



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC. CIVIL APPLICATION NO. 441 OF 2013

ACHOLA JAOKO & CO. ADVOCATES.....APPLICANT

-VERSUS-

BARAKA AGROVET LIMITED.....1ST RESPONDENT

DANSON MBUGUA NJUGUNA.....2ND RESPONDENT

-AND-

MUGAMA FARMERS COOPERATIVE UNION LTD....1ST GARNISHEE

THE COOPERATIVE BANK OF KENYA LTD.....2ND GARNISHEE

RULING

[1] The Applicant moved the Court vide the Notice of Motion dated **24 October 2016** pursuant to **Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; Order 23 Rules 1, 2, 3, 4, and 5, as well as Order 51 Rule 1 of the Civil Procedure Rules, 2010** for the following orders:

[a]Spent

[b] That an Order *Nisi* do issue that monies held to the credit of the 1st and 2nd Respondents in Account Number [...] at the Cooperative Bank of Kenya Limited, Murang'a Branch be attached to settle and/or satisfy the Decree for Kshs. 770,378.04 together with costs and interest pending the hearing and determination of the application;

[c] That a Garnishee Order do issue to compel the Cooperative Bank of Kenya Limited, Murang'a Branch, to pay the Applicant a sum of Kshs. 770,378.04 together with the costs of these Garnishee Proceedings and interest at Court Rates of 14% per annum to the firm of Achola Jaoko & Company Advocates using funds from the 1st Respondents' Account Number 2055347900 at the Cooperative Bank of Kenya Limited, Murang'a Branch;

[d] That the Respondents be condemned to bear the costs of this application.

[2] The application was premised on the Supporting Affidavit of **Caleb Odhiambo Jaoko** attached thereto, in which it was averred that, whereas the Respondents were ordered by a Decree of the Court passed on **18 August 2016** to pay the Applicant herein the sum of **Kshs. 770,378.04**, they have refused, neglected and otherwise failed to pay or satisfy the Decree. Accordingly, the Applicant moved the Court on **25 October 2016** for the Garnishees to be compelled to satisfy the Decree from the funds held on behalf of the Respondents in **Account No. [...]** at the 2nd Respondent's Murang'a Branch. It was the Applicant's contention that the 1st Garnishee owes the Respondents between **Kshs. 3,012,022 to Kshs. 13,000,000**; being the price of agrovet supplies made as per the documents marked **COJ3** and **COJ4** to the Supporting Affidavit.

[3] The application was filed under Certificate of Urgency, whereupon Garnishee Order *Nisi* was issued on **25 October 2016** and served on the Garnishees. Both Garnishees thereupon filed their respective affidavits herein in opposition to the application. The 1st Garnishee relied on the affidavit of **Francis Ngone Gathiga**, sworn on **14 November 2016**, while the 2nd Garnishee's Replying Affidavit was sworn by **Debra Ajwang Ogada** on **1 November 2016**. The purport of the two affidavits is the same, namely that the Garnishees are strangers to the aforesaid **Account No. [...]** and are therefore not in a position to honour the Garnishee Order *Nisi*, for the reason that the said account is non-existent.

[4] In response to the representations by the Garnishees, the Applicant filed a Supplementary Affidavit on **23 November 2016** contending that the Garnishees had committed gross perjury by denying the existence of **Account No. [...]** at the 2nd Garnishee's Murang'a Branch. The Applicant endeavoured to demonstrate this by deposing that in **HCCC No. 421 of 2005: Juanco SPS Limited vs. Baraka Agrovet Limited Another**, the 1st Respondent's General Manager, known as **Ephantus Wanjohi**, admitted the existence of the said bank account vide a Replying Affidavit sworn on **1st February 2013** in response to a Garnishee Order made on **13 December 2012** by Mabeya J, and in particular at paragraphs 11, 12, 13 and 14 thereof. Thus, according to the Applicant, the Garnishees were being unnecessarily mischievous. The said affidavit was exhibited herein as **Annexure COJ6** to the Supplementary Affidavit along with other relevant documents extracted from **HCCC No. 421 of 2005**.

[5] Granted these divergent positions, the matter proceeded for a determination on the merits; whereupon written submissions were filed by Learned Counsel for the parties for the Court's consideration, pursuant to **Order 23 Rule 5 of the Civil Procedure Rules**. In its written submission, the Applicant reiterated its contention that the Garnishees are holding funds to the credit of the Respondents in the aforementioned account. In support of his submissions, the Applicant's Counsel relied on **Order 23 Rules 1 and 2 of the Civil Procedure Rules** and the cases of **Benjamin Malakwen Koech & Another vs Jackson Kipngetich Komen [2013] eKLR** and **Tony Njuguna (T/A Wairuguru Njuguna & Co.) vs Deshpal Sian Singh & Another [2013] eKLR**. He thus urged the Court to find merit in the Notice of Motion dated **24 October 2016**, and to allow the same with costs.

[6] In its submissions, the 1st Garnishee posited that, contrary to the averment of the Applicant in the Supporting and Supplementary Affidavit, there is no express mention of the account number in question in the affidavit of **Ephantus Wanjohi**; and that the only account mentioned in the documents attached thereto is **Account No. [...]**. On its part the 2nd Garnishee reiterated the argument aforementioned and further denied that the said **Ephantus Wanjohi** is associated with it in any way so as to vouch for the existence of the subject account. The 2nd Garnishee relied on the cases of **Barclays Bank of Kenya Ltd vs. Kepha Nyabera & Others [2013] eKLR** and **Awo Shariff Mohamed T/A Mohammed Investment vs. Abdulkarim Shariff Abdirahim & 5 others [2007] eKLR** in urging the Court to find and hold the it does not owe the Respondents any money that can be attached to pay the Applicant. It further submitted that it has always honoured Garnishee Orders by several courts in cases where the Judgment Debtors had accounts with it; and that the instant application is not only an exercise in futility but is also a needless endeavour and ought to be dismissed with costs.

[7] The application was filed pursuant to **Order 23 Rule 1(1) of the Civil Procedure Rules** which provides that:

"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 ... 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."

[8] Having considered the application, the affidavits filed in respect thereof and the written submissions filed by Learned Counsel, in the light of the proceedings to date, there appears to be no dispute that the Applicant received instructions from the Respondents to defend them in **HCCC No. 421 of 2005**; and that the Applicant filed this Miscellaneous Application for the purposes of taxation of Advocate/Client Bill of Costs. The taxation was undertaken by the Deputy Registrar and a Ruling thereon rendered on **27 October 2014** awarded the Applicant a sum of **Kshs. 770,378.04** in costs. Thereafter, the Applicant filed the Notice of Motion dated **8 April 2015** for judgment to be entered in the aforesaid sum, which application was allowed on **18 August 2016**. A Decree in terms was accordingly issued herein dated **3 October 2016**.

[9] The Applicant has therefore demonstrated that it has a Decree in its favour which is yet to be satisfied. It was on the basis thereof that a Garnishee Order Nisi was issued, at the instance of the Applicant and on the basis of the averments in the Supporting Affidavit that the Garnishees are indebted to the Respondents. The Garnishees having refuted that averment, the only issue that presents itself for determination herein is whether the Applicant has proved the alleged debt, which is said to be funds in **Account No. [...]**. However, a careful perusal of the affidavit of **Ephantus Wanjohi** annexed to the Supplementary Affidavit, which is the principal document relied on by the Applicant to prove that the aforesaid account belongs to the Respondents, confirms the Garnishee's posturing that it makes no mention of any specific account.

[10] Whereas the Chamber Summons at page 4 of the Supplementary Affidavit does bear the Account No. [...], its Supporting Affidavit at page 6 of the Supplementary Affidavit adverted to **Account No. [...], Murang'a Branch**. The latter number is the number reflected on the SWIFT/RTGS Application Forms at pages 18 to 25 of the Supplementary Affidavit. In view of this glaring discrepancy, it cannot be said that the Applicant has proved that the Garnishees are indebted to the Respondents for purposes of the Garnishee proceedings. As was stated by the **Court of Appeal in Barclays Bank of Kenya Ltd vs. Kepha Nyabera & Others [2013] eKLR:**

"...The Judgment-Creditor must establish that there is a sum of money held by the garnishee that is due to and recoverable by the judgment-debtor. That is what would constitute a debt for purposes of garnishee proceedings."

[11] In the premises, I would agree with the Garnishees that this application lacks merit. The same is hereby dismissed with costs, and the Garnishee Order Nisi issued herein on **25 October 2016** is accordingly hereby discharged.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 7TH APRIL, 2017

OLGA SEWE

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF APRIL 2017

RACHEL NG'ETICH

JUDGE