



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 3 OF 2015

EMK alias A.....APPELLANT

VERSUS

SSS.....RESPONDENT

AND

STANDARD CHARTERED

BANK LIMITED.....GARNISHEE

RULING

1. The Applicant EMK alias A and the Respondent SSS are embroiled in the Originating Summons herein dated 31.3.15 in which the Applicant seeks certain declarations and orders relating to the properties listed herein which she claims to be matrimonial properties. By an interlocutory ruling of this Court of 22.6.15, Muriithi, J. directed the Respondent to pay to the Applicant the monthly sum of Kshs. 50,000/= on account of her share in the matrimonial property pending the hearing and determination of the Originating Summons. It is the Applicant's claim that the amount owed to her by the Respondent together with Court collection fees and service fee as at 14.12.18 stood at Kshs. 1,450,000/= (the amount due). Following an application dated 14.12.18 (the Application), the Court did issue an Order Nisi attaching the sum of Kshs. 1,454,250/= held in the accounts in Standard Chartered Bank Limited, the Garnishee to the credit of the Respondent. This Ruling relates to the prayer in the Application for a Garnishee Order Absolute.

2. The Respondent opposed the Application vide his Replying Affidavit sworn on 8.2.19. To him the Application is made in bad faith and is intended to exact revenge upon him. According to the Respondent, the Court was misled into believing that the family business Mvita Cables was making money. The order that he pay to the Applicant Kshs. 50,000/= which would come from his pocket, was unjust to him. He further states that he was not given an opportunity to be heard. He states that he has been dutifully paying the money through his pension and support from his 1st wife and relatives. He stopped paying the amount ordered after the Applicant moved to the Children's Court through garnishee proceedings and his accounts were frozen. The total sum received by the Applicant from him stands at Kshs. 850,000/=. He is a pensioner with no other source of income. The Garnishee has confirmed that there is no money in the said accounts. He urged the Court to review the orders.

3. For the Garnishee Grounds of Opposition dated 22.1.19 and a Replying Affidavit sworn on 24.1.19 by Fadhila Ghikas, the Client Service Manager were filed. The Respondent stated that Account No. [xxxx] has a nil balance and is overdrawn with charges. Account No. [xxxx] was closed. Account No. [xxxx] has a nil balance and is overdrawn with charges. Account No. [xxxx] has a credit balance of Kshs. 16,758.55 as at 23.1.19. This last account which is the only active account is subject to a Court Order dated 24.10.18 emanating from Children's Court Case No. 137 of 2015, Tononoka - EMK alias A v the Respondent SSS and Standard Chartered Bank Limited. As per the Court order, there is a standing order for the sum of Kshs. 40,000/= payable from the pension of Kshs. 116,944.70. In view of the foregoing therefore the Garnishee does not hold sufficient funds to satisfy the amount due. The Garnishee further stated since 2015 it had been sucked into the dispute between the parties herein and requested to be excused from these proceedings and its role be restricted to complying with lawful Court orders.

4. I have considered the Application, the rival affidavits and the submissions by the Applicant. The Respondent did not file submissions while the Garnishee chose to rely on the replying affidavit.

5. Order 23 of the Civil Procedure Rules, 2010 provides for the attachment of debts due to a decree-holder from any person in satisfaction of the decree against a Judgment- debtor. Order 23 Rule 1(1) provides:

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.

6. It is common ground that an order was made by this Court of 22.6.15 directing the Respondent to make a monthly payment of Kshs. 50,000/= to the Applicant pending the hearing and determination of the OS. It is also common ground that the Respondent initially complied with the said order. He paid a total sum of Kshs. 750,000/= according to the Applicant and Kshs. 850,000/= according to him. Although the Respondent claims that the order was issued on the premise of false allegations that there was ongoing family business. The Court however notes that the order of 22.6.15 has not been set aside, reviewed or appealed against and therefore remains in place. The order is continuous in nature and required that the amount payable be remitted to the Applicant every month until the determination of the OS. The Respondent admits that he stopped making this payment after the Applicant moved to the Children’s Court with Garnishee proceedings. This appears to me as wilful default on the part of the Respondent. It follows therefore that any default will result in execution proceedings such as the present case.

7. Article 68(c)(iii) of the Constitution of Kenya, 2010 recognized the need to protect matrimonial property and enjoined Parliament to enact legislation to

...regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage

8. Parliament did in 2013 enact the Matrimonial Property Act which at Section 6 includes the matrimonial home in the definition of matrimonial property. The Act further provides at Section 7 that:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

9. The marriage between the parties has been dissolved. Section 17(1) of the Matrimonial Property Act allows a party to **apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.** In these proceedings, the Applicant seeks a declaration and protection of her rights as guaranteed by the Constitution, to what she considers to be matrimonial property. In the ruling of 22.6.15, this Court was clear that the amount of Kshs. 50,000/= was not maintenance for the Applicant but on account of her share in matrimonial property the full extent of which shall be determined upon the full hearing of the Originating Summons.

10. The Court notes that the Garnishee stated that in paragraph 2 of the affidavit of Fadhila Ghikas as follows:

2. THAT the Defendant, S S S has held the following accounts with the Bank:

(1) Account No. [xxxx] (is dormant, has Nil balance and overdrawn with charges).

(2) Account No. [xxxx] which is closed.

(3) Account No. [xxxx] (is dormant, has Nil balance and overdrawn with charges).

(4) Account No. [xxxx] which has a credit balance of Kshs. 16,758.55 as at 23rd January 2019.

Attached hereto are the bank 1statements marked “FG-1”

11. The Court has looked at the statement annexed and notes that the same relates to only one account [xxxx]. Why did the Garnishee not provide statements for the other accounts? When did the other accounts nos. [xxxx] and [xxxx] become dormant? When was account no. [xxxx] closed? The Garnishee order nisi was clear that the Garnishee was to attend Court and show cause why it should not pay to the Applicant the decretal sum or so much thereof as may be sufficient to satisfy the amount due. The Garnishee was under an obligation to demonstrate to the Court by way of documentary evidence that the accounts of the Respondent held by the Garnishee had insufficient funds to settle the amount due. This the Garnishee failed to do to the satisfaction of the Court. The Court further notes that the Garnishee, in spite of having been served on 18.12.18 with the order nisi attaching the amounts in the Respondent’s accounts allowed withdrawals from the Respondent’s account in clear disobedience of the said order.

12. The Garnishee has stated that there is only one active account namely account no. [xxxx]. The funds therein are insufficient to satisfy the debt due to the Applicant. A copy of the statement for this account was annexed. This is the account into which the Respondent’s pension is paid. The Applicant has argued that attaching the amount in that account is merited notwithstanding that the same is the Respondent’s pension. It was submitted that the law prohibits attachment of pension funds or contributions against a member of a scheme while the funds are in the pension fund. Once the pension reaches the pensioner’s account however, the same ceases to be pension fund or contribution.

13. Section 36 of the Retirement Benefits Act No. 3 of 1997 provides:

Notwithstanding anything to the contrary contained in any other written law, where a judgement or order against a member of a

scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme rules and such contributions shall not form part of the assets of the member or of his employer in the event of bankruptcy.

14. I concur that Section 36 protects pension from attachment while it remains with the pension fund. A decree-holder may not therefore move against a custodian or manager of pension scheme funds to execute the decree against a member of the scheme. Once the funds are released to a pensioner whether in lump sum or periodically, the same ceases to be protected by the provisions of the Act. A judgment debtor cannot default in making payment decreed by a Court and then seek succour in Section 36 of the Retirement Benefits Act. The Respondent is under an obligation to use his pension to meet all his obligations including satisfying all Court orders against him.

15. In SKv RWK[2010] eKLR, Omondi, J when considering a similar matter where the respondent therein had defied a Court order and failed to make periodical payments to the applicant and was in substantial arrears. The Hon. Judge observed:

Rule 59(1) of the Matrimonial Causes provides for enforcement of orders where a person has defaulted in remitting money as ordered by the court – in the present situation, this is not the first time that respondent is defaulting. His initial attempt to have the sum scaled down failed precisely because he had failed to comply with those very orders. When the court made the orders for maintenance pende lite, it must have taken into consideration whatever financial challenges the respondent had including the fact that the parties lived in the same home and so were bound to share certain utilities such as water and electricity. Respondent is in arrears – which he attributes to his other commitments such as paying servants, shopping and paying utility bills.

16. Likewise, when Muriithi, J. made the order of 22.6.15 he must have taken into consideration all necessary factors before arriving at the figure of Kshs. 50,000/=. This is perhaps why the Respondent did not appeal the decision and did in fact make the payment for a while.

17. In the end, this Court finds that the Application dated 14.12.18 is merited. Accordingly, the Garnishee order nisi is hereby made absolute. The costs herein shall abide the outcome of the Originating Summons herein. For its conduct in the matter, the Garnishee shall bear its own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of May 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

.....for the Respondent

.....for the Garnishee

.....Court Assistant