



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**HCCC NO. 57 OF 1999**

**MARY N.K.W. OSUNDWA.....PLAINTIFF**

**VERSUS**

**BUNGOMA DISTRICT COOP UNION LTD.....DEFENDANT**

**RULING**

By a chamber summons dated 30th October 2003, M/S Barclays Bank of Kenya Ltd, the 1st Garnishee herein seeks the following reliefs:-

- (1) That there be a stay of execution of the decree pending the hearing and determination of this application.
- (2) That the Order of 7th October, 2003 dismissing the 1st Garnishee's application dated 11th July 2002 be set aside, reviewed on varied;
- (3) That the 1st Garnishee's application dated 11th July 2002 be re-instated and it be heard inter on merits ; and
- (4) That costs be provided.

The application is indicated to be brought under Section 3A and 63(E) of the Civil Procedure Act and Order 1XB rule 8 of the Civil Procedure Rules and is supported by an affidavit of Mr. Simiyu Makokha the Counsel who is in conduct of this case on behalf of the 1st Garnishee. The Decree-holder opposes this application relying on a replying affidavit of Mr. Kasamani her Counsel.

In support of the application Mr. Barasa who appeared before me for the 1st Garnishee submitted that his client's application dated 11th July 2002 was dismissed on 7th October 2003 for non – attendance of the Counsel. According Mr. Barasa the hearing date was taken ex parte by the Counsel for the Decree-Holder and that Mr. Makokha who was in conduct of the case on behalf of the 1st Garnishee was not aware until after the application was dismissed. Mr. Barasa admitted that a hearing notice was in fact received at the officers of the advocates for the 1st Garnishee but he claimed that owing to an oversight the Counsel from the firm did not attend Court on date and that resulted in the application being dismissed for want of prosecution. According to Mr. Barasa the failures of the counsel should not be visited upon the party. Mr. Barasa also submitted that as there are triable issues raised in the application the orders of 7th October 2003 should be set aside. He relied in that contention in the Case of Python Waweru Vs Thuku Mugiria (1982-88)IKAR 171 and of Patel Vs E.A. Cargo Handling Services Ltd (1974)E.A. 75 and urged that the orders be granted as sought.

Mr. Kasamani for the decree-holder opposed the application contending that the 1st Garnishee was guilty of laches. He claimed that the proclamation which precipitated this application was served on 21st October 2003 and that it never took any action until the execution was finalized. He added that the only reason why the 1st Garnishee's goods were not taken away was because it asked for 48 hours to sort out the matter. It was Mr. Kasamani's further contention that the 1st Garnishee was granted a stay on 12th July 2002 pending the inter parte hearing of the application and it never thereafter bothered to fix a hearing date for the application until the advocates for the decree-holder took a date and served their advocates but they failed to attend Court on the date so as to prosecute their client's application. According to Mr. Kasamani the 1st Garnishee had in fact sought to delay the course of justice in this case and had not been candid. He relied in this contention the case of Shah Vs Mbogo (1967) EA 116 at page 123. It was Mr. Kasamani's contention that in its application the 1st Garnishee made a general denial that it did not hold any account on behalf of the judgment-debtor and it did not specifically deny holding the Fixed Deposit account No. 055 800 960 on behalf of the judgment-debtor which had been named. He claimed that the 1st Garnishee was not candid but evasive and it should not expect a discretion to be exercised on its favour. He added that as both Mr. Makokha and the student admit that a hearing notice was served upon the firm of the advocates for the 1st Garnishee the dismissal of its application was regular. The explanation for the advocate's failure to attend Court is insufficient and there are no triable issues in the matter.

The record of this case indicates that on 11th July 2002 the 1st Garnishee filed its application in which it sought a stay of execution of the orders issued on 4th July 2002 pending the hearing of the application inter partes and that the orders made on 4th July 2002 be set aside. It also sought that the 1st Garnishee be allowed to file grounds of opposition and a replying affidavit to contest the decreeholder's application dated 26th June 2002. On 12th July 2002 the 1st Garnishee ex parte obtained an order staying the orders made on 4th July 2002 pending the hearing of its application inter partes on 31st July 2002. However on 31st July 2002 a preliminary objection to the said application was raised and argued and ruling was eventually delivered on 18th September 2002. On 20th January 2003 Mr. Makokha for 1st Garnishee fixed the hearing of the application for 24th February 2003 but it was not heard. On 4th August 2003 the advocates for the decree-holder fixed the hearing of the application on 7th October 2003. It is now admitted that a hearing notice was received by the advocates for the 1st Garnishee but they did not attend Court on that date so as to prosecute their application. Upon the application of the advocates for the decree-holder the application of the 1st Garnishee dated 11th July 2002 was dismissed with costs for want of prosecution. On 30th October 2003 the 1st Garnishee filed this application seeking similar prayers which has now come up for hearing.

It is clear to me that the 1st Garnishee obtained ex parte a stay of execution of the garnishee absolute obtained on 4th July 2002 and thereafter it sat back and never bothered to prosecute its application until after a year when the said application was dismissed for want of prosecution on 7th October 2003. The fact that their advocates even after being served with a notice for the hearing of their application did not attend Court is indicative of their lack of interest in the matter. The claim that a student in their office had failed to alert the advocate is not a sufficient explanation for the failure of the said advocates to attend Court or to send another advocate to seek its adjournment.

There was also a delay by the 1st Garnishee in raising the objection after it was served with a proclamation. It appears that it waited until the execution had been finalized before it came to Court by the application of 30th October 2003. It also appears that it made arrangements with the advocates for judgment-debtor to be given 48 hours to sort out what was understood to be payment.

When it comes to basis of these garnishee proceedings the 1st Garnishee merely made a general denial that it did not hold any account of the judgment-debtor. As the decree-holder had made a specific claim to the effect that the 1st Garnishee held a Fixed Deposit account No. 055 800 960 on behalf of the judgment-debtor the general denial was not sufficient to rebut those claims and the allegation of evasiveness may be correct.

In the result I would not exercise the discretion conferred upon me by the Civil Procedure Rules in favour of the 1st Garnishee. The application dated 30th October 2003 is hereby dismissed with costs.

Dated and delivered this 26th day of April 2004.

B.K. TANUI

**JUDGE**

In the presence of:-

Masika for Kasamani for D/H – respondent

N/A for appellant / 1st Garnishee.

B.K. TANUI

**JUDGE**