



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC APPLICATION NO 30 OF 2008

TONY NJUGUNA

(t/a WAIRUGURU NJUGUNA & CO).....ADVOCATE/DECREE-HOLDER

VERSUS

- 1. DESHPAL SIAN SINGH**
- 2. BAHKSHISH S W S SIAN.....CLIENTS/JUDGEMENT-DEBTORS**

AND

- 1. KAMAU KURIA & KIRAITU, ADVOCATES**
- 2. MORARA APIEMI & CO., ADVOCATES.....GARNISHEES**

R U L I N G

1. The **notice of motion dated 20th July 2011** is a garnishee application by the Advocate/Decree-Holder who has a decree for taxed costs against the Clients/Judgment-Debtors in the sum of KShs 493,865/00. The application seeks, under **Order 23, rule 1** of the **Civil Procedure Rules, 2010** (the **Rules**) attachment of -

“...a portion of the judgment-debtors’ entitlement in the sum of KShs 17,620,911/00 being held by the garnishees jointly in the Co-operative Bank Limited, Co-op House Branch A/C No. 0110088593...to satisfy the decree herein together with the costs of the garnishee proceedings.”

2. The application is supported by an affidavit sworn by the Advocate/Decree-Holder’s advocate, **Wilkister Nyangito**. She has deponed, *inter alia* –

- (i) That the decretal amount as at 6th October 2010 stood at KShs 603,643/00.
- (ii) That she perused HC Misc Application No 1200 of 2001 wherein she discovered that a consent order was filed in court on 19th January 2010 to the effect that a sum of KShs 24,718,126/00 be released to the joint names of the Garnishes.
- (iii) That the Garnishes have confirmed that they are indeed holding a sum of KShs 17,620,911/00 in the aforesaid bank account.

(iv) That she has enquired from the 1st Garnishee who informed her that the Clients/Judgment-Debtors are entitled to over 50% of the funds held by the Garnishees.

3. A garnishee *order nisi* was granted on 30th January 2012.

4. The 1st Garnishee opposed the garnishee application by **grounds of opposition dated 23rd February 2012**. Those grounds include –

(i) That “the advocate/client bill of costs that gave rise to the application is fraudulent, null and void”.

(ii) That the “liquidators are in the process of winding-up the company and the share of the judgment-debtors, who are among the shareholders, is yet to be ascertained”.

(iii) That the application has not been supported by a proper affidavit sworn by the Advocate/Decree-Holder, and no cause has been shown why he has not sworn such affidavit.

There is no replying affidavit filed on behalf of the 1st Garnishee.

5. The 2nd Garnishee filed a **replying affidavit** on **23rd February 2012**. It is sworn by the 2nd Garnishee, **Philemon Apiemi**, who practices under the name and style of Morara Apiemi & Co., Advocates. He has deponed as follows, *inter alia* -

(i) That he is on record for the Clients/Judgment-Debtors in HC Misc Application No 1200 of 2001.

(ii) That indeed on 19th January 2010 a consent was recorded in court “to the effect that a sum of KShs 24,718,126/00 be released to the joint account in the names of **Morara Apiemi & Company, Advocates** and **Kamau Kuria & Kiraitu Advocates**”.

(iii) That subsequently a joint account No. 01100188593 was opened in Co-operative Bank of Kenya Ltd., Co-op House branch wherein a sum of KShs 17,620,911/00 “has since been deposited in the joint names of the Garnishees”.

(iv) That the Clients/Judgment-Debtors herein “are entitled to at least 50% of the funds being held in the said joint account”.

(v) That in the circumstances he has no objection to the garnishee application.

Let it be remembered that the 2nd Garnishee is not acting for the Clients/Judgment-Debtors in the present application. The Clients/Judgment-Debtors have not filed any papers in response to the garnishee application. There was also no appearance for them at the hearing of the application.

6. I have considered the submissions made on behalf of the Advocate/Decree-Holder and the Garnishees. No authorities were cited.

7. **Order 23, rule 1 (1)** of the **Rules** provides –

“1. (1) A Court may, upon the *ex parte* application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been

issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree-holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with costs aforesaid.”

8. This rule expressly permits a decree-holder’s advocate to swear an affidavit in support of a garnishee application. The plea by the 1st Garnishee that the application has not been supported by a proper affidavit sworn by the Advocate/Decree-Holder himself is thus not well taken. There is a supporting affidavit sworn by his advocate.

9. The further plea by the 1st Garnishee that **“the advocate/client bill of costs that gave rise to the application is fraudulent, null and void”** is also not well taken. That is an issue that cannot be canvassed in the present application. It ought to have been taken up before or in the course of the taxation. These are not the proper proceedings to challenge the Advocate/Decree-Holder’s entitlement to the costs that were taxed. The certificate of costs or the decree for taxed costs cannot be challenged here!

10. The only issue for consideration is whether there is any debt disclosed due from the Garnishees to the Clients/Judgment-Debtors that can be attached to satisfy the Advocate/Decree-Holder’s decree for taxed costs.

11. The debt is expressly admitted by the 2nd Garnishee who has no objection to the garnishee application. The 1st Garnishee on the other hand, though admitting the existence of the monies held in the joint account, has gone so far only to admit that though the Clients/Judgment -Debtors may eventually have a share in those monies, that their share cannot at this time be ascertained for various reasons, and that the garnishee application is thus pre-mature. Unfortunately, those various reasons were not given in a replying affidavit duly sworn and filed. They were given by counsel from the bar. A learned counsel cannot be permitted to testify from the bar. A replying affidavit should have been filed.

12. I had asked for the court files for HC Misc Application No 1200 of 2001 and HC Winding-up Cause No 8 of 2010 to be availed to me for perusal in order to see whether there was anything in those files that would militate against making the garnishee order absolute as sought; they were not availed.

13. In the circumstances, I am satisfied that the Garnishees owe to the Clients/Judgment-Debtors money held in the joint account already referred to. Part of this debt can be attached to satisfy the Advocate/Decree-Holder’s decree for taxed costs plus costs of these proceedings.

14. I will in the event allow the application. The garnishee *order nisi* herein is made *absolute*. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2013

