



REPUBLIC OF KENYA



Orion East Africa Limited v Tetu Coffee Growers Co-operative Society Limited; Co-operative Bank of Kenya Limited (Proposed Garnishee) (Civil Case 343 of 2002) [2024] KEHC 5769 (KLR) (Commercial and Tax) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 343 OF 2002
JWW MONG'ARE, J
MAY 13, 2024**

BETWEEN

ORION EAST AFRICA LIMITED DECREE HOLDER

AND

TETU COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED .. JUDGMENT DEBTOR

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED ... PROPOSED GARNISHEE

RULING

Introduction

1. This ruling is in respect of the issue of whether this suit should be consolidated with HCCC No. 343 of 2002. The issue flows from the Notice of Motion application dated 29th June 2023 filed by Ruo Maina, the Director of the Decree Holder. The grounds are set out on the face of the application and the supporting affidavits sworn by the said Ruo Maina on 29th June 2023, 20th November 2023 and 21st March 2024.
2. The application is opposed by the proposed garnishee, the Co-operative Bank of Kenya (the Bank), through a Preliminary Objection dated 1st August 2023, and Grounds of Opposition dated 17th November 2023 and written submissions dated 16th April 2024, on the grounds that the consolidation would not be proper since HCCC No. 343 of 2002 was marked as fully settled through the Consent Order dated 16th May 2019 wherein Mugama Farmers' Cooperative Union Limited paid to Orion East Africa Limited the entire decretal sum being Kshs.17,395,410.20/=.



Background

3. On 14th February 2001, the Court entered judgment, in favour of the Decree Holder against the Judgment Debtor, for Kshs.1,907,000/= plus costs of the suit and interest. The costs awarded to the Decree Holder were subsequently taxed at Kshs.371,095/=. On 26th October 2001, the Decree Holder applied to execute its decree under Order 21 Rule 67 (attachment of shares) and Order 22(1) and (10) (attachment of debts) of the *Civil Procedure Rules* (now repealed).
4. The parties entered into a consent to the effect that the decree holder attached shares held by the Co-operative Bank of Kenya Ltd on the Judgment Debtors' account, equivalent to the amount in the decree plus costs and interest and sell the same through an authorised stock broker in order to realize the decree. The said consent was adopted as an order of the Court on 4th December 2001 and the Court ordered the attachment of sale shares held by the Bank on account of the Judgment Debtor.
5. The Decree Holder filed a Notice to Show Cause against the Bank. In response, the Bank filed a preliminary objection on the basis that on 9th November 2001, it was discharged from the proceedings by the order of Hon. Mbaluto J (as he then was) and that therefore the consent order of 4th December 2001 which came after it had been discharged was not binding on it. Through the ruling of 6th October 2017, Hon. Sewe J. upheld the Bank's Preliminary Objection and dismissed the Decree Holder's Notice to Show Cause because it had failed to comply with the procedure set out in Order 22 Rule 40(1) on attachment of shares.
6. The Decree Holder then applied for review of that ruling on the ground that there was an error on the face of the record. Through the ruling of 22nd May 2018, Hon. Sewe J. dismissed the application reasoning that the application did not meet the threshold for review and the Applicant had brought grounds that were for appeal.
7. The Decree Holder filed a subsequent application seeking to have the Bank furnish its share register and a record of all the shares held in the name of the Judgment Debtor as at 4th December 2001 and that the Bank be called upon to show cause why the shares should not be sold to satisfy the decree together with the costs of these garnishee proceedings. Through a ruling of 16th October 2018, Hon. Odero J. dismissed the application for want of merit. The Court found that the issue of whether the Bank could be compelled by the consent order as it had been discharged prior and the Bank's contention that it had no debtor-creditor relationship with the Judgment Debtor and held no money which could be considered a debt in the context of Garnishee Proceedings were addressed in the ruling of 16th October 2018 and were res judicata.

Analysis and Determination

8. I have considered the application, the supporting affidavits, the grounds in support and opposition and the written submissions.
9. The Court's jurisdiction to order the consolidation of suits is found under Order 11 Rule 3 (1)(h) of the *Civil Procedure Rules*. The tests for consolidation of suits were laid out by the Court in *Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa* [2000] eKLR, as follows:-

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where:-

- a. Some common questions of law or fact arises in both or all of them.



- b. The rights or reliefs claimed in them are in respect of the same transactions;
- c. For some other reasons, it is desirable to make an order for consolidating them.”

10. In *Law Society of Kenya v Center for Human Rights & Democracy & 12 Others* [2014] eKLR, the Supreme Court of Kenya observed that: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”

11. In the present application, the Decree Holder seeks an order for consolidation of this suit with HCCC 343 of 2002; *Orion East Africa v Mugama Farmers’ Co-operative Union Limited and Another*.

12. The Decree Holder relied on HCCC 343 of 2002 in support of the contention that the shares held by the Bank were subject to attachment of sale. However, the Decree Holder has not made out a case for the grant of the orders for consolidation. The Decree Holder has failed to demonstrate that either some common questions of law or fact arises in both suits; that the rights or reliefs claimed in them are in respect of the same transactions or that for some other reasons, it is desirable to make an order for consolidating them.

13. I note that in the Ruling of 16th October 2018, the Court noted that the Decree Holder had sought to rely on HCCC 343 of 2002 to support its Notice to Show Cause. In this respect, the Court observed as follows:-

“The Decree – holder sought to rely on the case of *Orion East Africa –vs – Mugama Farmers Co-operative Union Limited & Another* (supra) in support of its contention that shares held by the bank are subject to attachment and sale. However the “Orion” decision is distinguishable from the present on in that in the latter the Court had already issued a written prohibition order. This is evident from the holding in that case that:-

“The best course to take is for the Court to order the attachment of the shares and all dividends due on those shares on a written order prohibiting the Defendant in whose name the shares are standing from transferring the same or receiving any dividend thereon. The Garnishee is also bound by this prohibitory order and it shall not transfer or pay any dividend on the shares to the Defendant or to any other person [emphasis supplied].

The final orders in the Orion case were made in the following terms:-

“To enable the Court make the final orders herein, it directs that the Bank does furnish to this Court a copy (or copies) of the Share Register of Co-op holdings showing the shares held by the Judgment - debtor therein as at 26th May 2015 when the prohibition order was made and at the date of this order [emphasis supplied].

A clear reading of these final orders shows that it is only upon a prohibition order having been issued, that order seeking to compel the bank to furnish copies of Share Registers showing the shares held by the judgment – debtor would lie. In the absence of a Prohibition



Order issued under Order 22 r 40 (1) this present application is not tenable. The decree-holder herein has made no prayer for a prohibition order in terms of Order 22 r 40(1).

There can be no challenge to the validity of consent entered into between the parties on 4th December 2001. Indeed the Garnishee's do not seek to negate this consent at all. As the decree – holder asserts the order for attachment and sale of the shares remains valid and enforceable. What is in contention is the mode of attachment of those shares. The decree holder seeks to enforce the consent order by way of this application. However Order 22 r 40(1) for the *Civil Procedure Rules* clearly sets out the manner in which execution is to proceed in respect of shares held on behalf of the judgment – debtor.”

14. From the above, it can be gleaned that in HCCC 343 of 2002, the Decree Holder properly applied for attachment of shares under Order 22 Rule 40. It is also clear that the issues in the suits are different as in this suit, in three instances the Court has found that the Decree Holder has not complied with Order 22 Rule 40. There have been no appeals or reviews against those rulings. Therefore, the issues in this suit relate to whether there are proper garnishee proceeding pending against the Bank following the order of 9th November 2009 by Hon. Mbaluto J. discharging the Bank as a garnishee and whether the Decree Holder validly attached the share of the Judgment Debtor as required by Order 22 Rule 40.
15. Therefore, I am not persuaded that the consolidation of the suits would serve the intended purpose. For this same reason, it is my considered view that it would be prejudicial to consolidate the two suits.

Final Disposition

16. The upshot is that the Decree Holder's application dated 29th June 2023 is dismissed for want of merit with costs to the Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Ruo Maina (in person) for the Plaintiffs/Applicants.
2. Mr. Ochieng holding brief for Mr. John Ohaga SC for the proposed Garnishee.
3. Amos - Court Assistant

MONG'ARE,J.

