



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 289 OF 2015**

**PARAGON ELECTRONICS LTD.....PLAINTIFF/DECREE HOLDER**

**- V E R S U S -**

**VELOS ENTERPRISES LTD ...1<sup>ST</sup> DEFENDANT/JUDGMENT DEBTOR**

**JOSEPH MWAURA NDEGWA AUCTIONEER**

**T/A J/K NDEGWA AUCITONERS LIMITED..... 2<sup>ND</sup> DEFENDANT**

**I & M BANK .....1<sup>ST</sup> GARNISHEE**

**KENYA COMMERCIAL BANK LTD .....2<sup>ND</sup> GARNISHEE**

**WANANCHI GROUP LTD .....3<sup>RD</sup> GARNISHEE**

**BAVAJ FURNITURE LTD .....4<sup>TH</sup> GARNISHEE**

**HORIZON CONTACT CENTRE .....5<sup>TH</sup> GARNISHEE**

**HUAWEI TECHNOLOGIES (K) LTD .....6<sup>TH</sup> GARNISHEE**

**SIMBANET COM LTD .....7<sup>TH</sup> GARNISHEE**

**RULING**

1) The subject matters of this ruling are for applications filed by various parties. The first application is the motion dated 21.7.2017 in which Paragon Electronics Ltd, the decree/holder sought for the following orders:

***1. This application be certified as urgent, heard ex parte, and service of the same be dispensed with in the first instance.***

***2. A garnishee order nisi be issued ordering that all monies held in deposit to the benefit of Velos Enterprises Limited by I & M Bank Ltd (Formerly Investment & Mortgages Bank Limited) at Panari Sky Centre Branch and Ngong Road Branch and Kenya Commercial Bank Ltd at Gateway B+usiness Park Branch and Kencom House, in account numbers***

***a) 01959XXXX held at I & M Bank Ltd (formerly Investment & Mortgages Bank limited) and***

***b) 110237XXXX held at Kenya Commercial Bank Ltd***

***c) Any other account held by the judgement-debtor with I & M Bank Ltd and Kenya Commercial Bank Ltd be attached to answer the decree issued in favour of the decree-holder on 6<sup>th</sup> June, 2017 for the sum of ksh.55,365,664.73***

***3. An order be and is hereby issued directing I & M Bank Ltd (formerly Investments & Mortgages Bank Ltd) and Kenya Commercial Bank Ltd, the garnishees, to appear before this court on an appointed date and time to show cause why they should not release to the decree holder all monies (or such monies as are sufficient to answer to the decree issued on 6<sup>th</sup> June, 2017) held in deposit for the benefit of Velos Enterprises Ltd, in account numbers;***

*a) 019595XXXX held at I & M Bank Ltd (formerly Investment & Mortgages Bank Ltd); and*

*b) 110237XXXX held at Kenya Commercial Bank Ltd*

*c) Any other account held by the judgement debtor with I & M Bank Ltd and Kenya commercial Bank Ltd.*

**4. The court be pleased to make such other consequential orders as are necessary for the execution of the decree.**

**5. Costs of this application be borne by the judgement debtor.**

2. The aforesaid motion is supported by the affidavit of Bulent Gulbahar. When served with the aforesaid motion, Kenya Commercial Bank Ltd, the 2<sup>nd</sup> Garnishee, filed the replying affidavit of Christopher Mutunga to oppose the motion.

3. It is the applicant's submission that the directors of Velos Enterprises Ltd, the judgment/debtor are all dual and or foreign nationals and the decree/holder is apprehensive that the judgement/debtor will transfer its assets to third parties with a view of defeating the decree.

4. The applicant decree/holder further argued that the decree has not been set aside and neither is there an order for stay of execution of the decree.

5. The applicant also stated that there are reasons to believe that the accounts sought to be garnished hold funds that may be sufficient to satisfy the decree either partially or fully.

6. In response to the application, the 2<sup>nd</sup> garnishee confirmed that Velos Enterprises Ltd operates account no. 1102377090 currently indicating a ledger balance of ksh.5,414,428 as at 2.7.2018.

