REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT SIAYA

MISCELLANEOUS CIVIL SUIT NO. 5 OF 2020

PATRICK L. OTIENO OYOO T/A

OTIENO OYOO & COMPANY ADVOCATES.....PLAINTIFF/1ST RESPONDENT

VERSUS

AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....DEFENDANT

AND

DIAMOND TRUST BANK KENYA LIMITED.....GARNISHEE/APPLICANT

AND

OSCAR ODONGO T/A ODONGO INVESTMENTS.....2ND RESPONDENT

RULING

Introduction

1. This ruling determines two applications brought by the Garnishee Applicant herein, Diamond Trust Bank Limited. The first is an application dated 27.4.2021 seeking for setting aside of exparte Garnishee proceedings against it while the second application is dated 4th May 2021 seeking for orders to cite and punish the 1st Respondent and 2nd Respondent for contempt of court orders.

2. The first application dated 27th April 2021 is brought under the provisions of Order 12 Rule 7, Order 51 of the Civil Procedure Rules as well as sections 1A, 1B & 3A of the Civil Procedure Act in which the Garnishee/Applicant seeks the following orders:

i) Spent;

ii) Spent;

iii) That this Court be pleased to set aside the ex-parte proceedings taken and the garnishee order absolute issued against the Garnishee and all the consequential proceedings thereafter;

iv) That this Honourable Court be pleased to order that the hearing of the garnishee application filed by the Plaintiff against the defendant be allowed to commence de novo and the garnishee be granted leave to file suitable Replying Affidavit;

v) That the costs of this application be borne by the Plaintiff.

2. The second application is dated 4.5.2021 and is brought under Order 52 Rule 3(1) of the Rules of the Supreme Court of England and Section 5(1) of the Judicature Act. In that application, the Applicant/ Garnishee seeks the following orders:

i) That the Honourable Court be pleased to find that Messrs. Patrick Otieno Oyoo t/a Otieno Oyoo & Company Advocates and Oscar Odongo t/a Odongo Investment Auctioneers are in contempt of court for disobeying the order issued by this Honourable Court on 3 May 2021;

ii) That the Honourable Court be pleased to issue the following Orders against the Respondents for deliberately defying and

disobeying the Order issued by the Honourable Court on 3 May 2021;

iii) An Order that the Honourable Court be pleased to find that the Messrs Patrick Otieno Oyoo t/a Otieno Oyoo t/a Otieno Oyoo & Company Advocates and Oscar Odongo t/a Odongo Investment Auctioneers are in contempt of court for disobeying the order issued by this Honourable Court on 3 May 2021;

iv) An Order summoning the Respondents Messrs. Patrick Otieno Oyoo t/a Otieno Oyoo t/a Otieno Oyoo & Company Advocates and Oscar Odongo t/a Odongo Investment Auctioneers to appear in court to explain to this Honourable Court why they ignored a lawful order of the High Court;

v) An Order that Messrs Patrick Otieno Oyoo t/a Otieno Oyoo t/a Otieno Oyoo & Company Advocates and Oscar Odongo t/a Odongo Investment Auctioneers be fined Kshs. 2,000,000/= and that the same be paid to court forthwith;

vi) An Order that property belonging to Messrs. Patrick Otieno Oyoo t/a Otieno Oyoo t/a Otieno Oyoo & Company Advocates and Oscar Odongo t/a Odongo Investment Auctioneers be attached to the extent of such value as this Honourable Court may direct; and

vii) An Order that Messrs. Patrick Otieno Oyoo t/a Otieno Oyoo t/a Otieno Oyoo & Company Advocates and Oscar Odongo t/a Odongo Investment Auctioneers be committed to and/or detained in prison for a term of six (6) months;

viii) That the costs of and incidental to the Application be provided for;

ix) That there be liberty to apply;

x) That the cost of this Application be borne by the Respondents.

Applicant's /Garnishee's Case in the Application Dated 27.4.2021

3. It is the applicant's case that they seek to stay the execution of warrants of attachment dated 21.4.2021 and the proclamation issued by the firm of Odongo Investment Auctioneers and further have the ex-parte proceedings and the garnishee order absolute issued against the garnishee set aside.

4. The applicants further state that they are unaware of any proceedings which would give rise to the warrants of attachment as they were not served by the plaintiff with the garnishee application, the garnishee order nisi, hearing notice or any other pleading only to have their Kisii Branch served with warrants of attachment claiming Kshs. 2,902,450 and Auctioneer's fees of Kshs. 367,560.

5. It was their case that the applicant was never a party to the dispute between the plaintiff- decree holder and the defendant- judgment debtor and thus the garnishee order absolute was allowed irregularly without service of pleadings or on defective service of pleadings contrary to Order 23 Rule 1(2) of the Civil Procedure Rules and as such the execution being levelled against the Garnishee was illegal, void and ought to be set aside. Further, the Garnishee further stated that they stand to face extreme prejudice because the amount claimed by the plaintiff is substantial yet the Garnishee was not a party to the dispute between the plaintiff and the defendant.

6. In support of their application, Jennifer Thiga the applicant's legal officer swore an affidavit on the 27.4.2021 in which she deposed that the garnishee was shocked when at its Kisii Branch, on the 21.4.2021, it received warrants of attachment claiming Kshs. 2,902,450 and auctioneers' fees of Kshs. 367,560 despite the fact that they were aware there were no proceedings that could have given rise to such execution.

7. She further deposed that on checking the bank records, she was unable to find any garnishee application, order nisi or indeed any pleadings served on the bank by the plaintiff, an indication that these proceedings were not brought to the applicant's attention.

8. Ms. Thiga further deposed that notwithstanding the lack of service, the plaintiff had misled the court and obtained a garnishee order absolute contrary to Order 23 Rule 1 (2) of the Civil Procedure Rules and proceeded to commence execution against the Bank without serving it. She further stated that it is only just and in the interest of justice that the Bank be given an opportunity to show whether the defendant's accounts have money and whether it has a claim to the said monies failure of which it amounts to condemning the bank unheard contrary to rules of natural justice.

9. On the 20.9.2021, one Francis Kariuki swore a further affidavit to the application dated 27.4.2021. It was deposition that on the 18.11.2020, the High Court in Nairobi HC COMM. Insolvency Petition No. E004 of 2020 – Elizabeth Wawira Kariithi & 5 Others v Africa Merchant Assuarance Company Limited, issued a liquidation order, the effect of which was to bar commencement of any execution proceedings against the defendant herein.

10. It was his deposition that as a result of the aforementioned liquidation order, the execution proceedings before this court were void ab initio and further that the garnished accounts were no longer under the control and management of the defendant or applicant herein but under the liquidator. He further deposed that the garnishee ought to be granted an opportunity to respond to the garnishee application.

1st Respondent/Plaintiff's Case

11. Opposing the application by the Garnishee, the plaintiff decree holder filed a replying affidavit sworn on the 21.5.2021 in which he

deposed that the Garnishee Order dated 12.4.2021 and the Notice of Motion application dated 23.3.2021 were served upon the applicant and a return of service by one Brazhnev Ochieng Ang'wech filed and that the applicant through their lawyer Jennifer Thiga had not denied receiving the said email on the 12.4.2021 or existence or ownership of the email address ALLBUSERS@dtbafrica.com which the plaintiff deposed belongs to the Manager of the applicant's Capital Centre branch with whom he had communicated.

12. Mr. Otieno Oyoo further deposed that on 3.5.2021 at 3.12pm he received a call from one Francis Kariuki, a legal officer employed by the applicant/Garnishee who sought to have the applicant's attached goods released on condition that the applicant would pay the plaintiff Kshs. 1,500,000, being half of the decretal sum, and a further Kshs. 350,000 Auctioneer charges which conditions were settled by the applicant on the 4.5.2021.

13. The plaintiff/ decree holder further deposed that the applicant subsequently reneged on the compromise and refused to pay the plaintiff the outstanding balance of Kshs. 1,402,000. It is his case therefore that in view of the compromise reached by the parties herein and the payment of Kshs. 1,500,000 by the applicant to the plaintiff, the suit herein stands compromised under the provisions of Order 25 Rule 5 of the Civil Procedure Rules and thus the court ought to record the compromise.

14. The plaintiff further deposed that he was not opposed to having the ex-parte orders set aside but only on condition that the applicant pays the balance of the decretal sum of Kshs. 1,402,450 and have it deposited in a joint interest earning account in the names of the Counsel for the applicants and himself.

Applicant's Case in the Application dated 4.5.2021

15. The Garnishee applicant asserts that vide a Certificate of Urgency heard on the 3.5.2021, they were granted interim orders staying any further execution until the hearing date of 5.5.2021, which orders were issued at around 11.30am by F. Ochieng J sitting in Kisumu as the High Court Judge in Siaya was undoubtedly on leave.

16. The applicant states that at around 2.30pm, the 2nd respondent acting on the 1st respondent's action proceeded to execute warrants of attachment against the applicant at its Kisii Branch despite being informed and shown that there was an order staying execution issued by the Court.

17. It is the applicant's case that in an effort to secure its tools of trade which had sensitive customer information and which had been seized by the 2nd respondent, it paid Kshs. 1,500,000 in two cheques of Kshs. 750,000 each to the 1st respondent and Kshs. 350,000 to the 2nd respondent.

18. The applicant states that the respondents' wilful disobedience of the High Court Order had brought the Honourable Court into ridicule, odium and disrepute and that the said actions were unjustifiable and painted the High Court as weak, powerless and ineffective.

19. It is further stated that the 1st respondent whilst being fully aware of a liquidation order barring execution proceedings against the defendant/judgement debtor, proceeded to pursue and acquire a garnishee order absolute against the applicant which they subsequently executed.

20. The applicant stated that the 1st respondent's contempt was further compounded by the fact that the 1st respondent was an unqualified person within the meaning of Section 9 (c) of the Advocates Act for failure to obtain a practising license for the years 2019, 2020 and 2021.

21. The applicant's application was supported by the verifying affidavit of Jennifer Thiga sworn on the 4.5.2021 who reiterated the assertions in their application and further stated that the 1st respondent's actions of obtaining a garnishee order absolute and executing the same while having knowledge of the existence of the existence of the liquidation order against the defendant/judgement debtor amounted to further contempt of court.

22. The application was similarly supported by the verifying affidavit sworn on the 4.5.2021of Joel Wesonga, the Branch Manager of the applicant's Kisii Branch. It was his deposition that during the attachment by the 2nd respondent, he informed him of the existence of the stay of execution order and the 2nd respondent responded by stating he would stop execution if he was shown the order. He further stated that he managed to get the handwritten order from the Bank's legal department at about 2.43p.m. and showed the same to the 2nd respondent who refused to stop execution stating that he was executing an order issued in Siaya Senior Principal Magistrates Court Case No. E026 of 2021 that amounted to a break-in order.

23. He further stated that he informed the 2nd respondent that the High Court order superseded the Magistrate's Court order to which the 2nd respondent became more belligerent and proceeded with his attachment before leaving at about 3.00p.m.

24. Mr. Wesonga further deposed that the following day, the 2nd respondent returned some goods and collected two cheques of Kshs. 750,000 and one of Kshs. 350,000, which payment had been made by the Bank as the goods attached were tools of trade with sensitive customer information. He further stated that he was aware that the respondents were served with a copy of the Court Order via e-mail on the 3.5.2021 which they acknowledged receipt but proceeded to ignore in an attempt to steal a match on the Bank.

25. He further deposed that a break-in order is only issued in instances where the auctioneer has reason to believe that it will be necessary to break into the debtor's premises, where he fears intimidation by the debtor or where there is likely to be breach of peace which conditions did not exist in the instant case and thus the respondents sought to gain an unfair advantage over the applicant.

26. It was further deposed that the actions by the respondents were unconscionable, unjustifiable and a clear violation of the High Court's order and had plunged the applicant's Branch into an inoperable state.

27. On the 28.6.2021, one Francis Kariuki, a legal officer working for the applicant swore a further affidavit asserting that on the 3.5.2021 he received a call from the Kisii Branch Manager indicating that the 2nd respondent had refused to heed the stay of execution orders issued by the court and was proceeding with attachment of the Bank assets which would have the effect of paralysing Bank operations for the coming days.

28. He further deposed that he then called the 1st respondent after getting his number from the 2nd respondent and sought to have the bank deposit the decretal sum in court which the 1st respondent rejected as he wanted to be paid the decretal sum, which the bank was coerced into doing so as to ensure its operations proceeded the following day. He stated that the 1st respondent was paid Kshs. 1,500,000 and the 2nd respondent Kshs. 350,000.

29. Mr. Kariuki further deposed that the 1st respondent was well aware of the attachment proceedings by the 2nd respondent as well as the stay of execution orders as he was served with the stay of execution orders at 2.47pm and further called by Mr. Kariuki at 3.24pm and later in the evening at around 7.24pm. He further deposed that the 2nd respondent was an agent of the 1st respondent and thus the 1st respondent was liable for any acts or omissions committed by the former.

30. Mr. Kariuki further deposed that the applicant did not place the matter surreptitiously before Hon. Justice Ochieng but rather that the learned judge was the duty court when the certificate of urgency dated 28.4.2021 was filed. He further stated that the applicant did not compromise the matter in any manner but rather was coerced into paying the respondents so as to recover the sensitive information contained in the computers and other equipment taken from the Branch premises.

31. He further deposed that they had since established that the1st respondent was not licensed to carry out law practice in the years 2019, 2020 and 2021 as was evidenced by a letter from the Law Society of Kenya dated 7.5.2021.

32. Mr. Kariuki further deposed that via a ruling delivered by Hon. Justice Ochieng on the 4.5.2021 in Kisumu HCCC Misc. Application No. 33 of 2020, the Judge reiterated that once a liquidation order is issued, all execution is void. He further stated that the respondents were at all material times geared to circumvent the law and compel the Bank to pay the decretal sum despite the existence of the liquidation order which they were aware of.

33. Mr. Kariuki reiterated that the actions by the respondents had brought the court into ridicule and odium and urged the court to move to assert its authority so as to enforce obedience of its orders.

34. Mr. Wesonga swore a further affidavit on the 9.8.2021 in support of the applicant's application in which he stated that the CCTV footage produced as "NM1" showed Senior Sergeant Nyangeri and the 2nd respondent at the Kisii Branch where he asserts he informed them of the existence of the court order at 2.43p.m. at which point they were still in the bank contrary to their allegations. He further stated that the CCTV footage showed that 2nd respondent and his team left the Bank premises at 3:01:17pm and as such the Notification of Sale dated 3.05.2021produced by the 2nd respondent was fake.

35. Mr. Naftali Mwangi, the Head of Security, Fraud and Forensic Investigation also swore a further affidavit in support of the application dated 4.5.2021 in which he stated that he was the custodian of the CCTV footage from the applicant's various branches and proceeded to produce CCTV footage of the material date as "NM1" to support the events that took place on 3.5.2021.

36. It was his deposition that he talked to the officer in charge of the execution process and informed him of the existence of the stay order however the said officer insisted on seeing a written order so as to stop the execution. He further stated that he was aware that the handwritten order by the Judge was sent to Mr. Wesonga who showed it to the police officers as well as the 2nd respondent but the same was disregarded. He further stated that the CCTV footage showed that the 2nd respondent was done with attachment and left the bank premises at 3:01:17p.m.

The 1st Respondent's /Plaintiff's Case

37. Vide his replying affidavit sworn on the 17.5.2021, the 1st respondent whilst giving a chronology of the events of the 3.5.2021 deposed that the handwritten order of Justice F. Ochieng given on the 3.5.2021 was send to him via e-mail on the same date at 4.34pm but that he only saw it at 8.45am the following morning. He further stated that he is yet to be served with the extracted order.

38. He further deposed that he had previously communicated with the applicant's advocates particularly one Ms. Faith Wanja Mungai and that the applicant's advocate had his contact and as such expected the applicant's advocate to address him personally on the issue of contempt.

39. He further stated that the applicant's advocates were engaged in dishonourable conduct and sharp practices unbecoming of advocates for having failed to obtain stay orders before this court vide their Certificate of Urgency of 27.4.2021, and instead, they proceeded to have the matter placed before Justice F. Ochieng in Kisumu and obtained ex-parte orders which they served upon him on 3.5.2021 at 4.34pm by email together with the application but which he could only access the following day.

40. The 1st respondent further deposed that the applicant had conducted itself deceitfully and dishonestly in that having obtained the stay of execution orders at 11.30am on 3.5.2021, it chose to have one Francis Kariuki engage the 1st respondent in compromising the application dated 27.4.2021 by partially settling the decretal amount only to renege on settling the balance of Kshs. 1,402,450.

41. The 1st respondent further deposed that Kisumu HCCC Misc. Application No. 33 of 2020 was an active litigation between himself and the applicant that came to an end on the 4.5.2021 a day after the 1st respondent had obtained execution orders and he is thus at a loss as to why he had to refrain from executing a valid decree from another court of competent jurisdiction.

42. In the circumstances, it is the 1st respondent's case that the applicant's application for committal for contempt of court has no merit, is driven by bitterness and an attempt to settle scores and should be dismissed with costs.

2nd Respondent's /Auctioneer's Case

43. In opposition to the application dated 4.5.2021, the 2nd respondent filed an undated replying affidavit that was filed in court on the 29.6.2021 that he went to the applicant's Kisii Branch to execute warrants just before 2pm and was done by 2.07p.m. and as such it was evident that the applicant was misleading the court on the time when he seized the property in execution of the warrants of attachment.

44. It was his deposition that allegations that he failed to leave an inventory or notification of sale as required by law were hearsay by Ms. Thiga as she was not at the Kisii Branch to witness the events. He further stated that his telephone number was on the proclamation served upon the applicant on the 21.4.2021 and the applicant was thus free to send the untyped order immediately it was issued as opposed to sending it via e-mail after he had already seized the property and carted them away. He further reiterated that he received no court order from Mr. Wesonga, the Branch Manager and that the first conversation of the same was by way of e-mail from one Faith Wangui.

45. Mr. Odongo further deposed that the police manning the bank would not have allowed him to attach the Bank's property if there was an order of stay of execution and similarly, the officers accompanying him would have not done so if they were in doubt as to whether the 2nd respondent was doing the right thing. He further stated that he was out of the applicant's premises before 3.00p.m. and was thus at a loss as to why the applicant opted to settle the judgement debt. It was his case that the contempt proceedings herein ought to have been filed at Kisii.

46. In support of the 2nd respondent's case Senior Sergeant Fredrick Nyangeri No. 74348 of the Kenya Police stationed at Kisii Central Police Station swore an affidavit on the 23.6.2021 and the same was filed in court on the 29.6.2021 in which he stated that on 3.5.2021 he was informed by the O.C.S to verify with the Siaya Law Court the authenticity of an order made in Siaya CMCC Misc. Application No. E026 of 2021 which he managed to do after receiving an email from the Siaya court slightly past 1p.m.

47. It is his deposition that he led the operation of executing the said order and when they arrived at the bank, the branch manager Mr. Joel Wesonga informed them that there was an order of stay issued on 28.4.2021 but when presented with the said order, he realized that it belonged to a different matter namely Kisii HCC Misc. Application No. 140 of 2019. He stated that he informed Mr. Wesonga that he was executing a different order issued in Siaya HCC Misc. Application No. 5 of 2020 vide security orders issued in Siaya CMCC Mic. Application No. E026 of 2021.

48. Senior Sergeant Nyangeri further deposed that Mr. Odongo carried out his attachment and they left the bank without being served with any order of stay and that the only communication they received during that time was from the Bank's head of security who threatened him to withdraw the security or else he would report him to the Inspector General of Police.

49. He further reiterated that Mr. Odongo was not served with any order of stay during the exercise and that it was thus malicious to insinuate the same.

Applicant's /Garnishee Submissions on the application to set aside ex-parte Garnishee proceedings dated 27.4.2021

50. It is submitted that the provisions of Section 89 of the Civil Procedure Act and the provisions of Order 12 Rule 7 of the Civil Procedure Rules apply also to applications made during the pendency of a suit and that this court had the inherent powers to make orders to further the ends of justice. Reliance was placed on the Court of Appeal case of **Commissioner of Income Tax v Kencell Communications Limited [2013] eKLR** where the court held *inter alia* that the court's discretion to set aside an ex-parte judgement or order was intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person seeking to deliberately obstruct or delay the course of justice.

51. The applicant further relied on the case of **Samuel Muchiri wa Njuguna & 6 Others v The Minister for Agriculture [2013] eKLR** where Havelock J. reiterated the Court of Appeal holding in the Commissioner of Income Tax supra case and further stated *inter alia* that in considering whether or not to set aside a dismissal order in default, the judge has to consider the matter taking into consideration all the facts and circumstances both prior and subsequent and of respective merits in setting aside and varying the order.

52. It was the applicant's submission that it was not served with the garnishee application and only became aware of the proceedings undertaken and the Garnishee Order absolute issued after the same was served on the 30.11.2017. It was further submitted that service as alleged to be effected by the 1st respondent was ineffective and non-existent as the 1st respondent failed to demonstrate where he obtained the email address he claimed to have used to serve.

53. The applicant further submitted that it had raised triable issues that ought to be allowed to be canvassed. Reliance was placed on the Court of Appeal decision in **Amayi Okumu Kasiak & 2 Others v Moses Okware Opari & Another [2013] eKLR** where the Court held that a defendant only has to produce an affidavit of merit demonstrating the defence that they seek to raise.

54. The applicant further submitted that the fact that there was liquidation proceedings and order against the judgement debtor, the provisions of the Insolvency Act in Sections 430 and 432 voiding all execution instigated against the assets of the company after the commencement of liquidation as was held in the case of **Ndane Construction Company Limited v Spencon Kenya Limited [2016] eKLR.**

55. The applicant submitted that the existence of liquidation proceedings constituted a bona fide issue that the applicant ought to be given an opportunity to defend in the garnishee application. Reliance was placed on the case of **K-Rep Bank Limited v Inclusive Agencies Mombasa & 2 Others [2013] eKLR** where Kasango J held inter alia that in such cases the more important issue is whether the defendants have shown a bona fide defence with triable issues in which case the same ought to be allowed to proceed to hearing and final determination on merit.

56. The applicant submitted that they had identified a triable issue and thus ought to be allowed to contest the garnishee application and if the court found that service was properly done by the 1st respondent, they were willing to pay reasonable thrown away costs as to be determined by court.

Applicant/Garnishee Submissions on the Application for Contempt of Court dated 4.5.2021

57. It was submitted that the terms of the stay of execution order issued on 3.5.2021 were clear and unambiguous hence were binding on the respondents. It was further submitted that the respondents were fully aware of the existence of the aforementioned court order having been duly notified by the applicant's Branch manager Joel Wesonga at the Kisii Branch and further as they were served with the order via e-mail dated 3.5.2021 on the same day at 2:47p.m. The applicant submits that the 2nd respondent admitted that he was served with order in his undated replying affidavit filed in court on the 29.6.2021.

58. The applicant further submits that the 1st respondent was aware of the court order as he was notified via e-mail dated 3.5.2021 received at 2:47p.m. but chose to ignore the same rather than inform the 2nd respondent.

59. Reliance was placed on the case of **Basil Criticos v Attorney General & 8 Others [2012] eKLR** where Lenaola J. held interalia that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.

60. It was further submitted that the 2nd respondent was aware of the orders having been notified of the same on the material date of 3.5.2021 at 2:43p.m. via WhatsApp and further via e-mail at 2:47p.m. The applicant submitted that such service was sufficient taking into account the finding of the Court of Appeal in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where the court held *inter alia* that personal service is dispensed with where the person to be served was present when the order was made or is notified by telephone, email or otherwise.

61. It was submitted that the respondents acted in breach of the terms of the order which required no further execution to take place as they proceeded to attach the applicant's assets despite numerous instances of service of the order and further compelled the applicant to pay them part of the decretal sum and the entirety of the auctioneer fees.

62. The applicant further submitted that the respondents committed further contempt by knowingly making a false statement to the effect that they commenced the execution process at 2.00p.m. and finished it by 2.07p.m. which was disproved by the CCTV footage produced as "NM1" in the further affidavit sworn on the 9.8.2021 and filed on the same day by the applicant's head of security. It was thus submitted that the respondents were in contempt in breach of Rule 81.3 (5) (d) of the Civil Procedure Rules 1998 of the United Kingdom.

63. It was further submitted that the respondents' conduct of breaching the court orders issued on 3.5.2021 was deliberate, wilful and/or mala fide. The applicant submitted further that when informed of the orders they insisted on being given a copy which was availed to them by the Branch Manager only for the 2nd respondent to state that they were executing a breaking in order issued in Siaya SRMCC Misc. Application No. E026 of 2021.

64. The applicant submitted that breaking in orders issued by magistrate's courts were collateral proceedings to the main suit and thus stay proceedings applied similarly to breaking in orders and therefore by choosing to ignore the court order they acted deliberately and mala fides. Reliance was placed on the Shimmers Plaza Case supra where the court held interalia that obedience of court orders is not optional but mandatory and a person does not choose whether to obey a court order or not.

65. It was submitted that the respondents' conduct and intent was further demonstrated in their strong arm and blackmailing of the applicants by demanding to be paid half the decretal sum as well as the auctioneer fees despite their knowledge of existence of the court order.

66. It was submitted that the 1st respondent had not obtained a practicing licence for the years 2019, 2020 and 2021 and was thus unqualified to practice law. Reliance was placed on the case of Mohammed Ashraf Sadique & Another v Matthew Oseko t/a Oseko & Company Advocates [2009] eKLR where the court found the advocate in contempt of court for engaging in practice when unqualified to do so.

The 1st Respondent's Submissions on the application to set aside ex-parte proceedings dated 27.4.2021

67. It was submitted that after paying half the decretal sum of Kshs. 1,500,000 and auctioneer fees of Kshs. 350,000, the applicant reneged on settling the balance of Kshs. 1,402,450 when the matter came up before the court in Kisumu on the 5.5.2021 but subsequently paid the entire balance of the decretal sum and as such the garnishee proceedings had been fully compromised and the 1st respondent was no longer interested in pursuing the application dated 21.3.2021. He further submitted that he had been paid as follows:

a) ***15.4.2021 vide RTGS Kshs. 64,300***

b) 28.5.2021 vide RTGS Kshs. 300,000

c) 23.6.2021 vide RTGS Kshs. 500,472

d) 29.6.2021 vide RTGS Kshs. 474,944

68. It is the 1st respondent's submission that he informed the Court on the 29.6.2021 that he had been fully paid and requested that the garnishee proceedings be marked as fully settled but the applicant insisted on proceeding with their application and thus the applicant is asking the court to act in vain on a matter that has been settled. Accordingly, the 1st respondent submits that the court ought to mark the

garnishee proceedings as settled and dismiss the application dated 27.4.2021.

1st Respondent/ Plaintiff's Submissions on the Application for Contempt of Court dated 4.5.2021

69. It was submitted that the applicant has failed to show that the court order dated 3.5.2021 purported to be served upon him was clear and unambiguous and binding on him as the emails of Faith Wangui dated 3.5.2021 sent at 3.23p.m. and 4.34p.m. with the attached handwritten order was not certified as a true copy of the original as required by sections 79, 80 and 81 of the Evidence Act.

70. The 1st respondent submitted that it was not contested that the order was issued by this court on the 3.5.2021 but that the applicant ought to have extracted the same and have it signed and sealed before serving the same on the respondents and that no explanation by the applicant had been given as to why this was not done.

71. It was submitted that the applicant has presented no evidence in support of their allegations that the 1st respondent was served with a copy of the court order dated 3.5.2021 and further that the applicant has failed to define precisely the actions the 1st respondent perpetrated in furtherance of breach of the aforementioned court order.

72. It was submitted that allegations of blackmail as raised by the applicant against the 1st respondent are preposterous as it was the applicant's legal officer, David Kariuki who engaged the 1st respondent in out of court negotiations that resulted in the payment of Kshs. 1,500,000 to the 1st respondent.

73. The 1st respondent further submitted that the 2nd respondent is an auctioneer duly appointed by the court to execute warrants of attachment by court and thus it was a misconception on the part of the applicant to deem the 2nd respondent to be an agent of the 1st and conclude that the 1st respondent could be held liable for any acts of omission or commission in exercise of his duties as an auctioneer.

74. On allegations that he did not have a practising certificate and was thus in contempt, the 1st respondent submitted that he was the decree holder in this matter and he was not barred from appearing in person. He further stated that section 31 (1) of the Advocates Act only bars an unqualified advocate from acting as an advocate in the name of any other person and not in his own cause.

75. The 1st respondent further submitted that the applicant's only recourse was to file a complaint before the Law Society of Kenya Disciplinary Committee as the acts complained about, if proved, would only amount to professional misconduct. The applicant thus urged the court to find that he was not in contempt of court and dismiss the application dated 4.5.2021.

The 2nd Respondent's Submissions on the Application dated 4.5.2021

76. It was submitted that the applicant's motion must fail as there was no service of any court order upon the 2nd respondent before the attachment but what happened was a mere information of the 2nd respondent of the existence of a court order. It was further submitted that the applicant has failed to explain why an order that issued at 11.30a.m. was not served on the 2nd respondent.

77. It was further submitted that the CCTV recordings adduced as evidence by the applicant do not aid the applicant's case as an auctioneer undertaking an attachment is not required to have a precise recording of what he does and when he does it. Further, it was submitted that the admission of the CCTV did not meet the criteria set out in section 106B of the Evidence Act that requires the computer to be working properly and as such ought to be disregarded.

78. It was submitted that the affidavit of Naftali Mwangi is full of conjecture and suppositions as he attempts to describe the people captured in the CCTV recording whereas he has never met them and he is not in a position to ascertain that they are indeed doing the things that he is alleging.

79. It was further submitted that the applicant has failed to satisfy the requirements for grant of an order of contempt of court as discussed by Mativo J. in the case of **Katsuri Limited v Kapurchard Depar Shah [2016] eKLR** and as such the application must fail with costs to the 2nd respondent.

Analysis & Determination

80. I have carefully considered the two applications, the supporting and further affidavits filed by the applicant/Garnishee and the opposing affidavits by the Respondents together with the rival submissions filed by all the parties affected in the two applications. I now proceed to determine the merits of each of the two applications separately.

The Application dated 27.4.2021

81. In this application, the applicant Garnishee seeks to set aside the ex-parte proceedings taken as well as the garnishee order absolute issued against it. It is their case that they were not served with the proceedings for the garnishee application and were not even party to the dispute between the 1st respondent and the defendant. They further state that they have a defence on merits with a triable case and ought to have their day in court. The reason given for the applicant's failure to respond to the garnishee proceedings is that they were not served.

82. Order 23 Rule 1 of the Civil Procedure Rules, 2010 on attachment of debts provides that:

> ***"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. Third, the above rule contemplates the existence of a decree for the amount claimed. Generally, Garnishee proceedings is done in two different stages.

83. Thus there are two stages involved in Garnishee proceedings. The first stage is for the garnishee order nisi to issue exparte upon receipt of an application by the decree holder 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.

84. 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.

85. 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.

86. 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.

87. The Garnishee, where necessary also has an option of disputing liability to pay the debt. 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.

88. I have perused the court record and observe that the 1st respondent obtained the exparte Garnishee Order Nisi which was issued on the 12.4.2021. The Garnishee Order Nisi issued by the court at paragraph 3 specifically provided that the garnishee does appear before the court on the 20.4.2021 to show cause why it should not release to the 1st respondent the funds sought from the judgement debtor/defendant.

89. Vide an affidavit of service sworn on the 14.4.2021 by one Brazhnev Ochieng Ang'wech, the process server used by the 1st respondent, at paragraph 3 he deposes that he served the defendant Judgment debtor and the applicant with the copies of the Garnishee Order Nisi, Notice of Motion, Supporting Affidavit and its annexures. The affidavit of service has not been disputed and neither has the Defendant or applicant sought to cross examine the process server on the same. It is thus clear from the aforementioned Affidavit of Service that service was effected upon the applicant/garnishee.

90. On the 20.4.2021, the Notice of Motion dated 23.3.2021 came up for hearing inter-parties before this court and upon hearing the 1st respondent in the absence of the applicant herein after the court had satisfied itself that the applicant and judgment debtor were duly served, the court proceeded to grant the 1st respondent a Garnishee Order Absolute, which order was issued and sealed on the same day of the 20.4.2021.

91. In my view, the applicant/garnishee clearly failed to challenge the Garnishee Order Nisi. It cannot blame the 1st respondent or this court for the orders made absolute in their absence since the first stage in garnishee proceedings, the order nisi is made exparte after which the decree holder is directed to serve the garnishee to appear and either admit or deny owing the judgment debtor any money.

92. The key issue for determination in this first application therefore is whether the applicant has met the *threshold* for setting aside an *ex-parte* order. The law on that subject is well settled. This court has wide and *unfettered* discretion to set aside an *ex-parte* order. See **Shah v Mbogo (No. 1) [1967] E.A 116, Mbogo and another v Shah [1968] E.A 93.**

93. However, and as succinctly captured by *Harris J*, in ***Shah v Mbogo (No. 1)*** [supra], the discretion-

"Is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"

94. See also ***Kimani v Mc Connell [1966] E.A 547, Patel v East African Cargo Handling Services [1974] E.A. 75, Magunga General Stores v Pepco Distributors Limited [1987] 2 KAR 89, CMC Holdings Limited v James Mumo Nzioki, Court of Appeal, Nairobi, Civil Appeal 329 of 2001 [2004] eKLR, Wachira Karani v Bildad Wachira, Nyeri HCCC No. 101 of 2011 [2016] eKLR.***

95. In addition, the court must heed to the overriding objective to do justice to the parties. See **Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, Stephen Boro Gitiha v Family Finance Bank & 3 others, Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.**

96. Order 12 Rule 7 of the Civil Procedure Rules 2010 provides that:

"Where under this Order judgement has been entered or the suit has been dismissed the court on application, may set aside or vary the judgement or Order such terms as may be just."

97. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J persuasively held that:

"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

98. The Supreme Court of India in **Civil Appeal 1467 of 2011 Parimal v Veena Bharti (2011)** observed that:

"Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently …"

99. I have already established herein above that the applicant/garnishee was duly served with the Garnishee Order Nisi, Notice of Motion, Supporting Affidavit and its annexures but failed to challenge the same. Neither did the applicant send a representative to attend the hearing of the same as earlier directed by the court in the order nisi. It was following the failure to respond to the application and Order nisi that this court issued order absolute giving rise to the execution process by the second Respondent Auctioneer.

100. Having failed at the first hurdle, I must explore whether the applicant has met the other requirements to satisfy this court exercising its discretion to set aside the ex-parte proceedings and subsequent order.

101. Before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider whether the applicant has any defence which raises triable issues. In **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P. stated:

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

102. Again in the case of **CMC Holdings Limited v James Mumo Nzioki [2004] eKLR**, the Court of Appeal stated:

"The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues." *(Emphasis theirs)*

103. In this case, the applicant claims that that on the 18.11.2020, the High Court in **Nairobi HC COMM. Insolvency Petition No. E004 of 2020 – Elizabeth Wawira Kariithi & 5 Others v Africa Merchant Assuarance Company Limited**, issued a liquidation order the effect of which was to bar commencement of any execution proceedings against the defendant herein a fact which was well within the knowledge of the 1st respondent herein prior to his institution of garnishee proceedings against the applicant and a fact that they would have and shall rely on in the case at a full trial. The question is whether this is a triable issue.

104. In my view, this is a triable issue as **Sections 428 (1), 430 & 431 (1) of Insolvency Act** provide interalia that once the Liquidation process commences then the execution process against the Company ought to halt and that proceedings leading up to execution against the Company are put on hold awaiting the finding on whether the liquidation order shall be issued and liquidator appointed or not. In this case, the applicant having acted for the Defendant and having been party to **Kisumu HC Miscellaneous Application No 33 of 2020 Patrick L. Otieno - Oyoo t/a Otieno Oyoo & Co. Advocates v Africa Merchant Assurance Co. Ltd; Diamond Trust Bank Kenya Limited (Garnishee) [2021] eKLR** where Ochieng J found execution proceedings to be void, had prior knowledge of the liquidation proceedings pending against the defendant judgment debtor and in the absence of any order setting aside the orders issued by Muigai J in the Nairobi **HC Commercial Insolvency Petition No. E004 of 2020 – Elizabeth Wawira Kariithi & 5 Others v Africa Merchant Assurance Company Limited,** the plaintiff decree holder herein who is an advocate of this court cannot feign ignorance whatsoever of the law and legal process. The decree holder could be forgiven for a moment if he was an ordinary person. Not the one in these proceedings. It was incumbent upon him to follow the procedure provided for in law to seek to execute any decree against an entity against whom liquidation proceedings had been commenced.

105. Furthermore, section 228 of the Companies Act provides:

"228. When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the Court may impose."

106. The defendant judgment debtor is a Limited Liability Company and it is now clear to this court that liquidation proceedings had been commenced against it in **High Court in Nairobi HC COMM. Insolvency Petition No. E004 of 2020 – Elizabeth Wawira Kariithi & 5**

Others v Africa Merchant Assurance Company Limited. Under Section 431 (2) of the Companies Act: ***"If the Court makes a liquidation order under section 534, the liquidation commences on the making of the order."***

107. In the instant case, the court has been made aware that a liquidation order was made on 18th November 2020, which matter was not within the knowledge of this court when it made the orders decree Nisi. Pursuant to Section 431(2), of the Insolvency Act, liquidation of the defendant commenced on 18th November 2020. That being the case, any execution proceedings pending had to be stopped and any person intending to sue the company under liquidation had to first seek leave of court and in so doing, join the liquidator as a party to the proceedings. This was not done in the present proceedings.

108. Finally, the discretion to set aside ex-parte proceedings must be exercised upon terms which are fair to both parties. In this case, the applicant asserts that it stands to suffer extreme prejudice as the amount claimed by the 1st respondent is substantial yet the applicant was not a party to the suit between the 1st respondent and the defendant. The applicant is further willing to provide thrown away costs. I do not find any prejudice that would be suffered by the 1st respondent if the applicant was granted the orders of setting aside the garnishee proceedings and further that if he were to suffer any prejudice, the same can be adequately remedied by an award of costs.

109. In the circumstances, taking all the above into consideration, it is my view that the applicant failed to offer sufficient explanation as to why it failed to attend to court on the 20.4.2021 when the Garnishee Order Nisi came up for hearing. The applicant's allegation that it was not served is not supported. However, the applicant raised a triable issue, that is, that the 1st respondent was barred from commencing any execution proceedings against the judgement debtor/defendant by virtue of the liquidation order issued by the High Court in **Nairobi HC COMM. Insolvency Petition No. E004 of 2020 – Elizabeth Wawira Kariithi & 5 Others v Africa Merchant Assurance Company Limited n 18th November, 2020.**

110. Taking into consideration the interest of promoting access to justice, and in view of the liquidation proceedings commenced against the defendant judgment debtor, I hereby vacate and set aside the Garnishee Order Absolute issued on the 20.4.2021. I say so because the Garnishee Nisi order is by its very nature made exparte and therefore this court would not set aside the exparte order whose effect was to merely alert the parties of the existence of the execution process being commenced through Garnishee proceedings.

111. I will however not make any orders as to refund of the amounts so far paid by the garnishee to the applicant as there was no prayer for such refund. In addition, I note that the 1st respondent admitted that he had been paid the full decretal sum and was no longer interested in pursuing the garnishee proceedings that he instituted vide application dated 23.3.2021. This position was confirmed by Mr. Lugano the advocate for the judgement debtor/defendant who further stated that he had proof of payment which he forwarded to the 1st respondent. However, Mr. Kisinga for the applicant informed the court that the applicant was compelled to pay Kshs. 1,500,000 from its own funds and so it needed proof of payment so that it can seek reimbursement. Since there is clear admission by the 1st respondent of receipt of the monies in question, there should be no difficulty in the Applicant Garnishee recovering its monies from accounts held on behalf of the defendant judgment debtor. Furthermore, the defendant and Garnishee having been served with Garnishee Order Nisi, they should have notified this court of the legal impediments identified herein before the Order absolute was made. Instead, they failed to respond to the Notice of motion and to challenge the order nisi even after being served with court process. **Ojwang, J** (as he then was) in **B v Attorney General [2004] 1 KLR 431** stated that:

> ***"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."***

112. In the circumstances of this case, it is my view that it would be in vain to order for refund of the monies paid as the main parties, the liquidation order against the defendant notwithstanding, have settled the matter as between themselves and the third party, the applicant/garnishee herein, only needs confirmation of payment from the respondents so as to be reimbursed by the defendant judgment debtor. Nothing prevents the garnishee from recovering its monies from the defendant which recovery, it has not been demonstrated, requires any court action.

The Application for contempt of court dated 4.5.2021

113. It is the applicant's case that the respondents are in contempt of court for proceeding with the attachment of its assets despite the fact that the respondents were informed of and shown a court order for stay of execution. The respondents both submit that they were not served with any order of stay but merely shown a handwritten order which was not certified or authenticated in any way by the court.

114. Courts have over time defined contempt of court in much more direct terms and for instance in **Stewart Robertson Vs H. M's Advocate, 2007HCA 63**, where Lord Justice Clerk stated:

> ***"Contempt of court is constituted by conduct that denotes willful defiance of a disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings."***

115. The **Black's Law Dictionary 9th Edition** defines contempt of court as

> ***"Conduct that defines the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment"***

116. This Court's authority is derived from Articles 1(3) (c) and 159(1) of the Constitution. The power of this Court to punish for disobedience of its orders is expressly provided for in section 36 (1) of the High Court (Organization and Administration) Act which

provides as follows:

> ***"(1) A person who –***
>
> ***(a) assaults, threatens, intimidates or willfully insults a judge, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;***
>
> ***(b) willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;***
>
> ***(c) within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;***
>
> ***(d) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;***
>
> ***(e) causes an obstruction or disturbance in the course of a judicial proceeding;***
>
> ***(f) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;***
>
> ***(g) publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;***
>
> ***(h) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;***
>
> ***(i) dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or***
>
> ***(j) commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.***

117. Section 39 (2) (g) of the Act enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made.

118. The law that previously applied in this regard was the Contempt of Court Act of 2016, until the decision of the High Court (J. Chacha Mwita) made on 9th November 2018 in **Kenya Human Rights Commission v Attorney General & Another, [2018] eKLR.** The said decision declared the Contempt of Court Act of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

119. In the circumstances, one is obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders**.** It was in this respect observed in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008,** that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

120. In addition, where there is a lacuna in the enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

121. The applicable law as regards contempt of court existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR**. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:

> ***"The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."***

122. This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

123. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served. It is noteworthy that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1,** and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

124. It is also the position, and it has been held in several judicial decisions, that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in **Kenya Tea Growers Association v Francis Atwoli & Others [2012] eKLR, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497,** and **Davy International Ltd vs Tazzyman (1997) 1 WLR 1256.**

125. The first issue for determination in the present application arising from the requirement of knowledge of the orders, is whether the Respondents were served with, or aware of the orders issued herein on 3.5.2021. It is worth noting that the applicant failed to annex copies of affidavits of service showing that the respondents were served with the court order issued on the 3.5.2021.

126. The applicant submitted that the 1st respondent was aware of the court order as he was notified via e-mail dated 3.5.2021 received at 2:47p.m. but chose to ignore the same rather than inform the 2nd respondent. In the affidavit deposed by Mr. Wesonga, the Branch Manager of the applicant's Kisii Branch on the 4.5.2021, Mr. Wesonga stated that he informed the 2nd respondent of the existence of the stay of execution order and the 2nd respondent responded by stating he would stop execution if he was shown the order. He further stated that he managed to get the handwritten order from the Bank's legal department at about 2.43p.m. and showed the same to the 2nd respondent who refused to stop stating that he was executing an order issued in Siaya Senior Principal Magistrates Court No. E026 of 2021 that amounted to a break in order.

127. Vide his replying affidavit sworn on the 17.5.2021, the 1st respondent deposed that the handwritten order of Justice F. Ochieng given on the 3.5.2021 was effected upon him through e-mail on the same date at 4.34pm but that he only saw it at 8.45am the following morning. He further stated that he was yet to be served with the extracted order. It was the 1st respondent's submission that the applicant had failed to show that the court order dated 3.5.2021 purported to be served upon him was clear and unambiguous and binding on him as it was not certified as a true copy of the original as required by sections 79, 80 and 81 of the Evidence Act.

128. Similarly, the 1st respondent submitted that it was not contested that the order was issued by this court on the 3.5.2021 but that the applicant ought to have extracted the same and have it signed and sealed before serving the same on the respondents and that no explanation by the applicant had been given as to why this was not done.

129. It is not in doubt that there was no personal service upon the respondents herein. Contempt proceedings carry drastic consequences against the cited persons and it is the Court's opinion that a presumption that the advocate informed the persons mentioned in the order about service or even the terms of the order cannot be relied on to find culpability against the cited persons. It was submitted by the applicant that the court order dated 3.5.2021 was served upon the 1st respondent on the 3.5.2021 and was effected upon him through e-mail on the same date at 4.34pm. The 1st respondent admitted that a handwritten copy of the order was sent to his email on the 3.5.2021 but that he only saw it at 8.45am the following morning.

130. Mr. Wesonga, the applicant's Branch Manager submitted that he got the handwritten copy of the order from the Bank's legal department on the 4.5.2021 at about 2.43p.m. and showed it to the auctioneer who was by then in the process of executing the warrants of attachment. The auctioneer, the 2nd respondent, submitted that he received an email with the handwritten copy of the alleged order at 2.47pm by which time he had completed his execution of the warrants of attachment.

131. In this court's view, an unsigned, unsealed, handwritten alleged Court order as relied on by the applicant/garnishee is not a valid court order as it is impossible to authenticate the same and it would be impossible in the circumstances to assume that both the respondents had judicial notice of the learned Judge's handwriting. Further, it is discernible from the pleadings herein that the applicant herein took no steps to extract the aforementioned order so as to serve on the alleged contemnors. It would, in my view, be setting a dangerous precedent if this court were to hold that some handwritten and unsigned or unsealed order is a valid order of the court especially where there is no explanation for the failure to cause such order to be signed and sealed under the hand of the Deputy Registrar of the Court, as was in this case.

132. There was even no affidavit of service filed in that regard and the Court finds that the details of that service were not established to the required standard in civil cases and especially in the more serious contempt proceedings which are quasi criminal and finding one guilty of contempt of court can lead to loss of personal liberty of that person. I have seen the authority relied on by the applicant/garnishee specifically the ***Basil Criticos Case (supra)*** where the High Court held interalia that where a party is proved to have knowledge of the order, such a party can still be committed for contempt notwithstanding that there was no personal service of the order. A similar holding can be found in the cases of **Emmanuel Waweru Lima Mathai –vs- HFCK & 4 others (2009) e KLR** and **Justus Wanjala Kisiangani & 2 others –vs- The City Council of Nairobi & 3 others (2002) e KLR**.

133. These decisions are persuasive. Moreover, each case must be considered on its own circumstances, a party who has obtained an exparte order of the court MUST ensure that they extract the same and have it signed and sealed by the Deputy Registrar and ensure that it is served upon the party against whom such an order has been issued. Where service is impersonal i.e by email, especially in these covid times, then time must be allowed for the party intended to be served upon to receive the order for compliance. Furthermore, this court observes that even service by WhatsApp is valid service. There is no reason why the applicant's counsel did not expeditiously send to the 1st respondent what he believed to be a valid court order, through Mr Otieno Oyoo's WhatsApp contacts since execution process had commenced on that very day.

134. The purpose for which contempt of court proceedings are initiated was well captured in. In the case of **Teachers Service Commission v**

Kenya National Union of Teachers & 2 others [2013] eKLR where Ndolo J observed that:

> ***"The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."***

135. This court in **Vimalkumar Bhimji Depar Shah & another v Stephen Jennings & 5 others [2016] eKLR** citing the above decision had this to say regarding contempt of court:

> ***"The Court further augments the above statement and concurs with it and says "I am of the same persuasion that the reason why power is vested in Courts to punish for contempt of Court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice McKean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise."***
>
> **……**as ***earlier stated , the rule of law obliges that court orders must be obeyed, for , court orders are not made in vain and if for good reason a party finds it impossible to comply with court orders, then such party or person is expected to seek clarification from the court and unless vacated, set aside or varied, court orders must be obeyed ."***

136. Contempt proceedings should not at all be commenced or entertained unless proper service of the order has been effected, or brought to the personal knowledge of the alleged contemnors. In this case, there is no evidence to demonstrate what hurdles the applicant had in extracting and ensuring that the order obtained exparte was sealed and signed by the Deputy Registrar of the court and served upon the Auctioneer who was already in the process of executing order absolute for the decree holder.

137. In my view, Personal Service or other direct mode of service like through WhatsApp should have been utilized and only be relaxed when it is shown to the satisfaction of the court that a party has made attempts to effect personal service but for some reason, such service was not possible. Iam aware that knowledge supersedes personal service but it must be demonstrated to the satisfaction of the court that indeed the alleged contemnor had knowledge of the court order and brazenly disobeyed it. This view is informed by the fact that contempt proceedings are akin to criminal proceedings. A person may be sent to prison and thereby lose his liberty for that offence. For that reason, it is very important that he is shown to have had notice of the order and ***had the opportunity to obey the same but failed to do so***.

138. In my view, knowledge is to be resorted to only when service has been attempted and has proved difficult either due to evasion by the party sought to be served or any other good reason, especially where the order was not obtained in the presence of the alleged contemnors of their counsel. As earlier stated, during this covid 19 pandemic period, there are other modes of direct service that can be employed including WhatsApp. Service by email is valid. However, there must be time and opportunity given to the alleged contemnor to obey the orders since it is not demonstrable that emails once send are accessed instant. Many people are tuned to their phones all the time and it is easier to prove service by WhatsApp as opposed to service by email. See the case of **Payless Car Hire and Tours Limited v Imperial Bank LTD [2012] eKLR.**

139. Further, whereas this court does appreciate that contempt or brazen disobedience of court orders is a serious offence against the administration of justice, as was stated by **Wilmot, J in Rex V Almon, 97 E.R 94** at page 100:

> ***"That arraignment of the justice of the judges, in the arraigning the King's justice: It is an impeachment of his wisdom and goodness in the choice of his judge, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken. It is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of judges, as private individuals; but because they are the channels by which the Kings justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has, for many ages found all over this kingdom, and which so eminently distinguishes s and exalts it above all nations upon the earth. In the moral estimation of the offence, and in every public consequences arising from it, what an infinite disproportion is there between speaking contumelious words of rules of the court, for which attachments are granted constantly, and cooly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the judges themselves. It seems to be material to fix the ideas of the words "authority" and contempt of the court" to spelt with precision upon the question.***
>
> ***By the word "court" I mean the judges who constitute it, and who are entrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Act of Parliament.***
>
> ***Contempt " of court' involves s two ideas: Contempt of their power, and contempt of their authority. The word " authority" is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and if enforcing obedience to it, in which sense it is equivalent to the word power; but by the word "authority". I do not mean that coercive power of the judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.***

…….it is not the coercive power of the court; but it is homage and obedience rendered to the court, from the opinion of the qualities of the judges who compose it; it is a confidence in their wisdom and integrity , that the power they have applied to the purpose for which is as deposited in their hands: that authority acts as the great auxiliary of their power, and for that reason the constitution gives them this compendious mode of proceeding against all who shall endeavour to impair and abate it, and therefore every instance of an attachment for contumelious words spoken of a rule of the court (of which there are great many) is a case in point to warrant an attachment on the present case where a rule of court is the object of the defamation and it would be a very strange thing that judges acting in the King's Supreme Court of Justice in West Minister Hall, should not be under the same protection as a bailiff's follower, executing the process which those judges issue. It is not their own cause, but the cause of the public which they are vindicating , at the instance of the public; for I do not think that courts of justice are to take their complaints up themselves; it must be left to his majesty, who sustains the person of the public, to determine whether the offence merits a public notice and animadversion; and in this state of the proceedings , they are only putting the complaint into a mode of trial, where the party's own oath will acquit him; and in that respect it is certainly a more favourable trial than any other; for he cannot be convicted if he is innocent, which, by false evidence, he may be by a jury; and if he cannot acquit himself, he is but just in and same situation as he would be in, if he was convicted upon an indictment or an information; for the court must set the punishment in one case as well as the other: they do not try him in either case: he tries himself in one case, and the jury try him in the other."

140. The outcome of contempt proceedings is a judgment and therefore a court of law ought not to render a judgment condemning a person without sufficient evidence being adduced as to the guilt of that person. See **Linnet V Coles [1986] 3 ALL ER 652 page 656 to 657**, Where Letters J & Lawton LJ stated that:

"Anyone accused of contempt of court is on trial for that misdeameanor and is entitled to a fair trial. If he does not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is not trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depend on the facts of each case whether justice requires a new one to be substituted. If there had been no fairness or no material irregularity in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, if necessary, so as to make it a just one."

141. For the above reasons, I do not find that any a good case has been made for finding and committing the alleged contemnors to civil jail. The other applicable legal principles on culpability for contempt of court are that no person will be held guilty of contempt for breach of an order, unless the terms of the order are themselves clear and unambiguous. See **Iberian Trust Ltd v Founders Trust and Investment Co. Ltd (1932) 2 KB 913** and reiterated in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR.**

142. Furthermore, if the court is to punish anyone for not carrying out its order, the order must in unambiguous terms, directing what is to be done or not to be done. It was held in **Radkin-Jones vs Trustee of the Property of the Bankrupt, (1965) 109 Sol. Jo. 334** that an order should be clear in its terms, and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain its precise obligation.

143. In the present application, the order alleged to be breached was given on 3.5.2021and issued on the same date as follows:

"That in order to safeguard the subject matter of the application, I direct that there shall be a stay of further execution until 05/05/2021 when the application comes up for inter parte hearing."

144. The terms of the order are in my view clear. The order was aimed at the respondents herein as the persons who were intent of executing warrants of attachment to recover monies held in the applicant's Kisii Branch. The only question is whether they breached the said order.

145. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15.**

146. On the applicable standard of proof required to establish such a breach, it was held by the Court of Appeal in the unreported case of **Mwangi H.C. Wanganui v Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. Likewise, it was held as follows by the Court of Appeal in **Woburn Estate Limited vs Margaret Bashforth** [**2016] eKLR:**

"We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that;

"A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him."

147. In the instant case it is beyond doubt that the court order issued on the 3.5.2021 was exparte and that had the order of 3.5.2021 been properly served on the respondents or brought to their knowledge as I have stated above, I would have found that respondents are culpable of disobedience of this Court's orders. However, there is no such proof of service of a duly signed and sealed order of the exparte order made by Ochieng J in Kisumu High Court and there is further no evidence that the contents of the order issued by the learned Judge were brought to the knowledge of the alleged contemnors/ respondents herein.

148. I further observe that the CCTV footage produced in court as evidence of what was happening during execution does not aid this court in determining what exactly transpired at the material time. I have seen the still photos of the Garnishee's banking hall, the outside where there is a lorry parked and people and vehicles passing by. The 2nd respondent is not known to this court personally and therefore I was not able to tell who he is in any of the footage. There is nothing useful in that CCTV footage to demonstrate contempt or even service of a court order in issue which I have found was not a signed and sealed order of the court capable of enforcement or implementation.

149. It was further submitted by the applicant that the 1st respondent's failure to take out a practicing certificate for the pendency of the proceedings herein amounted to contempt of court. In response, the 1st respondent submitted that he was the decree holder in the matter and thus not barred from appearing in person and also that section 31 (1) of the Advocates Act only bars an unqualified advocate from acting as an advocate in the name of any other person and not in his own cause.

150. Section 2 of the Advocate's Act defines an "advocate", as *"any person whose name is duly entered upon the Roll of Advocate, or upon the Roll of Advocates having the rank of Senior Counsel and…includes any person mentioned in Section 10."* The section further describes an unqualified person as a person who is not qualified under section 9, is not exempt under section 10 and fails to take out a practicing certificate.

151. Section 10 makes no mention of a practising certificate. Sections 12 and 13 of the Advocates Act on the other hand, are devoted to the qualifications for being admitted as an advocate and these are both academic and professional qualifications.

152. Section 31 (1) provides:

> ***"Unqualified person not to act as advocate***
>
> ***(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.***
>
> ***(2) Any person who contravenes subsection (1) shall—***
>
> > ***(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and***
> >
> > ***(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and***
> >
> > ***(c) in addition be guilty of an offence."***

153. Section 83 provides that "Nothing in this Act or any rules made thereunder shall affect the provisions of any other written law empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings.

154. The question herein is whether Section 31 of the Advocates Act actually invalidates all actions performed by an advocate who is without a practising certificate. This Section prohibits unqualified persons from preparing certain documents or appearing in court or in any manner representing a client. It is directed at "unqualified persons." It prescribes clear sanctions against those who transgress the prohibition. Is such reasoning in keeping with a perception that Section 31 of the Advocates Act, invalidates all documents prepared by an advocate who lacks a current practising certificate? In my view the answer is no. This is because in each case, the court should consider the circumstances prevailing, distinct from other instances when an advocate fails to take out a practicing certificate and proceeds to act as an advocate.

155. In **National Bank of Kenya v Ana Warehousing Limited (2015) eKLR,** the Supreme Court held that documents drawn by an advocate who has not taken out a practising certificate are not necessarily invalid and the effect of striking out the pleadings drafted by such an advocate in that case amounted to unjust enrichment of one of the parties.

156. All through the proceedings herein, the 1st respondent has carried himself as an advocate. In the Certificate of Urgency dated 23.3.2021, through which he commenced the garnishee proceedings, the 1st respondent refers to himself as an advocate of P.O. Box xxxx Kisumu. He proceeds in his substantive application to state that he was the advocate on record for the defendant and is seeking to recover judgement debt owed by the defendant to him after offering his legal services.

157. The unfolding and undisputed facts as pleaded by the applicant garnishee herein are that the 1st respondent had not taken out a practicing certificate for the years 2019, 2020 & 2021. Conversely, the record is clear that the service rendered to the defendant was mostly done prior to 2018 when the advocate was properly licensed. Furthermore, the advocate is in these proceedings, a party seeking payment for the legal services rendered to his client prior to his ceasing to take out a practicing certificate and not as an advocate for a party other than himself.

158. The Courts, as the custodians of justice under the Constitution, need to proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up. This principle is typically expressed by *Sir Thomas Bingham, MR* in the United Kingdom's Appellate Court, in **M. v. Newham London Borough Council and X. v. Bedfordshire County Council [1994] 2WLR 554 at p. 572**:

> ***"If [the claimant] can make good her complaints…, it would require very potent considerations of public policy… to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied."***

159. The 1st respondent herein submitted that he instituted the garnishee proceedings in his personal capacity so as to follow up on monies owed to him by the defendant/judgement debtor. He stated that he had a right to appear in person in a matter concerning him. I am inclined to agree with Mr. Otieno Oyoo as the Court's obligation coincides with the constitutional guarantee of access to justice in Article 48, and in that regard, requires the fulfillment of the contractual intention of the parties.

160. It is clear that the parties herein, the 1st respondent and the defendant/judgement debtor, had intended to enter into a binding agreement, pursuant to which legal services were offered for a fee which was not settled and which the advocate was now pursuing. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document for initiating garnishee proceedings for his own benefit lacked a current practicing certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution that: ***"justice shall be administered without undue regard to procedural technicalities".***

161. On authority of the Supreme Court's holding in the ***National Bank of Kenya*** *supra* it is my opinion that, no instrument or document or proceedings become invalid under Section 31(1) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. In the circumstances I further find that the 1st respondent was not in contempt of court by the mere fact that he lacked a practising certificate at the time when he was commencing the garnishee proceedings.

162. In the end, I make the following final orders:

a. Garnishee Order absolute issued be and is hereby set aside

b. The application for contempt of court levelled against the respondents is hereby declined and dismissed.

c. Each part shall bear their own costs of the twin applications.

This file is effectively closed as there are no other proceedings pending, the advocate having been paid all his legal fees.

Orders accordingly.

DATED, SIGNED AND DELIVERED ONLINE AT SIAYA THIS 2ND DAY OF NOVEMBER, 2021

R.E. ABURILI

JUDGE