



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS CAUSE NO. 4 OF 2014

IN THE MATTER OF SIMON GIKONYO NDIRANGU (PATIENT/SUBJECT)

N. A. OWINO & COMPANY ADVOCATE.....APPLICANT/DECREE HOLDER

versus

CAROL MWIHAKI GIKONYO.....JUDGMENT/DEBTOR /RESPONDENT

DAVID MBUGUA GIKONYO.....ACCOUNT SIGNATORY/ RESPONDENT

versus

PAUL THUO GIKONYO.....PETITIONER/RESPONDENT

GRACE WANJIKU GIKONYO.....PETITIONER/RESPONDENT

MARGARET WAMBUI NJUGUNA.....PETITIONER /RESPONDENT

RULING

PLEADINGS

The Application before Court is Notice of Motion by the Applicant dated the 9th March, 2017. It mainly seeks that:-

(a) All monies belonging to and or in any of the accounts held by the Judgment debtor at Barclays bank of Kenya, Plaza Branch particularly in account No. 2032747364 in the name of Carol Mwihaki Gikonyo and Paul Thuo Gikonyo now standing at Ksh.3,208,000 on behalf of the Respondent/Judgment debtor herein be attached by an order nisi to answer the ruling delivered against the Judgment debtor on the 10.11.2016 for the sum of Ksh1,513,027.00 pending the hearing and determination.

(b) The Manager of the Garnishee or any other official authorized to act on its behalf be ordered to appear before this honourable Court to show Cause why the Garnishee should not pay to the decree holder the money held in its accounts for the Judgment debt, costs and accrued interest, including costs of these Garnishee Proceedings

(c) All monies owing or in any of the accounts of the Garnishee held on behalf of the Respondent/Judgment debtor be attached by an Order Absolute to answer the ruling entered against the Judgment/debtor on the 10th November 2016 for 1,513,027.

The grounds upon which the application is based are that;

i) The bill of costs dated 23rd March 2016 lodged by the Applicant herein was taxed on the 10th day of November 2016 and allowed as against the Respondent/Judgment debtor in the sum of Ksh.1,513,027.

ii) The said Judgment debtor has neglected and or refused to pay the decretal amount and does not have any known assets that can be attached to satisfy the decretal sum other than its monies on accounts held with the Garnishee at its branch at Barclays Bank, Plaza Branch Nairobi and which may be realized withdrawn, concealed and or diverted by the Judgment-debtor to the detriment of the decree holder herein who is unable to trace any other attachable assets of Judgment-debtor.

iii) The decretal amount remains unsatisfied to date to the time of the said Kshs.1,513,027

iv) The Garnishee holds monies on account for the Judgment-debtor and is within the Jurisdiction of this Honourable Court.

This was further Supported by the Affidavit of NORAH ANINDO OWINO and on further grounds to be adduced all the hearing hereof.

In her Further Supporting Affidavit, NORAH ANINDO OWINO averred that she is an Advocate of the High Court of Kenya practicing as such in the name N. A. Owino & Company Advocates and that the Applicant in this matter and she was on record for her then client CAROL MWIHAKI GIKONYO the 1st Defendant/Respondent.

That on 24th February 2016 she instructed the firm of Mwakio Kirwa & Company Advocates to put in a notice of change of Advocates on their behalf.

She stated that the bill of Costs dated 23rd March 2016 lodged by Applicant was taxed on 10th November 2016 and allowed as against the Respondent/Judgment Debtor in the sum of Ksh.1,513,027.

She also stated that despite the Ruling delivered by Hon. C. Kendagor Deputy Registrar on the 10th November 2016, the Judgment Debtor has not made any efforts to settle the amount which left the Applicant with no choice but to commence Garnishee Proceedings and seek an order nisi. She also deponed that the application dated 9th March 2017 seeking an order Nisi to be issued against the Respondent/Judgment Debtor is in order and not an abuse of the Court's process in that:

(a) The Respondent herein has an account with Barclays Bank, Account number 2032747364 which has the amounts totalling to Ksh.1,513,027.

(b) The Judgment debtor may withdraw the said sum so as to deny her costs for the work done on her behalf.

(c) There is evidence from the manager of the Barclays Bank Plaza Branch that there are persons visiting the bank to withdraw the saved monies before this application is heard and decided

(d) That the application for an order nisi is within this Honourable Court's jurisdiction hence rightfully lodged before this Honourable Court.

