



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC. APPL. NO. 161 OF 2016**

**BANK OF AFRICA KENYA LIMITED.....APPLICANT**

**VERSUS**

**TECHSPA GENERAL SUPPLIES LIMITED.....RESPONDENT**

**AND**

**GUARANTY TRUST BANK(KENYA) LIMITED .....GARNISHEE**

**RULING**

1. Bank of Africa Kenya Limited (**the Applicant**) has taken out Originating Summons dated 5<sup>th</sup> April 2016 seeking the following:-

2. Pending the hearing and determination of this application inter-partes, an amount not exceeding Kenya Shillings 47,746,488 Cents 75 owed to the Applicant by the Respondent as at 8<sup>th</sup> February 2016, on which sum interest continues to accrue at 28% per annum until payment in full, be attached from its Account Number 2120048260 maintained with GUARANTY TRUST BANK (KENYA) LIMITED and the said amount be withheld by GUARANTY TRUST BANK (KENYA) LIMITED.

3. An amount not exceeding Kenya Shillings 47,746,488 Cents 75 owed to the Applicant by the Respondent as at 8<sup>th</sup> February 2016, on which sum interest continues to accrue at 28% per annum until payment in full, be attached from its Account number 2120048260 maintained with GUARANTY TRUST BANK (KENYA) LIMITED and the said amount be released by GUARANTY TRUST BANK (KENYA) LIMITED to the Applicant's Advocates Messrs.Walker Kontos Advocates within seven(7) days of the Order hereto, to answer the said the sum which remains unpaid, together with costs.

2. Those Summons are expressed to be under the Provisions of Sections 1A, 1B and 3A of The Civil Procedure Act, Order 37 Rule 4 and Order 23 Rules 1(1) (2) and (4) of The Civil Procedure Rules (CPR).

3. Very early on 18<sup>th</sup> April, 2016, the Respondent challenged the proceedings by way of Preliminary Objection that the matter has been filed prematurely. The nature and scope of the Objection becomes clearer in the written submissions of 21<sup>st</sup> November 2016 made by the Respondent.

4. This Court must quickly accept that in so far as the Summons are said to be Garnishee Proceedings

under the Provisions of Order 23 Rule (1) of CPR, then they would be a substantial defect. Order 23 Rule (1) and (2) provides:-

“(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 so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

(2) At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor”.

It is conceded that the Applicant Bank is not a Decree Holder and would therefore not be entitled to take out Garnishee Proceedings as it is the preserve of a Decree Holder.

5. However, the Provisions of Order 37 Rule 4 may be wide enough to allow the Applicant Bank to bring proceedings against the Respondent in this nature. The Rule provides:-

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or **having property subject to a legal or equitable charge, or any person** having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee”.

6. From the Affidavit presented in support of the Summons it is alleged that as at 8<sup>th</sup> February 2016, the Respondent owed the Applicant a sum of Kshs.47,746,688.75 (**the debt**) which sum continues to accrue interest at 28% per annum until payment in full. The Debt is secured by a Debenture dated 30<sup>th</sup> August 2015 granted by the Respondent in favour of the Applicant Bank. Under clause 4 of the Debenture “all books and other debt revenues and claim including (Bank Deposits and Credit) balances” due and owing to the Respondent are charged as continuing Security in favour of the Applicant Bank.

7. In these Proceedings the Applicant Bank seeks that any amount not exceeding the debt amount that is in the Respondent’s Account No.2120048260 at Guaranty Trust Bank (Kenya) Limited be attached to answer the debt.

8. The Debenture is in the nature of a charge and so the Applicant bank would in that sense be a chargee. Order 37 Rule 4 seems to permit a mortgagee (reads as well a chargee) who has the right to foreclose any charge to take out, as of course, an Originating Summons for such relief.

9. It is for the above reason that this Court cannot fault the Originating Summons in so far as it is anchored on the Provisions of Order 37 Rule4. The Originating Summons survives the Preliminary Objection and the Interim Orders made herein remain in force.

10. However, because of my observation in respect to the Garnishee Proceedings this Court partly upholds the Preliminary Objection and removes the Garnishee from these proceedings with costs to it. Otherwise, each Party shall bear its own costs on the Preliminary Objection.

11. This Ruling applies to Misc. Applications No. 162/2016 and 163/2016.

**Dated, Signed and Delivered in Court at Nairobi this 16<sup>th</sup> day of February,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Mburu for Respondent

Omino for Applicant

Alex - Court Clerk