



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANGA**

**ELC NO. 37 OF 2018 (OS)**

**DAVID MAINA MWANGI .....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JOHN KARANJA .....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**NANCY NJERI NDUNGU .....3<sup>RD</sup> PLAINTIFF /APPLICANT**

**VS**

**JOHN KAMAU KAMARA..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ELIUD NJUGUNA KAMARA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**(Sued as administrators of PERIS WANJIKU KAMARA)**

**COOPERATIVE BANK OF KENYA LIMITED .....GARNISHEE**

**RULING**

1. The Plaintiffs instituted the suit against the Defendants for a claim for adverse possession. Judgment was entered in favour of the Plaintiffs against the Defendants on 24<sup>th</sup> June, 2019. On 4<sup>th</sup> August, 2020, the Plaintiffs moved Court seeking orders compelling the Defendants to give effect to the judgment by signing all the requisite documents for transfer. The Court gave orders as sought and before dust could settle, the Plaintiffs filed the instant Ex-parte Chamber Summons (sic) for orders:

a) Spent

b) THAT this Honorable Court be pleased to issue a Garnishee Order Nisi for the discharge of charge registered as entry No. 1 on the Title No. Loc 3/ Kariua/ 145 to secure a loan of Kshs. 900,000/= by Peris Wanjiku Kamara which has since been cleared and for the order of release of the title document held with the Garnishee to wholly satisfy the decree dated 6<sup>th</sup> February, 2020.

c) THAT the Garnishee be ordered to appear before this Honorable Court to show cause why it should not discharge the charge registered as Entry No. 1 on the Title NO. LOC 3/ KARIUA/ 145 and why it should not release the title document to the decree holders satisfy the aforesaid Decree dated the 6<sup>th</sup> Day of February, 2020

d) THAT the costs of this application be provided for.

2. The application is premised on the dispositions of David Maina Mwangi. That upon signing the relevant documents as directed by Court, the Applicants' were unable to effect transfer due to a registered charge against the property. That they were notified by the bank that a charge of Kshs. 900, 000/= had been secured on the property by Peris Wanjiku Kamara. That after making inquiry on the charge, the Bank vide letter dated 4<sup>th</sup> June, 2021 informed them they were unable to discharge the charge without an order of Court. In the end, they seek Court that a Garnishee Order be issued to satisfy the decree of Court.

3. The application was served on the Defendants as well as the Garnishee and no response was filed. Upon perusing Affidavit of Service dated 23<sup>rd</sup> June, 2021 the Court was satisfied that the Respondents and the Garnishee were served. At hearing of the application, the Applicant told Court that the charge taken on the property had been fully paid. That the registered owner died before the charge was discharged.

4. The main issue for determination is whether the application is merited as drawn.

5. It is not in dispute that the Plaintiffs were the successful litigants and have not executed the decree this far. That the suit property was registered in the name the late Peris Wanjiku Kamara who received a loan facility from Cooperative Bank.

6. It is the Applicants position that they have been unable to enforce the Decree due to an existing charge hence the instant application under the cited laws. Whereas this Court has inherent powers under Section 1A, 1B and 3A of the Civil Procedure Act, it is not clear why the Applicants preferred to invoke garnishee proceedings under Order 23 of the Civil Procedure Rules. Order 23 Rule 1 provides as follows;

(1) A Court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

7. In my considered view, the wordings of this provision strictly envision a monetary decree. It is for recovery of debts. As put by the Court in **Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others [2018] eKLR** "Garnishee proceeding otherwise known as 'garnishment' is a judicial process of execution or enforcement of monetary judgment whereby money belonging to a judgment debtor, in the hands or possession of a third party known as the 'Garnishee' (usually a bank), is attached or seized by a judgment creditor, the 'Garnisher' or 'Garnishor', in satisfaction of a judgment sum or debt. By its nature, Garnishee proceeding is "**sui generis**," and different from other Court proceedings, although it flows from the judgment that pronounced the debt".

8. The learned judge further held: "The primary object of a garnishee order is to make the debt due by the debtor of the judgment debtor available to the decree holder in execution without driving him to the suit. The Court may, in the case of debt (other than a debt secured by a mortgage or charge), upon the application of the attaching creditor, issue a notice to garnishee liable to pay such debt, calling upon him either to pay into Court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so."

9. Moreover, Order 23 above governs the manner in which garnishee proceedings shall be conducted. It recognizes that such proceedings can only be brought by a decree holder, either before or after oral examination of the judgment debtor. This rule presupposes that the judgment debtor has a right to address Court on the correctness/propriety of the execution proceedings brought against him or her before or even after a Decree Nisi is entered on Court record.

10. In the instant case, the Applicants claim is against the Respondents for the suit land title that is held by the bank. The supposed Garnishee herein, being Cooperative Bank is not a debtor to the Defendants (Respondents) in light of the above analysis to warrant garnishee proceedings against it in the instant manner. In this case the garnishee is holding the title as security thus its right in the title is that of a chargor. The title in the land previously was in the hands of the deceased but now adjudged in favour of the Applicants. The administrators of the estate of the late Peris Wanjiru Kamara are the Judgement debtors, put differently the Respondents herein.

11. According to the correspondences marked as annexure "DMMIII" and "DMMIV" the bank confirmed title document was held as security. There is no express indication therein that the loan is cleared save for the Applicants' submissions. The bank alluded to requiring 'relevant orders' directing the discharge of such title. There is no provision under Order 23 of Civil Procedure Rules for the said relevant order regarding a title held in a deceased's person's name.

12. In the upshot I find, for the reasons above, that chamber summons dated 14/6/2021 is incompetent.

13. It is struck out with no orders as to costs.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 29<sup>TH</sup> DAY OF JULY, 2021.**

**J G KEMEI**

**JUDGE**

Delivered online

Kinyanjui Advocate for 1<sup>st</sup> – 3<sup>rd</sup> Plaintiff/Applicant

1<sup>st</sup> & 2<sup>nd</sup> Defendants/Respondents - Absent

Kuiyak/Alexi, Court Assistants