(e) The applicant deserves costs that rightfully belong to her for services rendered for and on behalf of the Respondent/Judgment Debtor.

On 18th July 2017 Carol Mwihaki Gikonyo stated that she had read the contents of the Applicant's application dated 9th March 2017 and the Supporting Affidavit of Norah Anindo Owino sworn on the same day and understood the opposed the same as follows;

(a) That the Applicant had been in conduct of this matter and was well aware that monies in account number 2032747364 do not belong to me.

(b) That she had filed an application dated 22nd February 2017 which ought to have been heard first because the orders she was seeking in that application would affect the applicant's application.

(c) That the application was incompetent, bad in law and a brazen abuse of the court process.

(d) That the applicant's application is vexatious and frivolous and the same should be dismissed with costs.

By a Replying Affidavit filed on 20th July 2017, DAVID MBUGUA GIKONYO the 2nd Respondent herein, claimed he was conversant with the facts of this cause, that he had read and understood the application filed by the Advocates for 1st Respondent dated 22nd February 2019 and responded as follows:

(a) That he was not opposed to some of the orders sought therein regarding the grant of leave to object to the decision of the taxing master and the granting of stay of execution pending the hearing and determination of the application.

(b) That he objected to the Certificate of Taxation issued therein by Deputy Registrar dated 7th February 2017 because it was issued in respect to both Respondents yet he was not party to the proceedings and he did not receive any legal services from the Advocates involved.

(c) That there should be a stay of execution pending the hearing and determination of the application to allow parties to canvass the issues in dispute regarding the bill of costs.

(d) That the grant of leave to object the taxing master's decision will ensure that justice is served because it will grant him an opportunity to be heard and oppose the Certificate of taxation.

(e) That he was likely to suffer irreparable loss and damage if the grant of stay of execution was not granted and if leave was not

granted to object the decision of the taxing master.

In her further Supporting Affidavit sworn and filed on 21st day of July 2017, the Applicant/decree holder Norah Anindo Owino stated that she had read and understood the Replying Affidavit of Carol Mwhiki Gikonyo dated 17th July 2017 and replied as follows:

(i) That the said affidavit is a forgery as it does not hold the true signature of Carol Mwhiki Gikonyo that she has all along used in all her documents filed in this Honourable Court.

(ii) That the said Carol Mwhiki Gikonyo ought to have been summoned to this honourable court to confirm the signature on the said affidavit as she was reliably informed that she - Carol Mwhiki Gikonyo was out of the jurisdiction of this court and never swore the affidavit in question.

(iii) That further the account they intended to attach was in the names of Carol Mwhiki Gikonyo and the garnishee when served would be able to confirm the same.

(iv) That the respondent through their agents had been making frantic efforts to withdraw monies from this account before this application was heard so as to render the application void.

(v) That in any case the Respondent had never filed a reference to object to the taxation of the subject bill of costs.

(vi) That the Respondent had made no offer to pay the bill of costs for work legitimately done.

(vii) That the Respondent is planning to abscond the jurisdiction of this Court so as to fail to pay the said costs.

Carol Mwhiki Gikonyo the 1st respondent swore and filed a further affidavit and stated that she had read the further affidavit sworn by Norah A. Owino on 21st July 2017 and responded as follows:

(a) That in reply to paragraphs 3 and 4 of the Further Affidavit, she stated that she is the one who signed the affidavit dated 17th July 2017.

(b) That the issue of forgery raised by the Advocate/Applicant is a side show which is intended to delay the hearing of this matter.

ISSUE

Should the decree holder's debt be satisfied by the garnishee; the funds held in accounts in relation to this matter/proceedings?

DETERMINATION

The law relating to the instant proceedings is housed in Order 23 Rule 1 & 5 of Civil Procedure Rules 2010 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.”

“5. If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined.”

These proceedings originated from the application filed on 16th January 2014 and amended on 7th April 2014 on the care, support and well being of the patient/subject Simon Gikonyo Ndirangu aged 83 years now incapacitated by mental ill-health and requires medical care and support.

The subject is the owner of the suit properties disclosed during proceedings that ought to be managed for his maintenance and medical care and his wife who is also ailing.

The parties are children of the subject. By this Court's Order of 31st July 2014 and Ruling of 11th February 2015 the court appointed the following as legal managers of the subject's estate;

a) Paul Thuo Gikonyo

b) Carol Mwhaki (judgment debtor)

c) David Mbugua Gikonyo

And they opened a joint account to bank the rent receivables, pay medical bills and support for the subject and his wife, pay utilities and statutory deductions among other disbursements.

A further Ruling of 6th March 2017, the Court replaced Carol Mwhaki as one of the signatories to the joint account as she collected rent from part of the subject's property and failed to bank it in the said account nor account for monies she received and she has hampered the smooth execution of collection of funds of the subject's estate and payment for medical care and support of the subject and wife.

From the above background, the following facts are uncontested; the proceedings are with regard to the subject's wellbeing and management of his properties to support his medical care and essential services.

Whereas the Court record confirms that the decree holder Ms Norah Owino advocate represented the judgment debtor in these proceedings and thereafter Bill of Costs taxed at Ksh 1,513,027 as per the judgment of Taxing Master, Deputy Registrar Family Division; to attach the proceeds in Account Number 2032747364 as garnish of the decretal amount is not legally sound because;

a) As shown above, the instant account holds funds /proceeds that emanate from the subject's properties and the said funds are earmarked for subject's medical care, expenses, support and wellbeing.

b) Although, this Court appointed the judgment debtor a co signatory to the said Account, she was removed as such on allegations of withholding funds and non-accounting of proceeds she directly received with regard to the subject's properties.

c) The relationship of advocate and client is between the 2 respective parties and liability to pay the decretal sum cannot be visited on party/parties not privy to the advocate/client relationship between the decree holder and judgment debtor.

d) During negotiations, the client held herself out on the terms of legal representation and payment of legal fees. She cannot legally bind 3rd Parties who owe no debt to her promise to pay for legal services rendered.

e) Although, the Court granted payment of legal fees as one of the items to be paid for from the funds deposited in the said account; these legal fees relate to advocates who filed these proceedings to have the subject declared incapacitated and to ensure his wellbeing based on medical records presented and the resultant arrangements to ensure that the subject's wellbeing will be taken care of . Carol Mwhaki, sought legal representation independent of this arrangement and she is not in any way declared incapacitated and ought to have her own resources and funds to settle the decretal amount.

f) As stated in the case of ODHIAMBO OWITI & CO ADVOCATES vs CFC STANBIC BANK LTD [2015]eKLR;

"A garnishee order nisi had the effect of securing and binding the funds due to the judgment debtor into the hands of the Respondent....thus making the Respondent fully accountable to whoever would be adjudged to be rightfully entitled beneficiary to those funds at the conclusion of Garnishee proceedings."

The said account does not hold judgment debtors funds the subject does not owe her any debt. Therefore this action is without valid legal basis that would adversely impact the subject's medical care and well being.

a) The judgment debtor failed to attend the taxation proceedings; has not to date sought orders to set aside the orders, review or appeal the decision.

b) The application filed on 22nd February 2017 is pending for hearing and determination.

c) The joinder of one of Co signatories of the instant account David Mbugua Gikonyo was irregular, he was not party to the advocate/client relationship with Carol Mwhaki judgment debtor and decree holder. The instant account holds funds for the subject and not judgment debtor and she is no longer a Co signatory.

DISPOSITION

1) Due to the above reasons; despite the decree holder having a valid judgment on taxation of Bill of Costs; it cannot legally be realized by garnish of the instant account 2032747364 Barclays Bank as the subject and signatories owe no funds to the judgment debtor.

2) By virtue of Order 23 Rule 5 Civil Procedure Rules, 2010 this Court finds the garnishee application lacks merit and is dismissed. The signatories of the subject's account are not indebted to judgment debtor in any way and these funds are not subject to attachment.

3) The garnishee order nisi is not granted.

DELIVERED SIGNED & DATED IN OPEN COURT ON 1ST OCTOBER, 2018.

M.W.MUIGAI

JUDGE FAMILY DIVISION- HIGH COURT

IN THE PRESENCE OF:

Mr. Gikonyo holding brief for Mr. Rautta Adhiambo for 2nd Respondent

Mrs. Kangethe holding brief for Mr. Mwang'ombe for 1st Respondent

Court Assistant – Patrick