REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 130 OF 2018

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

MILLIMO, MUTHOMI & CO. ADVOCATES.....DECREE HOLDER

AND

THE REGISTERED TRUSTEES, KENYA RAILWAYS STAFF RETIREMENT

BENEFITS SCHEME.....JUDGEMENT DEBTOR

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST GARNISHEE

KCB BANK OF KENYA LIMITED.....2ND GARNISHEE

RULING

1. This Ruling is in respect to two applications dated 8th March 2021 and 28th April 2021 filed by the Decree Holder and the Judgment Debtor respectively.

The Decree Holder's Application dated 8th March 2021

2. This application was brought under **Section 38** of the **Civil Procedure Act, Order 23 Rule 1** and **2** of the **Civil Procedure Rules** and all enabling provisions of the law. The unspent prayers in the application are: -

> **a. THAT all monies in the credit of Account Number 203xxxxxx domiciled at Co-operative Bank of Kenya, Co-operative House branch, Account Number 110xxxxxx domiciled at Kenya Commercial Bank, Custody Services Branch, and Account Number 110xxxxxxx domiciled at Kenya Commercial Bank, Moi Avenue branch, or so much of it that is sufficient to satisfy the decree herein in the amount of Kshs. 411,573,757.701/= plus accrued interest be transferred to Millimo, Muthomi & Co. Advocates.**
>
> **b. THAT the cost of this application be borne by the Respondent.**

3. The application is based on the grounds on the face of it and supported by the Affidavit of **STEPHEN M. MUTHOMI**, an Advocate of the High Court of Kenya practicing as such in the name and style of the Decree Holder herein. He deposed that the application emanates from *Nairobi HCCC No. 294 of 2012, Edermann Properties Limited v The Registered Trustees of Kenya Railways Retirement Benefit Scheme & Kenya Railways Corporation* (hereinafter "**the primary suit"**) where the Judgement Debtor failed and continue to fail in paying the accrued legal fees after representation.

4. He averred that the Decree Holder filed a Bill of Costs dated 13th March, 2018 for taxation against the Judgement Debtor herein seeking an amount of Kshs 773, 229,744.00. The said Bill of Costs was heard on 3rd May, 2018 and taxation Ruling was delivered by the Deputy Registrar on the 4th March, 2019 assessing the payable fees at Kshs 411,573,757.70 and a Certificate of Taxation dated 19th March, 2019 was issued. Subsequently, the Decree Holder vide an application dated 26th March, 2019 moved the Court seeking an order that judgment be

entered as against the Judgement Debtor for the taxed amount of Kshs 411,573,757.70. Vide a Decree dated 14th October, 2019, judgment was entered in favour of the Decree Holder.

5. Consequently, the Judgement Debtor moved the Court vide an application dated 1st November, 2019 seeking, among others, leave to allow the firm of Prof. Mumma & Co. Advocates to represent her in place of the firm of Akide & Company Advocates and leave to file a reference against the Taxing Masters decision of 19th March, 2019. In a Ruling delivered on 28th May, 2020, this Court allowed the Judgement Debtor's aforesaid application upon fulfilling certain conditions.

6. However, in utter indifference to the Orders of this Honourable Court, the Judgement Debtor filed another application dated 26th June, 2020 seeking Review of the Court's Ruling of 28th May, 2020. This Honourable Court rendered its decision thereon on 26th October, 2020 dismissing the application and the Decree Holder was given the liberty to execute the Decree given on 14th October, 2020. The Decree Holder has on several occasions engaged the Judgement Debtor through various means to settle the decretal amount without any success. In the Decree Holder, the Judgement Debtor is bent on denying it its rightfully owed legal fees almost a decade since issuing instructions for representation in the primary suit in the year 2012.

7. He averred that the Judgment Debtor is truly indebted to the Decree Holder in the sum of Kshs. 411,573,757.70 plus accrued interest at the rate of 14% per annum from 4th March, 2019 until payment in full. He stated that the judgment Debtor holds substantial deposits in Account Number 011xxxxxxxxxx domiciled at Co-operative Bank of Kenya, Co-operative House branch, Account Number 1102388238 domiciled at Kenya Commercial Bank, Custody Services Branch and Account Number 110xxxxxxx domiciled at Kenya Commercial Bank, Moi Avenue branch, which will pay off or reduce its indebtedness to the Decree Holder.

8. He stated that it has become difficult realizing the decretal amount from the judgment debtor herein by other means and unless this Honourable Court intervenes immediately and secure the same from the garnishees, the debt will remain unpaid to the detriment of the decree holder. He averred that the Decree Holder continues to suffer financially as it spent monies meant for running the office in representing the Judgement Debtor in the primary suit and efforts to recover the same through diplomacy have been futile. As such, it is expedient and desirable that the Orders sought be granted.

9. In response, the Judgment Debtor filed a Replying Affidavit sworn on 7th May 2021 by **ISAAC SAVALI SILA,** its Chief Executive Officer. He stated that the Application as filed is misconceived, bad in law and incurably defective as it offends the mandatory provisions of **Order 22 Rule 18** of the **Civil Procedure Rules, 2010**. He contended that the Decree issued on 18th October 2019 was issued well over a year since the Decree Holder moved the Court. That the mandatory provisions of **Order 22 Rule 18** of the **Civil Procedure Rules, 2010** requires that a Notice to Show Cause be issued to the Judgment Debtor where a Decree Holder intends to move the Court for execution and neither the Judgment Debtor nor their previous Advocates have been served with the same.

