REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 57 OF 2016

NATIONAL BANK OF KENYA LIMITED

(ELDORET BRANCH)..GARNISHEE/APPELLANT

-VERSUS-

JANET KAGWIRIA NKURARU...1ST RESPONDENT

KNAAN MOTORS LIMITED..2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. M. Wambani, CM, delivered in Eldoret CMCC No. 173 of 2015 on 29 March 2016)

JUDGMENT

[1] This appeal was lodged herein on the **5 April 2016** by the **National Bank of Kenya Limited** (Eldoret Branch), from the Ruling dated **29 March 2016;** in respect of an application dated **30 July 2015**. In that application, the Appellant, as the Garnishee before the lower court, sought the following orders:

[a] That for reasons to be recorded, the said application be certified as urgent and be heard *ex-parte* for purposes of Prayer 2 thereof;

[b] That the court be pleased to stay execution of Garnishee Order Absolute made on **9 July 2015** against the Garnishee pending the hearing and determination of the application *inter partes*;

[c] That the court be pleased to review/vary/alter and/or set aside the Garnishee Order made on **9 July 2015** against the Garnishee in terms it may deem fit;

[d] That the costs of the application be provided for;

[e] That such further and other relief be granted to the Garnishee as this the court deems fit and expedient in the circumstances.

[2] That application was heard and determined by **Hon. M. Wambani**, **CM**, who concluded her Ruling dated **29 March 2016** thus:

"…I hereby hold that the application dated the 30/7/2015 is not meritorious. I hereby dismiss the same with costs to the Respondent. In any event the parties to this suit have an equal right to an unfettered right to a fair just and judicious determination of their case. To achieve this very key right to the parties I will not tamper with the court's order made on the 9/7/2015 against the Garnishee, because the same is meritorious. I hereby uphold the same and this court will also uphold enforcement of execution of the Garnishee order absolute made on the 9/7/2015…"

[3] Being dissatisfied with that Ruling and the Order ensuing therefrom, the Garnishee filed this appeal on the following grounds:

[a] The Learned Trial Magistrate misdirected herself in arriving at the conclusion that the Garnishee's application was an afterthought without addressing her mind to the entirety of issues presented in the application;

[b] The Learned Trial Magistrate erred in law and in fact in making a blanket condemnation of the Appellant by upholding enforcement of execution of the Garnishee Order Absolute without considering that the amount of money in the Judgment Debtor's

Account No. 01037062994600 cannot satisfy the decree herein;

[c] The Learned Magistrate erred in law in failing to find that it was in the interest of justice that the Garnishee Order Absolute should be varied to the extent of the Garnishee's liability to the Decree Holder going by the rendered statements of the Judgment Debtor's account;

[d] The Learned Magistrate's dismissal of the Appellant's application for review amounted to a denial of the Appellant's right to a fair hearing as enshrined in the Constitution in that the application for Garnishee Order Absolute had not been heard;

[e] The Learned Magistrate erred in law and in fact by failing to find that regardless of whether or not the Garnishee was served with the Order *Nisi*, as a matter of administering justice, the court was under obligation to invoke the Overriding Objective in civil litigation, which is to obviate hardship, expense, delay and to focus on substantive justice;

[f] That the Learned Magistrate erred in fact in failing to take into account and to independently evaluate the evidence adduced by the Appellant;

[g] The Learned Magistrate erred in law and in fact in failing to find that the Garnishee had demonstrated sufficient cause for failing to participate in the *ex-parte* proceedings;

[h] The Learned Magistrate erred in her interpretation of the nature of the rule of service of an Order in the light of the current state of the law of service on a corporation;

[i] The Learned Magistrate failed to appreciate the submissions of the learned counsel for the Appellant by failing to determine the indebtedness of the Garnishee;

[j] That in all the circumstances of the case, the findings of the Learned Magistrate are insupportable in law or on the basis of the evidence on record;

[k] The Learned Magistrate erred in law and fact in taking into account extraneous factors in determining the application before her;

[l] The Learned Magistrate erred in law and fact in making conclusive findings on issues of fact based on diametrically opposed affidavit of evidence;

[m] The Learned Magistrate erred in law and in fact by failing to consider the authorities tendered by the Appellant in their written submissions and thereby trashing the principle of stare decisis.

[4] Accordingly, the Garnishee/Appellant asked for the following orders on appeal:

[a] That the lower court's Ruling be set aside;

[b] That in its place an order be issued by this Court setting aside the lower court's *ex-parte* proceedings of **9 July 2015** together with the Judgment and Orders consequential thereto;

[c] The suit in the lower court be set down for trial of liability of the Garnishee;

[d] Costs be awarded to the Appellant;

[e] Any other and/or further relief this court may deem just and fair to grant.

