Mengich & Co Advocates v Sot Tea Growers Rural Co-operative Savings & Credit Society Limited; Co-operative Bank of Kenya (Garnishee) (Miscellaneous Application 4 of 2018) [2022] KEELC 13674 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13674 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISCELLANEOUS APPLICATION 4 OF 2018

MC OUNDO, J

OCTOBER 13, 2022

BETWEEN

MENGICH & CO ADVOCATES ..... APPLICANT

AND

SOT TEA GROWERS RURAL CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED ..... RESPONDENT

AND

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

RULING

1. Before me for determination are two Applications, which were disposed of by way of written submissions. The first one is dated the December 15, 2021 brought by the Respondent pursuant to the provisions of Order 51 Rule 1 and Order 22 Rule 22(1)5 (sic) of the *Civil Procedure Rules*, Section 1A, 1B & 3A of the *Civil Procedure Act* and all enabling provisions of the law wherein Counsel for the Applicant, M/s Obondo Koko & Company Advocates, seeks orders of stay of execution against the proclamation dated November 13, 2021 issued to the Hegeons auctioneers against the Respondents' properties.

2. The Applicant further seeks that the warrants of attachment dated November 5, 2021 be declared null and void, lifted or set aside, and finally, that the Applicants be allowed to continue liquidating the decretal sum by paying monthly installments of Ksh 50,000/= until payment in full.

3. The Application was supported by the grounds on its face as well as by the supporting affidavit of one Joseph Mabwai, the Respondent's chairman, dated the December 15, 2021.

4. In opposition to the Application, the Applicants herein filed their grounds of opposition dated the January 20, 2022 to the effect that the Application was bad in law, incompetent, misconceived and an abuse of the court process. That it was also fatally defective as it did not disclose any cause of action. That the provisions of Order 51 Rule 1, Section 1A, 1B and 3A of the *Civil Procedure Act* were procedural and not substantive and that Order 22 Rule 22(1) 5 was a non-existent provision of the law.

5. That the Application was res judicature, the issue of quantum of costs and applicable interest having been lawfully determined by the ruling of May 25, 2021 and as such the court was functus officio and thus lacked the jurisdiction to entertain a second Application.

6. That the Respondent/Applicant had come to court with unclean hands having issued dishonored cheques in part settlement of the decretal sum. That further, the Respondent's (Judgment Debtor) Counsel M/s Koko Obando & Co Advocates had no right of audience for want of instructions, after judgment had been entered, before seeking the leave of the court before filing their Notice of Appointment.

7. That the execution process was legitimate pursuant to the orders and Decree issued by the court, which order had not been varied, set aside and/or discharged by the Judgment Debtor who was seeking to evade payment of costs awarded by the court on the July 9, 2019 which was more than three years ago.

8. The second Application is an ex-parte Notice of Motion dated January 12, 2022, filed pursuant to the provisions of Order 23 Rule 1, 2, 3, 4, 9 &10 Order 51 Rule 1 of the *Civil Procedure Rules*, Schedule 6(B) of the *Advocates Remuneration (Amendment) Order, 2014* and all enabling provisions of the law, where the Applicant seeks to proceed with execution of the Decree by attachment of the Garnishee, who holds credit in the name of Stegro Sacco Limited, the Respondent herein, in account number xxxx in Co-operative Bank of Kenya (Bomet Branch), or such other account which ever in the name of the Judgment Debtor, such sums which shall be sufficient to satisfy the Applicant's decretal sum of Ksh 1,399,160/= as at November 5, 2021 and the recovery of costs of Ksh 270,390/ both totaling to Ksh 1,669,552/= as at December 28, 2021 for the satisfaction of the Decree holder and recovery costs due to Hegions Auctioneers Limited.

9. That the Applicants' Application was necessitated by the fact that upon the Respondent issuing him with two cheques for the sum of Ksh 50,000/= and Ksh 200,000/= being No xxxx and xxxx respectively, as part settlement of the decretal sum which was due for payment on December 28, 2021, they had gone ahead and instructed the Garnishee not to honor the payment wherein the cheques had been returned unpaid and/or dishonored.

10. The Applicant further seeks for orders for the Garnishee through its authorized bank signatories namely Joseph Mabwai, Joseah Korir and Robert K Mutai, to attend court and show cause why they should not pay the decretal amount of Kshs 1,669,552/=. That in the alternative, the Decree holder be granted leave to attach immovable properties in the name of the Judgment Debtor in execution of the Decree and award made by the court and the Deputy Registrar be granted leave to execute any conveyance necessary for the sale of the attached properties.

11. In opposition to the Application, one signatory to the Garnishee and Chairman of the Defendant herein, Mr Joseph Mabwai, via his Replying Affidavit sworn on the June 17, 2022 and not filed in court as there is no evidence of receipt, deponed that the Application was frivolous vexations and a waste of the court's time and that the same should be dismissed with costs. That there had been no evidence provided by the Applicant to support their claim that they held funds in account number xxxx in Co-operative Bank of Kenya (Bomet Branch). That the annexure marked as ''AM 6'' which the Applicant sought to rely on was questionable as no evidence of ownership, or a statement had been annexed to

prove that the Respondents held money in the account to be garnished. That the Garnishee had not confirmed the holders of the alleged account and neither were the Respondents, their employees or agents members of the Garnishee.

12. That in order for the Applicant to succeed in his Application, he had to fulfill the requisites needed for the issuance of the orders sought which in the present case, he had failed to do so. The Respondent deponed that they had no sufficient funds to make full payment to the Applicant and that had been the reason why they had entered into an agreement with him to pay by installments.

Determination.