10. He deposed that the Judgement Debtor being a pension scheme registered under the Retirement Benefits Act was primarily established and statutorily mandated to pay its pensioners their benefits. The Judgment Debtor Scheme was established in 2006 (the Scheme) as required by the Retirement Benefits Authority Act and following the repeal of the Retirement Benefits Rules and Regulations made pursuant to the Kenya Railways Corporation Act, has a total of 10,097 members comprising 8,767 pensioners and 1,330 dependents. The pensioners and their dependents rely on the Judgment Debtor to pay them their monthly pension which the Pension Scheme does from the rental income it collects from various properties that were transferred to it by the sponsor Kenya Railways Corporation in 2006. The Judgment Debtor was a uniquely established pension scheme where unlike most pension schemes, it was non-contributory and all assets were based on the transfer of various immovable properties by its sponsor essentially meaning, the Scheme had absolutely no liquid assets except for the rental income remitted to the Bank Accounts held by the Garnishees.

11. He noted that on 12th April 2021 this court issued orders restraining the transfer of funds in any of the accounts save for funds that would be surplus to the full Decretal amount applied to the aggregate amount of funds held in the said bank accounts. The said Court Order has a ripple effect on over 8500 pensioners of the Judgment Debtor Scheme and their families as the said Bank accounts hold rental income used to pay the amount due to the Scheme's pensioners. It was contended that the subsistence of the Orders issued on 12th April 2021 would embarrass the Court as they were issued in contravention of **Order 22 Rule 18** of the **Civil Procedure Rules, 2010**.

12. The 1st Garnishee also responded through a Replying Affidavit sworn on 18th May 2021 by **JUSTINA MUSYIMI** its Service Manager. She confirmed that they received a Garnishee Order Nisi requiring them to freeze the Judgment Holder's Account No. 011xxxxxxxxxx so as to satisfy a decree of this honourable court issued on 18th October 2019 in the sum of Kshs. 411,573,757.70. She stated that whereas it is not in dispute that the Judgment debtor holds an account with the 1st Garnishee in the name of KENYA RAILWAYS RETIREMENT, compliance by the 1st Garnishee is pegged on the funds available in the Judgment Debtor's account.

13. She noted that the said account has insufficient funds incapable of satisfying the whole decretal sum as the current balance in the account is Kshs. 114,584.20/=. According to her, the available balance can only partially settle the decretal sum and the bank is ready and willing to remit the same subject to deductions of transaction costs and legal costs of the 1st Garnishee which the court has the discretion to grant. In the premises, she prayed that the court do grant it costs of Kshs. 20,000/- and costs to be borne by the Judgment Debtor and thereafter discharge it as a garnishee in these proceedings after it remits the said funds.

14. The 2nd Garnishee responded to the application vide a Replying Affidavit sworn on 15th April 2021 by **JOSEPH OMOLO**, its Corporate Service Manager, Regional Markets Department, Corporate Banking Division. He stated that as at 13th April 2021, the Judgment Debtor's Account Number 110xxxxxxx held a credit balance of Kshs. 12,142,836.65 as evidenced by the annexed bank statement marked *'JO 1'*. He noted that the 2nd Garnishee duly attached the said account pursuant to this Court's orders of 12th April 2021. However, he stated that the said balance is not sufficient to fully satisfy the amount owed to the Decree Holder which is Kshs. 411,573,757.70 plus accrued interest. He averred that the 2nd Garnishee is ready and willing to release the said sum less its costs, should the Honourable Court so order. He urged the

Court to grant the 2nd Garnishee costs of Kshs. 50,000/=.

15. The 2nd Garnishee also filed a Further Affidavit sworn on 5th May 2021 by the same **JOSEPH OMOLO**. He noted that as at 1st April 2021, the Judgment Debtor's Account Number 110xxxxxxx held a balance of Ksh.0.00, and the same remains true to the date of generation of the attached statement of 4th May 2021. In his view therefore, the said account cannot satisfy the amount owed to the Decree Holder or any other amount and thus the 2nd Garnishee should forthwith be discharged from these proceedings with costs.

Submissions

16. The Application was disposed off by way of written submissions which were filed by the Decree Holder and the 2nd Garnishee only. The Decree Holder's submissions are dated 10th May 2021 whilst the 2nd Garnishee's submissions are dated 13th May 2021.

17. The Decree Holder submitted that despite the Judgement Debtor acknowledging its indebtedness to it pursuant to a valid decree given by this Court on 14th October, 2019, the Judgment has to date not paid any coin. This left it with no option but to execute against the Judgement Debtor through the garnishee proceedings herein.

As regards Account No. 110xxxxxxx held at KCB

18. The Decree Holder submitted that the attached bank statements attests that there has been substantial deposits of monies in this bank account and between the dates of 22nd March, 202l and 31st March, 2021, the credit balance rose from Kshs. 42, 208, 850.55/= to Kshs. 52, 840, 415.55/= despite the many debits that were made therein. He noted that on 1st April, 2021, the Judgement Debtor, with the aid of KCB, transferred two (2) substantial amounts from the said bank account, firstly, a sum of Kshs. 15,050,000.00/= and later Kshs. 43,100,000.00, with a view to defeat the garnishee proceedings herein. The Decree Holder further stated that there were some other rent deposits made therein culminating to the Kshs. 12,742, 836.65/= as at 13th April, 2021 despite the many debits there were made in the same period, including on the 12th and 13th April, 202l in blatant breach of the Court order issued in this matter on 12th April, 2021.

19. Further, the Decree Holder submitted that it is aware that post the 13th April, 2021, further monies were deposited by Judgement Debtor's tenants in the subject account and therefore the current credit balance is above the stated Kshs. 12,742,836.65. He also stated that he is aware that the Judgement Debtor has, with a view to defeat the garnishee proceedings herein, instructed its tenants to deposit their rent in a different bank account at Equity Bank.

As regards Account No. 110xxxxxxx held at KCB

20. The Decree Holder submitted that the 2nd Garnishee suspiciously and deliberately failed to avail the bank statements pre and post 1st April, 2021, that is, for the period from the 8th March, 2021 when the garnishee proceedings were filed, to 4th May, 2021 when it printed a bank statement in respect thereof. The Decree Holder submitted that the failure to print the bank statements for the entire relevant period to these garnishee proceedings is a deliberate act on the part of KCB in collusion with the Judgement Debtor to deny this Court of crucial information regarding the status of the subject account after the filing of the garnishee proceedings.

21. It submitted that it is of the reasonable apprehension that the subject account had money at all material times herein but whose details have been deliberately concealed by the failure to supply the bank statements with a calculated mission to defeat the garnishee proceedings herein.

As regards Account No. 203xxxxxxx held at Co-operative Bank

22. On this, I note that as at the time of filing these submissions, the 1st Garnishee had not put in a response to the Decree Holder's application. As such, the Decree Holder's submission that Co-operative Bank has deliberately opted not to participate in these proceedings no longer hold as they do not represent the true state of affairs.

As regards Costs

23. On this, the Decree Holder submitted that costs follow the event. It was stated that the Decree Holder would not have commenced and engaged in this garnishee proceedings had the Judgement Debtor settled the decree herein. As such, it is the Judgement Debtor that should meet the costs of the garnishee proceedings as the application is unopposed in any event.

24. On its part, the 2nd Garnishee reiterated that it is ready and willing to release the available sum should the Honourable Court so order pursuant to the provisions of **Order 23 Rule 2** of the **Civil Procedure Rules, 2010.**

25. The 2nd Garnishee further submitted that the allegations made by the Decree Holder in its submissions have not been proved and faulted it for bringing up such allegtions in their submissions instead of a Supplementary Affidavit so as to afford the 2nd Garnishee a chance to respond. It thus urged the Court to disregard the said allegations. Be that as it may however, it noted in regards to the allegation that the 2nd Garnishee aided the Judgment Debtor in defeating the proceedings herein that the record will bear witness that the Order nisi was given on 12th April 2021.

26. Relying on the court's sentiments in the case of **Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee) [2020) KLR**, that a Decree Nisi operates as an injunction that prevents the bank from paying the money to its customer

until the garnishee order is made absolute, it submitted that, before 12th April 2021, there was absolutely nothing preventing the Judgment Debtor from operating its account as it wished. However, post that date, the 2nd Garnishee observed and implemented the Order given to the letter and this is clear as day from the statement provided.

27. The 2nd Garnishee also relied on Muchemi J's statement in **Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited; Diamond Trust Bank (Tom Mboya & Koinange Street Branches) (Garnishee) [supra]**, that the relevant period in Garnishee proceedings is from the date of service of the Garnishee Order Nisi. It thus held the view that the statements attached by the 2nd Garnishee's responses as JO1 and JO2 fully are sufficient for the pleadings before this court.

The Judgement Debtors Application dated 28th April 2021

28. This Application was filed pursuant to **Sections IA, IB, 3A** and **9** of **the Civil Procedure Act,** Chapter 21 of the Laws of Kenya**, Order 50 Rule 6** of the **Civil Procedure Rules 2010, Article 159(2)** of the **Constitution of Kenya, 2010** and all other enabling provisions of the Law and all enabling provisions of the Law. The application seeks the following Orders:

> **1. Spent.**
>
> **2. Spent.**
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> **3. THAT this Honourable Court be pleased to set aside, discharge or vary the orders issued by Honourable Justice G. Ngenye on 12th April 2021 and extended on 20th April 2021.**
>
> **4. THAT *this Honourable Court do enlarge th*e time within which the Judgment Debtor/Applicant should comply with the Orders of Justice G. Nzioka in the Ruling dated 28th May 2020 and allow the Judgment Debtor to comply within 90 days of this Court's Order or such other time as the Court may direct as appropriate.**
>
> **5. THAT upon allowing prayer 3 above, the Applicant herein be granted leave to file a Reference within 21 days of the compliance as provided in the Ruling of 28th May 2020.**
>
> **6. THAT the costs of this Application be provided for.**

29. The application is based on the grounds on the face of it and supported by the Affidavit sworn on even date by **ISAAC SAVALI SILA,** the Judgment Debtor's Chief Executive Officer. He stated that by a Ruling delivered on 28th May 2019, the Honourable Justice Nzioka issued an Order setting aside the Judgment dated 14th October 2019 and the Decree issued on 18th October 2019 on the conditions that the Judgment Debtor shall:

> **i. Pay the Judgement Debtor 50% of the Decretal sum within 30 days pending hearing and determination of the reference; or**
>
> **ii. Secure the entire sum with a Bank Guarantee of the total sum within 30 days of the date hereof; or**
>
> **iii. Deposit the entire sum in an interest earning account in the names of the parties' counsels within 30 days.**

30. He stated that the Judgement Debtor is a pension scheme registered under the Retirement Benefits Act and is primarily established and statutorily mandated to pay its pensioners their benefits. The pensioners and their dependents rely on the Judgment Debtor to pay them their monthly pension which the Pension Scheme does from the rental income it collects from various properties that were transferred to it by the sponsor Kenya Railways Corporation in 2006.

