



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI COMMERCIAL COURTS, NAIROBI
CIVIL CASE 573 OF 2004

PRISCILLA NYAMBURA NJUE t/a

NAIROBI MOSCOW AIRWAYS.....DECREE HOLDER

V E R S U S

COUNTRYSIDE SUPPLIERS LIMITED JUDGMENT DEBTOR

AND

KENYATTA NATIONAL HOSPITALGARNISHEE/APPLICANT

R U L I N G

Before this court are two applications. The first one is dated 30th June, 2005, and is made by the judgment debtor herein, while the second one is dated 1st July, 2005 and is made by the garnishee. The two applications are considered together and form the subject matter of this ruling.

The application by the judgment debtor is brought by chamber summons under O. XX rule 11 (1) and 2; O. XXI rule 22 and O. XXII rule 7 of the Civil Procedure Rules; and Ss. 63 (e) and 3A of the Civil Procedure Act. It prays for three main orders –

1. That pending the hearing and determination of this application, the court do issue a temporary stay of absolute order issued against the garnishee on 11th April orders and the warrants of attachment therein (sic).
2. That the court be pleased to allow the judgment debtor/applicant to liquidate the decretal sum by instalments as proposed therein.
3. That the court be pleased to discharge the garnishee from the proceedings herein and set aside the absolute order issued on 11th April, 2005.

The application is supported by the annexed affidavit of JOHN MUTUTHO, the managing director of the judgment debtor/applicant, and is based on the grounds that the garnishee is not liable to satisfy the decretal sum herein as they have paid to the judgment debtor the sum due from it in the sum of Kshs.21,079,759.85; that it is in the interest of justice that the garnishee be discharged from the proceedings herein; that the judgment debtor intends to satisfy the decretal sum but is not in a position to pay the entire sum at once; that the garnishee's movables may be attached by the decree holder on or after 29th June, 2005 and hence the urgency of the application; and that as the judgment debtor is ready to take

up the responsibility of paying the decretal sum, it is in the interest of justice that a temporary stay of the order absolute be granted.

The garnishee's application is brought by a Notice of Motion under O. XLIV rule 1; O. XXI rule 22 of the Civil Procedure Rules; and Ss. 63 (e) and 3A of the Civil Procedure Act. The two main orders sought in the application are that pending hearing and determination of this application, the court do order stay of execution of the order absolute issued on 11th April, 2005 and the resultant orders therein; and that the court be pleased to review its ruling and/or orders delivered on 2nd June, 2005.

That application is supported by the annexed affidavit of NZUKI MWINZI, the Senior Legal Officer with the garnishee/applicant. It is based on the grounds that there is a discovery of new and important evidence namely the settlement proposals tendered by the judgment debtor and the vouchers confirming full payments and which evidence was not available and could not be produced by the garnishee at the time when the ruling and/or order was passed; that the garnishee has since obtained all payment vouchers confirming payment of Kshs.21,079,759/85 to the judgment debtor; that the garnishee suffers the threat of execution being levied against them which action will occasion the garnishee and the public at large irreparable harm and damage; and that the new evidence is sufficient to enable the court review its ruling delivered on 3rd June, 2005.

Both applications are strenuously opposed. In that regard, the decree holder/respondent has filed four replying affidavits all sworn on 5th July, 2005, by Nganga Munene, Advocate for the decree holder, Stephen Nyamu, a licensed auctioneer, Princilla Nyambura Njue, the decree holder, and Francis N. Kimani, an advocate in the firm of Munene & Company, Advocates, which has the conduct of this matter on behalf of the plaintiff/decreed holder. At the hearing of this application, Mr. Mogaka appeared for the judgment debtor/applicant; Mr. Bundotich appeared for the garnishee/applicant; while Mr. Kimani appeared for the decree holder/respondent.

I have considered the applications and submissions of all counsel. At this juncture, I feel that it would be prudent to highlight the background to these applications. On 8th March, 2005, this court entered summary judgment for the plaintiff against the defendant for the sum of Kshs.5,095,000/= with interest at 12% from the date of the filing of the suit until the date of judgment, and further interest on the aggregate sum at court rates from the date of judgment until payment in full. By that time, there was evidence on record that Kenyatta National Hospital owed the judgment debtor a sum of Kshs.4 million. On 17th March, 2005, the decree holder filed an application which was heard on the same day for the attachment of the said sum of Kshs.4 million owed to the judgment debtor by Kenyatta National Hospital, in order to answer the decree herein. This prayer was granted on the same date, and the court ordered that the application be served upon the garnishee (Kenyatta National Hospital) for hearing inter partes on 11th April, 2005. Apparently, the application was served on 21st March, 2005, and received at the garnishee offices at about 10.30 am. This is indicated at the back of the order, where the garnishee's senior legal officer also endorsed –

“Received under protest as we are not a party to the suit.”

