



**Hardware Trading Stores Limited v Transnational Construction
& M. S. Ltd; National Bank of Kenya Ltd (Garnishee) (Civil Suit
240 of 1999) [2009] KEHC 3886 (KLR) (27 March 2009) (Ruling)**

Hardware Trading Stores Limited v Transnational Construction & M. S. Ltd [2009] eKLR

Neutral citation: [2009] KEHC 3886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 240 OF 1999
MK KOOME, J
MARCH 27, 2009**

BETWEEN

HARDWARE TRADING STORES LIMITED PLAINTIFF

AND

TRANSNATIONAL CONSTRUCTION & M. S. LTD DEFENDANT

AND

NATIONAL BANK OF KENYA LTD GARNISHEE

RULING

1. The plaintiff/decree holder herein, filed an ex parte application under order 21 rules 1A, 2 and 10 of the Civil Procedure Rules, where he sought for orders that a sum of Kshs 2,123,531 held by the National Bank of Kenya (herein after referred to as the 'Garnishee') be attached to satisfy a decree in this suit in favour of the decree holder. The decree nisi was issued pursuant to the provisions of the law, but when the application was served upon the garnishee, they filed grounds, and showed reasons why the decree nisi should not be made absolute.
2. In addition to the replying affidavits sworn by the Manager of the Garnishee, they also called a witness one Jacob Njiru Mungatia who testified that the defendant held a fixed deposit account with the garnishee but the money held in that account was under lien as it guaranteed the performance by M/s Trans National Construction Limited to the Ministry of Public Works to the tune of Kshs 2,094,018/=.
3. The witness for the garnishee testified that upon request by the Judgment debtor, the garnishee guaranteed the judgment debtor on the performance bond. The judgment debtor held a fixed deposit



- account with the garnishee which formed part of the security for the performance of the bond executed on their behalf.
4. According to the garnishee, the money held in the fixed deposit account is not available for attachment. The guarantee to the Ministry of Public Works is still valid. Moreover there were other overdraft facilities accorded to the judgment debtor whereby he executed a legal charge to secure the borrowing. Under the legal charge, the garnishee has powers to consolidate all the accounts held by the judgment debtor thus the judgment debtor's accounts were overdrawn as at 16th May 2007 to the tune of Kshs 4.34045/70. For that reason the garnishee prayed that the decree nisi issued be set aside.
 5. On the part of the applicant, counsel argued that the decree should be made absolute because the garnishee has not provided sufficient material to establish on a balance of probability that the money held in fixed account belongs to a third party i.e. the Ministry of Roads and Public Works. The garnishee has also not established that it has a lien over the amount held in that account. Counsel further argued that the garnishee has a security in place namely a legal charge. It is therefore not necessary to allow the garnishee to benefit from fixed deposit account and the legal charge. Counsel argued that the judgment debtor herein has preference over other creditors.
 6. I have carefully considered the argument for and against the application on whether or not the decree nisi should be made absolute. The evidence before this court by way of affidavits of Eric Zedekiah Mwandaza Mwanzuna sworn on 15th May 2007 and 10th July 2007 together with the evidence of Jacob Njiru Mungatia clearly show that the money held with the garnishee on account of the judgment debtor is encumbered by way of a guarantee issued to the Ministry of Public Works. There is sufficient evidence in support of this fact. It is also clear that the judgment debtor secured other facilities from the garnishee and executed a legal charge which gives the garnishee powers to consolidate the accounts held by the judgment debtor and to set off the accounts.
 7. There is no evidence that the judgment debtor has honoured and fully settled these banking facilities or the performance bond which the garnishee guaranteed. As long as guarantee made to the Ministry of Public Works remains unsettled, the garnishee remains liable. Accordingly I am satisfied that the garnishee has shown sufficient reasons why the decree nisi issued herein should not be made absolute. The application dated 13th February 2007 is without merit and it is hereby dismissed with costs to be paid by the applicant.

RULING READ AND SIGNED ON 27TH DAY OF MARCH 2009

M. KOOME

JUDGE

