REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 1117 OF 2001

NATIONAL INDUSTRIAL CREDIT BANK LTD.....APPLICANT

VERSUS

MINDI ESTATES LTD .....RESPONDENT

JOSEPH MUIRURI GITHONGO & ANOTHER.....RESPONDENTS

RULING

In Civil Appeal No.27 of 1999 between the Government of the United States of America and Joseph Muiruri Githongo, the Court of Appeal on 14th July, 2000 ordered Mr. Githongo to transfer to the Government of the United States within 90 days from 14th July, 2000 certain properties in Spring Valley, Nairobi. The Court also ordered the Government of the United States to deposit with the Deputy Registrar of the Court of Appeal for the benefit of Mr. Githongo any sums that upon the exercise of the said Government's option to purchase on the dates identified may be certified by the Deputy Registrar as due to him under the lease purchase agreement between the parties. In the event the Government of the United States deposited with the Deputy Registrar the sum of Kshs.2,669,155.80.

It then came to pass that in the present suit, National Industrial Credit Bank Ltd, the plaintiff, obtained a decree against Mindi Estates Limited and Joseph Muiruri Githongo jointly and severally in the sum of Kshs.20,281,566.00. The Bank then obtained information that the Deputy Registrar of the Court of Appeal was holding a deposit in the sum of Kshs.2,669,155.80 in favour of the said Mr. Githongo whom I shall hereinafter refer to as the judgement debtor. On the basis of that information it applied for an order of garnishee to be made against the Deputy Registrar in respect of the said deposit. On 9.10.2001 this court granted the Bank an order *nisi* and the same was made absolute on 16th October, 2001 after the court was satisfied that the garnishee had been served with the order *nisi* but had failed to attend court to show cause why the order should not be made absolute.

On 5.12.2001, the Government of the United States of America moved the Court for orders *inter alia* that it be joined in the proceedings as an interested party and that the decree orders *nisi* and absolute be reviewed, vacated and set aside. The application was expressed to be made under sections 3A and 80 of the Civil Procedure Act, Order 50 rules 1 and 2, Order 44 rule 1, Order 22 and the rules made thereunder, Order 6 rule 13 (1) (d), Order 1 rule 10 (2) and all other enabling provisions of the law. The application was lodged with a certificate of urgency and on the same date it was ordered *exparte* that the Government of the United States be joined as an interested party, that the garnishee order absolute be stayed pending the *inter-partes* hearing of the application and that such *interpartes* hearing be held on 22nd January, 2002.

The application was canvassed before me on 22.1.2002 by Mr. Satish Gautama, counsel for the applicant and Mr. J.M. Mutungi, counsel for the respondent. Mr. Gautama submitted that the entire garnishee proceedings were misconceived in that the foundation of garnishee proceedings is the indebtedness of the garnishee to the judgement debtor and the onus is on the attaching creditor to show that the garnishee is indebted to the judgement debtor. He relied on the case of *Petro Sanko and Buhahi Sindi v Patel and Kiwanuka* [1953] 20 EACA 99 for the proposition that the onus is upon the judgement creditor seeking to garnishee a sum of money to prove that it is due and recoverable. He further submitted that the Deputy-Registrar, Court of Appeal could not be said to be indebted to the judgement debtor. The money deposited in court was not a debt to the judgement debtor but a deposit to be paid out on court order upon Mr. Githongo's transfer of the properties in question to the government of the United States. It was not an

unconditional deposit for the benefit of the judgement debtor, Mr. Gautama argued.

Mr. Mutungi on his part argued that the Deputy Registrar was in the circumstances of the case a garnishee. He argued that the deposit made by the government of the United States was in the form of purchase price and such deposit constituted the Deputy Registrar into a debtor within the meaning of Order 22 rule 1 and the decree holder could legitimately garnishee that deposit. He further submitted that the money was deposited for the benefit of the judgement debtor and if he declined to execute the transfer the Deputy Registrar of the Court of Appeal could do so. Counsel also argued that in any event the interested party could not oppose the application for garnishee orders at this stage.

From the above submissions it appears to me that the issues to answer in this application are two. First, whether or not the government of the United States of America is entitled to be heard on the application and secondly, whether or not the Deputy Registrar of the Court of Appeal was a garnishee in the circumstances of this case. As regards the first issue I think the Government of the United States was entitled to be heard for three reasons. First, it had been joined in the proceedings as an interested party. If it could not be heard, the order for joinder would have been a vain one. It would be to stand reason on its head to join a person as a party to proceedings and then decline to hear him. Secondly, the ultimate orders sought in the application were for review of the decree orders *nisi* and absolute. Section 80 of the Civil Procedure is explicit that any person aggrieved by an order from which either no appeal lies or an appeal lies but none has been preferred may apply for review of the same. The government of the United States of America is such a party and has applied for review. Thirdly, the money garnisheed was deposited by the said government. It strikes me as being contrary to natural justice to make adverse orders affecting the property of the Government of the United States of America and decline to hear it when it seeks to be heard. This is the kind of situation which would have invited the court to invoke its inherent powers under S.3A of the Civil Procedure Act if there was no other legal basis for hearing the applicant. So all in all I find that the Government of the United States of America was entitled to be heard and was properly heard on this application.

As regards the second issue I am persuaded that the Deputy- Registrar of the Court of Appeal was not and could not be a garnishee. For one to be a garnishee, he must be indebted to the judgement debtor. The Deputy- Registrar could not in anywise be regarded as a debtor to the judgement debtor. The deposit was not an amount due and owing to the debtor by the Deputy-Registrar: it was a deposit lying with the Registrar subject to the jurisdiction of the Court of Appeal and could not be released until the judgement-debtor had complied with the terms of the order of the Court of Appeal. I am also now of the persuasion that had the rules committee intended that deposits with the Deputy Registrar of the Court be attachable, they would have so provided. In that regard it is not insignificant that credit deposits with a bank or a building society are made expressly attachable by Order 22 rule 1A. The present case is an appropriate one for the invocation of the maxim *expressio unius, est exclusion alterius.*

Having taken the above view of the matter, I am impelled to conclude that the applicant has shown that the garnishee orders *nisi* and absolute given herein before were misconceived. That in my opinion constitutes sufficient reason to review them. The same are accordingly reviewed and set aside with costs to the government of the United States of America.

It is so ordered.

Dated and delivered at Nairobi this 7th day of February 2002

A.G RINGERA

JUDGE