



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1208 OF 2003

AFRICAN COMMUTER SERVICES LTD.....DECREE HOLDER

KENYA CIVIL AVIATION AUTHORITYJUDGMENT-DEBTOR

AND

NATIONAL BANK OF KENYA LTD.....GARNISHEE

PRINCIPAL SECRETARY

(Department of State for Transport)

MINISTRY OF TRANSPORT & INFRASTRUCTURETHIRD PARTY

RULING

1. On 10th February, 2015 the Decree holder lodged a *Ex parte* Motion on Notice under Order 23 of the Civil Procedure Rules seeking to garnishee monies belonging to the Respondent/ Judgment Debtor held by the National Bank of Kenya Ltd in Account Number 01001032092900, Harambee Avenue. When the matter came on a certificate of urgency, a garnishee NISI was issued freezing the said Account.
2. On 18th February, 2015, the Principal Secretary, Department of State for Transport, filed a Preliminary Objection as an interested party in the garnishee proceedings. Together with the preliminary objection, the Interested Party filed an Opposing Affidavit sworn by one Nduva Muli on 18th February, 2015 with a view to establish that monies held and garnisheed in the subject account belongs to it.
3. When the matter came up for the hearing of the application by the garnishee and that of the Respondent/Judgment Debtor, Mr. Gatonye applied that the two applications be heard separately which application was allowed. Thereupon, Mr. Muiruri Advocate for the Interested Party applied that his Preliminary Objection be heard first and that in view of the authorities served upon him by Counsel for the decree/holder, there is a likelihood that very serious issues of a Constitutional nature are likely to arise for determination. According to Mr. Muiruri, these are as regards the Constitutionality or otherwise of Order 29 Rule 2 (2) and (4) of the Civil Procedure Rules as read with Order 23 thereof. He therefore urged that the court considers invoking its jurisdiction under Article 165 (4) of the Constitution of Kenya and have a bench of an even number empanelled to determine those issues. Mr. Gatonye for the Respondent was in support of those submissions.
4. Mr. Ahmednasir, Learned Counsel for the Decree-Holder, objected and submitted that the Interested Party was not a party to his clients application, that the Interested Party had joined itself to these proceedings and cannot now dictate how they are to be conducted. He further submitted that this court

has jurisdiction to determine any constitutional issue at any stage of the proceedings as may arise during the hearing of the application.

5. I have considered the counsels submissions and the garnishee application dated 10th February, 2015. I have also looked at the preliminary objection, the Replying Affidavit of Nduva Muli sworn on 18th February, 2015 and the authorities that Mr. Muiruri urged the court to consider. What is for consideration by this court is the garnishee application dated 10th February, 2015. A critical look at this application does not disclose any serious constitutional issue as contended.

5. I think the Interested Party is misguided as to what is before this court. I have always known the law to be that, in garnishee proceedings, what the court considers is whether the monies in the hands of the garnishee and sought to be attached belongs to the Judgment Debtor or not. The Respondent in this case is neither a Government nor a Government department. To that extent, I see no constitutional issue that is likely to arise when determining the issue at hand.

6. The issue of immunity of the funds belonging to the Government could only arise if the Government or its department was a party to the garnishee proceedings. Before me is the Department of State for Transport which is a Government Ministry. It is not a party to the proceedings. It is only an Interested Party and its role and that of the Garnishee is limited to them proving to the court that the funds sought to be attached do not belong to the Respondent but belong to it. Once it establishes that fact, the courts role under Order 23 determines. Upon such proof, my view is that the court cannot inquire further as to whether the said monies are attachable or not. The monies which the court can inquire as to whether it is attachable or not is that of the Respondent/Judgment-Creditor.

7. To the extent that the decree is not against the Interested Party, I am of the firm view and so hold that the constitutionality or otherwise of the provisions barring attachment of its monies cannot arise. In this regard, I consider the application by the Interested Party to be unfounded and only meant to delay the conclusion of this matter.

8. The order made on 19/02/15 that the Interested Party's preliminary objection be heard as part of the Grounds of Opposition to the application is confirmed. The application for empanelling a bench of even number of Judges is hereby declined.

The garnishee application dated 10th February, 2015 to proceed for hearing.

DATED and Delivered at Nairobi this 2nd day of March, 2015.

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A MABEYA

JUDGE