7. The 2<sup>nd</sup> garnishee proceeded to furnish the court with a current statement of account. The amount shown to be in the bank account is said to be insufficient to satisfy the decree of ksh.55,365,664/74. The 2<sup>nd</sup> garnishee then stated that it is ready to cooperate and comply with any court order.

8. Bevaj Furniture Ltd, the 4<sup>th</sup> garnishee filed the replying affidavit of Roselyne Wambui Mbugi to oppose the motion dated 21.7.2017. It is the argument of the 4<sup>th</sup> garnishee that a garnishee order can only issue in instances where there is something which the law recognises as a debt.

9. It was further argued that the decree holder has not conducted due diligence thus wrongly enjoining the 4<sup>th</sup> garnishee since there is no Landlord-Tenant relationship between the 4<sup>th</sup> garnishee and the judgment debtor.

10. The 4<sup>th</sup> garnishee further pointed out that its relationship with the judgment debtor has been bad leading to the termination of their tenancy relationship.

11. The second garnishee application is the motion dated 11<sup>th</sup> June 2018 in which the decree/holder sought for the following orders:

*a) THAT this application be certified urgent and be heard ex parte in the first instance.*

*b) THAT pending the hearing and determination of this application, this honourable court be pleased to make a garnishee order nisi against the KENYA Commercial Bank Limited; Wananchi Group Limited; Bevaj furniture Limited; Horizon Contact Centre Limited; Huawei Technologies (K) Limited ; Simbanet Com Limited; the 2<sup>nd</sup> – 7<sup>th</sup> garnishees herein, ordering that any monies to be paid to the judgement debtor by the 2<sup>nd</sup> – 7<sup>th</sup> garnishees as rental income be attached to answer the decree for the sum of shs.55365,664.73.*

*c) THAT this honourable court be pleased to make an order directing the 2<sup>nd</sup> – 7<sup>th</sup> garnishees to appear before this court on an appointed date and time to show cause why they should not pay the decree holder the sum of shs.55365664.73 plus interest in satisfaction of the decree herein.*

*d) THAT costs of the and incidental to this motion be provided for.*

12. The aforesaid motion is supported by the affidavit of Bulent Gulbahar. The 1<sup>st</sup> defendant/judgment debtor filed grounds of opposition to resist the application.

13. It is the submission of the applicant decree holder that this court issued a decree nisi on 21.7.2017 in the accounts mentioned herein and therefore those orders should be made absolute. The applicant further stated that the judgment debtor receives substantial sums of money from the garnishees herein as rental income which amount is sufficient to satisfy the decree herein.

14. It is the submission of the judgement debtor that the applicant's application amounts to an abuse of the court process in that a similar application is pending before the Commercial Court vide H.C.C.C No. 289 of 2009 and H.C.C.C. No. 285 of 2010.

15. It was also argued that the decree holder's directors reside outside Kenya and that may cause serious inconvenience in that the amount may not be recovered.
16. It was also argued that the 1<sup>st</sup> defendant has neither received rent and or service charge from the garnishees since August 2017 when the decree holder obtained orders.
17. The 2<sup>nd</sup> garnishee filed grounds of opposition to resist the motion dated 11.6.2018. It is the submission of the 2<sup>nd</sup> garnishee that it does not have any debt as regards rent due to the judgment debtor and that the decree holder has not provided as much.
18. The 2<sup>nd</sup> garnishee also pointed out that rent payable to the judgment debtor is not a debt and cannot be subject to garnishee proceedings. This court was urged to reject the application.
19. Having considered the grounds stated on the face of the two applications together with the facts deponed in the affidavits filed in support and against the garnishee applications plus the grounds of opposition and having further considered the rival written submissions and the oral highlights, I have formed the following view in respect of the two garnishee motions.
20. First, it is not in dispute that the decree holder has made similar applications in H.C.C.C. No. 289 of 2009 and in H.C.C.C. No. 285 of 2010. The decree holder did not disclose those facts when filing the current applications. With respect, I agree with the judgement debtor's submissions that this conduct may amount to an abuse of the court process.
21. Secondly, I am also convinced by the submissions of the 4<sup>th</sup> garnishee that as of now there exists no Landlord-Tenant relationship between it and the judgment debtor and therefore there is no arrears of rent.
22. Thirdly, that the decree holder has failed to establish that there is a sum of money held by the 4<sup>th</sup> garnishee that is due to and recoverable by the judgment debtor that would constitute a debt for purposes of garnishee proceedings.
23. Fourthly, that the debt between the 4<sup>th</sup> garnishee and the judgment/debtor is subject of a ruling in an ongoing civil case no. 1888 of 2018.
24. For the above reasons I decline to issue the orders sought in the two applications. In sum, the two motions dated 21.7.2017 and 11.6.2018 are dismissed.
25. The 1<sup>st</sup> defendant took out the motion dated 25<sup>th</sup> June 2018 and applied to be granted the following orders:
- i. THAT this application be certified as urgent and this application be heard ex parte in the first instance.*
  - ii. THAT pending the hearing and determination of this application inter partes the court do grant a stay of the proceedings.*
  - iii. THAT all further proceedings herein be stayed on such terms as this honourable court may deem just and convenient pending the hearing and determination of the applicant's intended appeal against the ruling of this honourable court delivered on 11<sup>th</sup> May 2018.*
  - iv. THAT there be a stay of execution of the judgment of his court entered on such terms as the court considers just pending the hearing and determination of the applicant's intended appeal against the ruling of this honourable court delivered on 11<sup>th</sup> May, 2018.*
  - v. THAT the costs of this application be provided for.*
26. The motion is supported by the affidavit of Rameshchandra Jayantilal Sheth. The decree holder vehemently opposed the motion for stay of proceedings by relying on the grounds of opposition and the affidavit filed in support of the motion dated 3.8.2018.
27. It is the submission of the 1<sup>st</sup> defendant judgment debtor that it has now formally filed the record of appeal and therefore there is need to obtain an order for stay pending appeal. The applicant is apprehensive that once enforcement of the judgment takes effect the applicant's appeal will be rendered obtuse since it will be very difficult to recover the decretal sum from the decree holder since the plaintiff is run and operated by persons who are foreign nationals.
28. The decree holder on the other hand is of the submission that the order for stay should not be granted because the court did not grant a positive order. The decree holder further argued that the appeal has little chances of success.
29. It was also pointed out that the judgement debtor did not make an offer for the provision of security for the due performance of the decree.
30. The judgment debtor admitted that its board of directors comprised of both foreigners and Kenyan nationals.
31. In response to the submission that the judgment debtor has not made an offer to provide security for the due performance of the decree, the applicant stated that it was ready to abide by any conditions imposed by the court.

32. Having considered the material placed before this court in support and against the application for stay of proceedings there are certain facts which appear undisputed.
33. First, it is not in dispute that this court dismissed an application seeking to set aside the default judgment entered on 26.10.2015.
34. Secondly, it is apparent that the judgment debtor has now filed an appeal to have the dismissal order impugned before the Court of Appeal.
35. The judgment debtor is now seeking for the protection of this court pending appeal to grant an order for stay. The decree holder has not hid its intention to have the decree executed even before the appeal is heard and determined.
36. Thirdly, there is no doubt in my mind that having looked at the grounds of appeal that the appeal raises arguable points of law.
37. It is apparent that the applicant faces the risk of substantial loss since the decree holder is operated by persons who are foreign nationals.
38. In my humble view, I am satisfied that the judgment debtor would suffer substantial loss if the order for stay of proceedings in that there is reasonable apprehensions as to the ability of the 1<sup>st</sup> respondent to repay the colossal amount.

I am satisfied that the defendant has shown that it is entitled to the order for stay.

39. The other principle which the law requires to be considered is the provision of security for the due performance of the decree. The defendant applicant has stated that it is ready to comply with any conditions imposed by this court. This court is aware that the judgment sum is a colossal sum and if the 1<sup>st</sup> defendant is ordered to make a deposit the decretal amount the 1<sup>st</sup> defendant may close down its businesses.
40. I direct the 1<sup>st</sup> defendant to provide a bank guarantee for ksh.55,365,644/73 or in the alternative provide an insurance bond for the aforesaid amount within 30 days from the date hereof for the due performance of the decree.
41. The final application to be determined is the motion dated 3.8.2018 taken out by the plaintiff decree holder in which it sought for the following orders:

***i. This application be certified as urgent, heard and determined in terms of prayers 2,3 and 4 hereunder exparte, and set down for inter partes hearing at the earliest.***

***ii. The following sums held by the tenants on LR209/19115 and LR209/19116 to the credit of the judgment debtor be paid in court pending the hearing and determination of this application as follows:***

- a) Bevaj Furnitures Limited –kes.11,371,993.50***
- b) Kenya Commercial Bank Limited – kes.3,408,917.50;***
- c) Wananchi Group (K) Limited –kes.18,314,834.55 & USD 137,528.28***
- d) Wananchi Telcom Limited – USD56,520.18***
- e) Aldean Network Limited –USD 30,617.19***
- f) CBN Kenya –kes.677,040.00***
- g) Sichangi & Co. Advocates – kes1,753,325.00 and***
- h) Cannon Assurance Limited –kes975,910.35***

***iii) All further rental proceeds by the above mentioned be subsequently paid in court pending hearing and determination of his application.***

***iv) This order be served on the aforementioned in 2(a-h) for their compliance with prayer 2 and 3.***

***v) The supporting affidavit or Ramesh Rameshchandra Jayantilala Sheth sworn on 25<sup>th</sup> June 2018 be and is hereby struck out.***

***vI) The judgement debtor's application dated 25<sup>th</sup> June 2018 be and is hereby struck out with costs of full indemnity basis to the decree holder.***

***vii) The costs of this application and interest thereon at court rates be awarded to the decree holder and be paid by the judgement debtor.***

**viii) Any other orders that this honourable court may deem fit in the interests of justice.**

42. The motion is supported by the affidavit of Bulent Gulbahar. The motion is opposed by the garnishees. It is the averment of the plaintiff/decreed holder that the judgment debtor and the 4<sup>th</sup> garnishee have colluded to obtain an order for stay to frustrate the order of garnishee order nisi.

43. It is also stated that the 4<sup>th</sup> garnishee has disclosed that there is an ongoing civil dispute between the 4<sup>th</sup> garnishee and the judgment debtor over the amounts claimed to be owed to the judgment debtor.

44. According to the decreed holder, that submission is not correct.

The decreed holder further argued that Huawei Ltd is no longer the judgment debtor's tenant and therefore it is apprehensive that the other garnishees may follow suit.

45. It is also the argument of the decreed holder that several judgments have been entered over huge sums of money and that the property where the garnishees are tenant is charged in I & M Bank, the 1<sup>st</sup> garnishee and may be sold by the bank leaving the decreed holder with no recourse. For the above reasons the decreed holder urged this court to grant the orders sought in the motion.

46. The 4<sup>th</sup> garnishee is of the submission that the decreed holder's motion is frivolous and amounts to an abuse of the court process arguing that it owes no money to the judgment debtor and that there are pending court proceedings between them over disputed rent arrears.

47. It was also argued that the decreed holder has failed to discharge the burden of ascertaining that there is some money held by the garnishee that is due to and recoverable by the judgment debtor.

48. Having considered the rival submissions, I am persuaded by the submissions of the 4<sup>th</sup> garnishee that the decreed holder's motion dated 3<sup>rd</sup> August 2018 lacks merits. The same is dismissed.

49. In the end and on the basis of the reasons stated in this ruling the decreed holder's motions dated 21.7.2017, 11.6.2018 and 3.8.2018 are dismissed for want of merit. However the 1<sup>st</sup> defendant's motion dated 25.6.2018 is allowed with the resultant order that there be a stay of proceedings pending the hearing and determination of the appeal on condition that the 1<sup>st</sup> defendant provides a bank guarantee or in the alternative an insurance bond for ksh.55,365,644/73 within a period of 30 days in default the motion will be treated as having been dismissed.

50. In the circumstances of this dispute a fair order on costs is to direct which I hereby do that costs shall abide the outcome of the appeal.

**Dated, Signed and Delivered in open court this 16<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants