REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 874 of 2002

FIRST NATIONAL BANK OF KENYA LIMITED…….....
…...PLAINTIFF

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED…….....DEFENDANT

Coram: J. W. Mwera J.

Ochieng for Plaintiff/Respondent

Emukule for Defendant/Applicant

RULING

On 28.2.2003 the plaintiff filed an application under Order 22 rules 1, 1A, 9, 10 Civil Procedure Rules and section 3A Civil Procedure Act for orders that the service of the very process on the judgment-debtor be dispensed with for the purpose of hearing prayers 2 and 3 therein. These prayers concerned issuance of garnishee orders **nisi** against Standard Chartered Bank Ltd, Bank of India and Bank of Baroda who, it was pleaded, held accounts in which the defendant/judgment debtor had funds that should satisfy the decretal sum due to the plaintiff.

Prayer No.3 did say:

"3. That an **order nisi** upon the guarnishee(s) do issue and the same be served on the garnishees before being served on the judgment-debtor herein."

It was further prayed that the garnishees do appear before court on an appointed date to show cause why they should not pay to the plaintiff/decree-holder sh. 37,632,663/40 as at 25.2.2003 together with costs and interest of these proceedings. Five grounds were laid out on which the application was based.

On the same 28.2.03 the court granted prayers 1 and 2 i.e. dispensing with the service of the application and a garnishee **order nisi** too was granted. May it be recalled that in prayer 1 the plaintiff/decree-holder had asked that the dispensed service was:

"……. for the purposes of hearing and determination of prayers 2 and 3 hereof."

Prayer 2 is the one whereby the garnishee **order nisi** issued on 28.2.03 and it was served on the garnishees but not the defendant/judgment-debtor for 5.3.03 to make the order **absolute**.

On 5.3.03 the decree-holder and the 1st garnishee (Standard Bank) appeared by Mr. Ochieng and Mr.

Odera respectively. Mr. Emukule appeared and filed grounds of opposition plus an affidavit to oppose making the garnishee order **absolute**. The court was satisfied that the other garnishees were served but were not present. Mr. Odera stated from the Bar as he waited for the statement of account of the defendant to show that his client had some sh. 27m on behalf of the defendant.

Mr. Ochieng told the court that the nature of these proceedings were ex parte and he was willing to take that sum of sh. 27m held by M/s Standard Chartered Bank and then take course to recover the balance of the decretal sum. Mr. Emukule had a contrary view. He told the court that much as the proceedings to obtain a garnishee order nisi were exparte the applicant was bound to serve the application on the judgment-debtor when it came to proceedings to make that order absolute. The court was told that the defendant had not been so served and it only came to court by courtesy of its bankers. So Mr. Emukule opposed the confirmation of order nisi saying that besides a stay application pending before the Court of Appeal (to be entertained on 12.3.03) there was or were appeals pending in that Court regarding first the ruling that gave judgment to the plaintiff and the refusal of stay pending that appeal.

Mr. Emukule further told the court that he had a cheque for the decretal sum plus costs and interest to be deposited in a joint income-earning account of both lawyers in case the defendant's moves in the Court of Appeal do not succeed. Mr. Ochieng noted that that cheque was already in the joint names of lawyers before and without either the consent of the parties or an order of this court, and that appeared basically correct.

In this court's view, essentially attachment of debts even by way of garnishee orders is ex parte. Order 22 rule 1 begins:

"1.(1) A court may, upon ex parte application of a decree-holder……."

That provision of law says at subrule (2) that at least 7 days before the hearing of the order nisi shall be served on the garnishees, and unless otherwise ordered, on the judgment debtor. That is the provision of law that Mr. Emukule sought to rely on. But the court noted that on 28.2.2003 the court ordered that service of this application on the judgment-debtor be and was dispersed with .

The law does not however say that the judgment debtor will not be served with that application for the hearing at which the order nisi has to be made **absolute**. That is the point at which the defendant came in and this court is of the view that that was with no default of the law.

It may sound as if the court is reading too much in a judgment-debtor appearing at a stage when a garnishee order **nisi** is sought to be made **absolute**, if he actually appears and asks or makes to be heard. But there is no reason for a party whose property is going to be affected to come to a session where an order in that regard is to be and simply keep quiet and watch over the proceedings. In this court's view such a party, the judgment-debtor, ought in accordance with rules of natural justice, to be accorded some audience, along with any garnishee who may have to say that he does not hold the funds or debt targeted or that in fact a 3rd person is the one entitled not the judgment-debtor. With this in mind this court is inclined to bear the judgment-debtor's presence and even submission. But it was not served with this application. The defendant appeared because its bankers informed it of the garnishee order nisi.

Having held the view that a party whose property is to be involved, has a right to say something about it, whether or not decree is there against him, the defendant herein was heard.

The defendant claimed that if its money with Standard Chartered Bank is attached and paid to the plaintiff, that will paralyse the former's operations. But the court was left wondering what that would mean in the light of the fact that Mr. Emukule arrived with a cheque which he said bore the whole decretal sum, costs and interests involved. Only that it was already in the joint names of the lawyers before they consented to it or the court ordered it.

There was then this issue of the judgment debtor's moves in the Court of Appeal: the stay application and the appeal(s), which Mr. Emukule said that the stay application was due to be heard on

12.3.03 Mr. Ochieng told the court that that application dated 5.12.2003 was set for hearing by consent on 20.5.2003.. Not much seemed to turn on that point, though.

This court is of the view that the defendant is capable of paying the plaintiff even with funds from resources other than the bank accounts held by the garnishees particularly Standard Chartered. It has drawn a cheque, which if this court had deemed it properly drawn would have been paid in full settlement to the plaintiff. It was not properly drawn because without the consent of the parties and/or this court's order the cheque came already in the joint names of the parties' lawyers. That was presumptuous. But at the stage both parties are, and the time from the date of these arguments (S. 3 O. 3) to the mention/hearing of the stay application in the Court of Appeal on 12.3.03 is not far. Probably the defendant uses its funds in the account at Standard Chartered for other purposes to run its operations. The plaintiff has nonetheless proved its case.

It is therefore ordered that this matter be mentioned here on 13.3.03 either to make the garnishee order absolute or the defendant hands over a cheque in full settlement, all written in favour of the plaintiff. This court declined to grant a stay, unless the Court of Appeal says otherwise.

Orders accordingly.

Delivered on 11.3.03.

J. W. MWERA

JUDGE