



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 241 OF 2019

NYANDORO & COMPANY ADVOCATES.....JUDGMENT-CREDITOR

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....JUDGMENT-DEBTOR

AND

KENYA COMMERCIAL BANK GROUP LIMITED.....GARNISHEE

RULING

Introduction

1. Before me for determination is the Decree-holder's application dated 13th March 2020 seeking an order that the garnishee order *nisi* made on 13th March 2020 be made absolute in terms of prayers 4 and 5 of the application. Mr. Njuguna, the applicant's counsel relied on the grounds in the application and the Replying Affidavit. He submitted that there is no dispute about the debt, and that no stay or appeal has been filed. He submitted that there is no contest that the garnishee holds the funds and urged the court to allow the prayers sought.

2. Mr. Mahinda, counsel for the garnishee submitted that they do not oppose the application. He relied on their replying affidavit of Gordon Winani dated 21st May 2020.

3. Mr. Wena, counsel for the Judgment-Debtor relied on the replying affidavit of Sharon Obonyo sworn on 4th June 2020 and argued that much as the Judgment-Debtor respects court orders, it pleads that if the order *nisi* is made absolute, the Judgment-Debtor will not be able to meet its obligation because the money had not been budgeted for. He argued that the Judgment-Debtor is a public organ and it risks being crippled. He submitted that the money held by the Garnishee belongs to the Judgment-Debtor and all they need is to comply, hence, the question of the garnishee's costs does not arise

4. I find it useful to start by referring to the definition the word garnishee proceedings in the *Black's Law Dictionary*^[1] which is: - "a statutory proceeding whereby a person's property, or credit in possession or under control of, or owing by, another are applied to payment of former debt to third person by proper statutory process against debtor and garnishee."

5. The Nigerian Supreme Court in *C.B.N. v Auto Import Export*^[2] offered an explanatory yet concise definition of garnishee proceedings in the following words:

"Garnishee proceedings are special specie of process by which a judgment creditor may attach (or garnishee) debts due in satisfaction of the judgment debt. The debt owed by the third party to the judgment debtor, on being attached, shall ultimately be paid by him to the judgment creditor on the order of court. Thus, garnishee proceedings involve the attachment of debt due from a third party to the judgment debtor, and the use of the amount of that debt in liquidating the judgment debt. In garnishee proceedings, the third party indebted to the judgment debtor is called the garnishee. The judgment creditor, on the other hand, is referred to as the garnishor."

6. Garnishee proceedings serve to facilitate the satisfaction of judgment debts. Garnishees, in this regard, often have no objections to garnishee orders being made final, so long as there is a discernible debt due and owing to the judgment debtor; once such indebtedness is established, it is inconsequential to the garnishee who the debt is paid to. However, garnishee orders are premised on indebtedness – without such indebtedness to the judgment debtor, it would be plainly unjust to order a party to pay a sum to the judgment creditor.

7. In The term execution has not been defined in the Civil Procedure Act.^[3] The expression “execution” means enforcement or implementation or giving an effect to the order or judgment passed by the court of justice.^[4] Simply execution means the process for enforcing or giving effect to the judgment of the court.^[5] Execution is the enforcement of decrees and orders by the process of the court, so as to enable the decree-holder to realize the fruits of the decree.^[6] The execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by the judgment, decree or order.

8. In *Kenya Bureau of Standards v Geo Chem Middle east*^[7] I had the occasion to address an application of this nature. I find it fitting to recall much of what I stated in the said case. *One*, when a party receives a judgment in his favour, he is entitled to enforce the judgment if the other party fails to comply with its terms. *Two*, the Civil Procedure Act^[8] provides for the enforcement of judgments and orders. Specifically, Order 22 provides for Execution of Decrees and Orders while order 23 provides for Attachment of Debts. As the Supreme Court of India observed in *Ghanshyam Das v Anant Kumar Sinha*,^[9] “so far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all aspects.” *Three*, the numerous rules of the Civil Procedure take care of different situations providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors, as the case may be. However, in rare and exceptional cases, where provisions are rendered incapable of giving relief to an aggrieved party, the answer is a regular suit in the civil court.

