



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO. 128 OF 2018

KITAMAIYU LIMITED.....APPLICANT/DECREE HOLDER

VS

CHINA GANSU INTERNATIONAL

CORPORATION FOR ECONOMIC

TECHNICAL CORPORATION CO LTD.....RESPONDENT/JUDGEMENT DEBTOR

CREDIT BANK.....GARNISHEE

RULING

1. It is the application dated the 17/5/2021 brought by the Applicant /Decree holder seeking the following orders;

a. THAT this matter be certified urgent and be heard ex parte in the first instance.

b. THAT pending the hearing and determination of the instance application a *Garnishee order nisi* do issue against Credit Bank, Koinange Street Nairobi Branch ordering that all the monies held in deposit in Account Number 0260367853018 to the credit of China Gansu International Corporation For Economic Technical Corporation Company Limited, the Respondent herein be attached to answer the decree issued on 23rd July, 2020.

c. THAT the Garnishee do appear before this Honourable Court on an appointed date to show cause why the Garnishee order nisi so issued should not be made absolute and any sums up to a maximum of Kshs. 55,042,000/- being the decretal sum in favour of the Applicant herein be released to the Applicant's Advocates herein and costs of these Garnishee proceedings.

d. THAT the Garnishee order nisi be made absolute.

e. THAT the costs of this application be provided for.

2. The Application is premised on the grounds annexed thereto together with the supporting affidavit of Maina Wanjigi, the director of the Applicant sworn on the 17/5/2021.

3. The deponent avers that the Applicant has a judgement in its favour entered on the 23/7/2020 against the Respondent for trespass and aggravated damages in the sum of Kshs 55,042,000/- (MW1- is the extract of the decree). That the said judgement remains unsatisfied todate. That the Respondent holds in its account No. 026036783018 at Credit Bank Koinange Street to settle the debt wholly or partially. In addition, that the Respondent has neglected and or refused to make good the judgement debt. That unless the application is granted the Respondent is likely to transfer the monies to further frustrate the decree holder.

4. In opposing the application, ZOU QILI, the General Manager of the Respondent in his replying affidavit sworn on the 12/7/2021 acknowledged the default in satisfying the decree and stated that it has filed an appeal against the decision. That notwithstanding that it is in the process of negotiating a payment plan on a without prejudice to forestall any action against it and its bankers, the Garnishee herein. Interalia that it has not refused to settle the decretal sum but for insufficiency of funds.

5. Despite the parties electing to file written submissions, it is only the Applicant that complied. I have read and considered the written submissions on record.

6. The key issue for determination is whether the application is merited.

7. Garnishee proceedings are governed by Order 23 rule 1 of the CPR which 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.

(2) At least seven days before the day of hearing the order nisi shall be served on the Garnishee, and, unless otherwise ordered, on the judgment-debtor.

(3) Effect of Garnishee order Service of an order that debts due to a judgment-debtor liable under a decree shall be attached, or notice thereof to the Garnishee in such manner, as the Court may direct, shall bind such debts in his hands.”

8. In the case of **Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others [2018] eKLR** Court in explaining the rationale of Garnishee proceedings had this to say;

“Generally, Garnishee proceedings is done in two different stages.^[2] The first stage is for the Garnishee order *nisi*, while the second stage is for the Garnishee order *absolute*. At the first stage, the judgment creditor makes an application *ex parte* to the Court that the judgment debt in the hands of the third party, the Garnishee, be paid directly to the judgment creditor unless there is explanation from the Garnishee why the order *nisi* should not be made *absolute*. If the judgment creditor satisfies the Court on the existence of the Garnishee who is holding money due to the Judgment Debtor, such third party (Garnishee) will be called upon to show cause why the Judgment Debtor’s money in its hands should not be paid over to the judgment creditor, and if the Court is satisfied that the judgment creditor is entitled to attach the debt, the Court will make a Garnishee order *nisi* attaching the debt.

20. The essence of the order *nisi* is to direct the Garnishee to appear in Court on a specified date to show cause why an order should not be made upon him for the payment to the judgment creditor of the amount of debt owed to the Judgment Debtor. It is a requirement that a copy of the order *nisi* must be served on the Garnishee and Judgment Debtor at least 7 days before the adjourned date for hearing. The second stage is for the Garnishee order *absolute*, where on the adjourned date, the Garnishee fails to attend Court or show good cause why the order *nisi* attaching the debt should not be made *absolute*, the Court may subject to certain limitations make the Garnishee order *absolute*. The Garnishee, where necessary also have an option of disputing liability to pay the debt. The Applicants ignored these procedures.

21. 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. I agree with the position of Lord Denning M.R. in considering the procedure for attachment of debts in the case of **Choice Investments Ltd vs. Jeronimon (Midland Bank Ltd, Garnishee) [1981] 1 All ER 225** at page 227 where he said:

“The word ‘Garnishee’ is derived from the Norman-French. It denotes one who is required to ‘garnish’, that is, to furnish, a creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. The creditor can get a ‘Garnishee’ order against the bank by which the bank is required to pay into Court or direct to the creditor, out of its customer’s £150, the £100 which he owes to the creditor.

There are two steps in the process. The first is a Garnishee order *nisi*. *Nisi* is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into Court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors”

10. In this case the decree is dated the 23/7/2020. There is no evidence that the same has been set aside, appealed and or vacated. There is therefore no stay of execution against said decree.

11. From the record it is noted that the Garnishee was served with the application as seen in the affidavit of service dated the 13/10/2021.

12. The unsatisfied decree has not been disputed by the Judgment Debtor. Though the judgement debtor averred that it is negotiating the settlement of the decree, the Court notes that no evidence of such negotiations are on record. The Judgement Debtor has neither denied its account nor the sums in the account save to state that it may not be sufficient.

13. For the above reasons the Court finds that the application is merited. It is granted in terms of prayer b, c and e.

14. The matter shall therefore be mentioned before the Court on the 21st February, 2022 for purposes of prayer no c above.

15. The costs shall be in favour of the Applicant.

DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms. Nganga for the Plaintiff

No appearance for the Defendant/Respondent

Ms. Phyllis Mwangi – Court Assistant