31. He averred that at the time of the issuance of the Court Orders, the Scheme was grappling with the inability to liquidate its assets in order to pay pensioners their benefits and was often unable to meet the cash flow requirements rendering many pensioners of the Scheme destitute. That any of the Judgment Debtor's assets that would need to have been disposed of towards ensuring compliance with the Court Orders would not have been disposed within the 30 days period ordered by the Court as the disposal of the properties would be subject to the **Public Procurement and Asset Disposal Act, 2015** which would take a considerable period of time. Further, that the Judgment Debtor's previous disposal of assets to various state-related entities that resulted in delayed or protracted payment arrangements. For instance, to date, there is well over Kshs. 450 Million pending disposal of assets to state agencies such as the Kenya Urban Roads Authority and the Kenya Power and Lighting.

32. He averred that the Judgment Debtor's erstwhile Advocates on record, wrongly advised it to pursue a Review of the Ruling of the Court pursuant to which an application for Review was filed by the said Advocates on its behalf on 26th June 2020 which was subsequently dismissed by a Ruling dated 26th October 2020. He averred that while the Affidavit in support of the application properly depicted the financial hardships faced by the Judgment Debtor alluded to above, he has been advised by their current Advocates on record that an application for review was not the appropriate legal remedy to seek in the circumstances. That once the application for review was heard and determined, the Judgment Debtor lost its legal right to appeal the Ruling of the Court as it ought to have.

33. He stated that in view of the above and the colossal Decretal amount of Kshs. 411,573,757.70, the Judgment Debtor's finds itself in a predicament where its only option is to seek this Court's discretion to extend time to enable comply with the Court Orders. He noted that in a turn of good fortune for the affairs of the Judgment Debtor, the Government of Kenya (hereinafter "the GOK") compulsorily acquired the Kenya Railways Club being one of several properties for purposes of building a passenger terminal as well as for the Nairobi Expressway

Road Project. The GOK, through the National Treasury approved compensation for the said property in the sum of Kshs. 7,935,585,600. In the agreed compensation plan, the GOK undertook inter alia to clear all outstanding pension arrears and all other critical pending payments on behalf of the Judgment Debtor to the tune of Kshs. 596,325,331.00.

34. He stated that the GOK further undertook to pay the monthly pension dues for the financial years 2021/2022 and 2022/2023 as well as settle outstanding loans and facilitate waivers due to various Government agencies and others including the Retirement Benefits Authority, the Kenya Revenue Authority and the Nairobi County Government. To confirm this, he has annexed a copy of the minutes of a meeting held on 17th December 2020 convened at the National Treasury and attended by the Cabinet Secretary, National Treasury and Planning, Commissioners and officials of the National Land Commission and Trustees and officials of the Judgment Debtor.

35. He further noted that within the said compensation plan, the GOK carried out a debt arrangement to settle the Judgment Debtor's outstanding bridging loan facility with Kenya Commercial Bank Limited for the sum of Kshs. 850,000,000.00. He posited that with the clearing of the outstanding loan due to Kenya Commercial Bank, the Judgement Debtor will be able to secure a bank guarantee for the Decretal sum in compliance with the Court Orders should this Honourable Court allows our application.

36. Further, he stated that he has read the Ruling of the Honourable Court where the Court in granting the now lapsed Orders acknowledged the merits of the intended Reference by the Judgment Debtor seeking to set aside the impugned taxation decision that gave rise to the Judgment and Decree in this matter. He argued that the Advocate-Client Bill of cost whose taxation gave rise to the judgment amount being a colossal sum of Kshs. 411,573,757.70 that continues to attract interest, was taxed without the participation of the Judgment Debtor and its erstwhile Advocates on record. He averred that the Judgment Debtor was not a substantive party but was enjoined mid-way of the proceedings and in any case, the suit was withdrawn well before hearing.

37. In his view, the taxed amount is greatly exaggerated, repugnant and unconscionable and was obtained in collusion between the Decree Holder and the Judgement Debtor's erstwhile Advocates and thus he believes that the same will be set aside as of right once the Judgment Debtor has its day in Court. He contended that if this Court declines to exercise its discretion in the Judgments Debtor's favour, then the colossal Decretal amount arising out of an unjust and unconscionable taxation will stand thereby exposing the assets of the pension scheme and ultimately the pensioners whose livelihoods in the form of pension payments are sourced from the rental income from these assets.

38. He reiterated that, following the turn of the Judgement Debtor's fortunes, they are in the position to pay any just amount that would be due to the Decree Holder. He noted that the Judgment Debtor has made arrangements based on the forthcoming settlements by the GOK and undertaken a change of Trustees and management of the scheme. It has since taken a proactive approach and made concerted efforts to meet all its due and just obligations. The deponent stated that being a contributor to this concerted effort, he is aware that when he took office in November 2020, the Scheme had arrears of 12 months-worth of payments due to the pensioners and as at to date, the arrears have fallen to slightly above 5 months.

39. Finally, he stated that the present application has been brought without inordinate delay in the circumstances. He also noted that this Court, in exercise of its powers, is duty-bound to balance the interest of the parties in the administration of justice where on the one hand the Court holds the public interest to safeguard the welfare of the over 10,000 members of the Judgment Debtor who rely on the Judgment Debtor for sustenance *vis a vis* the pecuniary interests of the Advocate whose interests will not be prejudiced by this application beyond atonement of costs.

40. In response to this application, the Decree Holder filed a Replying Affidavit sworn on 3rd May 2021 by **STEPHEN M. MUTHOMI**, an Advocate of the High Court of Kenya practicing as such in the name of the Decree Holder herein. The Decree Holder reiterated that the Firm was retained to defend the Judgement Debtor in *Nairobi High Court Civil Case No. 294 of 2072* wherein the Plaintiff therein had sought a sum of over Kshs. 26 Billion as per the Plaint and amended Plaint on the court record. Subsequently, the Decree Holder prepared, among others, a Statement of Defence, responses to various interlocutory applications, pre-trial documents, witness statements, attended hearing of main case running to a number of years until February 2020 when the Law firm of Prof. Albert Mumma & Company Advocates took over the matter.