[5] The appeal was urged by way of written submissions. Hence, in its written submissions dated **9 January 2019**, the Appellant argued its Grounds of Appeal under the following broad heads:

[a] Whether the Trial Court erred in law and fact by failing to evaluate the apportionment of the Garnishee's liability to the debt burden;

[b] Whether service upon the Garnishee herein was rightful;

[c] Whether the Garnishee was accorded the right to a fair trial; and,

[d] Who should bear the costs of the appeal?

[6] It was thus, the submission of Counsel for the Garnishee/Appellant that since the Judgment Debtor's account with it did not have sufficient funds to satisfy the decree, the Learned Trial Magistrate ought to have reflected on the provisions of **Order 23 Rule 1(1)** and made an order that accorded with that reality. He argued that the object of the Garnishee Proceedings is to enable a Decree Holder to reach a debt that is due to the Judgment Debtor from a Garnishee, but not to condemn a Garnishee to bear the full brunt of the Judgment Debtor's debt, irrespective of the amount of debt owing to the Judgment Debtor. Counsel drew the Court's attention to the Statement of Accounts and the Certificate of Balance at pages 46 and 47 of the Record of Appeal, and urged the Court to find that only **Kshs. 260/=** was available for

attachment as at **15 July 2015**.

[7] In support of the foregoing argument, Counsel relied on **Barclays Bank of Kenya Limited vs. Kepha Nyambera [2007] eKLR** and **Orion East Africa vs. Mugama Farmers co-operative Union Limited & Another [2015] eKLR** for the proposition that a judgment creditor has no greater rights in the judgment debtor's assets held by the garnishee than the judgment debtor does; and that a garnishee's liabilities are limited to the extent of its indebtedness to the Judgment Debtor. Counsel was of the posturing that it would be erroneous for a court to make orders that would place heavier burdens and liabilities on a third party who neither participated nor benefitted from the transactions between the judgment creditor and judgment debtor.

[8] With regard to service in respect of the Garnishee Proceedings, it was the assertion of the Appellant that the Learned Trial Magistrate fell into error by accepting as proper, service on its Eldoret Branch instead of the Moi University Branch where the account of the Judgment Debtor was then situated or the National Bank Headquarters in Nairobi. The Appellant relied on **Boniface Ooko Ganda vs. Stanley Maina & Another [2005] eKLR** and **National Bank of Kenya vs. Puntland Agencies Limited & 2 Ohters [2006] eKLR** and submitted that where service is faulted, the *ex parte* proceedings based thereon are a nullity.

[9] Mr. C.F. Otieno, Learned Counsel for the 1st Respondent, opposed the appeal and in his written submissions dated **29 May 2019**, he defended the Ruling of the lower court, contending that the lower court did in fact evaluate the evidence before it and was satisfied that the Garnishee Proceedings had been properly undertaken; and therefore that there was no justification for review as sought by the Garnishee. It was further the assertion of the 1st Respondent that service was properly effected on an officer of the corporation who was at the time duly authorized to receive such service. Reliance was placed on **Justus Wanjala Kisiangani & 2 Others vs. City Council of Nairobi & 3 Others [2008] eKLR** for the holding that so long as a party is aware of a court order, he or she is under obligation to obey the same.

[10] Counsel for the 1st Respondent also took issue with the Appellant's prayers in respect of matters that were never canvassed in the impugned Ruling, such as the setting aside of the lower court Judgment, that in his view, was regularly entered against the 2nd Respondent. He suggested that there could be some form of collusion between the Garnishee and the 2nd Respondent to frustrate the realization by the 1st Respondent of the fruits of her Judgment. Counsel added that **Order 23** of the **Civil Procedure Rules** constitutes a complete code in itself with provisions for the trial of the liability of the Garnishee; and that it would be inappropriate to import other provisions of the **Civil Procedure Rules**. He accordingly urged for the dismissal of the appeal.

[11] The duty of the Court in this appeal is to review the evidence adduced before the lower court upon which the impugned Ruling was premised with a view of satisfying itself that the decision was well-founded in all respects. (see **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123).**

[12]The brief background of the matter is that the 2nd Respondent was at all times material to the dispute, a dealer in motor vehicles based in Eldoret Town; and that in that capacity it received some **Kshs. 2,290,000/=** from the 1st Respondent on **27 August 2014** as a deposit for the purchase of a motor vehicle, but failed to either supply the motor vehicle or refund the money. Thus, the 1st Respondent filed the lower court suit, being **Eldoret CMCC No. 173 of 2015: Janet Kagwirira Nkuraur vs. Knaan Motors Ltd,** for specific performance or the refund of the deposit of **Kshs. 2,290,000/=.**

[13] The record of the lower court shows that, at the instance of the 1st Respondent, a Default Judgment was entered in her favour on **21 April 2015**, after the court was satisfied that the Defendant had been duly served with the Plaint and Summons to Enter Appearance but had neither appeared nor filed a Defence in the suit. Accordingly, a Decree and Certificate of Costs were issued on **5 May 2017** against the 2nd Respondent; whereupon a Notice of Entry of Judgment dated **21 April 2015** was served on the 2nd Respondent.

[14] In a bid to recover the sums decreed, the 1st Respondent filed an *ex parte* Notice of Motion dated **17 June 2015** under **Order 23** of the **Civil Procedure Rules**, citing the Appellant as the Garnishee and seeking orders that the funds owing to the Judgment Debtor from the Garnishee in Account No. 0103706299460 at the Garnishee's Eldoret Branch, be attached to the tune of **Kshs. 2,505,140/=;** and that the same be paid to the Decree Holder through her Advocates. A Garnishee Order *Nisi* was accordingly issued on **24 June 2015**, which was made absolute on **9 July 2015**. It was thereafter that the Garnishee filed what it purported to be a Memorandum of Appearance dated **16 July 2015**; which was followed closely by the subject application dated **30 July 2015**.

[15] An issue of a preliminary nature was raised by Counsel for the 1st Respondent. It is the question whether a garnishee can seek to set aside a regular judgment entered against a judgment debtor in proceedings that it was not a party to. This issue, of course arises from the wording of Prayer (b) of the appeal. Although extensive submissions were made in that regard by Counsel for the 1st Respondent, it is a non-issue in my view; granted that the impugned application and the appeal were confined to the proceedings and orders of **9 July 2015**. As no judgment was entered on **9 July 2015**, the inclusion of the word "judgment" in that prayer is a misnomer. I will proceed to treat it as such.

[16] Since the application dated **30 July 2015** was filed under **Order 45 Rule 1** of **the Civil Procedure Rules**, the key issues that presented themselves before the lower court for determination, and which I will focus my attention on in this appeal, were whether there was **discovery of new and important matter or evidence** which after the exercise of due diligence, was not within the Appellant's knowledge or could not be produced by it at the time when the order was made; or whether there is some **mistake or error apparent on the face of the record**, or some other **sufficient reason** to warrant a review of the impugned ruling. **Order 45 Rule 1(1)** of the **Civil Procedure Rules**, provides that:

> **Any person considering himself aggrieved-**
>
> **(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or**

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

[17] With regard to the proceedings of **9 July 2015**, the record of the lower court clearly shows that Learned Trial Magistrate applied her mind to the evidence placed before her by way of affidavits and was satisfied that service of the Garnishee Order *Nisi*, along with other pertinent documents, was effected on the Garnishee as required by **Order 23 Rule 1(2)** of the **Civil Procedure Rules.** As the application was unopposed, the Learned Trial Magistrate was perfectly entitled to make the Garnishee Order *Nisi* absolute. Moreover, at paragraph (ii) of the Grounds set out on the face of the Notice of Motion dated 30 July 2015 and paragraph 5 of its Supporting Affidavit, it was conceded by the Appellant that:

> **"…a set of documents comprising of; Attachment of Debt Order, Certificate of Urgency, Ex-Parte Notice of Motion, Supporting Affidavit and annextures were served on Mr. Julius Korir, the garnishee's branch officer…"**

[18] It was however contended that that mode of service was not proper; and that service ought to have been effected on the Garnishee's Corporation Secretary, Director or a Principal Officer duly authorized for that purpose. Again, this issue was adequately canvassed before the lower court. I note too that the said **Julius Korir** was called for purposes of cross-examination and was duly cross-examined in connection with the aspect of service; and that he conceded that he did receive the documents on behalf of the Appellant. There is no gainsaying that the said officer was the Branch Manager of the Appellant at its Eldoret Branch; and that the proceedings were specific to the **National Bank of Kenya Limited (Eldoret Branch).** He could have declined service on the ground that the account in question was not domiciled at their branch, and referred the Process Serve to the **Moi University Branch**; or on the ground that he was not the authorized person to receive such service; but did not.

[19] Accordingly, I find untenable the argument that service ought to have been made on the Appellant's principal office in Nairobi or at the Moi University Branch; the bottom-line being that service was indeed effected and this fact was admitted by **Julius Korir.** No explanation was proffered as to why the Garnishee chose not to dispute the debt, notwithstanding what it considered to be an anomaly in service. I would accordingly agree with the expressions of **Hon. Lenaola J.** (as he then was) in **Kenya Tea Growers Association vs. Francis Atwoli & Others [2012] eKLR** that where any party is aware of a court order, he or she has the unqualified obligation to obey the same until and unless the order is set aside.

[20] The Appellant, though served with the Garnishee Order *Nisi* requiring it to respond to the application opted to ignore the same. Accordingly, the Learned Trial Magistrate cannot be faulted for the conclusion she reached. Indeed, **Rule 4 of Order 23, Civil Procedure Rules,** provides that:

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

[21] On the basis of the uncontroverted material placed before the lower court in the course of Garnishee Proceedings, the trial court was not expected to engage in an inquiry as to the extent of the Garnishee's indebtedness as of the **9 July 201**5; there being no dispute in that regard for her determination pursuant to **Order 23 Rule 5** of the **Civil Procedure Rules.** It is also noteworthy that the Bank Statements annexed to the subject application by the Garnishee to demonstrate that 2nd Respondent's account had a debit of Kshs. **264/=** by the time the Garnishee Order Absolute was issued, are statements for **2014 to 2015** and were therefore available on **9 July 2015** when that Order was made.

[22] Moreover, it is curious that the said statements terminate on 30 June 2015; while the Certificate of Balance at page 47 of the Record of Appeal is a document dated **16 July 2015;** some seven days after the Garnishee Order Absolute was issued. It is manifest therefore that the Appellant's documents did not fully reflect the status of the account for the period between **30 June 2015** and **15 July 2015,** when the Certificate of Balance was issued. Similarly, the Appellant did not present to the lower court the statements for the subject account between **15 July 2015** and **30 July 2015** when the review application was made; yet the statements were, at all material times, in its possession and custody.

[23] Consequently, I am far from convinced the there was any new or important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Garnishee or could not be produced by it at the time when the Garnishee Order Absolute dated **9 July 2015** was made. Likewise, it is my finding that there was no mistake or error apparent on the face of the record with regard to the proceedings of **9 July 2015.** Nevertheless, a pertinent issue came to the fore by way of the Garnishee's application dated **30 July 2015,** and that issue was whether the Garnishee was indeed indebted to the 2nd Respondent to the extent of the sums decreed by the lower court. Accordingly, the learned trial magistrate was duty-bound to deal with it and determine whether this amounted to sufficient reason for setting aside the Garnishee Order Absolute dated **9 July 2015.**

[24] It is trite that a garnishee is only liable to the extent of the debt owed by it to a judgment debtor. In **Barclays Bank of Kenya Ltd vs. Kepha Nyambera [2007] eKLR,** the Court of Appeal held that:

> **"a judgment creditor has no greater rights in the judgment debtor's assets held by the garnishee than the judgment debtor does…the 1st Respondent has no greater right than the judgment debtor (2nd respondent) had to the funds held by the appellant bank. The rights of the 1st Respondent over the funds held by the appellant bank are co-extensive and limited to the exact rights that the judgment debtor had over the funds."**

[25] The Garnishee herein having disputed the debt and furnished proof that the 2nd Respondent's account was in debit as the time the review application was made, the lower court ought to have given it an opportunity to dispute the debt as provided for in **Order 23 Rule 5 o**f the Civil Procedure Rules. It would therefore not work justice to condemn the Appellant to satisfy the 1st Respondent's decree without proof of the alleged debt. As was aptly stated by ***Apaloo, JA*** *in* ***Philip Keipto Chemwolo and Mumias Sugar Company Ltd vs. Augustine Kubende****:*

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits ... Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

[26] It is on that account that I find merit in the appeal. I would allow the same and issue orders as follows:

> **[a]** That the lower court's Ruling dated **29 March 2016** be and is hereby set aside;
>
> **[b]** That in its place an order be and is hereby made allowing the application dated **30 July 2015** and setting aside the lower court's *ex-parte* proceedings of **9 July 2015** together with the Orders consequential thereto;
>
> **[c]** The suit in the lower court be forthwith set down for trial of liability of the Garnishee;
>
> **[d]** Costs of the appeal to be borne by the Appellant;

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE