



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. CIVIL APPLICATION NO 94 OF 2018

IN THE MATTER ADVOCATES ACT CHAPTER 16 LAWS OF KENYA

AND

**IN THE MATTER OF AN OF THE ADVOCATE'S BILL OF COSTS ARISING FROM LEGAL SERVICES IN OYUGIS SRM
NO. 223 OF 2009 ROYN ODELLO AUDI VERSUS LACOOIN INVESTMENTS & ANOR**

BETWEEN

JAMES AGGREY MWAMU

T/A MWAMU & COMPANY ADVOCATES.....DECREE HOLDER RESPONDENT

VERSUS

AFRICAN MERCHANT ASSURANCE COMPANY LIMITED.....JUDGMENT DEBTOR

AND

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

RULING

1. In the case of **Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332**, the Court of Appeal held that when the matter is fixed for mention, it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. This position was reiterated in **Republic Vs. Anti-Counterfeit Agency & 2 Others Exparte Surgipharm Limited, Nairobi JR Miscellaneous Application No. 11 Of 2012 [2014] eKLR** and **Paul Odhiambo Ogunde V Maersk Kenya Limited [2016] eKLR**.

2. Article 50 (1) which underscores the right to be heard and provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

3. Further to the foregoing, **Halsbury Laws of England, 5th Edition 2010 Vol. 61 para 639** states that:

"the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him, and a fair opportunity to be heard, (the Audi alteram partem rule) is a fundamental principle of justice."

4. I have considered the notice of motion dated 27th January, 2020 in the light of the affidavits on record and submission by counsel for the Applicant and the Respondent and I am persuaded that it is merited.

5. It is therefore hereby ordered THAT:

a) This court's order made against the Garnishee/Applicant on 5th December, 2019 is set aside in its entirety

- b) The Notice of Motion dated 21st November, 2019 shall be disposed off by way of written submissions.
- c) The Respondent is thus directed to file, and serve its response, by electronic mail to the Applicant's advocate within seven (7) days from today's date
- d) The Applicant's advocate shall have 7 days from the date of service thereof to file and serve, by electronic mail, any further affidavit, if need be, and written submissions
- e) Upon service of the Applicant's submissions, the Respondent shall file and serve its submissions by electronic mail within 7 days
- f) The advocates shall be notified of the date for delivery of the ruling via electronic mail
- g) Costs of this application shall be in the cause

DELIVERED THIS 14th DAY OF April, 2020

T. W. CHERERE

JUDGE

Court Assistants - Ms. Amondi/Ms. Okodoi

For the Garnishee - Mohamed Madhani & Co. Advocates

For the Advocate - Mwamu & Co. Advocates

Order

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.