9. A reading of Order 23 of the Civil Procedure rules shows that it comprises of self-contained provisions which are distinct and independent of Order 22. It prescribes two steps in Garnishee proceedings. The first is a Garnishee Order *nisi*. *Nisi* is Norman-French. It means ‘unless.’ It is an order to the bank communicating that unless there is some sufficient reason why the bank should not pay the decree, it will be required to pay money held in the Judgment Debtor’s account. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to the creditor might be unfair by preferring him to other creditors.^[10] If no sufficient reason appears, the garnishee order is made absolute, to pay to the Judgment-Creditor, or into court, whichever is more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if the Judgment-Debtor directed the bank to pay it.

10. 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.^[11] The money at the bank is then said to be ‘attached,’ 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.

11. A garnishee order *nisi* binds the debt in the hands of the garnishee. The rule operates as soon as the garnishee order *nisi* is served on the garnishee. By the same order or the subsequent order, the court may order the garnishee to appear before the court to show cause why he or she shall not pay to the decree holder the debt due from him or her to the judgment debtor or so much of the debt as may be sufficient to satisfy the decree with costs. The garnishee order *nisi* is also served on the Judgment-Debtor. Where the garnishee does not dispute the debt due or claimed to be due from him or her to the Judgment-Debtor or if he or she does not appear upon the day of hearing named in the garnishee order *nisi*, the court may order execution against the goods of the garnishee together with the costs of the garnishee proceedings. Where the garnishee disputes his or her liability, the court, instead of making an order that execution be levied, may order that the issue or question necessary for determining his or her indebtedness should be tried and determined. The garnishee may suggest or advance the argument that the debt sought to be attached belongs to a third party. Subsequent to that, the court may order the third-party to appear and be heard.

12. As stated above, Order 23 is a self-contained rule and prescribes its own procedures. There is no provision under Order 23 requiring a Notice to Show Cause to Issue. The only requirement under Order 23 Rule 1 is the existence of an unsatisfied decree, the amount and another person is indebted to the Judgment-Debtor. There is no argument before me suggesting that the procedures laid down in Order 23 have been not been followed. The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with. The decree must be allowed to be executed, and unless an extraordinary case is made out, no stay or setting aside should be granted.

13. A litigant is entitled to reap the fruits of his successful litigation. As a result, where a Judgment-Debtor fails to comply with the terms of a judgment, the Judgment-Creditor is entitled to enforce such judgment by adopting a suitable procedure provided under the law. By the process of garnishee, the court has power to order the garnishee to pay directly the sums it owes the Judgment-Debtor to the garnishor or so much of it as may be sufficient to satisfy the amount of the judgment and the cost of the garnishee proceedings. In this regard, the provisions of Order 23 Rule 4 provide with sufficient clarity what this court should do where the Garnishee admits the debt as in this case.

[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.

14. The above provision is explicit where the debt is not disputed. The Garnishees admitted the claim in its affidavit sworn by Gordon Winani dated 21st May 2020. It not only confirmed the credit balances in the accounts but it also attached Bank Statements in support thereof. The garnishee confirmed willingness to comply with this court’s orders. Consistent with the provisions of Order 23 Rule 4 of the Civil Procedure Rules, 2010, I find absolutely no bar either legal or equitable preventing this court from invoking the provisions of Order 23 Rule 4.

15. Accordingly, I order that the Garnishee Order *Nisi* made on 13th March 2020 be and is hereby made absolute. Execution be and is hereby issued against the Garnishee directing it to pay the amounts in account numbers 111xxxxxxx and 112xxxxxxx, so much thereof towards the satisfaction of the decree and costs of these Garnishee proceedings. The Garnishee shall recover its costs from the sums in the said accounts.

The Judgment-Creditor shall recover the costs of these garnishee proceedings from the said accounts.

Orders accordingly

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY, 2021

JOHN M. MATIVO

JUDGE

Delivered electronically via e-mail

[1] Bryan Garner, 5th Edition, p. 612.

[2] {2013} 2 NWLR (Pt. 1337) 80 p. 126 paras. E – F

[3] Cap 21, Laws of Kenya.

[4] Halsbury's Laws of England (4th ed.) Vol. 17 at p. 232.

[5] Overseas Aviation Engineering, In re, (1962) 3 All ER 12.

[6] Ghanshyam Das v. Anant Kumar Sinha, AIR 1991 SC 2251.

[7] Misc Cause No. 455/2015.

[8] Cap 21, Laws of Kenya.

[9] Ghanshyam Das v. Anant Kumar Sinha, AIR 1991 SC 2251.

[10] 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.

[11] see Joachimson v Swiss Bank Corpn [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ.