



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. CIVIL APPLICATION NO 172 OF 2018

(CONSOLIDATED WITH MISC. CIVIL APPLICATION NO 173 AND 174 OF 2018

BETWEEN

L.G. MENEZES & COMPANY ADVOCATES.....DECREE HOLDER

AFRICAN MERCHANT ASSURANCE COMPANY LTD.....JUDGMENT DEBTOR

AND

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

RULING

1. The Court record demonstrates that Decree Holder's garnishee application dated 03.02.2020 was filed on the same date and a Garnishee Order Nisi was issued on 04.02.2020.
2. The Garnishee Order Nisi dated 04.02.2020 together with the Decree Holder's garnishee application dated 03.02.2020 and a hearing notice for 06.02.2020 were sent to the Garnishee Applicant's Nairobi office by courier on 04.02.2020
3. When the application came up for *interpartes* hearing on 06.02.2020, the Garnishee having been served on 05.02.2020, which was one day to the hearing was not represented. The court found that the Decree Holder's garnishee application dated 03.02.2020 was not opposed and issued a Garnishee Order Absolute.
4. The Garnishee notice of motion dated 14.02.2020 filed on 18.02.2020 seeking orders to set aside the Garnishee Order Absolute was compromised by a consent dated 26.02.2020.
5. The parties could however not agree on who among them is liable to pay auctioneer charges and I directed them to file submissions which the Decree Holder and the Garnishee dutifully filed.
6. The law concerning the attachment of debts is to be found under Order 23 of the Civil Procedure Rules which provides as follows:

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.

(2) At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.

7. From the record, the Decree Holder has not demonstrated any special circumstances to justify departure from the requirement that the garnishee order nisi ought to have been served on the Garnishee, and, unless otherwise ordered, on the Judgment-Debtor at least seven days before the day of hearing.

8. There is therefore no doubt that the Garnishee and the Judgment Debtor, having been served only a day to the hearing on 06.02.2020, were not availed adequate time to respond to the Decree Holder's Notice of Motion dated 03.02.2020 that gave rise to the proclamation of the Judgment Debtor's property.

9. In view of the foregoing, I find that it would not be in the interest of justice to condemn either the Judgment Debtor or the Garnishee to pay the auctioneer's costs.

10. Consequently, it is hereby ordered that the auctioneer's costs shall be borne by the Decree Holder.

DATED THIS 21st DAY OF May 2020

T. W. CHERERE

JUDGE

Court Assistants For Decree Holder For Judgment Debtor For Garnishee

- Ms. Amondi/Ms. Okodoi

- L.G. Menezes & Company Advocates

- N/A

- Mohamed Madhani & 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 vide Gazette Notice no. 3137 of 17th April, 2020.