



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 329 OF 2003

**AWO SHARIFF MOHAMMED T/A MOHAMMED
INVESTMENT.....PLAINTIFF/JUDGMENT CREDITOR**

VERSUS

ABDULKADIR SHARIFF ABDIRAHIM..... DEFENDANT/JUDGMENT DEBTOR

AND

KENYA COMMERCIAL BANK LIMITED.....1ST GARNISHEE

SAVINGS & LOAN KENYA LIMITED.....2ND GARNISHEE

CONSOLIDATED BANK OF KENYA LIMITED3RD GARNISHEE

EABS BANK LIMITED.....4TH GARNISHEE

SASA GENERAL INVESTMENT LIMITED.....5TH GARNISHEE

RULING

This is an application by the decree holder for orders that various sums allegedly held by the Garnishees to the credit of the judgment debtor be attached to answer the decree passed against the judgment debtor. The application is expressed to be made under the provisions of Order XXII Rules 1 and 2 of the Civil Procedure Rules and Sections 3A and 94 of the Civil Procedure Act.

The short background is this. On 16.2.2006, the decree holder obtained judgment against the defendant for USD 200,000 and Shs.800,00.00 together with interest and costs. The judgment debtor did not satisfy the decree. In an application for stay of execution lodged in the Court of Appeal a stay was granted on condition that a sum of KShs.12,000,000.00 be deposited in a joint account in the names of the parties' respective advocates within 30 days of the date of the order which was on 9.4.2007. The judgment debtor did not meet that date line.

The judgment debtor appears to have himself or through proxies raised or been assisted to raise the said deposit although outside the time appointed by the Court of Appeal. Through his advocates he attempted to have the joint account opened with M/s Housing Finance Company of Kenya. However as the time allowed by the Court of Appeal to open the joint account had expired, the decree holder believed he would attach the undeposited sums allegedly held by the various bodies from whom the sums for the said

deposit had been obtained. Hence this application. An affidavit by the decree holder in support of the application sworn on 18.4.2007 discloses the basis of the application. It is deponed in paragraph 13 of that affidavit that a sum of KShs.2,000,000.00 vide cheques number 192384 dated 17.4.2007 drawn by the 1st garnishee in favour of M/S HFCK to the order of the judgment debtor and the value thereof has been appropriated to answer for the decretal sum in the suit. Similar averments are made with respect to cheques for KShs.2,600,000.00 drawn by the 2nd garnishee, KShs.600,000.00 drawn by the 3rd garnishee and KShs.1,400,000.00 drawn by the judgment debtor and or the 5th garnishee on their account with the 4th garnishee. Copies of the cheques are annexed as “ASMV”.

All the garnishees oppose the application and have filed replying affidavits. What runs through the affidavits is the deposition that the garnishees are not indebted to the judgment debtor at all save for the 2nd garnishee who admit that a sum of KShs.35,803.90 is currently held by them to the credit of the judgment debtor.

I have considered the application, the affidavits both in support thereof and in opposition thereto. I have also carefully considered the oral submissions of the learned counsels appearing. Having done so, I take the following view of this matter. The basis of the decree holder's application are the cheques drawn by the garnishees. The 1st garnishee, Kenya Commercial Bank denies that the judgment debtor has any account with them at all. Its Legal Manager, Mr. Evans Mose swears that cheque number 1923841 drawn in favour of Housing Finance was so drawn at the request of the 1st garnishee's customer distinct from the judgment debtor. The 1st garnishee therefore contends that they do not hold any funds to the credit of the judgment debtor. The decree holder has not filed any further or supplementary affidavit to challenge the averments made on behalf of the 1st garnishee. I have no reason to doubt those averments.

