



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 2098 OF 1993**

M & E CONSULTING ENGINEERING LIMITED.....DECREE-HOLDER

V E R S U S

LAKE BASIN DEVELOPMENT AUTHORITY.....JUDGMENT-DEBTOR

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED..... GARNISHEE

R U L I N G

This ruling concerns some two applications which I heard together. Hearing commenced on 12th June, 2007 and concluded on 18th July, 2007. Preparation of the ruling has taken this long because of the size of the record, the length of the applications, and also because of the fact that perusal of the record has been tedious and time consuming, there being no typed proceedings. All the same, the delay is regretted.

The first application is the **notice of motion dated 19th September, 2006**. It is brought by the Garnishee, Co-operative Bank of Kenya Ltd. It is stated to be brought under sections **3A and 63(e)** of the **Civil Procedure Act, Cap 21** (the Act), **Order 50, rule 1** of the **Civil Procedure Rules** (the Rules) and all enabling provisions of the law. It seeks the following main orders that;-

” 1....

2....

3....

4. The consent order dated 13th September 2006 executed

between the advocates for the decree-holder and the

advocates for the judgement-debtor be set aside.

5. The Garnishee Order Absolute issued on 14th September, 2006 be set aside.

6. The garnishee proceedings be set aside *ex debito*

justitiae.

7.....

8....”

The grounds for the application appearing on the face thereof are, *inter alia*:-

1. That no garnishee proceedings and/or orders could issue in these proceedings because the suit was on 2nd April, 2003 marked as settled by consent of the Decree-Holder and the Judgement-Debtor.
2. That further, by an order dated 17th September, 2004 a deputy registrar of the court found that **“the debt has been paid in full and nothing is outstanding...this matter has been fully settled and any warrants existing are cancelled forthwith”**.
3. That the consent dated 13th and filed on 14th September, 2006, executed between the Decree-Holder’s advocates and the Judgement-Debtor’s advocates requiring payment by the Judgement-Debtor to the Decree-Holder of the sum of the KShs 80 million was an attempt to revive a liability already determined to have been extinguished, both by consent of the parties and by a finding of a competent officer of the court.
4. That the said consent dated 13th September, 2006 is illegal and a nullity as it was obtained fraudulently.
5. That the Garnishee was not involved in negotiating the terms of the said consent and did not execute the same.
6. There is threat from the Decree-Holder to execute against the Garnishee the garnishee order *absolute* dated 14th September, 2006.
7. That should the Garnishee pay the Decree-Holder the sum of KShs 80 million in compliance with the garnishee order *absolute*, it will expose itself to potential litigation because the consent dated 13th September, 2006 is tainted with fraud and is a nullity.

The application is supported by the affidavit of one **ROSEMARY MAJALA GITHAIGA**, the company secretary of the Garnishee. The affidavit sets out the history of the litigation in so far as it concerns the Garnishee.

Upon being served with this application, the Decree-Holder’s first reaction was to file a preliminary objection dated 28th September, 2006 upon the following grounds:-

1. That the Garnishee lacked capacity to bring the application.
2. That the Garnishee has no *locus standi* before the court.
3. That the Garnishee was guilty of obstruction of justice.
4. That the Garnishee had on two previous occasions, blatantly disobeyed the orders of the court and should not be heard until the contempt is purged.
5. That the suit having been amicably settled between the Plaintiff and the Defendant by the consent dated 13th September 2006 the court is *functus officio*.

A replying affidavit was filed on 28th September, 2006. It is sworn by one JOHN MARISSON

LITONDO, a director of the Decree-Holder. The grounds of opposition emerging from this replying affidavit include:-

1. That the Garnishee is not a party to this suit beyond the garnishee proceedings and is just a meddler.

2. That the decree was never compromised as alleged. If

there was such compromise the same was repudiated by the Decree-Holder.

3. That the decretal sum remains unsatisfied, and payment of the sum of KShs. 23,884,847/00 was received without prejudice long after the Decree-Holder had repudiated the alleged compromise of the decree.

4. That the board of the Judgment-Debtor acknowledged that the decree remained unsatisfied by its resolutions passed on 26th and 27th October, 2007 to the effect that the Judgment-Debtor still owed the Decree-Holder KShs. 76,013,361/20 upon the decree.

5. That this was followed up by a letter dated 25th January, 2005 by the Judgment-Debtor's managing director confirming the indebtedness.

6. That the Garnishee is merely obstructing justice by refusing to honour the garnishee order *absolute* which it is bound by law to obey.

7. That allegations of fraud and want of authority to enter into the contested consent are unfounded.

Another replying affidavit was filed on 2nd October, 2006. It is sworn by one **WILFRED COLLINS ODHIAMBO**, the Judgement-Debtor's erstwhile advocate who entered the impugned consent dated 13th September, 2006. He takes exception to the imputation of impropriety, dishonesty and fraud attributed to him in entering the consent. He further states that he was instructed by the chairman of the board of the Judgement-Debtor and its legal officer to enter and record the consent.

In answer to this affidavit is an affidavit sworn by one ZABLON OWIGO OLANG, the non-executive chairman of the Judgment-Debtor's board of directors. He denies that he instructed the advocate, WILFRED COLLINS ODHIAMBO, to enter the consent dated 13th September, 2006.

The second application considered in this ruling is the **notice of motion dated 2nd November, 2006**. It is by the Judgement-Debtor, and is expressed to be brought under section 3A of the Act. It seeks the main order that the aforesaid consent order of 13th September, 2006 be set aside upon the following grounds, *inter alia*:-

1. That the consent was entered without the authority of the Defendant.

2. That the circumstances of the consent "**are reminiscent of a fraud on the part of the Defendant's advocates and its legal officers**".

3. That this suit had been compromised and the Plaintiff's

claim paid in full.

The application is supported by the affidavit of one **FERDINAND K. WANYONYI**, the managing director of the Judgement-Debtor. It is a very long affidavit that gives the full history of the matter. To it are annexed many documents, including applications and affidavits previously filed in the suit. It is deponed in this affidavit, *inter alia*, that following negotiations between the Decree-Holder and the Judgment-Debtor's parent Ministry, it was agreed that the Decree-Holder be paid KShs. 23,929,039/00 in full and final settlement; that the said amount was subsequently paid; that on 2nd April, 2003 the case was

marked as fully settled save for party-and-party costs (agreed at KShs. 2 million) which would be liquidated by monthly instalments of KShs. 50,000/00; that on 17th September, 2004 a Deputy Registrar of the court found that the decree had been fully settled; and that subsequently new advocates acting for the Decree-Holder applied for and obtained a garnishee order *nisi* for the sum of KShs. 79,867,746/67 against the Judgment-Debtor's bankers. It is further deponed that the order sought to be set aside was clearly entered fraudulently and in collusion between the Decree-Holder and the Judgment-Debtor's officers and advocates who had no instructions to enter such an order, and further, that the matter having been fully settled, no further decretal sum could have accrued.

The Decree-Holder has opposed the application by a replying affidavit filed on 8th November, 2006. It is sworn by the same director of the Decree-Holder, JOHN MORRISON LITONDO. In this affidavit the settlement pleaded by the Judgment-Debtor is conceded, but it is deponed that the same was rescinded by the Decree-Holder upon grounds of "**deception**" and breach of conditions. It is further pleaded that when the Judgment-Debtor paid KShs. 23,884,847/00 the settlement was no longer in place. It is also pleaded that subsequent events showed clearly that the Judgment-Debtor recognised and acknowledged the full indebtedness not to have been discharged.

I have considered the submissions of the learned counsel's appearing, including the authorities cited. I have also perused the court record which reveals the following:-

(i) On 6th March, 1998 the Judgment-Debtor's defence in this suit was struck out and judgment entered for the Decree-Holder for the sum of KShs. 57,507,575/55.

(ii) On 2nd April, 2003 the following consent order was entered by a senior deputy registrar of the court in the presence of counsels for the Decree-Holder and Judgment-Debtor:-

"By consent the matter be marked as fully settled. The party-and-party costs be and are hereby agreed at KShs 2 million against the Judgment-Debtor. The same to be liquidated by monthly instalments of KShs 50,000/00 payable on the 10th day of every month for 3 months with effect from 10th April, 2003. The instalments payable to be reviewed upwards thereafter. Further mention on 15th July, 2003."

(iii) On 10th September, 2004 the matter came up before a principal deputy registrar for the taking of accounts in respect to payment of the costs. The parties filed their accounts. In a ruling dated 10th December, 2004 the principal deputy registrar found that "**the debt has been paid in full and nothing is outstanding. This matter has been fully settled and any warrants that may be existing are cancelled forthwith and revoked**".

(iv) On 14th September, 2006 a consent garnishee order *absolute* dated 13th September, 2006 was filed. It was signed by the advocates for the Decree-Holder and the Judgment-Debtor. An order in accordance with that consent was entered by a deputy registrar of the court on the same day. The consent was as follows:-

"1. That the garnishee order *nisi* dated 18th April, 2005 be and is hereby confirmed to the sum of KShs. 80 million all-inclusive.

2. That the Decree-Holder's chamber summons application dated 1st July, 2005 and the notice of motion dated 28th September, 2005 be and (are) hereby allowed in their entirety.

3. That this matter be and is hereby settled in its entirety.

4. That each party to bear its own costs."

The chamber summons dated 1st July, 2005 sought an order to make *absolute* the garnishee order *nisi*,

while the notice of motion dated 28th September, 2005 sought the main order to set aside or vary the consent order recorded on 2nd April, 2003. The Decree-Holder also sought, *inter alia*, leave to proceed with execution of the decree passed on 6th March, 1998.

It seems to me that the following are the issues that I must decide in these applications:-

1. **Does the Garnishee have *locus standi* to bring the first application?**
2. **Was the decretal sum compromised as between the Decree-Holder and the Judgment-Debtor and settled as recorded by consent on 2nd April, 2003?**
3. **If the decretal sum was compromised, could the Decree-Holder unilaterally rescind the compromise?**
4. **If the decretal sum was compromised and settled could any further liability accrue upon the decree?**
5. **Could the consent order dated 13th and filed on 14th September, 2006 be lawfully entered if the decretal sum had been compromised and settled?**
6. **Was the consent order dated 13th and filed on 14th September, 2006 fraudulent and entered without the authority of the Judgment-Debtor?**
7. **Should the orders sought in the two applications be granted?**

Issue No. 1: Does the Garnishee have *locus standi* to bring the notice of motion dated 19th September, 2006?

It was submitted for the Garnishee that it had the *locus standi*, first, because it was in a fiduciary relationship with the Judgment-Debtor and, secondly, that the funds it held to the credit of the Judgment-Debtor were in fact public funds designated for another specific purpose. Further, that since the consent order of 13th (filed and entered on 14th) September, 2006 was entered without the consent of or consultation with the Garnishee while it had already opposed the garnishee proceedings, it was entitled to challenge the said consent. For the Decree-Holder it was argued that the Garnishee was a mere busy-body; its lawful duty was to obey the garnishee order *absolute* and not to raise any queries upon it.

My view of this issue is as follows. Under **Order 22, rule 1** of the Rules, a garnishee is entitled to show cause why he should not pay to the decree-holder the debt due from him to the judgment-debtor. In other words, the garnishee has the right to oppose a garnishee application. In the present case the Garnishee indeed opposed the garnishee application by raising a preliminary objection to the same. I therefore hold that the Garnishee was entitled to challenge the consent order of 13th September, 2006 that purported to compromise the garnishee application, the said consent having been entered without reference to or the consent of the Garnishee. As there is no specific provision in the Rules for such application, the Garnishee has properly approached the court under **section 3A** of the Act.

Even if there was no right provided in Order 22 of the Rules for a garnishee to resist a garnishee application, I would still have allowed the Garnishee herein to challenge the consent order of 13th September, 2006 for the following reasons. The Judgment-Debtor is a public body; the decree against it had apparently been compromised and settled as compromised, yet it was now required to pay a very huge additional sum of money upon the same decree; and the Garnishee was in a fiduciary capacity with the Judgment-Debtor and the funds it held to its credit appeared to be public funds designated for another specific purpose. It was therefore proper for the Garnishee's suspicions to be aroused and for it to approach the court.

Issue No. 2: Was the decretal sum compromised as between the Decree-Holder and the Judgment-Debtor and settled as recorded by consent on 2nd April 2003?

Correspondence has been exhibited by both the Decree-Holder and the Judgment-Debtor in their various affidavits that show clearly that there were negotiations between the Decree-Holder and the Judgment-Debtor's parent Ministry. These negotiations resulted in a substantial reduction of the decretal sum to just under KShs 24 million, except for costs. It appears that there were no conditionalities attached to this reduction; none have been laid before the court. The reduced decretal sum was eventually paid following various false starts (bouncing cheques). It is clear, however, that when the consent order of 2nd April, 2003 was recorded the reduced decretal sum had been paid. Costs of the suit were also agreed at KShs 2 million and terms for payment thereof recorded.

Furthermore, subsequently in the year 2004 the Decree-Holder purported to execute in respect of the said costs of KShs 2 million. The matter went before a deputy registrar of the court for the taking of accounts. The deputy registrar found on 10th December, 2004 that the costs had been paid in full and nothing was outstanding. Why was the Decree-Holder at this stage executing only for costs if there was still such a huge sum still outstanding upon the decree?

I therefore find, in light of the clear record of the court, that indeed the decretal sum was compromised and settled as recorded by consent on 2nd April, 2003, save for costs, which were settled subsequently.

Issue No. 3: If the decretal sum was compromised, could the Decree-Holder unilaterally rescind the compromise?

No clear and unambiguous terms of the compromise between the Decree-Holder and the Judgment-Debtor were laid before the court. So, it is not possible to tell if there was a default clause that entitled the Decree-Holder to require payment of the full uncompromised decretal sum. What is without doubt, however, is that long after the compromise, which had been negotiated in the year 1999, the consent order of 2nd April, 2003 was recorded marking the matter as fully settled except for costs of the suit agreed at KShs 2 million.

I have perused the notice of motion dated 28th September, 2005 (which challenged the consent order of 2nd April, 2003, and which was allowed by the consent order of 13th September, 2006 challenged in the present applications). The supporting affidavit thereof claims that the Decree-Holder learnt of the consent order of 2nd April, 2003 in April 2004, yet the application was not filed until 28th September, 2005. This was after the garnishee proceedings in issue had been challenged by the Garnishee. To the supporting affidavit is annexed a letter dated 16th August, 2005 by the Decree-Holder's former advocates, M/s Nyamogo & Nyamogo. That letter states clearly that the consent order of 2nd April, 2003 was entered pursuant to the Decree-Holder's written instructions dated 5th April, 2002. So, how could the Decree-Holder claim in the aforesaid application dated 28th September, 2005, or now, that the order of 2nd April, 2003 was entered without its authority or consent? If the Decree-Holder had indeed rescinded the compromise, as it has now been claimed, why did it give its written instructions for entry of the said consent?

All available evidence points to the fact that the compromise between the Decree-Holder and the Judgment-Debtor was acted upon by the latter; it paid the compromised decretal sum way back in 1999. The Decree-Holder cannot claim that it rescinded a contract that had already been performed by one party. There was nothing to rescind. In any event, there were no clear terms of the compromise laid before the court, except for the reduced decretal sum, that the Judgment-Debtor could be said to have breached. It paid the compromised decretal sum, and the matter was marked as settled by a consent order of the court recorded nearly four years after the compromise and payment. I find that the Decree-Holder did not rescind, and could not have lawfully rescinded, the compromise.

Issue No 4: If the decretal sum was compromised and settled, could any further sums accrue upon

the decree?

Having answered as I have issues Nos. 2 and 3 above, the answer to this issue must be in the negative. The decretal sum having been compromised and paid, the decree was thereby settled and extinguished. No further liability could accrue upon it.

Issues Nos 5 and 6: Could the consent order dated 13th and filed on 14th September, 2006 be lawfully entered if the decretal sum had been compromised and settled?

Was the consent order fraudulent and entered without the authority of the Judgment-Debtor?

The answer to issue number 5 must also be in the negative; for issue number 6 the answer must be yes. The effect of the consent order of 13th (entered on 14th) September, 2006 was to revive a debt that had been extinguished by compromise. It created a charge upon public funds (the Judgment-Debtor being a public authority) that was clearly unlawful. The compromised decretal sum having been settled in 1999, some six years before, the decree was long settled, and that fact was recorded in the consent order of 2nd April, 2003. It matters not that some officer or officers of the Judgment-Debtor acknowledged the alleged further indebtedness upon the decree. It matters not that at some point the board of directors of the Judgment-Debtor may have acknowledged the alleged further indebtedness. The officers of the Judgment-Debtor were clearly acting either in ignorance or in collusion with the Decree-Holder. They must have advised the board of directors to acknowledge the alleged further indebtedness either in ignorance or in furtherance of a fraud. The intention here appears to be all too clear; it was to illegally obtain funds from a public body that had now come into substantial funds from the Government.

Upon the affidavit evidence placed before the court I find that the Judgment-Debtor never gave its authority for the consent order of 13th September, 2006 to be entered. And even if it had given such authority, the same would have been unlawful as, in fact and in law, there was no longer any decretal sum due and payable by itself. I therefore find that the consent order dated 13th (and filed on 14th) September, 2006 was not lawfully entered as the decretal sum had been long compromised and settled. The consent order was fraudulent and unlawful.

Issue No. 7: Should the orders sought in the two applications be granted?

Having answered the first six issues as I have above, it is obvious that the two applications must be allowed. I will allow them. The result is that the consent dated 13th (filed and entered as an order of the court on 14th) September, 2006, is hereby set aside. The effect of this is that the consent order recorded on 2nd April, 2003 is restored. The garnishee proceedings, including the garnishee order *nisi* issued on 18th April, 2005 and the garnishee order *absolute* granted by the consent order entered on 14th September, 2006 (now set aside), are all hereby struck out and set aside as the case may be. The other effect of allowing the present applications is that the notice of motion dated 28th September, 2005 must be struck out. It is hereby struck out.

The Garnishee and the Judgment-Debtor will have costs of their respective application. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF OCTOBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17TH DAY OF OCTOBER, 2008