13. I have considered both the applications and submissions herein as well as the authorities relied upon. In regard to the first Application, it is clear that both the jurisdiction of the court as well as the representation of the Applicant's (Judgment Debtor) Counsel has been questioned as to whether or not he is properly on record. For ease of reference in this ruling, the parties shall be referred to as they appear in the pleadings, in both Applications.

14. It is not in dispute that in the main suit being, ELC No 65 of 2015, there had been a change of Advocates wherein the firm of Obondo, Koko & Co Advocates came on record for the 1st and 2nd Defendants via their Notice of Change of Advocates dated January 22, 2018. Subsequently a consent judgment had been entered wherein the Respondent's previous Counsel (Applicant herein) Mr Mengitch Advocate filed his Bill of costs dated February 26, 2018 which was taxed on the June 26, 2019 for a sum of Ksh 1,012,620.84/= and adopted as a decree of the Honorable Court. The Applicant therefore proceeded to execute for recovery of his costs. It is also not in dispute that pursuant to the said taxation, the Respondents herein via an Application dated the January 9, 2020, sought for stay of execution of the same which Application had been dismissed in the ruling of the May 25, 2021. They have now filed a similar Application wherein no Appeal had been filed.

15. The law on res judicata is found in Section 7 of the *Civil Procedure Act* which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

16. The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other. This order, having become a Judgment of a Court of competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by an appellate Court in an appropriate proceedings. This being the case, the Application dated the December 15, 2021 fails with costs.

17. On the second Application dated the January 12, 2022, I find that the law governing Garnishee proceedings is found in Order 23 Rule 1(1) of the *Civil Procedure Rules* which provides:-

> ''A court may, upon the ex parte Application of a decree holder, and either before or after an oral examination of the judgment debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment debtor and is within

the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, Rule 42 owing from such third person (hereinafter called the "Garnishee") to the judgment debtor shall be attached to answer the decree together with the costs of the Garnishee proceedings; and by the same or any subsequent order it may be ordered that the Garnishee shall appear before the court to show cause why he should not pay to the decree holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid."

18. Order 23 Rule 4 of the *Civil Procedure Rules* further provides:-

> ''If the Garnishee does not dispute the debt due or claimed to be due from him to the judgment debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the Garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with costs of the Garnishee proceedings; and the order absolute shall be in Form 17 or 18 of Appendix A, as the case may require. ''

19. In *Mengich t/a Mengich & Co Advocates & Another vs Joseph Mabwai & 10 Others* [2018]eKLR the court laid out the procedure in Garnishee proceedings as follows:-

> " Garnishee proceedings is done in two different stages. The first stage is for the Garnishee order nisi, while the second stage is for the Garnishee order absolute. At the first stage, the judgment creditor makes an Application ex parte to the court that the judgment debt in the hands of the third party, the Garnishee, be paid directly to the judgment creditor unless there is an explanation from the Garnishee why the order nisi should not be made absolute. If the judgment creditor satisfies the court on the existence of the Garnishee who is holding money due to the judgment debtor, such third party (Garnishee) will be called upon to show cause why the judgment debtor's money in its hands should not be paid over to the judgment creditor, and if the court is satisfied that the judgment creditor is entitled to attach the debt, the court will make a Garnishee order nisi attaching the debt.
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> The essence of the order nisi is to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the judgment debtor. It is a requirement that a copy of the order nisi must be served on the Garnishee and judgment debtor at least 7 days before the adjourned date for hearing. The second stage is for the Garnishee order absolute, where on the adjourned date, the Garnishee fails to attend court or show good cause why the order nisi attaching the debt should not be made absolute, the court may subject to certain limitations make the Garnishee order absolute. The Garnishee, where necessary also have an option of disputing liability to pay the debt.
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> The primary object of a Garnishee order is to make the debt due by the judgment debtor available to the decree holder in execution without driving him to the suit."

20. It is not in dispute that the Applicant obtained a certificate of taxation for Ksh 1,012,620.84/= against the Respondent which was adopted as a decree of the Honorable Court and which has not been settled to date. The Respondent's Chairman at para 19 and 20 of his un-received Affidavit has acknowledged that they do not have sufficient funds at the moment to make full payment and therefore they had agreed to make the payments by installments. He however denied having a bank account with the Garnishee stating that there had been insufficient evidence. He however did not explain on the evidence tendered of the dishonored cheques issued to the Applicant to draw funds from the Garnishee account.

21. Since the said affidavit was not filed in court and also having noted that there was no response from the Garnishee confirming or disputing whether the Judgment Debtor had an account with them, despite service of an order of the court to do so, and which order had been served upon them on February 10, 2022, as per the affidavit of service filed on March 16, 2022, they had neither acknowledged nor disputed the debt. In that respect, I find that the Application dated January 12, 2022 is unopposed by the Respondent and further that the Garnishee's silence was an indirect acknowledgment that the Judgment Debtor held accounts with them and thus they had no objections to attaching the debt.

22. In *Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Co Ltd, Diamond Trust Bank (Garnishee)* [2020] eKLR the court held that:-

> "It is the position of the law that in Garnishee proceedings the Garnishee banks are only required to appear before the court to acknowledge or dispute the debts. In the present case, the Garnishee bank did not appear or file a response and in the absence of evidence to the contrary, I find that they acknowledged that the Respondent held accounts with them and it was not necessary for the court to question them and cross examine them as they did not have any objections in relation to the attachment."

23. That said and done, I find that since the Garnishee has indirectly admitted and/or acknowledged the claim by the Applicant that the Respondent holds an account with them, it is herein directed that the Garnishee appears before this court within 30 days of the delivery of this ruling, to show cause why the Judgment Debtor's money in its hands should not be paid to the judgment creditor. The Application dated January 12, 2022 is allowed to this extend (see *Mengich t/a Mengich & Co Advocates supra*) with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 13TH DAY OF OCTOBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE