



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO.36 OF 2010

BENJAMIN MALAKWEN KOECH.....1ST
PLAINTIFF

WESLEY KIPSANG KOECH.....2ND
PLAINTIFF

VERSUS

JACKSON KIPNGETICH KOMEN Alias
TUITOEK.....DEFENDANT

RULING

Benjamin Malakwen Koech and Wesley Kipsang Koech, hereinafter referred to as the Applicants, have taken out the Motion dated 19th March 2013 in which they sought for the following orders:

1. **THAT** the instance application be certified as urgent and service thereof be dispensed with in the first instance.
2. **THAT** for reasons for to be recorded service of process on the judgment debtor under this proceedings be dispensed with for the purposes of this hearing and determination of prayers 2&3 hereof.
3. **THAT** honorable court be pleased to make a Garnishee Order Nisi against **K-REP BANK, KERICHO BRANCH** the Garnishee herein, being the **“ACCOUNT NUMBER 010010001298”** Ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of **JACKSON KIPNGETICH KOMEN** Alias **TUITOEK** the defendant/judgment debtor herein be attached to answer the Decree for the sum of Kshs.777,400 being the amount in respect of which judgment was entered in favour of the the plaintiffs herein plus costs of Kshs.48,550 for the suit together with interest at the commercial rate.
4. **THAT** an order Nisi upon the Garnishee do issue and the same be served on the garnishee before being served on the defendant/judgment debtor.
5. **THAT** the Garnishee do appear before this court on an appointed date and time to show cause why it should not pay the plaintiffs' Advocates the sum of Kshs.825,950 plus costs and interest at the commercial rate, being the Decretal sum in favour of the plaintiffs herein and further costs of these Garnishee proceedings.
6. **THAT** the plaintiffs be at liberty to apply for any such further orders/or directions as the honorable court may deem fit and just to grant.

7. THAT the costs of this application be borne by this Garnishee.

The Motion is supported by two affidavits of Wesley Kipsang Koech sworn on 19/03/2013 and 2nd April 2013 respectively. K-Rep Bank, the garnishee herein filed two replying affidavits of Haggai Kessio to oppose the Motion.

It is the submission of Mr. Miruka, learned advocate for the applicants that the garnishee should be compelled to release to the applicants the amount held by it in trust for Jackson Kipngetch Koech alias Tuitoek, the Defendant herein. The learned advocate is of the view that it is unfair for the garnishee to continue refusing to release the money yet there is evidence that it holds a sum of Kshs.1,700,000 on behalf of the judgment debtor and there is no order barring it from releasing the money. Mr. Mutai, learned advocate for the garnishee, informed this court that there were other proceedings pending conclusion before this court which militates against issuing an order to release the amount held by the garnishee. The garnishee mentioned Kericho H.C.C.C no.33 of 2011 as one of those cases which was still pending hearing and determination. It is said the aforesaid suit seeks to challenge the entire process of the garnishee's exercise of its statutory power of sale. It is also argued that upon being restrained the garnishee transferred the proceeds of sale to a suspense account hence the money is not available for use in any manner. It is also stated that at the conclusion of the aforesaid case, the garnishee may be ordered to refund the proceeds of sale hence it will be dangerous to part with the defendant's money.

I have considered the material placed before this court and the oral submissions made by learned counsels. In the motion, the applicants are seeking for a sum of Kshs. 825,950 to be released to them by the garnishee to satisfy a decree. The aforesaid amount is the judgment sum in favour of the Applicants and against the defendant. It is said the garnishee is holding money belonging to the defendant in excess of Kshs.1,700,000 in account no.01010010001298. The garnishee did not dispute the fact that the defendant holds an account with it. In the replying affidavit of Haggai Kessio, the garnishee's Kericho Branch Manager, it is averred that the defendant had no money in the aforesaid account to release. The applicants filed the supplementary affidavit of Wesley Kipsang Koech sworn on 2nd April 2013 in which they disputed that averment. They accused the garnishee of concealing the fact that the garnishee held with it a sum of Kshs.1,790,259/47 on behalf of the defendant. The garnishee denied the applicants' assertion by filing a further replying affidavit of Haggai Kessio. The garnishee admitted having disposed of the Defendant's parcel of **L.R.No. Kericho/Municipality/Block 2/83** in exercise of its statutory power of sale which took place on 27/04/2011 and that it holds the proceeds of sale which have been deposited in a suspense account to await the outcome of Kericho H.C.C.C No. 33 of 2011 which suit was instituted to challenge the sale of the defendant's parcel of land.

There is an averment that the garnishee has closed the defendant's account no.01010010001298 due to lack of funds. After a careful consideration of the rival submissions I have come to the conclusion that the garnishee was not candid from the beginning. The Applicants were able to show that the garnishee hid some information from the court and were able to show that the garnishee was holding funds in other accounts belonging to the defendant other than a/c no.01010010001298. There is an averment by the garnishee's Kericho Branch Manager that the proceeds of the sale of L.R.No.Kericho Municipality/Block 2/83 was deposited in a suspense account awaiting the outcome of Kericho H.C.C.C no.33 of 2011. I do not believe the explanation because the bank statements attached to further replying affidavit of Haggai Kessio gives a different picture. The documents availed shows that the defendant's parcel of land was sold at Kshs.4,500,000. The garnishee and the auctioneer deducted all their expenses and debts leaving a balance of Kshs.1,762,986/60 due and payable to the defendant.

That amount is capable of settling the decretal sum in this suit. In the end I am convinced the Notice of Motion dated 19th March 2013 is well founded. It is allowed as prayed.

For the avoidance of doubt, **K-REP BANK** is hereby ordered to release to the Applicants herein the sum of Kshs.825,950 from the amount it holds in account no.010090043596 or in any other account held by the defendant with the garnishee. Each party to meet its costs in the motion.

Dated and delivered this 27th day of September 2013.

J.K.SERGON

JUDGE

In open court in the presence of

Mr. Mutai for Garnishee

N/A for Applicant

N/A for Judgment Debtor

Mr. Koech- court clerk