



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1300 of 2002

IN THE MATTER OF ARBITRATION ACT 1995

AND

IN THE MATTER OF ARBITRATION ACT

BETWEEN

BUSURU RICHARD MARK T/A

BUSURU R.M. & PARTNERS, ARCHITECTS.....DECREE HOLDER

AND

MR. B.A. OMUSE T/A

AFRO-ANGLO INVESTMENTS LTD.....JUDGMENT HOLDER

AND

BLUE SHILD INSURANCE CO. LTD.....1ST GARNISHEE

KENYA POST OFFICE SAVINGS BANK.....2ND GARNISHEE

KENYA CREDIT TRADERS LTD.....3RD GARNISHEE

BEAUTY WORLD SALON.....4TH GARNISHEE

GOLDPRINT LTD/THE PROFOTO CENTRE.....5TH GARNISHEE

KITALE PROGRESSIVE TRAINING INSTITUTE.....6TH GARNISHEE

MARSON ELECTRONICS.....7TH GARNISHEE

PHOEBE'S HAIR SALON.....8TH GARNISHEE

TIANISHI(TIENS) SPECIALITY SHOP/ACUPOINT

SERVICES.....9TH GARNISHEE

WESTERN UNION.....10TH GARNISHEE

RULING

Before me is an application by Way of Chamber Summons brought under Order XXII Rule 1 dated 16th October 2006 and amended on 17th January 2007 in which the Applicant Decree - Holder seeks orders:

1. That all rents owing or accruing due from all the Garnishee to the Judgment/Debtor in respect of the building in Kitale and more particularly known as LR NO. 2116/26 Kitale be attached to answer the decree herein in the sum of Shs.5,205,848.20 as at 18th September 2006.
2. That the above mentioned Garnishee do show cause why the said Garnishee should not pay to the applicant the Decree-Holder the rent due from them to the said Respondent or so much thereon as may be sufficient to satisfy the decree together with costs of these proceedings.
3. That service of the Order Nisi on the Judgment Debtor be dispensed with as service of the Order Nisi will cause much delay and it is desirable that these Garnishee Proceedings should be proceeded with the least delay if the result is to be fruitful and to prevent termination of tenancies to defeat this process.

The application is based on the grounds that:

- (a) The Judgment-Debtor has not exhibited any willingness to settle the decretal amount.
- (b) The Judgment-Debtor owns a commercial building within Kitale Municipality on plot LR NO. 2116/VI/26 Kitale which has been let out to the Garnishee at a reasonable rental.
- (c) It is only fair and just that the rent due and owing from the Garnishee to the Judgment-Debtor be attached to satisfy the Decree herein.

The application is also supported by an affidavit sworn by Busuru R. Mark on 19th January 2007 in which he has deponed on facts similar to the grounds herein.

The Khalwale counsel for the applicant submitted that efforts to recover the decretal amount from the Judgment-Debtor has not been successful.

The application is opposed by the Garnishee through learned counsel Mr. Akoto and who relies on the Replying Affidavit filed herein.

In the Replying Affidavit the Judgment-Debtor depones that he has made efforts to liquidate the decretal sum.

Mr. Akoto submitted that Judgment was entered by consent in the sum of Shs.3,164,045.20. The Judgment Debtor has paid Shs.1,820,000/= and produced payment receipts to prove payment.

But despite the efforts made by the Judgment Debtor to liquidate the decretal sum, the decree –Holder has resorted and has adopted a multiplicity mode of execution against the Judgment-Debtor simultaneously. There was an attempt to sell his moveable property which application was withdrawn.

Also that there was an attempt to sell the building which attempt was withdrawn by the order of this court. Subsequently an attempt to sell the Judgment-Debtor property was stopped by the court but that application is still pending.

There are two parallel firms acting for the Decree-Holder namely Khalwale & Co. Advocates and Mosoti & Co. Advocates and both firms filed application simultaneously. Further Mr. Akoto submitted that a tenant cannot be classified as a Debtor. Under the Provisions of Order XXII Rule 1 of the Civil Procedure Rules, Rents payable by such tenants as and when they fall due cannot be classified as debts which are recoverable by way of Garnishee Proceedings. Further no evidence has been adduced to prove that the Garnishee are actually tenants of the Judgment Debtor. No lease agreement produced to prove tenancy.

Mr. Khalwale counsel for the applicant conceded that he had withdrawn the previous applications filed against the Judgment Debtor. This application is brought under the Provisions of Order XXII of the Civil procedure Rules which provide thus:

XXII(1) 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 that the salary, or allowance coming within the provisions of Order XXI Rule 43 owing from such third person (therein after 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 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.

A debt must either be proved or admitted. With due respect counsel rent payable to the landlord is not a debt and cannot be subject to Garnishee Proceedings. Rent payable is equivalent to periodical allowance which could be covered by Order XXI Rule 43 of the Civil procedure Rules.

For the reasons stated above, the Decree Holders' application is dismissed with costs.

Dated at Nairobi this 5th day of March 2007.

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J.L.A. OSIEMO

JUDGE