



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**Civil Case 108 of**

**2008**

**ANTONY WASWA T/A TOMUPEX ENTERPRISES.....PLAINTIFF**

**-versus-**

**NGERIA MUTHAMI T/A ROZIWA TRANSPORTERS.....DEFENDANT**

**AND**

**CO-OPERATIVE BANK K. LIMITED.....GARNISHEE**

**MUNUNGA TEA FACTORY.....INTERESTED PARTY**

**RULING**

The subject matter of this ruling is the Chamber Summons dated 8th October 2008, in which Antony Waswa T/A Tomupex Enterprises, the Plaintiff herein, sought for the following orders:

***1. That the Applicant herein be heard ex-parte in the first instance.***

***2. That a Garnishee Order be and is hereby issued ordering that any credit deposit on Account No. [particulars withheld] held in Co-operative Bank of Kenya, Stima Plaza Branch, in Nairobi owing from Garnishee to the Judgment-Debtor herein be attached to answer the decree, interest and cost of the Garnishee proceedings to the extent of Ksh.1,881,750.00 and auctioneers' charges of Ksh.150,000.00.***

***3. That an order be and is hereby issued directing the Garnishee to appear before Court to show cause why it should not pay to the decree-holder the credit deposited from it to the Decree-holder to the satisfaction of the decretal amount, costs and interest.***

***4. That pending the hearing and determination of this application an order be and is hereby issued, directing the Garnishee not to release out any money held by them and payable to the Judgment-Debtor and to disclose the particulars of the amounts held by them in favour of the Judgment-Debtor.***

The aforesaid Summons is supported by the affidavit of the Plaintiff. When the Summons was served upon Co-operative Bank of Kenya Limited, the Garnishee herein, the bank, opposed the same by filing the Replying Affidavit of Eliud Ogutu. Mununga Tea Factory, the Interested Party, also opposed the Summons by filing the Replying Affidavit of Rebecca Mbithi while Ngera Muthami T/A Rozina Transporters, the Defendant herein, too swore a Replying Affidavit to oppose the application.

When the summons came up for interpartes hearing, this Court directed the Summons to be disposed of by oral evidence. The Plaintiff and the Defendant were the only parties who turned up to testify. The Garnishee and the 3rd Party were forced to close their cases when their witnesses failed to turn up in Court to testify.

I have considered both the affidavit and oral evidence tendered in support and against the Summons. I have further considered the rival written submissions filed herein. Antony Waswa, (P.W.1), told this Court that he advanced a sum of Ksh.1,600,000/= to Ngeria Muthamia T/A Rozina Transporters on 21st May 2003. The aforesaid amount was repayable within six (6) months together with interest of Ksh.200,000/=. The Defendant defaulted in repaying the loan thus prompting the Plaintiff to file this suit. The Plaintiff successfully applied for judgment in default of a defence. A notice of entry of judgment was served upon the Defendant but the Defendant has neglected to settle the decree. The Plaintiff avers that he has attempted to execute the decree with little success because he has failed to trace the Defendant's attachable assets. The Plaintiff claims that the Defendant told him that he operates an account with Co-operative Bank of Kenya (Garnishee). He also alleged that the Defendant gave him a statement of account with a credit balance of Ksh.2,000,000/=. The Plaintiff admitted that the Defendant had told him that his account had been frozen pending investigations of some complaint relating to fraud by Police Officers from the Criminal Investigation Department. The Plaintiff urged this Court to grant him the orders sought in the Summons.

The Defendant on his part, told this Court that he is the sole proprietor of Rozina Transporters which operated Account No. [particulars withheld] with the Garnishee. He denied having colluded with the Garnishee and the Interested Party to frustrate the Plaintiff from accessing funds in the aforesaid account. Ngera Muthoni further told this Court that he is a director and the bank signatory of Mununga Tea Factory, the Interested Party herein. The aforesaid company is said to have been incorporated in the year 2003. The Defendant also stated that Rozina Transporters offered transport services to the Interested Party and was owed Ksh.2,000,000/=. The Defendant claimed he had issued instructions to the Garnishee to pay Rozina Transporters the aforesaid sum from the funds held in the account of Mununga Tea Factory (Interested Party). D.W.1 produced the Certificate of Incorporation No.C.103778 of Mununga Tea Factory. That certificate shows the Interested Party was incorporated on 26th May 2003. The Defendant denied knowledge of another company with the same name like that of the Interested Party. The Defendant further indicated to Court that Rozina Transporters held Account No. [particulars withheld] with the Garnishee with a credit balance of Ksh.2,100,000/=. The aforesaid account remains frozen by the Interested Party.

