



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 148 OF 2013

OTIENO RAGOT & CO. ADVOCATES.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBIDEFENDANT

RULING

1. Before me is a Motion on Notice dated 24/4/15 by the Applicants brought under Order 23 Rule 5 (1) to (4,) (8,) (9) & (10) of the Civil Procedure Rules. The same seeks to make the Garnishee Order Nisi absolute and for the release of the monies attached to the Applicants Advocates in satisfaction of the decree that is in favour of the Applicant.
2. The application was supported by the Supporting Affidavit of Brian Otieno sworn on 24/4/15. The basis of the application was that the Applicant had a decree against the City Council of Nairobi (Now City County of Nairobi) “the Respondent” for Kshs.30,610,559/- together with interest at 14% per annum; that the amount outstanding on that decree as at the date of the application was Kshs.50,987,985/=; that after the elections of 2013,theRespondent took over the assets and liabilities of the aforesaid City Council of Nairobi.
3. It was contended that upon execution in or about January, 2015, the parties entered into a consent for the liquidation of the outstanding sum in instalments of Kshs.5million per month commencing 25/2/15 until payment in full; that despite as aforesaid, not a single instalment was made towards reduction of the amount due. The Applicant further contended that it had now discovered that the Respondent had A/C Nos.**[particulars withheld]**, **[particulars withheld]** and **[particulars withheld]** with the Garnishee at its Kenyatta Branch with funds sufficient to settle the decretal sum.
4. The Garnishee appeared and filed a Replying Affidavit in opposition to the application. Elvis Kuria swore that the Respondent and the Garnishee Bank has a scheme for provision of car loans and mortgages for the members of the Respondent’s County Assembly and that the subject accounts relate to that scheme; that the subject funds constitute the repayments by individual members of the Respondents County Assembly; that the Garnishee has a lien over the funds in the said Accounts as security for the loans advanced; that in the circumstances the Garnishee cannot either release or pay any monies from the said accounts.
5. Mr. Ragot, learned Counsel for the Applicant submitted that there was no evidence on record to show that the monies in the said Accounts were held as security for any advances; Counsel cited the cases of **Saleh Mohammed Vs Ramla Rubeiya Said & anor (1998) eKLR** and **Kilimani Junior Academy and S.M Nzioki Tax Consultants (2012) eKLR** in support of his submissions. That there was no evidence that any monies had been advanced by the Garnishee; but the statements showed that there were withdrawals from the said accounts. Counsel urged that the application be allowed.
6. Mr. Kariuki, Learned Counsel for the Garnishee submitted that the Accounts were the subject of a scheme for provision of car loans and mortgages to the staff of the Respondent; that the evidence

- showed that the proceeds of those accounts constituted repayments from the individual members of the Respondent's Assembly. That in the circumstances, the Garnishee has a lien over the proceeds in those accounts. Counsel urged that the application be dismissed.
7. Although the Respondent was served and its Counsel attended court on 5/5/15 when the Garnishee Order Nisi was made, no Replying Affidavit was filed or any appearance made on its behalf at the hearing of the motion.
 8. There is no dispute that there is a decree in favour of the applicant which has not been settled. From the consent letter dated 23/1/15 and produced as "B013", it is clear that the Respondent obtained respite from the then execution proceedings against it by admitting in that consent that it will liquidate the sum due then at Kshs.49,259,330/= by monthly instalments of Kshs 5 million commencing 25/2/15.
 9. The issue then before court is "whose money is it that is held in A/c Nos. *[particulars withheld]*, *[particulars withheld]* and *[particulars withheld]* in the Garnishees bank at Kenyatta Avenue Branch?" The Garnishee contends that the funds therein are repayments by individual members of the Respondent's County Assembly and it has a lien over the same. That the same is therefore security for loans and mortgages advanced.
 10. Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the Garnishee's indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.
 11. In this case, the Garnishee produced statement of accounts for each account. All the accounts have the title of Nairobi City County Mortgage Scheme Fund Account as the holder thereof. They cover the period April, 2014 – June 2015. The Garnishee contend that the funds therein are a security for loans advanced to the members of the Respondents County Assembly. That it has a lien over the proceeds thereon.
 12. I have looked at the said Statements of Account and the following is clear on them:-

a. A/c No. *[particulars withheld]*

– A deposit of Kshs.100,000,000/= was made on 8/1/15 and the credit balance as at 8/4/15 was Kshs.93,754,705/88.

b. A/c No. *[particulars withheld]*

- A deposit of Kshs.254,000,000/= was made on 11/06/14 and the account had a credit balance of Kshs.202,944,581/54 as at 08/04/15.

c. A/c No. *[particulars withheld]*

- A sum of Kshs.254,000,000/- was made on 10/6/14 and there was a credit balance of Kshs.51,728,533/92.

13. In all the Accounts, there are no other deposits made thereto save for interest accrued on the original deposit or the balance thereof. The Accounts in paragraph 12(a) and (b) above are Call Deposits whereby interest is payable on Maturity. Whilst A/c in 11(c) above it is a business current account. Indeed, all the payments out – presumably the loans and mortgages to the members of the Respondents County Assembly, seem to have been made through this last account.

14. In view of the foregoing, it is irresistibly clear that the funds in those accounts belong to no one but the Respondent.

15. Are those funds held as security or lien? A lien is a legal right or interest that a creditor has in another's property which lasts until a debt or duty that it secures is satisfied. See **Blacks Law Dictionary (supra)** page 1006. A property under a lien cannot be seized by a creditor. In this regard, for a lien to arise, the party claiming the same must establish circumstances under which

- the same arises – i.e. must establish the existence of a debt or duty in respect of which it secures.
16. In the present case, the Garnishee proffered no evidence to show that it had advanced any of its monies to the members of the Respondent's County Assembly for which the funds in the Accounts can act as security. I agree with Mr. Ragot's submission, that a prudent banker will have an agreement to show what is being advanced and what is being held as security. To my mind, I am satisfied that the funds in the accounts belong to the Respondent and are being held by the Garnishee at the direction of the Respondent on who of its members is to be advanced, how much, when and how.
17. To this end, there is nothing to show that the Garnishee is anything than a manager of the Respondents loan and mortgage fund whose funds lie in those Accounts. That does not give the Garnishee any right whatsoever over the said funds save only as a manager thereof answerable to the Respondent.
18. In the premises, I allow the application. The Garnishee order nisi is hereby made absolute whereby the Garnishee is to pay forthwith to the Applicants Advocates, a sum of Ksh.50,987,985/= to satisfy the Decree herein from monies attached and held in a/c Nos. ***[particulars withheld]***, ***[particulars withheld]*** and ***[particulars withheld]***, respectively. The Garnishee will also pay the costs of the application.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of July, 2015.

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A. MABEYA

JUDGE