



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 66 of 2012**

***(Being an appeal from the Ruling delivered at Nakuru by Hon. L. Komingoi, P.M. on the 7th April, 2011 in the Chief Magistrate's Court at Nakuru, Civil Suit No. 749 of 2008)***

KENYA COMMERCIAL BANK.....APPELLANT

**VERSUS**

DANIEL KIMUTAI RONO.....1<sup>ST</sup> RESPONDENT

GEOFFREY MAKANA ASANYO.....2<sup>ND</sup> RESPONDENT

**RULING**

This Ruling relates to the two (2) Notices of Motion dated respectively 11<sup>th</sup> April 2012 and filed the same day, and 25<sup>th</sup> June 2012 and filed on the 26<sup>th</sup> June 2012. The former Motion on Notice was filed by the 2<sup>nd</sup> Respondent, while the latter was filed by the 1<sup>st</sup> Respondent. Both Motions on Notice have similar first prayers -

- (1) that the Appellants' appeal against the 2nd Respondent be struck out;***
- (2) that in the alternative the 2nd Respondents name be struck out, (in respect of the latter Motion),***
- (3) that costs of the application and the entire appeal be borne by the Appellant - (both applications).***

The Motions on Notice were supported by the respective Affidavits of the 2<sup>nd</sup> Respondent/Applicant, sworn on 11<sup>th</sup> April 2012, and the 1st Respondent/Applicant sworn on 25<sup>th</sup> June 2012. The Motions were also buttressed by the respective grounds on the faces thereof.

On 19.02.2013, the counsel for the 1st Respondent/Applicant and 2<sup>nd</sup> Respondent/Applicant, recorded a consent order in which the two applications were allowed as between the two Respondents with no order as to costs.

Looking back at this consent order, it is really meaningless as no orders are sought by either applicant against the other. The proper understanding of that consent order is that they would be argued together as both raised one fundamental point, that the appeal as against each of them be struck out.

Before considering the issue whether or not the appeal herein should be struck, it is necessary to lay

some brief background to the claim.

The appeal arises out of garnishee proceedings under which the Appellant was ordered to pay a sum of Ksh 536,080/= in Nakuru CMCC Case No. 749 of 2008 in which the 1st Respondent/Applicant was the successful plaintiff (*decree-holder*), against the 2nd Respondent/Defendant (*judgment-debtor*).

After obtaining his judgment, the decree-holder decided to enforce it by way of garnishee proceedings against the Appellant. The Appellant paid out the moneys to the decree-holder, after trying unsuccessfully to stay the garnishee orders.

The case of both the Respondent and Applicant is that by paying to the 1st Respondent the amount in the garnishee order, the Appellant expressly admitted that the garnishee had rightfully paid the said sum, and that there is nothing to appeal against, and that the appeal should be struck out with costs.

In their grounds of opposition dated 6.12.2012 and filed on 7.12.2012, the Appellants counsel contended that the respective Motions on Notice are misconceived, frivolous and vexatious, defective and bad in law and are incompetent and cannot be granted under the legal provisions upon which they are based, and that they are an abuse of the process of court.

These arguments were followed by counsel for the Appellant, that the appeal ought not to be struck out, **firstly** because the appeal was allowed to be filed out of time, and that under Section 79B of the Civil Procedure Act (*Cap. 24, Laws of Kenya*) only the court can summarily dismiss an appeal, that having been allowed to be filed, there is no more argument about laches, that the Appellant was brought into the proceedings at the last stage, both applicants admit that the Appellant, paid the moneys, that the appeal seeks an opportunity to do that which it was denied to do in the lower court and that the appeal was in order and ought not to be struck out.

I have considered these rival arguments. The determination of the application whether or not to strike out the appeal herein depends on the nature of garnishee proceedings.

Section 81(2)(d) of the Civil Procedure Act provides for the making of rules governing the procedure for seeking garnishee and charging orders either in addition to, or in substitution for the attachment and sale of debts. Order 23 of the Civil Procedure Rules 2010 provides for the procedure for attachment of debts. Rule 1 provides for making of an application *ex parte* for attachment of debt, against a third party (*the Garnishee*) who owes, or with whom the judgment-debtor has an account. Rule 2 requires service of at least seven days notice upon the garnishee, and also the judgment-debtor.

If the garnishee does not dispute the debt due or if he does not appear on the date fixed for hearing the order **NISI** may be confirmed by the court.

However, if the garnishee disputes his liability, the court will not make the order Nisi absolute and may order that the issue or question necessary for determining of his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried and determined.

Although the Order 23 rule 7 confers upon the court the discretion to set aside a garnishee order or decree, I think it is important for the garnishee to observe the requirements of rule 4, to dispute liability at the earliest stage so that the dispute may be determined at that early stage.

In this case, the consent judgment was entered on 24.04.2010. The garnishee order nisi was obtained on 20.01.2011 some eight months following the judgment. The court directed that both the garnishee and the judgment-debtor be served, and fixed the hearing inter partes for 3.02.2011.

The garnishee order NISI was served upon the Applicant on 28.01.2011, and the judgment-debtor on 31.01.2011. On 3.02.2011, after noting that the garnishee order NISI had been duly served upon both the garnishee and the judgment-debtor, the lower court ordered the garnishee order nisi be made absolute. The applicant's application dated 8th February 2011, though initially granted ex parte, was

dismissed on 7th April 2011 following hearing inter partes.

It is that Ruling which is the subject of appeal, and which appeal both the judgment-debtor and the decree-holder agree that should be dismissed.

For the decree-holder the fruits of his judgment have been received. For the judgment-debtor he believes his debt has been discharged as against the decree-holder. The question that arises is whether the judgment-debtor is in anyway indebted to the garnishee under the garnishee proceedings.

That question ought to have been determined under rule 4 of Order 23 -

***“that if the garnishee disputes the liability, the court instead of making an order that execution be levied, the court may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried and determined.”***

The garnishee raised no such issue of lack of indebtedness to the judgment-debtor at the hearing of the garnishee proceedings and the principal ground that the garnishee was not represented at the hearing was entirely due to the failure of the garnishee itself. Though duly served, it ignored the proceedings, and its application to stay the garnishee orders was on the balance of probability dismissed by the lower court.

I consequently agree with the contention of the decree-holders' counsel that there having been no issue that either Respondent refund the decretal sum to the garnishee, the applicant's claim does not arise out of the garnishee proceedings, and cannot arise on appeal. In law no ground which was not raised in the lower court can be raised on appeal. The question of indebtedness by either Respondent/Applicant does not arise.

In any event and more importantly, any cause of action by the Appellant would only be against its customer the judgment-debtor, one Geoffrey Makana Asanyo, and having failed to raise it in the lower court the issue can only be raised in a fresh cause of action, and not on an appeal.

For those reasons, I allow the Respondents'/Applicants' Motions on Notice first referred to above and strike out the Appellant's Appeal with costs to the decree-holder. The judgment-debtor may have farther issues with the garnishee, and I direct that he bears his own costs.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of April, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**