REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 560 of 1998

KEPHA NYABERA & 189 OTHERS…….…PLAINTIFF/DECREE-HOLDERS

VERSUS

KENYA FARMERS ASSOCIATION LTD….DEFENDANT/JUDGMENT-DEBTOR

CO-OPERATIVE BANK OF KENYA LTD…….……1ST GARNISHEE

BARCLAYS BANK OF KENYA LTD…….…….2ND GARNISHEE

RULING

On the 10th of May, 2006, the plaintiffs/decree-holders in this case filed an application under the provisions of **Order XX11 rule 1 & 1(a) of the Civil Procedure Rules** seeking to attach the amounts held in the accounts operated by the defendant/Judgment debtor at the Co-operative Bank of Kenya, Nakuru Branch (A/C No.2025451000) and at Barclays Bank of Kenya Nakuru East Branch (*A/C No.2009627*) by garnishee order to satisfy the decretal amount ordered to be paid by the defendant by this court. This court issued the order nisi and the same was served upon the two banks. The order nisi prohibited the banks from obeying any mandate issued by the defendant pending the hearing and determination of the garnishee proceedings. Co-operative Bank of Kenya did not file any affidavit in response to the said garnishee order. On the 13th of November, 2006, the advocates for the said bank and the advocates for the plaintiffs/decree holders entered into a consent whereby the sum of Ksh.35,055/= which was held by the said bank on account of the defendant/judgment-debtor was released to the plaintiffs/decree holders.

Barclays Bank of Kenya however disputed the garnishee order issued against it. Alfornse Kisilu, the head of Corporate Recoveries of the bank (*hereinafter referred to as the garnishee*) swore a lengthy replying affidavit disputing the fact that the garnishee owed the defendant/judgment-debtor any sum of money. He deponed in his affidavit as follows;

"5. I confirm that the judgment-debtor is the bank's customer and does hold an account No.2009727 with the bank at its Nakuru Branch but the same is merely the judgment-debtor's fuel and lubricants'

account. The said account stood in credit in the amount of Ksh.2,806,635/65 as at 11th May, 2006 and is still in credit as can be seen from the annexed exhibit 'AK-1' which is a true copy of the relevant statement of account.

6. The judgment-debtor is also the bank's customer in an ordinary loan account No.027/2009678 in which it presently owes to the bank the sum of Ksh.740,679,040/89. A true copy of the current statement of the account attesting to this is annexed hereto as exhibit 'AK-2'."

Mr. Kisilu then went on to depone that a charge instrument had been registered over the properties of the defendant/judgment-debtor when the said loan was advanced to it. A clause in the said charge instrument provided that in the event that the defendant's account was attached, then the right to combine, consolidate, and set off the sums in the various accounts would accrue. The charge instrument was annexed to the said replying affidavit. In paragraph 17 of the said replying affidavit, Mr. Kisilu swore that;

"17. *I now wish to state that the bank disputes any liability to the judgment debtor and categorically states that it has no debt accruing due to the judgment-debtor of any amount since the said debtor has a net liability to the bank. Accordingly, the bank does not admit any liability to the garnishee and prays that the order nisi issued against it herein be discharged, vacated or rescinded."*

At the hearing of the garnishee proceedings to show cause why the garnishee would not satisfy the decretal amount due to the plaintiffs, Mr. Nyamunga, learned counsel for the garnishee reiterated the contents of the replying affidavit sworn by Mr. Kisilu on behalf of the bank. He submitted that the bank held no money in credit on account of the defendant/judgment-debtor. He submitted that under the relevant clause of the charge instrument, once the accounts of the defendant/judgment-debtor were attached, the bank had the right to offset the amount owed to it by the defendant/judgment-debtor by consolidating the accounts which were in credit with the accounts which were in debit. He submitted that the defendant/judgment-debtor owed the bank more money than was in the account which was attached. He therefore submitted that the bank owed no amount to the defendant/judgment-debtor which could be attached by a garnishee order. He urged this court to set aside the order nisi issued attaching the said account. Mr. Nyamunga referred this court to several decided cases in support of his submissions.

Mr. Karanja, learned counsel for the plaintiffs/decree holders submitted that the garnishee had no justifiable cause to refuse to release the amount which was attached when the order nisi was issued. He submitted that the garnishee had not invoked the relevant clause of the charge instrument to enable it combine, consolidate or offset the account which was attached with its loan account. He therefore argued that the right to offset as provided by clause 8 of the charge instrument had not accrued. He further submitted that it was apparent that the garnishee had colluded with the defendant/judgment-debtor to frustrate the decree holders from accessing the said funds in the accounts held by the garnishee. He submitted that the charge instrument which was annexed to the replying affidavit was faxed from the offices of defendant/judgment-debtor. He therefore urged this court to order the garnishee to release the money which was attached in the account of the defendant/judgment-debtor.

I have read the pleadings filed by the parties to this application in support of their respective positions. I have also carefully considered the rival submissions made by Mr. Karanja on behalf of the plaintiffs/decree holders and by Mr. Nyamunga on behalf of the garnishee. The issue for determination by this court is whether the garnishee has established that it owes no money to the defendant/judgment-debtor which can be liable to be attached by a garnishee order. The garnishee does not deny that it is holding the sum of Ksh.2,806,636/65 in A/C No.2009627 operated by the defendant/judgment-debtor. The garnishee however has vigorously argued that the defendant/judgment-debtor owes it a sum far more in excess of the amount in the said account. It is the garnishee's submission that the charge instrument gives it a right to offset the amount in credit with the loan account once any of the accounts held by the garnishee are attached. On the other hand, the plaintiffs/decree-holders dispute that the garnishee has a right to offset the amount in credit with its loan account.

I have carefully evaluated the arguments made in this application. It is not disputed that the garnishee

holds an amount on account of defendant/judgment-debtor which is in credit to the sum of Ksh.2,806,636/65. By its own admission, the garnishee confirmed that it allowed the defendant/judgment-debtor to operate the said account for its fuel and lubricants' expenses. At the time the said account was attached pursuant to the order nisi issued by this court on the 10th of May, 2006, the said account was within the control of the defendant/judgment-debtor. The defendant/judgment-debtor could withdraw the said amount if it so wished. In fact, a cheque of Ksh.50,000/= issued by the defendant/judgment-debtor was paid a few hours before the garnishee became aware that a garnishee order had been issued by this court. It is therefore clear that at the time the garnishee order was issued by this court, the garnishee was holding the said amount on account of the defendant/judgment-debtor. I have read clause 8 of the charge instrument which was annexed to the replying affidavit of Mr. Kisilu. It is clear that clause 8 (g) of the said charge instrument would come into force if the properties or the assets of the defendant/judgment-debtor were to be attached by any decree, order, warrant or process issued in execution of a court judgment.

In my opinion, the action envisaged in the said clause 8 would only come into effect if an action was taken against the properties of the defendant/judgment-debtor and if the garnishee made a positive move to realize the security. In my view, an account held in a bank is not a property or asset as contemplated by the said clause. In any event, the amounts owed by the defendant/judgment-debtor to the garnishee are properly secured. Indeed the garnishee intimated to the defendant/judgment-debtor by the letter annexed as the garnishee's annexture 'AK-4' dated the 17th of March, 2006 that it would be willing to co-operate with the defendant/judgment-debtor for the charged properties to be sold by mutual agreement to a willing buyer. It is therefore clear that the relationship between the garnishee and the defendant/judgment-debtor is cosy. The garnishee is unwilling to exercise its power of sale by chargee when it comes to the defendant/judgment-debtor.

I therefore agree with the submission made by Mr. Karanja that by the time the garnishee order nisi was issued by this court on the 10th of May, 2006 the provision of clause 8 of the charge instrument had not accrued and neither has it accrued to-date because the garnishee has made no effort to realize the securities charged to it by the defendant/judgment-debtor. It is therefore clear that the resistance by the garnishee to give effect to the garnishee order issued by this court has been made with the active connivance of the defendant/judgment-debtor.

I find no merit with the objection by the garnishee to give effect to the order nisi issued by this court on the 10th of May, 2006. I therefore order that the garnishee do with immediate effect release the said sum of Ksh.2,806,636/65 to the plaintiffs/decree-holders in compliance with the garnishee order issued by this court. The order nisi issued by this court on the 10th of May, 2006 is made absolute. The plaintiffs/decree-holders shall have the costs of the garnishee proceedings.

DATED at NAKURU this 1st day of December, 2006

L. KIMARU

JUDGE