On behalf of the 2nd garnishee, the same Legal Manager of the 1st garnishee has sworn that the only sums held to the credit of the judgment debtor amounts to KShs.35,803.90 on account number W1368687. However with respect to account number 229645002 referred to in the decree holder's application, the 2nd garnishee contends that the account does not belong to the judgment debtor. It is in fact for the 2nd garnishee and has no connection at all with the judgment debtor. Once again the decree holder has not challenged those averments in a further or supplementary affidavit and I see no basis for rejecting the same.

The 3rd garnishee on its part has sworn that a check at all its branches reveals that the judgment debtor does not have any account with it. It is also deponed on behalf of the 3rd garnishee that cheque number 115225 for KShs.600,000.00 was purchased by way of cash by a third party and was issued through account number 0110000160101 a banker's cheques account and even if it is not presented for payment by the payee, Housing Finance Company it can only be claimed by the purchaser thereof who is not the debtor. Again those averments are not challenged by the decree holder. I am afraid I have no basis for disbelieving the 3rd garnishee.

The 4th garnishee swears that it is a stranger to the decree holders allegations and does not owe the judgment debtor any monies or assets. It further depones that the cheque for 1,400,000.00 is drawn on an account of the 5th garnishee which is a limited liability company with separate legal existence. I have perused the said cheque. I see no nexus with the judgment debtor. It is drawn by an entity called Sasa General Investments Limited in favour of Housing Finance. The cheque in my view is not evidence of any sums owed by the 4th garnishee to the judgment debtor or the said entity.

The 5th garnishee admits that the judgment debtor is its co-director and that the company has an account with the 4th garnishee and enjoys overdraft facilities with the latter. On the strength of those facilities the 5th garnishee had a cheque drawn for KShs.1,400,000.00 in favour of Housing Finance but does not owe the judgment debtor any monies at all. Indeed the said sum of KShs.1,400,000.00 was advanced to the judgment debtor as an emergency personal loan. Once more, the decree holder has not challenged that contention of the 5th garnishee. The contention therefore remains uncontroverted.

In all the above premises, I am of the view that the decree holders application cannot succeed. The purpose of garnishee proceedings is to attach sums owed to the judgment debtor by the garnishee for the purpose of paying the same to the decree holder. If the garnishee does not owe the Judgment debtor any sums nothing can be attached to pay the decree holder. It is irrelevant that as between the garnishee and the judgment debtor there are arrangements whereby the garnishee may honour certain liabilities of the judgment debtor. Those arrangements cannot translate into sums owed by the garnishee to the judgment debtor.

In the matter at hand the decree holder is of the view that as the Housing Finance joint account was not opened, the sums indicated in the cheques in favour of Housing Finance are available for attachment. That view is clearly misconceived. In the first place Housing Finance is not a party to these proceedings. Its side of the story is therefore not available for consideration. It is the payee in those cheques and no orders can be made against it as that would offend against the well known Natural Law Maxim that a party should not be condemned unheard. Secondly the garnishees have in my view satisfactorily explained the circumstances under which those cheques were issued. The cheques were not drawn on funds held to the credit of the judgment debtor. In other words, the garnishees do not owe any sums to the judgment debtor save for the said sum of KShs.35,803.90 held by the 2nd garnishee to the credit of the judgment debtor. Sections 25, 30, 31, 35 of the Bills of Exchange Act referred to by the decree holder are of no assistance in this application. So save for the said sum of KShs.35,803.90 held by the 2nd garnishee, these proceedings are misconceived.

The upshot of this matter is that the garnishee proceedings against the 1st, 3rd, 4th and 5th garnishees have no merit and are dismissed with costs. The proceedings against the 2nd garnishee are allowed to the limited extent that the said sum of KShs.35,803.90 held by the 2nd garnishee to the credit of the judgment debtor should be paid to the decree holder. As between the decree holder and the 2nd garnishee each party shall bear his/its own costs of the proceedings.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Wamalwa for the decree holder, Mungate for the 3rd garnishee and Kinyanjui for the 5th garnishee and the judgment debtor.

F. AZANGALALA

JUDGE

4/7/07