



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL SUIT NO. 123 OF 2011**

**BROOKSIDE DAIRY LIMITED.....PLAINTIFF**

**VERSUS**

**ADONCAN NJAGI, FIDEL NYAGA AND DEDAN RIUNGU Sued as registered**

**officials of MUTHIRU DAIRY SELF HELP GROUP.....DEFENDANT**

**AND**

**COOPERATIVE BANK OF KENYA.....1<sup>ST</sup> GARNISHEE**

**KCB BANK KENYA LIMITED.....2<sup>ND</sup> GARNISHEE**

**RULING**

1. Judgment in the matter was delivered on 13<sup>th</sup> March 2018 in favour of the Plaintiff for the sum of Ksh 21,410,585.65/=. This Judgment has not been challenged either by way of appeal or review. Though from the records it is apparent that the Defendant sought to prefer an appeal, the progress of any such appeal has not been disclosed. The Applicant has been making attempts at executing so as to have the decree satisfied including by way of seeking to attach the Defendant's movable properties. The decretal amount continues to accrue interest and it is claimed that the total outstanding amount stood at Ksh 50,000,000/= as at 24<sup>th</sup> February 2021.

2. The Defendant applied for stay of execution and the Court, on 23<sup>rd</sup> November 2020 allowed the Defendant's application for stay on condition that the Defendant paid half of the decretal sum within 60 days. The Defendant failed to comply with this condition. The Applicant continues with its mission to execute and filed the instant garnishee proceedings through its application dated 2<sup>nd</sup> March 2021.

3. Upon consideration of the application made on 2<sup>nd</sup> March 2021 by the Applicant, this Court, on 8<sup>th</sup> March 2021, issued a garnishee order nisi attaching the following Bank Accounts to the credit of Muthiru Dairy Farmers Sacco Ltd: -

i. Cooperative Bank of Kenya Limited A/c No. [...] Chuka Branch.

ii. KCB Bank Kenya Limited A/c No. [...].

**The Application**

4. The application is brought under the provisions of Order 23 Rules 1, 2, 8 and 9 of the Civil Procedure Rules. It is premised on the grounds on the face of it, on the supporting affidavit in support thereof and on the supplementary affidavits sworn on 8<sup>th</sup> April 2021 and 7<sup>th</sup> May 2021. The Applicant's case is that the Defendant/Judgement Debtor has failed to settle the Judgment and also failed to comply with the conditions of stay granted by the Court on 23<sup>rd</sup> November 2020 and that the Garnishees, who are within the jurisdiction of the Court are holding money belonging to the Judgement Debtor.

5. With respect to the 1<sup>st</sup> Garnishee's claim that the account under reference belongs to a separate entity, the Applicant urges that the 1<sup>st</sup> Garnishee failed to invite the Court to exercise its power under Order 23 Rule 6 to order the supposed third party to whom the account belongs to confirm its claim on the funds in the said account. The Applicant claims that Muthiru Dairy FCS Ltd and the Defendant are one and the same entity. Referring to the Applicant's application for stay of 10<sup>th</sup> December 2019, they urge that the Judgement's Debtor's own Chairman, one Jasper Nyaga M'muga referred to Society's Bank statements whilst acknowledging that the Defendant is also a society

besides being a self-help group and that in his affidavit, the Defendant's official produced bank statements belonging to the subject accounts. They urge that the 1<sup>st</sup> Garnishee can only disprove this fact by availing account opening forms and bank mandates to contradict Mr. Jasper Nyaga's M'muga's evidence. They urge that there is mischief on the part of the 1<sup>st</sup> Garnishee for failing to disclose the existence of other bank accounts held by the Judgement Debtor. Relying on the case of *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee) (2020) eKLR*, they urge that the 1<sup>st</sup> Garnishee has failed to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.

6. With respect to the 2<sup>nd</sup> Garnishee's claim that the Judgment's debtor's account was closed, they urge that the 2<sup>nd</sup> Garnishee was untruthful since they had first denied the existence of the subject account only to later own up and state that the account had since been closed following filing of a supplementary affidavit by the Applicant. The Applicant submits that the 2<sup>nd</sup> Garnishee is guilty of material non-disclosure and they highlight entries in the statement showing that tax amount was charged on two accounts held by the Judgment Debtor and that details on payments made to the Judgment Debtor on 9<sup>th</sup> and 10<sup>th</sup> February 2021 have not been disclosed. They urge that the order nisi was issued against Account No. [...] and any other account held by the 2<sup>nd</sup> Garnishee and that KCB should not be discharged from the proceedings just yet until account details of the entries of 30<sup>th</sup> November 2019, 9<sup>th</sup> and 10<sup>th</sup> February 2020 are disclosed. They rely on Order 23 Rule 5.