Having given the brief summary of the evidence tendered for and against the Summons, let me now turn my attention to the merits or otherwise of the summons. It is trite law that the purpose of Garnishee proceedings is to attach a debt owed to a Judgment-Debtor by the Garnishee for purposes of settling a decree held by a Judgment-Creditor. In such a case, the Judgment-Creditor must prove that the Garnishee owes the Judgment-Debtor some money. If the Garnishee does not owe the Judgment-Debtor anything, then the order will not be made. The following issues have arisen for my determination:

**(I) *Whether the Judgment-Creditor has established that the Garnishee owes the Judgment-Debtor any money!***

**(ii) *If the answer to (I) above is yes, whether the amount is enough to satisfy the decree!***

Let me start by dealing with the first issue as to whether the Judgment-Creditor has established that the Garnishee is indebted to the Judgment-Debtor. There is no dispute that the Plaintiff herein has obtained judgment against the Defendant. The Defendant admits that fact. It is also not in dispute that the amount sought to be attached is held in Account No. [particulars withheld] with the Garnishee. The aforesaid account is in the name of Rozina Transporters. In the Replying Affidavit of Eliud Ogutu, the Legal Officer of the Garnishee, it is averred that prior to the service of Garnishee Order Nisi, the aforesaid account had already been frozen by the Garnishee and the operations of the account suspended. It is the argument of the Garnishee that the money was not available to the Judgment-Debtor to freely utilize as genuine money due to him. The Garnishee is of the view that the funds held in the aforesaid account

comprise of some money which was unlawfully diverted and belonging to a third party namely: Mununga Tea Factory (Interested Party herein). The Judgment-Debtor told this Court that he was charged in Court and later acquitted of the charge. The Defendant's allegation was never controverted by the Garnishee nor by the Interested Party – who both failed to tender any oral evidence. In my humble view, I am convinced that the Plaintiff has established that the Garnishee is indebted to the Defendant to the tune of Ksh.2,050,000/=. Having disposed of the first issue, let me now determine the second issue as to whether the amount held by the bank can satisfy the decree. I have already stated that before the Defendant's account was frozen, he had deposited a cheque for Ksh.2,050,000/=. There is no evidence that the aforesaid cheque was dishonoured. According to the Garnishee, the order should not be made because the amount held in the account will not satisfy the decree. It is the bank's averment that the Defendant had given instructions to it to pay Ksh.1,900,000/= to a third party on 22nd October 2005. The instructions were not effected because the account had been frozen. The bank was of the view that the third party should be paid first. It is interesting to note that the Defendant does not mention the aforesaid transaction. May be the Defendant has settled the debt due to Peter Maingi Gateri, the third party. The only concern raised by the Defendant is that if order is given to the Plaintiff, the Defendant's business will be crippled. The Defendant beseeched this Court to permit him to settle the debt by comfortable installments. In my humble view, I am satisfied that the amount held by the Garnishee is sufficient to settle the decretal sum. I am convinced the Plaintiff is entitled to the order sought.

There is an interesting issue which has been raised and argued by Garnishee, that is to say that since **Section 94** of the **Civil Procedure Act** has not been complied with, the execution process should be declared premature. The aforesaid provision requires that costs must be taxed before execution can issue. The Plaintiff and his counsel did not address this Court over the above issue. In my view, the issue regarding the execution of the decree is between the Plaintiff and the Defendant. It cannot lie in the mouth of the Garnishee to challenge the execution process in a matter where it is not a party. The Defendant appears to be comfortable with the decree hence a third party cannot be allowed to raise issues where it is not concerned. Furthermore, that section gives this Court the discretion to permit the execution process to go on despite the fact that costs have not been taxed. I will not interfere with the process of execution.

In the end, I find the Summons dated 8th October 2008 to be well founded. It is allowed in terms of prayer 2. In essence, the Garnishee Nisi made on 22nd day of October 2008, is made absolute with costs to the Plaintiff.

**Dated and delivered this 17th day of August 2012.**

.....

**J. K. SERGON**

**JUDGE**

In Open Court in the presence of Ombongi holding brief for Midikira for Plaintiff.

No appearance for Garnishee and no appearance for Defendant.