



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 19 OF 2020

HENRY NYABUTO ONDIEKI.....APPLICANT/APPELLANT

VERSUS

CHEMELIL SUGAR COMPANY LTD.....RESPONDENT

AND

KENYA COMMERCIAL BANK LTD.....GARNISHEE RESPONDENT

RULING

The Appellant, **HENRY NYABUTO ONDIEKI**, has asked the Court to set aside the Ruling and Orders delivered by the learned trial magistrate on 14th May 2020.

1. By his application dated 26th May 2020, the Appellant also asked this court to substitute the dismissal of his application dated 22nd April 2020, with an Order granting the reliefs sought by that application.
2. As far as the Appellant was concerned, there was absolutely no legal basis to warrant the dismissal of his application dated 22nd April 2020.
3. In the application dated 22nd April 2020, the Appellant herein had asked the trial court for a Garnishee Order directed against the Garnishee, **KENYA COMMERCIAL BANK LIMITED**, requiring the said bank to show cause why the money it was holding to the order of **CHEMELIL SUGAR CO. LIMITED** should not be attached.
4. The Appellant had obtained a judgment against Chemelil Sugar Company Limited, and his application dated 22nd April 2020 was a process of executing the Decree.
5. When the application dated 22nd April 2020 came up for hearing, the trial court dismissed it because;

“The applicant herein completely failed

to demonstrate by way of documentation

that the judgement-debtor herein held

account No. 118** with the***

Garnishee or any other account which

had funds to enable this court grant the

orders he prayed for.”

6. Following the dismissal of the application the Appellant lodged an appeal before this court on 21st May 2020.

7. It is common ground that the reliefs sought in the said appeal are as follows;

“a) That this appeal be wholly allowed.

b) That the trial magistrate’s ruling and order made on 14th May 2020 be set aside.

c) That the appellant’s application by way of a Notice of Motion dated 22nd April 2020 be allowed as prayed.

d) That this honourable court do give any other or further orders it may deem just and expedient in the interests of justice.

e) That the appellant be awarded costs of this appeal and interest thereon.”

8. In response to the application before me, the Garnishee filed a Replying Affidavit which was sworn by its Senior Recovery Manager at the Credit Support Unit of KCB Bank Limited.

9. By his said affidavit, ATUNDA NYAGAKA said, inter alia;

*“... the Garnishee/Respondent inadvertently furnished the account details for bank account number 118*****, instead of furnishing bank account details of account number 118*****, as required by the Appellant.”*

10. He went on to set the record straight, by deponing thus;

*“5. THAT I wish to correct this and state that the correct account number, as sought by the Appellant is 118*****. Further, I confirm that the Judgement-Debtor/Respondent herein holds and operates the account No. 118***** with the Garnishee/Respondent, Kenya*

Commercial Bank Ltd, whose

particulars are as follows as at

04th June 2020;

Account Name - CHEMELIL SUGAR CO. LTD.

*Account Number - 118******

Account Balance - 41,282,678.45

Loan Amount - 15,628,683.80

Available Balance - 25,653,994.65”

11. Notwithstanding the said information, both the Respondents herein opposed the application.

12. At this stage of the proceedings, the Court has not yet been called upon to give Directions for the hearing of the appeal. Therefore, the appeal is not yet ripe for hearing.

13. In any event, it is not the appeal that has come up for hearing. Currently, the court has been called upon to determine the application dated 26th May 2020.

14. A comparison of the reliefs sought in the application, and the reliefs sought in the appeal reveals that they are similar. Therefore, if the court were to grant the prayers sought in the application, the court would have disposed of the appeal.

15. I find that the Appellant was trying to get the court to determine the appeal, through the interlocutory application. I hold that that would be an improper manner of hearing and determining the appeal.

16. Accordingly, I have no alternative but to dismiss the application as I hereby do.

17. Nonetheless, I order that the costs of the application shall be borne by the Garnishee. I so order because it does appear that the decision of the trial court was hinged upon the information provided by the Garnishee, and I hold the considered view that if the Garnishee had provided the accurate information to the trial court, at the material time, the determination of the application dated 22nd April 2020 would most probably have been different.

DATED, SIGNED and DELIVERED at KISUMU This 9th day of September 2020

FRED A. OCHIENG

JUDGE