



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 26 OF 2010

ISLAND UNIFORMS LIMITED PLAINTIFF/DECREE HOLDER

BETWEEN

MUNICIPAL COUNCIL OF MOMBASA..DEFENDANT/JUDGMENT DEBTOR

AND

- 1. THE CO-OPERATIVE BANK OF KENYA LTD**
- 2. KENYA COMMERCIAL BANK OF KENYA LTD**
- 3. CONSOLIDATED BANK OF KENYA LTD**
- 4. NATIONAL BANK OF KENYA LTD**
- 5. BARCLAYS BANK OF KENYA LTD**
- 6. STANDARD CHARTERED BANK OF KENYA LTD**
- 7. ECO BANK LIMITED**
- 8. FAMILY BANK LIMITED GARNISHEES**

RULING

1. By a consent in a letter dated 7th January 2011 the Plaintiff/Decree Holder and the Defendant/Judgment Debtor agree that the amount of Kshs. 21,345,422.20 being the decretal sum be paid to the Plaintiff by instalments. The Defendant failed to honour the agreed instalments.
2. The Plaintiff filed a Notice of Motion dated 25th February 2013 for orders of garnishee to issue against the first to the eighth Garnishees. This was in order to recover the decretal amount. A Garnishee nisi was issued on 25th February 2013. It is against all the Garnishees. In that Garnishee nisi the accounts that the Defendant was said to hold in the Garnishees banks were set out.
3. By consent between the Plaintiff and the second Garnishee it was agreed that the second Garnishee was to pay to the Plaintiff Kshs. 21,630,562/-. On payment of that amount the second to the sixth Garnishee were to stand as discharged.
4. The first Garnishee that is Co-operative Bank of Kenya Ltd through its account service officer Daniel Muthama swore an affidavit dated 6th March 2013 in response to the order of Garnishee nisi. He said in that affidavit-

“That it is within my knowledge and from the records held with the Garnishee that the judgement debtor herein has never held and neither do they have or operate the accounts listed in the Garnishee order nisi served herein with the first Garnishee that is-

- i. **Account No. 0110078671600**
- ii. **Account No. 012450786716**
- iii. **Account No. 0120078671606**
- iv. **account No. 0112007867160”**

The deponent proceeded to state that in view of the fact that the first Garnishee did not hold such an account on behalf of the Defendant it was incapable of complying with the Garnishee nisi order of 25th February 2013. He further deponed-

“... that the decree holder herein had ample time to carry out adequate due diligence and has an obligation in law to furnish the honourable Court with correct particulars to avoid issuance of orders in vain.”

5. The first Garnishee now seeks for the court to order the Plaintiff/Decree Holder to pay its costs of appearing in Court in response to the Garnishee nisi.
6. The fifth Garnishee also through its employee Waweru Mathenge swore an affidavit dated 13th March 2013. By that affidavit the 5th Garnishee stated that the Defendant/Judgment Debtor had an account with it which had a credit balance of Kshs. 1,038,136.65. That amount was there as at 28th February 2013. Those funds although insufficient to satisfy the decretal amount the fifth Garnishee stated that it was ready to release the amount less its costs.
7. In view of the consent that discharged the second to the sixth Garnishee the 5th Garnishee by submissions before Court sought an order that its costs be paid from the amount that it held credit on behalf of the Defendant.
8. The Plaintiff opposed the first Garnishee’s prayer for costs. The Plaintiff’s counsel submitted before the Court that the issue of who bears the costs should not be based on whether the first Garnishee held funds for the Defendant or not but rather that the Court should consider whether the Garnishee proceedings were successful. If it answers in the positive, the plaintiff’s submissions were that it should not be ordered to pay the first Garnishees costs because costs follow the event.
9. I have considered the submissions before me and the affidavit evidence. The plaintiff/decree holder in its affidavit in support of Notice of Motion dated 25th February 2013 which motion sought the order of Garnishee nisi stated as follows-

“that the Garnishees herein are holding various sums of money on behalf of the Respondent (the Defendant) in various accounts of the Respondent with them and the Court has power to issue the Garnishee order sought”

The plaintiff proceeded to itemize the various accounts the Garnishees held for the Defendant and in respect of the first Garnishee the Plaintiff set out the account numbers stated herein before.

10. It was on the basis of that deposition by the plaintiff that the court

proceeded to issue Garnashee nisi order which order required all the Garnishees to show cause why an order attaching the funds they held on behalf of the Defendant upto the amount due under the decree should not be attached. Whereas the fifth Garnishee was holding funds, although not sufficient to satisfy the decree, the first Garnishee by sworn evidence stated that it neither held any money for the Defendant nor did the Defendant have any account with it. That sworn testimony was not contradicted by the Plaintiff. The Court therefore accepts that evidence to be the correct position.

11. In respect of the fifth Garnishee, the Plaintiff was correct to state that the fifth Garnishee held funds on behalf of the Defendant. It was submitted that the fifth Garnishee todate continues to

hold that money in credit on behalf of the Defendant. The Defendant's failure to pay the decretal sum by instalments is what precipitated the orders of the Garnishee nisi of 25th February 2013. The Defendant shall therefore be the one to bear the costs of the fifth Garnishee in respect of the Garnishee order served upon them. Those costs will be paid from the funds held in credit for the Defendant at the fifth Garnishees bank. I will make an order for the payment of the fifth Garnishees costs in exercise of the discretion donated to me by Order 23 rule 10 of the CPR 2010. That rule provides-

“The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, shall be to the discretion of the court, and the cost of the decree holder shall, unless otherwise directed be retained out of the money recovered by him under the Garnishee order and in priority to the amount due under the decree.”

12. Decision on who meets the cost of the first Garnishee will also be guided by that Rule. Like any discretion, the discretion under that Rule will be exercised judicially and on reasons connected to this case. As stated before the Plaintiff deponed that the first Garnishee not only held accounts at its bank on behalf of the Defendant but that those accounts had credit balances. That information contained in the Plaintiff's affidavit led the Court to require the first Garnishee to show cause why Garnishee absolute should not be ordered against the first Garnishee. It is that information that brought the Garnishee to this Court and thereby leading the first Garnishee to incur legal costs. Had the Plaintiff not erroneously stated that the first Garnishee held an account on behalf of the Defendant the first Garnishee would not have incurred the legal costs it now seeks that it be awarded.

13. In exercise of my discretion I find that it is just for the Plaintiff, who in the words of the first Garnishee advocate dragged the first Garnishee to Court, to bear those costs. The Plaintiff shall therefore bear the first Garnishees costs in this matter which costs shall be determined by a taxing master of this Court. I decline to award a specific amount of costs as sought by the Garnishees. The Ruling of the Court is as follows-

- 1. The fifth Garnishee shall have its costs taxed by the Taxing Master, with the bill of cost being served upon the Defendant. Once taxed those costs shall be recovered from the credit balance held by the fifth Garnishee on behalf of the Defendant in its bank account No. 8418256 Digo Road Branch of Barclays Bank (K) Ltd.***
- 2. The costs of the first Garnishee shall be taxed by the Taxing Master of this Court to be paid by the Plaintiff. The bill of cost shall be served upon the Plaintiff.***

Orders accordingly.

Dated and delivered at Mombasa this 23rd day of August, 2013.

MARY KASANGO

JUDGE