According to the annexures attached to garnishee's application, a voucher for the payment of Kshs.1,500,000/= to the judgment debtor was prepared on 21st March, 2005, and the payment effected by cheque on 31st March, 2005. Another voucher for the payment of Kshs.2,500,000/= to the judgment debtor was made on 22nd March, 2005 and the payment effected by cheque on 23rd March, 2005. The sad aspect about these payments is that they total Kshs.4million, and were effected after receipt of a court order of garnishee nisi, ordering attachment of the said sum of Kshs.4 million in answer to the decree passed herein.

On 11th April, 2005, the date scheduled for the hearing of the application inter parties, the garnishee did not show up in court. In their absence, the garnishee order nisi was made absolute. The garnishee was accordingly ordered to pay forthwith to the decree holder the sum of Kshs.4 million due from the garnishee to the judgment debtor. In default, execution was to issue for the same.

On 12th April, 2005, the garnishee was served with a copy of the order dated 11th April, 2005. The garnishee's reaction was swift and robust. Instead of complying with the court order, it filed an application dated 22nd April, 2005, seeking the setting aside of the said order and consequential orders of execution made thereunder. The application was based, inter alia, on the grounds that the garnishee order absolute and the proceedings giving rise to it were all illegal, null and void, as the garnishee order was not served upon the applicant and the judgment debtor. Their further grounds were that the garnishee did not owe the judgment debtor any sums of money or at all, and that the failure of the applicant to attend court on 11th April was inadvertent, unpremeditated and excusable. Reference to lack of service on the judgment debtor signalled a red light. But I did not think much of it at that time. I accordingly did not give weight to counsel for the decree holder's argument that there was collusion between the garnishee and the judgment debtor. On 2nd June, 2005, the application was dismissed with costs, with the court observing that the garnishee's failure to attend court on 11th April, 2005, was deliberate, well calculated and contemptuous.

On 14th June, 2005, the garnishee filed another application dated 13th June, 2005, applying for inter alia, an order to stay execution of the warrants of attachment issued on 8th June, 2005. This application was withdrawn on 27th June, 2005, as the advocates for the decree holder agreed to a stay of execution up to 29th June, 2005. After this there was a short lull in the storm; and then it came back with all its fury with the twin applications by the judgment debtor and the garnishee, dated 30th June, 2005 and 1st July, 2005, which are the subject matter of this ruling.

On 1st July, 2005, Mr. Stephen Nyamu, auctioneer, proceeded to seize and collect from Kenyatta National Hospital some goods which he had proclaimed on 8th June, 2005. While at it, the garnishee's Senior Legal Officer rang Mr. Munene, an advocate in the firm of Munene & Co., Advocates informing Mr. Munene that auctioneers were towing away Kenyatta National Hospital's ambulances and office equipment to satisfy the decretal sum owing by the said hospital as garnishee. According to the affidavit of Mr. Munene, the hospital's Senior Legal Officer expressly said that KNH were willing to settle fully but could not write a cheque as its Finance Managers were attending a seminar at Mombasa till 6th July, 2005. This information is corroborated by the affidavit of Mr. Nyamu, the auctioneer, who avers that he spoke personally to Mr. Nzuki Mwinzi, the garnishee's Senior Legal Officer, who confirmed that the auctioneer should collect all payment from the Senior Legal Officer on 6th July, 2005 at 12.00 noon. In consideration, thereof, the auctioneer suspended the seizure of the attached property. Mr. Munene's statement is further corroborated by a letter written on 1st July, 2005, by Mr. Mwinzi.

The letter is addressed to Munene & Co., Advocates and reads –

“Dear Sirs,

RE: HCCC NO. 573 OF 2004 – PRISCILLA NYAMBURA NJUE T/A NAIROBI MOSCOW AIRWAYS v. COUNTRYSIDE SUPPLIERS LTD. AND KNH (GARNISHEE)

This refers to our discussion this morning at 9.45 am in respect of the attachment of our goods arising out of the garnishee proceedings in this matter.

As intimated in our conversation aforesaid, the requisite payments can only be made by Wednesday, 6th July, 2005. This is because our Finance Manager, who is one of the main cheque signatories is in Mombasa for a seminar until Tuesday, 5th July, 2005. The auctioneers charges will be paid accordingly.

In the premises, kindly indulge us as agreed in our tele-conversation under reference. I have handed over a copy of this letter to Mr. Nyamu of Lifeline Traders Auctioneers for their information.

Yours faithfully

Signed

Nzuki Mwinzi

AG. CHIEF LEGAL OFFICER”

It did not take Mr. Mwinzi five days to act. Instead of waiting till 6th July, 2005, to forward his cheque to Munene & Co., Advocates for the decree holder, he had some other ideas. He decided to give the said firm of advocates the surprise of their lifetime.

On the same day, he instructed his advocates to file this application, asking for an order of stay of execution, and asking the court to review its ruling and/or orders delivered on 2nd June, 2005. This was “the cheque” which he promised Mr. Munene, only it came promptly instead of coming on 6th July, 2005.

This is a court of equity. The garnishee’s conduct, through its Senior Legal Officer, is most undeserving of any equitable remedies. A court of equity will not allow a garnishee, or any litigant for that matter, to blow hot and cold or to approbate and reprobate at the same time. This is exactly what KNH is doing.

Mr. Kimani for the decree holder argued at length that there was collusion between the judgment debtor and the garnishee. In its application dated 22nd April, 2005, the garnishee alleged that the judgment debtor had not been served. Pray, how did the garnishee come by such information? In the judgment debtor’s application herein dated 30th June, 2005, the judgment debtor is praying for an order that the court grant a temporary stay of the absolute order issued against the garnishee on 11th April, 2005 as well as the warrants of attachment therein. The debtor further seeks an order that the garnishee be discharged from the proceedings herein. The consideration which the judgment debtor offers is the payment of the Kshs. 4 million which Mr. Mwinzi promised to pay by 6th July, 2005, and which the judgment debtor undertakes to pay by 15th February, 2006. The judgment debtor and the garnishee have become two of a kind. I can’t see the judgment debtor’s action in any light other than as a plea for an accomplice. How else would it explain its application for orders on behalf of the garnishee? In the process, it even forgot that the decretal sum stands now at more than 5 million shillings. And it does not mention how it will settle the difference between the more than Kshs.5 million which is now due, and the Kshs.4 million, which it proposes to pay some eight months down the road.

On its part, the garnishee also applies for a stay of execution and a review of the court’s orders of 11th April, 2005. One of the grounds upon which its application is based is that there is a discovery of new and important evidence, namely the settlement proposals tendered by the judgment debtor. Those are only proposals. The garnishee cannot take cover under proposals which may never materialize. They are not any different from the garnishee’s proposals to pay the sum of Kshs.4 million by 6th July, 2005. We know what happened thereafter. Such proposals do not constitute “new and important matter ... which was not within the garnishee’s knowledge and which could not be produced by the garnishee when the orders of 11th April were made” as perceived under O. XLI rule 1 (1) of the Civil Procedure Rules. For the avoidance of any doubt, I reject the judgment debtor’s proposals outright. Those proposals are not serious and the judgment debtor is not trustworthy.

The other ground on which the garnishee bases its application is that it has since obtained all payment vouchers confirming payments of Kshs.21,079,759/85 to the judgment debtor. Those vouchers are only statistics. What they reveal is very interesting, but what they conceal is more important. The garnishee does not even have the courtesy to reflect for a moment on the implication of the payments which were effected after the court order of 17th March, 2005. The effect of a garnishee order is clearly spelt out in O. XXII rule 2 of the Civil Procedure Rules. It provides –

“Service of an order that debts due to a judgment – debtor liable under a decree shall be attached, or notice thereof to the garnishee in such manner ... shall bind such debts in his hands.”

The effect of the order made by the court on 17th March and served on the garnishee on 21st March, 2005, was to bind the Kshs.4 million which was in the hands of the garnishee. Instead of paying that money to the decree holder, the garnishee diverted it to the judgment debtor to the detriment of the decree

holder, and worst of all in contempt of the court order. The garnishee now comes to tell the court, quite shamelessly, that it cannot pay the Kshs.4 million to the decree holder since it has paid it to the judgment debtor. If the garnishee had obeyed the court order, we would not be here today.

The court will not allow litigants to play Russian roulette with the court and, in the process, with the administration of justice. The garnishee says that execution will occasion the garnishee and the public at large irreparable harm and damage. If the garnishee is really mindful of the interests of the public, it should note that the decree holder is also a member of the public to whom the garnishee is now causing irreparable harm by disobeying a court order. Her property is now on the verge of being sold, and this only because of the garnishee's flagrant breach of a court order. It is ironical that the garnishee should now come for protection from the same court whose order it has disobeyed. If every other garnishee were to behave like Kenyatta National Hospital, the public would lose confidence in our enter judicial system. That will not be allowed, no matter the cost.

In the sum, my verdict over this matter is that both the judgment debtor and the garnishee are neither honest nor trustworthy. Their conduct betrays them and they are not worthy of any protection from the court. Their applications dated 30th June and 1st July, 2005, respectively, are hereby dismissed. Each applicant will pay the costs of its application to the decree holder/respondent.

Dated and delivered at Nairobi this 1st day of August 2005

L. NJAGI

JUDGE