



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

MISC APPLICATION E 291 OF 2019

AMOS OPUDO AKECH.....APPLICANT

VERSUS

IDB CAPITAL LTD.....1ST RESPONDENT

HAGGAI WILLIAM2ND RESPONDENT

JEDIDAH BORO.....3RD RESPONDENT

ALPHONSE ODHIAMBO.....4TH RESPONDENT

IDB SAVINGS & CREDIT

COOPERATIVE SOCIETY.....5TH RESPONDENT

(2ND-4TH DEFENDANTS ALL SUED AS CHAIRMAN, SECRETARY & TREASURER RESPECTIVELY OF THE 5TH RESPONDENT)

RULING

By an application filed by the Applicant on 23rd July 2019, the Applicant sought following orders;

- a) That a stay of proceedings in **CMCC No 5332 of 2017** be granted pending hearing and determination of the application *interpartes*.
- b) The Applicant be granted stay of execution of garnishee order issued on 14th March 2019 in **Milimani CMCC 5332 of 2017**
- c) The Court to stay, vary and/or review the garnishee order issued on 14th March 2019.

The Applicant relied on the following grounds;

- a) The 1st Respondent then Plaintiff sued 2nd-5th Respondents for Ksh 2,139,764 with interest
- b) The Respondents failed to enter appearance to the claim and an Interlocutory judgment was entered on 13th October 2017 and decree and certificate of costs were obtained.
- c) The 4th Garnishee filed Replying affidavit to the 1st Respondent's Application of 7th February 2018 and denied owing the 1st Respondent Ksh 1,032, 573/-
- d) Under **Order 23 Rule 5 CPR** if a Garnishee disputes liability, then the disputed issue is resolved first before execution.
- e) On 14th March 2018, the Trial Court allowed the 1st Respondent application in total contravention of **Order 23 Rule 5 CPR**

f) On 23rd March 2018, the 1st Respondent applied for execution, warrants for execution of the decree were issued to Kiriiyu Auctioneers on 1st November 2018 for Ksh 877,370/-

g) On 8th February 2019, warrants for attachment were issued for attachment of movable property to Daystar Auctioneers to recover Ksh 1,149,886/=

h) The Garnishee order is irregular and the same should be varied reviewed and vacated as it is contrary to **Order 23 of CPR 2010**

The Respondent filed Replying Affidavit on 14th August 2019 and objected to the application on the following grounds;

a) That the entire application is misguided and incompetent before the High Court as there is a suit pending in the Trial Court where judgment was entered against the Applicant and the correct procedure was applied.

b) If the Applicant was/is dissatisfied with the judgment then he ought to appeal to the High Court or apply for review in the Trial Court.

c) In any event the Applicant admitted the debt and part payment of it is made by the Applicant as shown by copies attached to his application of text messages requesting to pay by monthly instalments of Ksh 50,000/-

d) There is also copy of a cheque drawn by the Applicant for Ksh 200,000/= which the Applicant later withdrew.

e) The application for stay of proceedings and stay of execution are not tenable since no appeal or application for review was filed.

f) The Applicant was served with the Garnishee Application slated for 14th March 2018 but failed to attend Court on that day for hearing and judgment was entered against him on that date. To date he has never applied to set aside the said judgment nor appealed against it.

DETERMINATION

The Court considered pleadings and submissions by parties and the issue(s) for determination is whether stay of proceedings and/or stay of execution should be granted by this Court at this stage.

ANALYSIS

The applicant submitted that **Article 50 COK 2010** bestows upon parties right to fair hearing and therefore there is no known law that prevents the Applicant from filing a Miscellaneous Application in the High Court while **CMCC 5332 of 2017** exists.

Secondly, the Applicant is not a substantive party to proceedings in the Trial court in **CMCC 5332 of 2017**. He was brought into the suit by virtue of garnishee proceedings which he contends do not conform to **Order 23 Rule 5 of CPR 2010**.

The Garnishee proceedings and order are made after Judgment is passed against the Defendant and a decree is extracted which is not the case herein.

Therefore, the Applicant's remedy cannot be in an appeal to the High Court or Review before the Trial Court.

Under **Article 165 (6) CoK 2010**, the High Court has supervisory jurisdiction over subordinate Courts and in **Article 165 (7) CoK 2010** the High Court may call for the record of any proceedings and grant orders or give directions considered appropriate in the administration of justice.

The Applicant's objection is that he does not owe the 5th Respondent Ksh 1,032,573/- and the Trial Court relied on an incomplete **IDB SACCO** Annual Report of 2017. This issue was not heard and determined by the Trial Court.

It remains unresolved.

An order nisi as required under **Order 23 Rule 1 (4) CPR** which was not provided.

An order granting the decree Nisi absolute as required by **Order 23 CPR** was also not complied with.

1. Order for the attachment of debts [Order 23, rule 1.]

(1) A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the

court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

4. Execution against garnishee [Order 23, rule 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.

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

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

I have outlined the relevant provisions that guide the Garnishee proceedings under the **CPR 2010**. The Respondent submitted that the Applicant was served with the application under **Order 23 (1) CPR** on 14th March 2018, he failed to attend Court on the date of hearing and judgment was entered against him under **Order 23 (4) CPR**. If he contested or disputed the claim in the garnishee application he would have appeared and/or filed necessary documents to object to the claim. Better still he could have been represented to lodge his objection to the claim. He did not. The Court in default of appearance and/or objection regularly entered judgment.

The Applicant did not challenge the fact that he was served with the Garnishee application and did not file any pleadings and judgment was entered for non-appearance. Since 14th March 2018, the Applicant did not file an application to set aside the default judgment so as to be granted the opportunity to dispute the claim against the 5th Respondent.

The Respondent disclosed that the Applicant settled part of the debt to 5th Respondent IDB Sacco and has paid Ksh 432,477/- and has a balance of Ksh 837,918/-

Therefore, from the above consideration, the Applicant is entitled as part of access to justice under **Article 48 & 50 Cok 2010** right to fair hearing by pursuing an application of setting aside of default judgment of 14th March 2018. In the case of **Richard Mark T/A Busuru RM Partners, Architects vs Mr B.A. Omuse T/A Afro- Anglo Investments Ltd MISC Application 1300 of 2002**; where it was held for a garnishee order to issue; **a debt must either be proved or admitted**. The Applicant upon service of the Garnishee application ought to have appeared and be granted the opportunity to demand proof of the debt. He may also apply to the Trial Court, seeking a review its orders to facilitate *inter partes* hearing and determination of what amount the Applicant owed the 5th Respondent. Thereafter, if the party is aggrieved by the orders from the Trial Court then he may lodge an appeal to the High Court.

For these reasons, the court finds no legal basis to stay execution and/or proceedings in the Trial Court as the Applicant has opportunity to defend his claim under the **CPR 2010** before the Trial Court first then an appeal to the High Court if need be and right of appeal thereafter to the other Appellate court if merited.

DISPOSITION

1. The Application for stay of proceedings and stay of execution of 23rd July 2019 is dismissed and the issues shall be canvassed before the Trial Court first and thereafter either party may pursue an appeal in the High Court.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH APRIL 2020

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

AYIEKO KANGETHE & CO ADVOCATES FOR APPLICANT

KABARU & COMPANY ADVOCATES FOR RESPONDENT