



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**MISC. CIVIL APPLICATION NO 96 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. 224 OF 2009 LEONARD SHIKUKU VERSUS LACOON INVESTMENTS & ANOR**

**BETWEEN**

**JAMES AGGREY MWAMU t/a**

**MWAMU & COMPANY ADVOCATES.....APPLICANT/DECREE HOLDER**

**VERSUS**

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

**AND**

**DIAMOND TRUST BANK KENYA LIMITED.....GARNISHEE**

**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, 5<sup>th</sup> 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 27<sup>th</sup> January, 2020 in the light of the affidavits on record and submissions 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 5<sup>th</sup> December, 2019 is set aside in its entirety
- b) The Notice of Motion dated 21<sup>st</sup> 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 14<sup>th</sup> 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 15<sup>th</sup> March, 2019.**