



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 249 OF 2013

FREDRICK MWANGI NYAGA.....PLAINTIFF

VERSUS

GARAM INVESTMENTS

HOUSING FINANCE LIMITED.....DEFENDANT

RULING

1. The application before me was brought pursuant to the provisions of Order 23 Rules 1 (1) (2) and 4 of the Civil Procedure Rules.
2. The application is premised on a consent order dated 11th December 2011, pursuant to which the plaintiff says that it became entitled to costs.
3. The plaintiff filed a Bill of Costs dated 19th December 2015, which was taxed on 2nd April 2016. The learned Taxing Officer awarded to the applicant costs in the sum of Kshs. 7,575,452.16, and a Certificate of Taxation was duly issued.
4. The applicant has now asked the court to order that the respondent's funds, which are held in his bank account at the **CO-OPERATIVE BANK of KENYA LIMITED**, by attached.
5. Although the respondent, **FREDRICK MWANGI NYAGA**, was served with the Garnishee application, he did not file any affidavit to respond to the application.
6. His advocate, Mr. Ng'ang'a Ngigi, informed the court that the respondent was unable to swear an affidavit because he was being held at the Thika prison.
7. Meanwhile, the Garnishee, **CO-OPERATIVE BANK of KENYA LIMITED** swore two replying affidavits.
8. In one affidavit it disclosed the balances in the 2 accounts in issue; whilst in the second affidavit it disclosed that although the respondent was the sole signatory to the said accounts, both of them were operated in his respective Business names. The said Business names were **ST. AGNES COMPLEX and KILIMAMBOGO HOUSING DEVELOPERS**, respectively.
9. The former had a debit balance of Kshs. 3,723.52, whilst the latter had a credit balance of Kshs.

155,128.63.

10. Consequently, the funds in the 2 accounts were insufficient to settle the taxed costs.

11. When the application came up for hearing, the respondent termed it as premature, as there was no Decree that had been extracted.

12. The applicant did not contest the contention of its application being premature.

13. The applicant's advocate also reasoned that there should have been a process of accounting, as the suit property had been sold by the auctioneer, yet the plaintiff had not provided accounts. His view was that if the accounts were provided, it would be possible to establish whether or not the costs had been recovered.

14. The action taken by the advocate for the respondent was irregular. He purported to give factual evidence through legal submissions. The court has therefore decided to pay no attention to the "facts?" stated by the advocate, in relation to the alleged sale of the suit property.

15. Nonetheless, Order 23 Rule 1 says that the application for the attachment of debts is to be made by a Decree-holder. The said applicant seeks orders for the attachment of money which another person, who is indebted to the judgement-debtor, is holding.

16. Effectively, therefore a garnishee application is in the nature of an execution application.

17. Execution of Decrees ordinarily only takes place after the substantive case had been determined, giving rise to a Decree.

18. The process of taxation of a party and party Bill of Costs, gives rise to a Certificate of Taxation: it does not give rise to a Decree.

19. But ordinarily, the process of taxation of a party and party Bill of Costs takes place after the substantive case is determined.

20. I therefore share the opinion expressed by the respondent, that because the applicant has not demonstrated that it is a Decree-Holder, the application for attachment of the debt held by the garnishee, is premature.

21. The applicant will pay to the respondent and to the garnishee, the costs of that application.

22. As the garnishee is not a party to the substantive suit herein, it means that their involvement in the case has come to an end. In the result, justice dictates that the court should forthwith assess the quantum of costs payable to the garnishee.

23. The court was urged to award costs of Kshs. 15,000/-. However, I find that sum is on the high side. Accordingly, the costs payable to the garnishee are assessed in the sum of Kshs. 10,000/-.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Kahura for Ngigi for the 1st Defendant

Kania for Muriuki for the 2nd Defendant

Collins Odhiambo – Court clerk.