it complies with the decree-absolute dated 27th February, 2013 and/or this order.

17.As regards the effect and or efficacy of the Agency Notices dated 28th February, 2013, which are a subject of a judicial review proceedings, that would be decided in those proceedings but they will not act to frustrate the decree-absolute issued on 27th February, 2013 or this order.

18.It is so ordered

DATED and DELIVERED this 15th day of March, 2013.

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A .MABEYA

JUDGE