REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 83 OF 2011

BHUPENDRA SOMABHAI PATEL.....APPLICANT/DECREE-HOLDER

VERSUS

KINGSWAY TYRES LIMITED ..... 1ST RESPONDENT/JUDGMENT DEBTOR

MANOJ SHAH .....2ND RESPONDENT/JUDGMENT DEBTOR

AND

DIAMOND TRUST BANK LIMITED..... GARNISHEE

RULING

The application dated 19th September 2020 was brought by the Decree-Holder, **BHUPENDRA SOMABHAI PATEL**.

1. It is an application for a Garnishee Order to issue against **DIAMOND TRUST BANK LIMITED**, (the Garnishee), directing that all monies belonging to the Judgment Debtors, **KINGSWAY TYRES LIMITED** and **MANOJ SHAH**, which were currently in the joint names of the advocates acting for the parties herein, be attached to answer the Decree in this case.

2. The Applicant identified those 2 Fixed Deposit Accounts as being Numbers;

(i) 001FDLC120400007, and

(ii) 001FDLC180780005

3. The Applicant also asked the Court to issue a Garnishee Order against the Diamond Trust Bank Limited, directing that all monies belonging to the Judgment Debtors, which are held by the Garnishee in the names of the Judgment Debtors, whether individually or their joint names, be attached to answer to the unsatisfied Decree.

4. It was the Applicant's intention that the 2 Fixed Deposit Accounts would settle the sum of Kshs 6,750,000/=, whilst the other accounts of the Judgement-Debtors would settle the sum of Kshs 2,359,773.33.

5. It is common ground that the garnishee has not raised any objection or opposition to the application.

6. Therefore, the Applicant submitted that the Court ought to proceed to make absolute, the garnishee order nisi which the Court had issued on 21st September 2020.

7. However, the Judgment-Debtors have raised opposition to the application.

8. Pursuant to **Order 23 Rule 3** of the **Civil Procedure Rules**;

> ***"If the garnishee does not dispute the debt due or claimed to be due from him to the judgement-debtor, or, if he does not appear upon the day of hearing named in the 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 ……"***

9. I understand that to mean that the issuance of a garnishee order absolute is not automatic, when the garnishee does not dispute the debt

due or the debt claimed to be due from him to the Judgment-Debtor.

10. The rule is permissive: it says that the court **may** issue the order. That implies that there might arise circumstances in which the court may decide not to issue a garnishee order absolute, even when the garnishee did not raise any objection.

11. In this case, the Defendants have asserted that there was need for the Applicant to specify the exact amount constituting the decretal amount.

12. Of course, as the Defendants have said, if the figures were uncertain, the garnishee (bank) would not know how much should be released to the Plaintiff.

13. In this case, I find that there is no uncertainty about the amounts which the Plaintiff is seeking from the bank.

14. If the Defendants were of the view that the amounts which the Plaintiff was demanding from the bank were out of line with the decretal amount, they should have been specific.

Procedure

15. It is common ground that on 15th September 2020, the Plaintiff filed an application for Notice to Show Cause. The said application has not been prosecuted at all.

16. However, the Defendants have submitted that it was not open to the Plaintiff to pursue 2 parallel methods of execution.

17. The Plaintiff's answer was that he was compelled to initiate the application for garnishee orders, by the fact that the bank had issued a Notice of its intention to forward the money it was holding, to the Unclaimed Assets Authority.

18. However, the Defendants believe that the only thing that was necessary, in the circumstances, was a letter addressed to the bank, notifying them that the money in issue was being held by virtue of an Order of the Court.

19. Whether or not such a letter could have been sufficient, is not for me to determine, in this application.

20. However, I hold the considered opinion that the money being held by the bank, to the order of the advocates for the parties herein, cannot be deemed to be unclaimed assets.

21. Meanwhile, as the Plaintiff had taken absolutely no steps on the Notice To Show Cause, I find that the Plaintiff was not simultaneously running 2 parallel processes of execution.

Notice To Show Cause

22. According to the Defendants, it is mandatory, pursuant to **Order 22 Rule 18** of the **Civil Procedure Rules**, for the Decree-Holder to take out a Notice To Show Cause where the Decree was more than one year old.

23. The said Rule stipulates as follows;

> ***"18 (1) Where an application for execution is made –***
>
> ***(a) more than one year after the date of the decree; or***
>
> ***(b) against the legal representative of a party to the decree; or***
>
> ***(c) for the attachment of salary or allowance of any person under 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.***
>
> ***Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on on any previous application for execution, or in consequence of the application being made against the legal representative of the judgement-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.***
>
> ***Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgement- debtor having changed his employment since a previous order for attachment."***

24. In this case the decree was over 2 years old. Therefore, unless the Plaintiff demonstrated that the decree was subject to one proviso in **Order 22 Rule 18 (1)** of the **Civil Procedure Rules**, execution should have proceeded by way of Notice To Show Cause.

25. The Plaintiff drew attention to the Ruling delivered on 6th February 2020, when the Court discharged the order for stay of execution, which had been in force since 28th February 2018.

26. It was held that the Defendants had failed to comply with one of the pre-conditions for the grant of the order for stay of execution.

27. In the circumstances, the Court stated that the order for stay of execution was not in force. The Court concluded thus;

> ***"Therefore, it is now open to the Plaintiff to institute appropriate proceedings for the execution of the Decree."***

28. In my considered opinion the ruling dated 6th February 2020 was on an application for execution, as the Plaintiff had sought orders which would give effect to the Decree in this case.

29. However, I also note that it was after the Court delivered that Ruling, that the Plaintiff moved the Court for taxation.

30. In the case of **FRANCIS KIMANI KIIGE Vs NHIF, (NAIROBI) JUDICIAL REVIEW APPLICATION NO. 13 OF 2009**, Hon. Lady Justice R.E. Aburili declared thus;

> ***"75. For execution proceedings to commence, there must be an Order or Decree or Certificate of Taxation of taxed costs. Where the Decree is not a money Decree, then in the event costs are awarded, then they must be assessed and a certificate to that effect issued for enforcement."***

31. The rationale for having both the decree and the Certificate of Taxation, or Certificate of Costs prior to the commencement of the process of execution is that execution would ordinarily not be conducted piecemeal.

32. A Decree-Holder ought to execute the decree when the costs awarded to him had also been ascertained, so that the execution is undertaken at one go.

33. Of course, there may arise instances where the execution process does not result in the realization of all the fruits of the decree: in such instances, the Decree-holder was entitled to undertake further execution.

34. In the present case, the Decree is for both money and other facets. Therefore, the process of execution which is geared towards the realization of the portion for the money decree would not yield the either the return of the motor vehicle or the transfer of the immoveable property to the Plaintiff.

35. It would thus be understandable that the process of execution would have to be undertaken through more than one procedure. Nonetheless, in respect to any one aspect of the decree, the Decree-Holder ought not to undertake simultaneous parallel processes of execution.

36. In the case of **ROSE CHEPKORIR Vs MWINYI MOHAMED RIVA & 2 OTHERS, HCCC NO. 27 OF 2009**, (at Kericho), the Court stated as follows;

> ***"…. I do find that after the Plaintiff/ Respondent being silent on the 2nd Defendant/Applicant, could not get a decree 2 ½ years after judgement and then slam it on the 2nd defendant/ applicant without any notification.***
>
> ***The Applicant may easily have thought he had been forgiven of the debt, considering the conversation between his Counsel and the Plaintiff's Counsel, and the payment of Kshs 2 Million by his insurer."***

37. In contrast, the Plaintiff in this case has been actively pursuing the Defendants, with a view to realizing the fruits of the decree. Therefore, it cannot be said that the conduct of the Plaintiff may have led the Defendants to think that the Plaintiff had forgiven them the debt.

Certificate of Taxation

38. When a Bill of Costs is taxed, the taxing officer issues a Certificate of Taxation.

39. On the other hand, when the costs are assessed either by the trial court or by the Deputy Registrar, a Certificate of Costs would be issued.

40. When the party who was successful in the case, had been awarded costs, he ought to take steps to execute the decree in a manner that ensures that the costs were recoverable during the said execution.

41. The party ought not to execute for the decree, to the exclusion of costs.

42. However, it is open to the decree-holder to apply to the court to proceed to execution before the costs are either assessed or taxed.

43. When the decree-holder was permitted by the court to proceed to execution, prior to the ascertainment of the quantum of costs, the court

would normally make it clear that the decree-holder had decided to forego the costs.

44. In this case, the taxation was undertaken after the decree-holder had filed his application for execution. In the event that the said process of execution was finalized prior to taxation, it would have been difficult for the decree-holder to thereafter institute other proceedings for execution, in respect to the taxed costs.

Order 22 Rule 18 (2)

45. The said Rule stipulates as follows;

> ***"Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recoded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice."***

46. Assuming that a Notice To Show Cause ought to have been issued in this instance, the court could have had the discretion to issue any process in execution of the decree, without issuance of the prescribed notice.

47. However, the court would, in the circumstances, be obliged to give reasons why it had made a conscious decision to forego the issuance of notice.

Garnishee Proceedings

48. As the Defendant has submitted;

> ***"Garnishee proceedings are in essence the attachment of debts. The money being sought to be released should be a debt owed by the bank to the judgment-debtor.***
>
> ***The plaintiff has chosen the forum of garnishee, which means that he is acknowledging that the money in the said bank accounts belongs to the defendants.***
>
> ***He actually acknowledged, in his submissions, that the signatory to the bank account is the 2nd defendant."***

49. I find that the funds in the Fixed Deposit Account belonged to the Defendants.

50. Although the Plaintiff's advocate was a signatory to the accounts, that did not make the funds therein to change ownership.

51. Therefore the funds could be *"attached"* through a garnishee order.

52. Accordingly, there is merit in the application dated 19th September 2020. I therefore order that a garnishee order absolute should issue forthwith in the terms set out in the application in issue.

DATED, SIGNED at **DELIVERED** at **KISUMU**

This **2nd** day of **December** 2020

FRED A. OCHIENG

JUDGE