41. As regards the taxation proceedings, he averred that initially, the Judgment Debtor did not appear or appoint an advocate to represent it in the same and upon several adjournments; the taxation was set for Ruling. Prior to delivery of the Ruling, the Client appointed the law firm of Akide & Company Advocates who moved the Taxing officer under an application dated 30th August, 2018 seeking to set aside the taxation proceedings. This application was granted vide the Taxing Officer's ruling delivered on 25th January, 2019. Thereafter, the taxation proceedings hearing was conducted inter partes, then a ruling thereon was delivered on 4th March, 2019, taxing the Bill at Kshs. 411,573, 757.70/=. In his view therefore, the Judgement Debtor has sought to further frustrate the garnishee execution proceedings by filing the instant application.

<u>As regards Prayer 2 of the application</u>

42. He averred that since the dismissal of Judgement Debtor's review Application on 26th October, 2020, the Client had not taken any step in respect of this matter until when gamishee proceedings were commenced which is a clear sign that this application is an afterthought. He argued that the Judgement Debtor's mistaken view that the Advocate's application dated 8th March, 2021 is defective does not in itself constitute a ground to justify its instant application and prayer to jump the queue without an order by this Court staying the Decree Holder's application dated 8th March, 2021.

43. Further, he denied the allegations that the application dated 8th Match, 2021 offends **Order 22 Rule 18** of the **Civil Procedure Rules**. He stated that the Judgement Debtor having been represented by Counsel, formed part of the two Court rulings and or orders that were made on 28th May, 2020 and 25th October, 2020, a period whose one (1) year has not lapsed as at the time the garnishee proceedings were commenced on 8th March, 2021. He argued that in any event the garnishee proceedings have an inbuilt mechanism for a Notice to Show Cause before a garnishee order absolute is granted but instead of showing cause, the Client has opted to clog the wheels of justice by filing

the instant application

b) As regards Prayer 3 of the application

44. He contended that under **Order 23 Rule 1(2)** of the **Civil Procedure Rules**, the only condition imposed on such garnishee order nisi is that they must be served on both the garnishee and Judgement Debtor at least seven days before the hearing date, a condition complied with by the Advocate herein vide the service of Court orders on 15th April, 2021 despite the parties advocates having been in Court when the orders were issued on 12th April, 202l. In his view, such service constitutes notice to the Judgement Debtor of the imminent execution by way of garnishee proceedings.

45. Further, he argued that the Court orders of 12th April, 2021 were granted after the Court's attention was drawn to the fact that the Client, with a view to defeating the garnishee proceedings, was on a calculated mission spree of transferring monies from the bank accounts subject of the garnishee proceedings which fact has indeed been confirmed by the bank statements availed by the 2nd Garnishee. He noted that in any event, the orders made on 12th April, 2021 are interim and their lifespan time bound to the hearing of the garnishee application hence there is no prejudice capable of being suffered by the Judgement Debtor if the orders are sustained during the pendency of the garnishee proceedings. If the Client was aggrieved by the Orders of 12th April, 2021, then recourse lies in appealing to a higher Court and not vexing the court that issued the orders with a view to demonstrating that the Court made an error in issuance of the impugned orders.

46. He stated that as such, the Judgement Debtor's desire to lift the orders of 12th April, 2020 is not aimed at achieving justice but to circumvent justice by securing an opportunity to drain the attached bank accounts by withdrawal of all monies therein.

As regards Prayers 4 and 5 of the application

47. He averred that Prayer 5 which seeks leave to file reference out of time has been sought twice in these same proceedings, wherein the Judgement Debtor was successful in the first instance and lost in the 2nd instance. He reiterated the history of this matter noting that the Judgement Debtor in this instant application, yet again seeks the same prayer for leave to file reference out of time for the 3rd time. He argued that this Court, in ordinary civil proceedings, has power to revisit its own orders only once, through a review application but no such review right exists in taxation proceedings. He contended that there is no law that permits this same Court to entertain the question of leave to fi1e a reference out of time in this matter for the third time hence this Court lacks jurisdiction to entertain the said prayer.

48. As regards Prayer 4 on extension of time within which to offer security from 30 to 90 days, he averred that it had been sought in similar terms in Prayer (c) of the review application dated 26th June, 2020 where the Client had sought that the leave conditions be reviewed, varied and or set aside. The Court in its ruling of 26th October, 2020, dismissed this prayer in entirety. It was argued that the ruling and Orders of 26th October, 2020 having been granted by a Court of competent and concurrent jurisdiction, this Honourable Court lacks jurisdiction to entertain an application seeking the same or similar prayers. In the Decree Holder's view, the instant proceedings are calculated to invite the Court to review Orders subject of an already concluded review proceedings.

49. As regards the Judgement Debtor's averments on its business and cash flow challenges, public procurement and Asset Disposal Act, 2015 as reasons for non-compliance with Court Orders on security, it was noted that similar grounds were invoked in both the client's applications dated 1st November, 2019 and 26th June, 2020. In the latter application, the Court considered all those grounds and proceeded to dismiss it. It follows therefore that it is not open for the Judgement Debtor to subject the Decree Holder to endless litigation over the similar facts which the Court has already considered and dismissed.

50. Further, it was argued that the obligation to pay rendered legal services is not subordinate to other financial obligations of the Judgement Debtor who in any case is not bankrupt nor has it been placed under liquidation. It is not therefore that it is unable to pay legal fees but it has, in its self-serving view, other financial obligations which runs on priority and preference to the due legal fees and Court Orders herein. He asserted that Court Orders are not issued to be complied with at the convenience of a party against whom the Order are issued but are issued to meet the ends of justice. The Decree Holder stated that in fact, he is aware that since the taxation of his legal fees in March, 2019, as well as after the passing of a decree on 14th October, 2019, the Client has engaged in sale of its immovable properties and received hundreds of millions of sale proceeds. That the Judgement Debtor also secured a loan of 850 million shillings.

51. The Decree Holder further faulted the Judgement Debtor's averment that it was misadvised by the previous advocates to file a review application instead of an appeal. In his view, raising such an assault against its former advocates now with a view of laying blame on the former advocates while well aware that the said advocates are not before this Court nor would they find an opportunity to defend themselves is an unfortunate direction which this Court ought not to entertain. He stated that it is for the court to do so in order to protect an advocate who have severed a relationship with a Client from unfair attacks upon losing an action(s) and in upholding the rules of Natural justice. That even if there were to be any misadvise on the part of the said advocates, which has not been demonstrated, then recourse does not lie in this Court but elsewhere in established legal forums. In any event, he argued that it cannot be that the former advocate would only be found to have misled the Client after the Client lost the review application when the same advocate successfully canvassed the Client's application dated 1st November, 2019.

52. Further, the Decree Holder stated that since the Judgement Debtor averred that it is expecting compensation in the tune of Kshs 7,935,585,600.00 from the Government of Kenya, it was expected to confirm award acceptance by completing, within 7 days, an award acceptance and Electronic Funds Transfer Forms but no such evidence has been tendered before Court to confirm that indeed the award was accepted and also, there is no indication as to when the alleged award compensation sum would be paid. He argued that the subject award compensation and expected payments thereof are speculative and cannot constitute a ground for grant of a Court Order. In addition, that the Railway Club land, subject of the hereinabove mentioned compensation is part of the parcels of land which the Client had informed the Court of their disposal in the previous applications dated 1st November, 2019 and 26th June 2020 and which facts the Court considered and made final decisions. It is therefore not open for the Judgement Debtor to invoke similar grounds to seek to relitigate over the same matter before

the same Court.

53. The Decree Holder further rubbished the Judgement Debtor's averments that the taxation was done without its participation and its erstwhile advocates. He argued that the taxed amount is commensurate to the work done and the value of the subject matter of the suit which he was instructed to defend being over Kshs. 26 Billion. He noted that the Judgement Debtor appointed two previous law firms managed by advocates in the ranks of Senior Counsel who defended it in the taxation and judgment adoption proceedings. It is thus a blatant lie for the client to depone otherwise and this was confirmed by this Court at paragraph 39 of the ruling delivered on 28th May, 2020 when it held, thus,

> **"Therefore, to allege that the application was heard ex parte, when the Respondent thereto was fully aware of the same and participated in the hearing of the same for six months, is being less than candid and/or misleading,"**

54. It was also the Decree Holder's position that the allegations that the taxed amount was exaggerated, repugnant and unconscionable are general and baseless. In his view, the taxed amount was proper, fair, just, reasonable and in any event much lesser that what was due and owing as raised in the taxed Bill of Costs. He also averred that by alleging that the taxed amount was obtained in collusion between the Decree Holder and its erstwhile Advocates, the Judgement Debtor has imputed improper motive in the Court process and outcome and scandalized the conduct and character of both the Court, all the Advocates Practicing in the law firm of the Decree Holder and its previous advocates on record. He noted that the Judgement Debtor has not provided any shred of evidence and or particulars to prove such a serious and far reaching false accusation against both the Court and officers of the Court.

55. It was further argue that a pension payment is a duty which the Judgement Debtor is bound to meet just as is the settlement of the Decree Holder's earned legal fees for services rendered. The Decree Holder was also of the view that change of Trustees and Management of the Judgement Debtor's Scheme do not in law constitute a ground for postponement of settlement of accrued liabilities incurred by the Client. That it is an institution with perpetual succession and settlement of its liabilities is not and ought not to be dependent on the sitting trustees and management wishes, preferences and/or desires.

56. The Decree Holder asserted that in the circumstances, the instant application is an afterthought, vexatious, scandalous, Res judicata, frivolous and an abuse of Court process. This Honourable Court is also functus officio and lacks jurisdiction to preside over this instant application. No prejudice may be thus be suffered by the Judgement Debtor if the application is dismissed as the overriding interests of justice weighs in favour of restraining the client from engaging in endless litigation by dismissal of the instant application.

Analysis and Determination

57. I have considered the two applications herein, the parties respective responses thereto, the submissions filed by the parties as well as the authorities relied on. It is my considered view that two applications raise various issues which shall be determined as hereunder. I will however begin with determining the Judgment Debtor's application as this will whether the decree nisi can be made absolute as prayed by the Decree Holder.

Whether the garnishee order nisi should be set aside, discharged or varied

58. On this issue, I note that the Judgment Debtor's main reason for seeking this order is that the Advocate-Client Bill of cost whose taxation gave rise to the decretal sum of Kshs. 411,573,757.70 was taxed without its participation and that of its erstwhile Advocates. The court record however attests otherwise hence this argument is untenable. The Judgment Debtor has also urged the Court to lift this order to enable it pay the pensioners and beneficiaries under its scheme the pension due to them.

59. It has also made other supportive arguments that it is expecting some money from the GOK which will enable it pay any just amount that would be due to the Decree Holder if allowed to file reference against the decision of the taxing officer. Apart from the fact that latter argument this argument has been made over and over in the previous applications, the Judgment Debtor has never paid the Decree Holder even a single coin. I will however reserve my determination on this issue and return to it after considering the next issues.

Whether *this* H*onourable Court can enlarge th*e time within which the Judgment Debtor should comply with the Orders of Justice G. Nzioka in the Ruling dated 28th May 2020 and allow the Judgment Debtor to comply within 90 days of this Court's Order or such other time as the Court may direct. If the same is in the affirmative, can the court grant the Judgment Debtor leave to file a Reference within 21 days of the compliance as provided in the Ruling of 28th May 2020

60. The history of this matter, which is very clear from the court record, has been accurately set out by the Decree Holder herein and thus it is unnecessary to belabor every aspect of the same. However, it is noteworthy that on 28th May 2020, Nzioka J. delivered a Ruling in respect of the Judgment Debtor's application dated 1st November 2019 in which it had sought leave to file a Reference against the decision of the taxing officer that taxed the Decree Holder's advocate-client costs at Kshs. 411,573,757.70. The court directed that the said decision be set aside on various conditions *inter alia,* that the Judgment Debtor shall;

> **"a. Pay the Respondent 50% of the decretal sum within thirty (30) days of the date of this order pending the hearing and determination of the intended Reference, or**
>
> **b. Secure the entire sum with a Bank Guarantee of the total sum within thirty (30) days of the date hereof; or**
>
> **c. Deposit the entire sum in an interest earning account in the names of the parties' counsels within thirty (30) days of the**

date of this order; and

d. Pay the Respondent costs of the application."

61. Instead of complying, the Judgment Debtor filed another application dated 26th June 2020 seeking for review of the above orders and to be allowed to file the Reference on such terms as are just and cognizant of its operations. This application was dismissed in a Ruling delivered by the same court on 26th October 2020. The Judgment Debtor, realizing that it compromised its right to appeal, now claims that it was misled by its advocates to file a review instead of an appeal. In my view, this is a lousy excuse by the Judgment Debtor to have a second bite of the cherry. Indeed, there is nothing on record to show that the Judgment Debtor instructed its advocates to institute an appeal but they negligently failed to do so. Further, no explanation has been tendered for the delay in seeking this order since the Ruling was made in October 2020. This just confirms that the order sought is an afterthought.

62. More importantly, I note that the Judgment Debtor is cunningly asking this court to seat on appeal of the orders made by a court of concurrent jurisdiction just because it is dissatisfied with an avenue it chose. This court cannot entertain such a prayer because it has no jurisdiction to do so. Further, it is noteworthy that this is not a mere procedural technicality that can be cured by **Article 159(2) (d)** of the **Constitution** which the Judgment Debtor has sought to rely on. In any event, it is as clear as day that the order sought is Res Judicata as this issue has already been determined with finality by a court of competent jurisdiction. Surely, the Judgment Debtor cannot be allowed to take the Decree Holder in circles over the same subject matter and the same issues. In the case of **William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR** the court noted that:

> **"The philosophy behind the principle of res judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."**

63. In the premises, I find that this is an obvious case of abuse of court process by the Judgment Debtor which cannot be condoned by this court. According to the **Black's Law Dictionary, 10th Edition**, abuse of court process is defined as:

> **"The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."**

64. In **Satya Bhama Gandhi V Director Of Public Prosecutions & 3 Others [2018] eKLR** Mativo J. elaborated what an abuse of the court process entails in the following manner:

> **"The concept of abuse of Court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations: -**
>
> > **a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.**
> >
> > **b. Instituting different actions between the same parties simultaneously in different Courts even though on different grounds.**
> >
> > **c. Where two similar processes are used in respect of the exercise of the same right for example a cross Appeal and Respondent notice.**
> >
> > **d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.**
> >
> > **e. Where there is no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**
> >
> > **f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.**
> >
> > **g. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.**
> >
> > **h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent**."

65. In view of all the foregoing, it is clear that the Judgment Debtor has not given this court any concrete basis to set aside, discharge or vary

the garnishee order nisi made herein on 12th April 2021 as sought in prayer 3 of its application.

Whether the garnishee application is incurably defective for offending the mandatory provisions of Order 22 Rule 18 of the Civil Procedure Rules, 2010

66. The Judgment Debtor took issues with the fact that the Decree Holder made the garnishee application more than a year since the Decree herein was issued on 18th October 2019 but failed to serve it and/or its previous Advocates with a Notice to Show Cause. In its view, this offended the mandatory provisions of **Order 22 Rule 18** of the **Civil Procedure Rules, 2010** which requires that a Notice to Show Cause be issued to the Judgment Debtor where a Decree Holder intends to move the Court for execution.

67. Order 22 Rule 18 of the Civil Procedure Rules deals with instances of execution by attachment of salary and allowance which is different from attachment of debts under Order 23. As rightfully submitted by the Decree Holder, the only requirement under Order 23 Rule 1(2) is that the order nisi must be served on both the garnishee and the judgment-debtor at least seven days before the date of hearing of the garnishee application by the Decree Holder. From the record, it is clear that proper service of the order nisi of 12th April 2021 was duly effected on the two Garnishees as well as the Judgment Debtor through its Advocates on record. In any case, I note that all the parties' advocates were present in court on the day when the orders were made. I therefore find the Judgment Holder's argument in this regard is untenable.

Whether the Decree Holder has established a proper case for the making of the garnishee order

68. Garnishee proceedings are governed by Order **23** of the **Civil Procedure Rules**. **Rules 1(1)** thereof provides as follows:-

> **"Order for the attachment of debts [Order 23, rule 1]**
>
> **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. Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or place of business or in such manner as the court may direct.**
>
> **4. An order nisi shall be in Form No. 16 of Appendix A."**

69. Garnishee Proceedings are normally instituted to enforce a money decree by the seizure or attachment of the debts due to the Judgment Debtor which form part of his property that is available for execution. In **Ecobank Kenya Ltd v True North Construction Company Ltd & Another [2018] eKLR**, the court stated that the purpose of garnishee proceedings is to enable a Decree Holder to reach a debt due to the Judgment Debtor from the Garnishee as may be sufficient to satisfy a Decree. The Garnishee is thus required to prove whether or not it is indebted to the Judgement Debtor.

70. In **Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee) [2020] eKLR** the court cited the case of **Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee) (1981) 1 All ER 225** at page 227 where it was stated:

> **"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: see Pritchard v Westminster Bank Ltd [1969] 1 All ER 999, [1969] 1 WLR 547 and Rainbow v Moorgate Properties Ltd [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days' notice, the order nisi operates as the**

notice."

71. In the instant case, there is no dispute that there is a decree in favour of the Decree Holder that has not been settled. The Garnishees have confirmed that the Judgment Debtor operates the subject accounts in the banks. They have also confirmed that they hold funds on behalf of the Judgment Debtor in the said accounts and none of the Garnishees have any claims over the funds. However, both Garnishees stated that the funds held in the subject accounts are not sufficient to satisfy the Decree herein but they are willing to release them.

72. The Decree Holder stated that Order Nisi made on 12th April 2021 was duly served on all parties on 15th April 2021, a fact that has not been controverted by the Garnishees herein. The effect of the Order Nisi was to prohibit the Garnishees from releasing money from the three accounts until the order is discharged or made absolute to satisfy decree herein. In **Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee) (Supra)** it was stated:

> **"As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: see Joachimson v Swiss Bank Corpn [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be 'attached', again derived from Norman-French. But the 'attachment' is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay."**

73. I note that the 1st Garnishee produced a Statement of Account showing that as at 10th May 2021, the Judgment Debtor's Account No. 011xxxxxxxxxx had a debit balance of Kshs. 114,584.20/=. Notably however, the statement shows that there have been several transactions in respect of the account since being served with the order nisi. For instance, as at 24th April 2021, the available bank balance was Kshs. 200,330.20/= then a substantial amount of Kshs. 71,400/= was credited from the account. This was done in disobedience of the court Order and with the aim of frustrating the satisfaction of the Decree herein.

74. Similarly, the 2nd Garnishee also produced two Account Statements in respect of the Judgment Debtor's Accounts Number 110xxxxxxx and 110xxxxxxx. The 1st Statement of Account marked 'JO-1' shows that as at 13th April 2021, the Judgment Debtor's Account Number 110xxxxxxx had a credit balance of Kshs. 12,142,836.65/= whilst the 2nd Statement of Account marked 'JO-2' shows that as at 1st April 2021, the Judgment Debtor's Account Number 110xxxxxxx had a balance of Ksh.0.00.

75. The Decree Holder raised various allegations in its written submissions regarding the Statements of Accounts produced by the 2nd Garnishees in respect of the two accounts held by the Judgment Debtor in the bank. Notably however, it is not clear why the Decree Holder, who is an Officer of this Court, did not seek leave to put in a Further Affidavit in order to give the 2nd Garnishee an opportunity to respond to the issues raised. Indeed, it is well settled that new issues cannot be raised through submissions meaning that the allegations made by the Decree Holder cannot find their way into this court through the submissions and thus I will not make any finding on the same.

76. I find persuasion in the case of **Republic vs. Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & Another [2014]** where Korir, J. stated as follows:

> **"The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."**

77. Be that as it may, the Judgment Debtor has not denied holding the said accounts with the Garnishees. It only claims that the Garnishee Order will have a ripple effect on over 8500 pensioners of the Judgment Debtor Scheme and their families since the said Bank accounts hold rental income used to pay the amount due to the Scheme's pensioners. In my view, this excuse does not hold because the Judgment Debtor's obligation to the pensioners does not rank higher than paying its other debts such as the advocate fees owing to the Decree Holder herein.

78. In the premises, I am satisfied that the Decree Holder has established a proper case for the making of the garnishee order.

Deposition

79. In the ultimate, I make the following orders:

a. The Judgment Debtor's application dated 28th April, 2021 is dismissed with no orders as to costs.

b. Prayer 6 and 7 in Decree Holder's application dated 8th March, 2021 are allowed in the following terms:

i. The garnishee order nisi is hereby made absolute.

ii. The 1st garnishee is ordered to pay forthwith to the Decree Holder the sum of Kshs. 114,584.20/= plus such other sums that have been paid into account number 011xxxxxxxxxx from the date it was served with the Order Nisi to date.

iii. The 2nd Garnishee is ordered to pay forthwith the sum of Kshs. 12,142,836.65/= held in account number 110xxxxxxx plus such other sums that have been paid therein and to account number 110xxxxxxx from the date it was served with the Order Nisi to date.

iv. The costs of the Application shall be borne by the Garnishees.

c. The 1st and 2nd Garnishees are hereby ordered to produce in court updated statements of the subjects accounts for the period between the service of the order nisi to date on them to date, within FOURTEEN days from today.

d. The matter to be mentioned on 22nd July, 2021 for compliance and further orders.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Chesoro h/b for Milimo for the Applicant/ Decree Holder.

2. Mwangi Kibicho for the Respondent/Judgement Debtor.

3. No appearance for the 1st Garnishee(Cooperative Bank).

4. Ms. Watitu for the 2nd Garnishee