

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1929 of 1999

XUE WENYINGAPPLICANT

V E R S U S

GRACE WANJIRU KANYARIRESPONDENT

AND

NAIROBI CITY COUNCILGARNISHEE

R U L I N G

On 13th February, 2002 a garnishee order *nisi* was granted herein. The same was formally issued on 26th February, 2002. On 14th March, 2002 the order *nisi* was made *absolute*. The garnishee order *absolute* was formally issued on 21st March, 2002.

The Garnishee has applied by notice of motion dated 14th March, 2007 seeking the main order that the aforesaid garnishee order *absolute* be vacated. The application, in so far as it concerns this prayer, is stated to be brought under section 3A of the Civil Procedure Act, Cap. 21. It is brought upon the grounds, *inter alia*, that the Garnishee is no longer indebted to the Judgment-Debtor, and that the Decree-Holder is abusing the garnishee order. There is a supporting affidavit sworn by one MARY N. NGETHE, the director of legal affairs of the Garnishee.

The Decree-Holder has opposed the application as set out in the replying affidavit sworn by his advocate and filed on 19th April, 2007. The effect of the replying affidavit is that the application totally lacks merit.

I have considered the submissions of the learned counsels appearing. I have also read the supporting and replying affidavits. The Garnishee has claimed in the supporting affidavit that the Decree-Holder chose to receive some of the garnishee amount directly from the Judgment-Debtor. This is denied by the Decree-Holder. There is no clear and acceptable evidence of this alleged direct recovery. The handwritten note exhibited at paragraphs 8 of the supporting affidavit is a note written by one MR. YANG YE, not by the Decree-Holder, XUE WEN YING. In the replying affidavit the Decree-Holder's advocate has stated that he did not act for any YANG YE in this matter.

In paragraph 10 of the supporting affidavit it is alleged that the Decree-Holder obtained KShs.447,000/00 from the Judgment-Debtor's advocate in part-settlement of the garnishee amount. However, the evidence exhibited at that paragraph does not measure up. It is merely an acknowledgement by the Judgment-Debtor that KShs. 447,000/00 was paid from her account to E. N. Ng'ang'a, apparently the Decree-Holder's advocate. It is not stated who held this account; it appears from the material available to the court that the account was held by the Garnishee, which means that it was the Garnishee who had paid that sum towards the garnishee amount.

So, I am not satisfied that the Decree-Holder abandoned his rights under the garnishee order *absolute*, choosing instead to deal directly with the Judgment-Debtor. On the contrary, there is evidence that the

Decree-Holder pursued the garnishee order *absolute* to its logical conclusion; at one point the Assistant Town Clerk of the Garnishee was committed to civil jail for not honouring the garnishee order *absolute*.

Of greater significance is that the Garnishee paid out its indebtedness to the Judgment-Debtor long after it had been served with the garnishee order *absolute*. It did this without reference to the Decree-Holder or to the court, if indeed it thought that the Decree-Holder had abandoned the garnishee order *absolute* and was dealing directly with the Judgment-Debtor. By paying the Judgment-Debtor before settling the garnishee amount, the Garnishee was in contempt of the garnishee order *absolute*. It cannot now claim that the order should be vacated in the interests of justice.

Having considered all matters placed before the court, I find no merit in the notice of motion dated 14th March, 2007. It is hereby dismissed with costs to the Decree-Holder. Orders accordingly.

DATED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 23RD DAY OF NOVEMBER, 2007