



**Gatundu & Company Advocates v Penelly Construction and Engineering Limited;
Renewable Energy Corporation (Garnishee) (Miscellaneous Application E118 of 2023)
[2023] KEHC 3430 (KLR) (Commercial and Tax) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E118 OF 2023
JWW MONG'ARE, J
APRIL 18, 2023**

BETWEEN

GATUNDU & COMPANY ADVOCATES JUDGMENT CREDITOR

AND

**PENELLY CONSTRUCTION AND ENGINEERING LIMITED JUDGMENT
DEBTOR**

AND

RENEWABLE ENERGY CORPORATION GARNISHEE

RULING

1. By a Notice of Motion dated February 17, 2023 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 laws of Kenya and Order 23 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Judgement Creditor moved the court the following orders: -
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to issue an order directing the Garnishee to appear before this Honourable court on an appointed time and date to show cause why they should not pay the Judgement Creditor the sum of Kshs 39,311,465.68 being the outstanding decretal sum pursuant to the decree issued on November 1, 2021 in Civil Suit No E819 of 2021.
2. The application is supported by the grounds pleaded on the face of it and the Supporting Affidavit of Alex Gatundu, Advocate, sworn on February 17, 2023. In the said Affidavit, the Advocate deponed



that he represented the Judgment-Debtor in a suit between the Judgment-Debtor and the Garnishee and the Judgment-debtor was awarded the sum of Kshs 64,728,160.

3. The Judgment-Debtor having been afforded an opportunity to pay off the judgement debt and failed to do so, the Advocate being the Judgment-Creditor has moved to Garnishee the funds held by the Garnishee to secure payment of the amount due from the Judgment-Debtor.
4. The application before the court therefore is seeking for the court to order for the Garnishee nisi to be made absolute and order for release the sum of Kshs 39,311,465.68 to satisfy the judgement debt.
5. The Garnishee did not oppose the application but confirmed that indeed the funds were in its possession and via the directions of the court, the said funds had been deposited with the court in compliance with its orders. The Garnishee sought for costs at the sum of Kshs 750,000.
6. The judgement debtor has filed a replying affidavit objecting to the Garnishee proceedings. In the replying affidavit sworn by Moses Chelugei, a director of the Judgment Debtor. In its objection the Judgment debtor submitted that the process of garnisheeing the arbitral award has been brought prematurely as the same is yet to crystalize.
7. In their submissions, the judgment debtor argues that pending in the arbitral proceedings is the party and party costs that are yet to be agreed upon or taxed and that there is active litigation under HCCCOMM No E819/2021 challenging the agreed legal fees on the arbitration proceedings including the formular in which it was arrived, to which the Applicant was legal counsel for the Judgment-Debtor. The Judgment-Debtor submitted that agreed fees for the Arbitration process were to be computed at 8% of the Arbitration Award. The Arbitration Award was for Kshs 64,728,160 and in its view, 8% thereto could not be the sum of Kshs 39,311,465.68 as claimed by the Advocate/ Judgment-Creditor.
8. Further, the Judgment-Debtor stated that it has moved the court in HCCCOMM No E819/2021 to set aside the ex-parte interim judgment giving rise to these proceedings and the same is yet to be determined by the court.

Analysis and determination.

9. I have considered the submissions by all the parties and the pleadings by the parties and also considered the oral submissions made by counsels before me. To my mind, garnishee proceedings are a process in execution of decrees where matters have been fully determined. Order 23 of the Civil Procedure Rules 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. Having considered the application before me I am guided by Section 34 of the *Civil Procedure Act*, provides as follows;

' (1) 1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.' In the case before this court, I note that the applicant chose to file a Miscellaneous Application and not bring the Garnishee proceedings within the Main suit that is still pending before the courts, in HCCCOMM No E819/2021, between the Applicant and the Judgment debtor.



This means that this court is deprived of an opportunity to examine the correctness of the decree being executed and any of the processes that led to the execution stage. In my view, and guided by section 34 of the Civil Procedure Act cited above, garnishee proceedings being an execution process cannot be initiated away from the main suit from which the decree has been obtained. This therefore mean the application before this court is incompetent for having been brought in contravention of section 34 of the Civil Procedure Act, Cap 21, Laws of Kenya.

11. In conclusion, the upshot of the above findings is that the application before this court, brought by the Applicant/Judgment-Debtor by a Notice of Motion dated February 17, 2023 is dismissed and struck out. The order for Garnishee nisi issued by this court is forthwith vacated and the funds so deposited in Court pursuant to an order of this court be returned to the Garnishee forthwith. The Applicant shall bear the costs of this Application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18th DAY OF APRIL 2023.

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J. W. W. MONGARE

JUDGE

In the presence of: -

1. Mr. Gichaba for the Advocate/Applicant

2. Mr. Wesonga for the Respondent/Client

3. Mr. Ligunya for the Garnishee

4. Sylvia- court Assistant

