



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 13 of 2005

MOHAWK LIMITED.....PLAINTIFF

VERSUS

DEVCON GROUP LIMITED.....DEFENDANT

RULING

The application under consideration is the one dated 19th November, 2007. Three prayers are sought as follows:

2. **THAT** the Court be pleased to stay execution of the Garnishee order absolute made by this Honourable Court on 7th November, 2007 against the Garnishee.
3. **THAT** the Honourable Court be pleased to review/vary/alter and/or set aside the Garnishee Order absolute made on 7th November, 2007 against the Garnishee on terms it may deem fit.
4. **THAT** costs of this application be provided for.

The application is based on four grounds cited on the face of the chamber summons application in the following terms:

1. **THAT** on 23rd October, 2007 when the court heard the Garnishee application inter-partes, the Garnishee was not in a position to furnish to the Honourable court with the position on the amount being held in the judgment debtors account with itself;
2. **THAT** the Garnishee subsequently established that the amount available in the judgment debtors account number 0010291331875 is Kshs.1,512,947.30;
3. **THAT** the Garnishee has no objection to the said amount of Kshs.1,512,947.30 being utilized in partial satisfaction of the decree herein;
4. **THAT** it is just and fair that the orders of this Honourable Court made on 7th November, 2007 be reviewed varied and/or altered to reflect the said sum of Kshs.1,512,947.30 as opposed to the sum of Kshs.4,355,850.50 awarded therein.

There are further grounds in the supporting affidavit sworn by **VINCENT MUKIRI MWANGI** dated 19th November, 2007 and the further affidavit of the same deponent dated 3rd December, 2007.

This application is opposed. There is a replying affidavit sworn by **MOHAMMED MUNIR CHAUDHRI**, Advocate for the Plaintiff/Decree-holder herein, dated 22nd November, 2007.

Mr. Maluki argued the application on behalf of the Applicant while **Mr. Kisaka** appeared for the Respondent.

Mr. Maluki submitted that the application was seeking a review, variation, alteration and/or the setting aside of a Garnishee Order absolute made by this court on the 7th November, 2007. The Applicant has annexed the letter by the Plaintiff/Respondent's Advocate forwarding a draft decree order in which the ruling of this Court of 7th November, 2007 ordered the Applicant herein to satisfy the entire decretal sum in the suit.

Mr. Maluki submitted that when the Garnishee application came up for hearing before Okwengu J, he unsuccessfully sought an adjournment in order to get instructions in the matter. **Mr. Maluki** submitted that he had been instructed by a branch of the garnishee the same morning the matter was canvassed before **Okwengu J**. Counsel urged further that it was only after the matter was heard that he received full instructions from the Head office of the Garnishee including a statement of the Judgment-debtors bank statement showing the total balance in the account. That statement is annexed to the supporting affidavit as VMM2. The statement shows the total credit balance in the Judgment- Debtor's account, which is 1,512,947.30.

Mr. Maluki submitted that when the court issued the Garnishee order absolute, the Applicant made out a bankers cheque in the sum of Kshs.1,512,947.30 which is annexure VMMI. It is Mr. Maluki's submission that since the Applicant had only 1.5 million in the Judgment-debtor's account, it cannot satisfy the decretal sum in the case of Kshs.4,355,850.50.

The Applicant has in the further affidavit averred that the Decree-holder has specifically sought to attach account No.001029133875 held at FOUR WAY TOWERS, Branch, Equity Bank Limited. It is averred further that as per the statement of that account, the total sum of money available in the account is Shs.1,512,947/12. **Mr. Maluki** submitted that since said sum cannot satisfy the decretal sum, the court's order of 7th November 2007 needed to be varied accordingly.

Mr. Kisaka for the Decree Holder/Respondent has opposed the application. It was his submission that no bases had been laid that could justify a review as sought since the grounds upon which such an application can be made were not satisfied. Counsel submitted that the Applicant had not shown any error on the face of the record or that there had been a discovery of a new matter. Counsel raised complaints that the Applicant/Garnishee failed to disclose amounts held in various accounts belonging to the Judgment Debtor. Mr. Kisaka referred the court to "MMC 4" which is the Judgment Debtor's replying affidavit filed in opposition to the Garnishee proceedings.

I have looked at "MMC 4" and do not agree with **Mr. Kisaka** that the Judgment Debtor stated that it had more than one account in the Garnishee bank. That argument is not supported by the Garnishee Advocate's letter "MMC3" as **Mr. Maluki** argued. **Mr. Maluki** in response submitted that the Garnishee proceedings were taken out in respect of Account No. 0010291331875 held at Four Way Towers Branch, Equity Bank.

I have looked at the Garnishee proceedings. The ex-parte Chamber Summons application dated 12th October 2007 did not request the attachment of any specific account. The supporting affidavit however cited the Account Number sought to be attached at paragraph 5 where it stated thus:

"5 That I have information which information I verily believe to be true that the judgment-debtor operates bank account and has deposit with the Garnishee and more particularly at the Four Way Towers Branch of Equity Bank Limited, Muindi Mbingu Street, Nairobi, Account Number 0010291331785."

From the foregoing, it is clear that the Applicant cited the account number sought to be attached and that no mention of more than one account ever featured in the Garnishee proceedings.

The Garnishee has explained that at the time the application was argued, its Advocate had not been instructed as to the amount of money held in the Judgment Debtor's account with them. The instructions came after the application was heard. It is acceptable in the circumstances, that the time the Garnishee order absolute was made, the court was not aware of the amount in the account nor did it know whether the amount could satisfy the decretal sum.

The Garnishee has shown that the amount in the Judgment Debtor's account with them cannot satisfy the decree. In a show of good faith the Garnishee made out a cheque payable to the court in the total amount held in the Judgment Debtor's account. That amount has since been deposited with this court.

I find that the application is indeed merited. The Garnishee is unable to satisfy the decree with the Judgment Debtor's money held by it. The Garnishee order absolute is varied to read that the Garnishee do satisfy the decree to the extent of the sum of Kshs.1,512,947/30 which is the Judgment Debtor's monies held by it. The said sum, which was deposited by the Garnishee with the Court 18th December, 2007 should be released to the Decree Holder's Advocate.

Costs of the application be to the Decree Holder/Respondent

Dated at Nairobi this 8th day of February, 2008.

LESIIT, J.

JUDGE

Ms. Ndeto holding brief Mr. Maluki for Applicant/Garnishee

Mr. Isaka for Decree Holder

No appearance for Judgment Debtor.

LESIIT, J.

JUDGE