



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.1047 OF 1987

IN THE MATTER OF THE ESTATE OF STEPHEN NYONGO MUTINDA (DECEASED)

GANZE ESTATE LIMITED..... GARNISHEE / APPLICANT

-AND-

SAMUEL KAGICA NYONGO

MONICA MURUGI NYONGO.....JUDGMENT DEBTORS

HANNA WANJIRU NYONGO

-AND-

MURIITHI & CO. ADVOCATE.....DECREE HOLDER/RESPONDENT

RULING

The applicant filed a notice of motion pursuant to then **Order XLIV (now Order 45) Rule 1** of the **Civil Procedure Rules** and **Rules 63, 72 and 73** of the **Probate and Administration Rules** seeking orders of this court to review the order issued by Rawal J on 15th June 2009 and thereby vary or set aside the same. The applicant further prayed the warrant of attachment and sale issued to Ms. Ikinu Auctioneers on behalf of Muriithi & Co. Advocates be recalled by the court and thereafter be cancelled. The grounds in support of the application are stated on the face of the application. The application is supported by the

annexed affidavit of Kennedy Mbugua Thairu, the managing director of the applicant. He swore a further affidavit in support of the application. The application is opposed. Charles Muriithi an advocate in the firm of Muriithi & Co. Advocates swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, counsel for the parties to the application, agreed by consent to file written submissions in support of their clients' respective opposing positions. The said submissions were duly filed. I have the pleadings filed by the parties herein in support of their respective cases. I have carefully considered the submissions made by counsel for the parties herein. The issue for determination by this court is whether the applicant made a case to entitle this court review the decision that is the subject of this application. Under **Order 45 Rule 1** of the **Civil Procedure Rules, 2010**, (which is similar to the previous **Order XLIV Rule 1** of the former **Civil Procedure Rules**), this court can review an order or decree if it is satisfied that the applicant has discovered a new and important matter or evidence which if the court had earlier considered it would have reached a different decision. The court can also review its decree or order if it becomes apparent that there is a mistake or error apparent on the face of the record. The court can review its decision if sufficient reason is placed before the court for the grant of such order of review.

The facts of this application are more or less not in dispute. The firm of Muriithi & Co. Advocates was instructed to act for some of the dependants of the deceased. The said firm of advocates was not paid their legal fees. An agreement was reached between the said firm of advocates and the administrators of the estate of the deceased regarding the payment of the said legal fees. The administrators agreed to sell one of the properties that comprise the estate of the deceased to the applicant. The property sold was a parcel of land known as LR.No.5022/5. The purchase consideration was Kshs.3,860,000/-. The applicant paid a deposit of Kshs.380,000/- on execution of the agreement. The agreement was dated 20th November 2008. In order to ensure that the balance of the purchase consideration was applied to settle the legal fees owed to the said firm of Muriithi & Co. Advocates, the said firm instituted garnishee proceedings against the applicant.

On 4th May 2009, a consent was entered between the said firm of advocates and the applicant. In the said consent, which was subsequently adopted as the order of the court, the applicant agreed that it would pay to the firm of Muriithi & Co. Advocates a sum of Ksh.1.2 million plus interest at 14% thereof together with a further sum of Kshs.15,000/- being the costs of the garnishee proceedings. The applicant agreed to pay this amount to the said firm of advocates subject to the completion of the sale transaction involving the subject parcel of land that was being sold to the applicant company by the administrators of the estate of the deceased. From the affidavit sworn on behalf of the applicant, it was apparent that the applicant hoped to secure the balance of the purchase consideration from a loan that it had sought from a financial institution. The completion of the payment of the balance of the purchase consideration was therefore dependent on the applicant securing the loan from the particular financial institution. As it later turned out, the applicant was unable to secure the loan from the financial institution. The said firm of advocates became impatient. It sought to enforce the garnishee order. It applied for warrants of attachment and sale of the applicant's properties. The warrants were issued by the Deputy Registrar of this court on 16th December 2009. The warrants were to be executed by Ikinu Auctioneers. It was for the sum of Kshs.1,401,500/-. On 21st December 2009, the said firm auctioneers proclaimed the applicant's movable properties. The said proclamation provoked the present application.

It was the applicant's case that the said attachment was unlawful because the payment of the amount agreed in the consent to the firm of advocates was predicated upon the sale of the suit property being completed. It was the applicant's case that since the bank had not advanced to it the said loan to pay off the balance of the purchase consideration, it was not in a position to pay the amount demanded by the said firm of advocates. On its part, the firm of advocates argued that since it had established that the applicant owed the estate of the deceased an amount that was more than the one demanded by it as legal fees, and since the garnishee nisi had been made absolute, it was upon the applicant to make good part of their bargain by settling the amount in the garnishee order.

Under **Order XXII (now Order 23) Rule 4 (now Rule 5)** of the **Civil Procedure Rules**, it is provided that "*If the garnishee disputes his liability, the court, instead of making an order that execution be levied,*

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 or determined.” In the present proceedings, the applicant entered into an agreement with the administrators of the estate of the deceased for the purchase of the suit property. The suit property was sold for the purpose of, inter alia, settling the legal fees then owed to the firm of Muriithi & Co. Advocates. When the said firm of advocates commenced garnishee proceedings against the applicant, the applicant did not resist the application. In fact, it entered in a consent with the said firm of advocates agreeing to settle the said legal fees on condition that it secures the loan from the bank to pay the balance of the purchase consideration.

This court holds that the liability of the applicant was predicated upon the applicant securing the loan from the bank to settle the balance of the purchase consideration. It was clear from the affidavit sworn by the managing director of the applicant that the applicant’s effort to secure the loan from the bank has so far been unsuccessful. The applicant cannot therefore be held liable to pay the said firm of advocates as a debtor to the estate of the deceased when in fact it has not been established that the applicant has the funds due and owing to the estate of the deceased. The applicant raised a point which is pertinent: what if the applicant rescinds the agreement to purchase the suit property? Will the applicant still owe the amount of the purchase consideration to the estate of the deceased? The answer is obviously in the negative. It was clear to the court that the garnishee order could only attach to the applicant if it was established that the applicant had already obtained funds from the bank to settle the balance of the purchase consideration. The firm of advocates has not established this condition precedent for the garnishee order to be liable to be executed.

In the premises therefore, it is clear from the foregoing that the applicant’s application has merit. The applicant established that the order issued by this court making the garnishee order absolute and the further order issued allowing the said firm of advocates to execute against the applicant was made in error that is apparent on the face of the record. A condition precedent to the garnishee order being made absolute had not been fulfilled. The order making the garnishee absolute is therefore reviewed and is hereby set aside. The order of the court granting Muriithi & Co. Advocates leave to execute the said garnishee order is also set aside. The warrants of attachment and sale issued to Ikinu auctioneers is hereby recalled. The same should be surrendered to the court. The said auctioneers charges shall be paid by the estate of the deceased. Each party shall bear its own costs.

DATED AT NAIROBI THIS 16TH DAY OF MARCH, 2011

L. KIMARU

JUDGE