### **1<sup>st</sup> Garnishee's Case**

7. The Garnishees participated in these proceedings. The 1<sup>st</sup> Garnishee, through the replying affidavit and further replying affidavit sworn on 25<sup>th</sup> March 2021 and 25<sup>th</sup> May 2021 respectively by Beatrice Wamaitha, the Bank's Legal Officer states that although the existence of the said account is not disputed, the account does not belong to the Defendant but to Muthuru Dairy F.C.S Ltd which is a different entity from that of the Defendant. She states that at the time of opening the said account, the 1<sup>st</sup> Garnishee was duly furnished with a Certificate of Registration No. CS/14655 dated 11<sup>th</sup> September 2012 issued by the Commissioner for Co-operative Development in respect of Muthuru Dairy Farmers. She states that immediately they received the order nisi, the account was flagged down with a balance of Ksh 85,169.30 and that it is only monthly loan repayments of Ksh 46,117.64 in respect of a loan owed to the 1<sup>st</sup> Garnishee that has been recovered. She claims that the account has an overdrawn balance. In their submissions, the 1<sup>st</sup> Garnishee states that this quagmire of ownership can be resolved by ordering the third party to appear in Court to shed light on whether it is the same as the Defendant in the case and that it is not for the Applicant to allege that the two entities are one and the same while their names prove otherwise. Relying on the case of *Ngaywa Ngigi & Hibet Advocates vs Invesco Assurance Co. Ltd & Others*, they urge that they have proved that the subject account does not have sufficient funds to satisfy the decree herein and that the account is in debt and not in credit.

### **2<sup>nd</sup> Garnishee's Case**

8. The 2<sup>nd</sup> Garnishee through the replying affidavit and further affidavit sworn by Amos Njiru, its Branch Manager at Chogoria on 31<sup>st</sup> March 2021 and 9<sup>th</sup> April 2021 respectively, states that the account number [...] does not exist in its records and that they do not hold any other account on behalf of the Defendant. He states that account number [...] was closed on 11<sup>th</sup> February 2021. He highlights that the bank statements relied upon by the Plaintiff was generated on 29<sup>th</sup> November 2019, over a year ago and does not reflect the current position. In their submissions, the 2<sup>nd</sup> Garnishee restates that an order of garnishee cannot be made in the instant case because it does not hold funds on behalf of the Judgement Debtor. They urge that the relevant period in garnishee proceedings commences upon issuance of a garnishee order nisi and there is no duty for the garnishee to explain the transactions made by the Judgement Debtor before the relevant period.

### **Determination**

9. There is no dispute that there is a decree in favour of the Applicant which has not been settled. Despite the Court granting conditional stay to the Defendant, the Defendant failed to comply by depositing half of the decretal sum. The Applicant brought these garnishee proceedings as a way of executing against the Defendant. The question before the Court is whether to confirm the Garnishee order nisi as absolute to facilitate the settlement of that decree. The law providing for Garnishee proceedings is found at Order 23 of the Civil Procedure Rules as follows: -

**[Order 23, rule 4.] Execution against garnishee.**

**4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.**

**[Order 23, rule 5.] Trial of liability of garnishee.**

**5. If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined.**

**[Order 23, rule 6.] Claim of third person.**

**6. Whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court may order such third**

**person to appear, and state the nature and particulars of his claim upon such debt.**

10. The Garnishees herein participated in the proceedings. They have both denied liability. The 1<sup>st</sup> Garnishee claims that the account exists but belongs to a different entity and that in any event, the account has an overdrawn balance. The 2<sup>nd</sup> Garnishee claims that the account existed but it was long closed on 11<sup>th</sup> February 2021.

11. In the case of *Otieno Ragot & Co. Advocates vs. City Council of Nairobi (2015) eKLR* the Court held as follows:-

**‘Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the Judgment Debtor. Ordinarily, the judgment creditor only makes allegations of the Garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the fund in its hands or the debt is not due or payable’.**

**I agree. There is an onus on the applicant to provide prima facie evidence that the Garnishee is indebted to the Judgment Debtor. Only then does the burden of proof shift or is cast upon the Garnishee to prove otherwise on strong, sufficient and convincing evidence. One rationale for this rule would be that, ordinarily, the Garnishee has more special knowledge of its position vis-à-vis the Judgment Debtor than would the Decree Holder. Another is that a Garnishee may conceal a debt so as to help the Judgment Debtor avoid a Decree.’**

### **Legal Personality**

12. The 1<sup>st</sup> Garnishee has claimed that the account it holds belongs to a different entity i.e Muthiru Dairy F.C.S Ltd and not the Defendant herein, Muthiru Self Help Group. In essence, the 1<sup>st</sup> Garnishee pleads that the debt sought to be attached belongs to some other person as contemplated under Order 23 Rule 6. The Applicant on the other hand claims that the two are one and the same entity and that the Chairman has previously alluded to the fact that the Defendant, besides being a self-help group is also a society.

13. Although there is some similarity in the names of the two entities, this Court is alive to the distinct nature of legal personalities. Notwithstanding the commonalities in the names, the slightest change in the other names implies that these are in fact two different entities. While one is a co-operative society, the other is a self-help group. Indeed, even if the Directors and other officials of the entities are the same, from a legal perspective, the two are separate entities and one cannot be made to bear the burdens of another and vice versa unless there is an express agreement to this effect. This finding would call for an invitation of the third party, Muthiru Dairy F. C. S. Ltd to be summoned to explain its claim on the debt sought to be attached as is required under Order 23 Rule 6. This Court acknowledges that this would indeed have been the most certain way of determining the status of the third party.

14. However, this Court is confronted with the question of whether it is in the first place necessary to summon the third party. As pleaded by the Applicant and as has been confirmed by this Court, in the Defendant’s application for stay dated 9<sup>th</sup> December 2019, the Defendant’s Chairman relied on and owned bank statements belonging to Muthiru Dairy F. S. C. Ltd. He in fact described the Defendant as a society in the statement exhibiting the annexure as follows: -

**‘THAT the Applicant is a very small dairy farmer’s society which is not worth even a fraction of the amount claimed.’  
(Annexed and marked JNM ‘5a’ and ‘5b’ is a copy of the society bank statements)**

15. It appears the Defendant considers itself one and the same with the third party. However the 1<sup>st</sup> Garnishee is the party that has privity of contract with the said third party. It has annexed a Certificate of Registration No. CS/14655 with respect to Muthiru Dairy F. C. S. Ltd. This Court will therefore not be so quick to assume that they are one and the same and will order that the said third party be summoned to explain the nature of its claim to the debt sought to be attached. It matters not that the representatives of the third party may be the same as those of the Defendant.

### **Value of Debt vis a vis the status of Account**

16. The 1<sup>st</sup> Garnishee introduced another issue. It claims that over and above the disputations on ownership of the account, the account has an overdrawn balance. It avers that at the time of issuance of the decree nisi, the account had a balance of Ksh 85,169.30/= which amount was used to offset the loan amount. This averment has not been challenged. Would there then be any purpose of summoning the third party when the account attached to the third party is said to be operating on a deficit? This Court finds in the affirmative as the two issues of ownership and account status are distinct and can indeed stand alone. The interests of justice will require this explanation to be first made as this will not only clear the air in this application but it will also assist for future reference. This Court will thus order for the said third party to be summoned to explain the nature of its claim if any to the debt sought to be attached.

### **Closure of Account**

17. The 2<sup>nd</sup> Garnishee has indicated that the account existed but was closed on 11<sup>th</sup> February 2021 and has annexed bank statement showing a zero balance as at the said date. The bank statements relied on by the Applicant were for November 2019 and this Court is convinced that the same may not reflect the current status. Furthermore, this is information which is within the special knowledge of the Applicant and as required by Section 112 of the Evidence Act, the 1<sup>st</sup> Garnishee has furnished this Court with evidence to prove that the account is indeed closed. The 2<sup>nd</sup> Garnishee has indicated willingness to comply with any of the Court’s directions including those requiring any of its officials to appear in Court. This Court recognizes that there is always a chance of the garnishees colluding with the Judgment Debtor to avoid payment. Nonetheless, this has not been proven. The instant application was filed on 2<sup>nd</sup> March 2021, way after the said account was closed

on 11<sup>th</sup> February 2021. This Court is mindful that it cannot confirm a garnishee order where the account from which a debt is sought to be attached is non-existence. Court orders cannot be made in vain. This Court will therefore not confirm the same. Concerning the allegation that the 2<sup>nd</sup> Garnishee has failed to disclose the existence of other accounts, this Court finds that it is ordinarily the duty of the Applicant to lay a prima facie case and only then can the burden shift to the garnishee.

## **ORDERS**

18. Accordingly, for the reasons set out above, the Court makes the following orders: -

**i. The Court declines to confirm the garnishee order nisi with respect to KCB Bank Kenya Limited A/c No. [...] owing to the confirmed closure of the account.**

**ii. The third party, Muthiru Dairy F. C. S. Ltd SHALL be summoned to explain the nature of its claim to the debt sought to be attached at Cooperative Bank of Kenya Limited A/c No.[.... ] Chuka Branch.**

**iii. Each party shall bear their own costs.**

Order accordingly.

**DATED AND DELIVERD THIS 21<sup>ST</sup> DAY OF JULY 2021**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

**M/S Wainaina Ireri Advocates, LLP for the Applicant**

**M/S Gichungi Muthuri & Co. Advocates for the Respondent**

**M/S Mithega & Kariuki Advocates for the 1<sup>st</sup> Garnishee**

**M/S Gathara Mahinda & Co. Advocates for the 2<sup>nd</sup> Garnishee.**