

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 32 of 2006

CHARLES BONNIE JUMAE OBAYO

.....**PLAINTIFF/JUDGMENT DEBTOR**

VERSUS

**VICTORIA NDUKU NZIOKI t/a V.N. NZIOKI & CO. ADVOCATES ..1ST
DEFENDANT/DECREE HOLDER**

**JOHN W. KAMETA t/a KAMETA ENTERPRISES2ND
DEFENDANT/DECREE HOLDER**

**SHAABAN SWEDI NKYA3RD DEFENDANT/DECREE
HOLDER**

AND

**ATTORNEY GENERAL Joined for and on behalf of the Chief Magistrate's Court,
Mombasa.....
.....RESPONDENT**

R U L I N G

By a summons dated 18th February 2008, taken out pursuant to Sections 3A, 27 and 63(d) of the Civil Procedure Act and under order XXXVIII rules 2 and 4 of the Civil Procedure Rules, the 1st and 2nd defendants sought for the following orders:

(a) *An order restraining the judgment debtor from collecting and or receiving the sum of Kshs. 294,927/- held by the Chief Magistrate's Court, due to him out of the Kshs.2,403,853/80 in Mombasa C.M.C.C. No. 4303 of 2004 Victoria Nduku Nzioki T/a V.N. Nzioki & Co. Advocates =vs= Charles Bonnie Jumae Obayo.*

(b) *An order directing the Chief Magistrate to pay forthwith the 1st and 2nd defendants the sum of Kshs.294,927 out of Kshs.2,403,853/30 held by the Chief Magistrate to the credit of the plaintiff/judgment debtor as their taxed costs in this suit.*

The summons is supported by the affidavit of Adams K.B. Muthama sworn on 18th February 2008. The application was duly served upon the firm of J.O. Magolo & Co. Advocates. The application was prosecuted exparte when the aforesaid firm of advocates failed to file any response to the application despite having received the summons on behalf of the plaintiff/judgment debtor.

The short history leading to the filing of their application can easily be deduced from the application and the pleadings. The 1st defendant herein an advocate of this court had been previously instructed by the plaintiff herein to represent him in various suits. He failed to settle her legal fees and this prompted the advocate (1st defendant) to institute Mombasa S.R.M.C.C. No. 4303 of 2004 to recover her fees. The aforesaid suit was compromised on 20th January 2005 in which the plaintiff was required to pay the

advocate's legal fees fixed by consent at Kshs.710,549/30. The plaintiff was to settle the aforesaid sum by monthly installments but he defaulted forcing the 1st defendant to execute the decree to recover the decretal sum. The 1st defendant instructed the 2nd defendant to execute the decree which instructions led to the sale of the plaintiff's parcel of land known as L.R. No. CR.920 Plot No. MN/VI/1036 to the 3rd defendant. The plaintiff then filed this suit seeking to challenge the sale. The defendants filed applications seeking to have the suit struck out. The applications were heard and determined on 26th July 2007 in which this suit was ordered struck out with costs to the defendants. The 1st and 2nd defendants' costs were taxed at Kshs.294,927/-. On the 9th day of September 2005, the 2nd defendant deposited a sum of Kshs.2,403,853/30 in the Chief Magistrate's court in favour of the judgment debtor being the balance from the proceeds of the sale of plot No. MN/VI/1026 sold in execution of the decree issued in **Mombasa C.M.C.C.C. No. 4303 of 2004, Victoria Nduku Nzioki t/a V.N. Nzioki & Co. Advocates =vs= Charles Bonnie Jumae Obayo**. The 1st and 2nd defendants are now asking this court to issue an order directing the Chief Magistrate to release to the 1st and 2nd defendants a sum of Kshs.294,927/- from the deposit held in favour of the plaintiff.

I have taken into account the oral submissions made by Mr. Muthama learned advocate for the 1st and 2nd defendants. I have also considered the grounds set out in the summons plus the facts deponed in the supporting affidavit. The amount sought to be released is held by the Chief Magistrate's court as the balance of the proceeds of the sale of an immovable property known as Plot No. 1026/original No. 951/2/VI/M.N. in execution of a decree issued in Mombasa C.M.C.C.C. No. 4303 of 2004. This court has been urged to make the orders under Section 3A, 27 and 63(d) of the Civil Procedure Act and under order XXVIII rules 2 and 4 of the Civil Procedure rules. A critical perusal of Section 27 of the Civil Procedure Act reveals that it relates to the discretion of the court to make an award in respect of costs. The provision therefore cannot be invoked to issue the orders sought. Of course section 3A of the Civil Procedure Act is the Section saving the inherent jurisdiction of the court. That Section can only be applied where there is no specific provisions addressing the issue at hand. I find that the inherent jurisdiction of the court has been improperly invoked. As regards section 63(d) the law mandates this court to issue an order to prevent the ends of justice from being defeated to appoint a receiver of any property and therefore enforce the performance of his duties by attaching and selling his property. It is obvious from the wording of Section 63(d) that the orders sought herein are not covered. In the end I find that the jurisdiction of this court has not been properly invoked. The provisions of order XXVIII rules 2 and 4 of the Civil Procedure rules relate to proceedings by or against the government and attachment of debts or appointment of a receiver in respect of monies due by the government. The provisions cited are therefore irrelevant.

The money held by the Chief Magistrate's court did not arise out of a suit filed by or against the government. In my view the relevant provisions applicable in these proceedings should have been order XXI rules 47 and 48 of the Civil Procedure Rules. The procedure to be followed is mandatory in its language. In the circumstances of these proceedings it is necessary that the court's jurisdiction must be properly invoked. The defect I have just pointed out is so fundamental that it cannot be said to be technical. Consequently the summons herein is rendered incompetent and fatally defective hence available for striking out. In the end I hereby order that the same be struck out with no order at to costs.

Dated and delivered at Mombasa this 28th day of March 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Muthama for 1st and 2nd Defendants.

N/A for the others.