



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**MISCELLANEOUS CIVIL APPLICATION NO. 88 OF 2008**  
**IN THE MATTER OF TAXATION OF COSTS**

**BETWEEN**

**ODHIAMBO OWITI & COMPANY ADVOCATES .....APPLICANT/DECREE HOLDER**

**AND**

**STANDARD ASSURANCE (K) LIMITED ..... RESPONDENT/JUDGMENT DEBTOR**

**KENYA COMMERCIAL BANK LIMITED ..... 1ST GARNISHEE**

**STANDARD CHARTERED BANK LIMITED ..... 2ND GARNISHEE**

**CFC STANBIC BANK LIMITED ..... 3RD GARNISHEE**

**RULING**

There are two applications before me one dated 27th July 2015 and the other dated 7th August 2015. By the Notice of Motion dated 27th July 2015 the 3rd Garnishee/Applicant seeks orders that:-

"1. Spent.

2. Pending the hearing and determination of this application, there be a temporary stay of execution of the Garnishee Order Absolute made herein on the 13th of March 2009.

3. Leave be granted to the Policy Holders Compensation Fund to be joined in these proceedings and heard in the instant application.

4. The Garnishee Order Absolute made herein on the 13th of March 2009, be reviewed and be set aside with an order compelling The Policy Holders Compensation Fund, as the Statutory Manager of Standard Assurance Company Limited, to satisfy the decree herein and in default execution to issue against the Policy Holders Compensation Fund.

5. The Court do issue such further and other orders as are in the interest of justice.

6. The costs do abide the outcome of the application."

It is premised on the following grounds:-

(a) The Court of Appeals direction that indemnity be sought against the statutory manager was

**based on the fact that while proceedings were pending in the Court of appeal, the funds held by the 3rd Garnishee, in favour of the Judgment Debtor, had been released to the Statutory Manager.**

**(b) There is no dispute that the funds attached pursuant to the garnishee order absolute have since been released to the Statutory Manager.**

**(c) It is just that the Statutory Manager releases the funds together with interest to the Decree Holder.**

**(d) The 3rd Garnishee is prepared to give security or abiding , by such other reasonable terms and conditions as the Court may direct.**

**(e) The Decree Holder has now threatened to issue execution effective 27th of July 2015.**

In the Notice of Motion dated 7th August 2013 the 3rd Garnishee seeks orders as follows:-

**"1. Spent.**

**2. Spent.**

**3. The warrants of attachment and sale issued herein on the 4th of August 2015 be set aside.**

**4. The Court do issue such further and other orders as are in the interest of justice.**

**5. The costs do abide the outcome of the application."**

The said application is based on grounds that:-

**(a) The warrants issued are irregular as they purport that there is a decree that has quantified auctioneers charges that they set out.**

**(b) The purported auctioneer's charges have never been assessed by the Court.**

**(c) The warrants are in breach of Rule 18 of Order 22 in that the decree in respect of which the warrants have been issued is more than a year old.**

**(d) A Notice to show cause should have preceded the issuance of the warrants.**

**(e) The Applicant is ready and willing to furnish security for the performance of the decree.**

The Applications are supported by affidavits sworn by Eric Otonolo, on 27th July 2015 and 7th August 2015 respectively. He describes himself as the 3rd Garnishee's Legal Counsel.

If I understand him well in the affidavit sworn on 27th July 2015 he is saying that whereas the 3rd Garnishee was, in this matter which has gone upto the Court of Appeal, ordered to release the funds held by it in favour of the Judgment Debtor to the Decree Holder together with costs and interest those funds have already been released to the Statutory Manager who is now the Policy Holders Compensation Fund and who ought therefore to be ordered to pay the Decree Holder. He has also deposed that the 3rd Garnishee is prepared to give security or abide by such other reasonable terms and conditions as the Court may direct. The 3rd Garnishee has indeed by an order of the Deputy Registrar of this Court made on 10th August 2015 deposited the entire decretal sum as a condition for stay.

In his affidavit sworn on 7th August 2015 he has deposed that the decree in this matter being more than a year old a Notice to show cause ought to have been issued and that the warrants of attachment are invalid. That moreover the same contain

Auctioneer's charges which have never been assessed and that the same were issued to steal a match on the application filed by the 3rd Garnishee on 27th July 2015.

The Respondent filed a replying affidavit sworn by Kennedy Odhiambo Owiti on 6th August 2015 and Notice of Preliminary Objection of even date which raises the issues that:-

**"1. Prayers 2 and 4 of the Application is Res Judicata as the issues raised in the mentioned application have been heard and determined by the Court of Appeal sitting in Nairobi vide Civil Appeal No. 232 of 2009.**

**2. Based on the reasons in ground 2 above, this Court lacks jurisdiction to hear and/or make any determinations concerning prayers 2 and 4 of this application."**

In the replying affidavit he deposes that the 3rd Garnishee's application dated 27th July 2015 is misplaced, bad in law, misconceived, lacking in bonafides and an abuse of the Honourable Court. He then gives a history of the matter up to the Court of Appeal and at paragraph 11 deposes that this Court lacks jurisdiction to vary, stay, review or even set aside the orders of the Court of Appeal made in his favour as only the Court of Appeal itself or the Supreme Court can do so. He also deposes that the prayers for stay of execution are res judicata the same having been determined by the Court of Appeal in Civil Appeal No. 232 of 2009. At paragraph 18 he deposes that the 3rd Garnishee has not in any event met the conditions for review as this application is made 6 years after the order of the Garnishee order was made; it has not annexed the order she seeks to review and further that she has not demonstrated any error apparent on the record nor brought out any new matter. He further deposes that the legal position now is the same as it stood when this suit was heard and determined. He contends that the application is only intended to frustrate and/or prevent him from realising the fruits of his judgment.

The applications were canvassed by way of written submissions and this Court has perused the same alongside the pleadings, affidavits and annextures and authorities cited.

It is conceded that the Respondent/Decree Holder has a garnishee order absolute against the applicant in this case. That order was made on 13th March 2009. It is also conceded that the Garnishee order absolute was the subject of litigation in Milimani Commercial Court and thereafter the appeal in the Court of Appeal wherein by a judgment delivered on 13th March 2015 the Court ordered the 3rd Garnishee/Applicant to pay the Decree Holder/Respondent the monies in terms of the Garnishee order together with interest at Court rates from 13th March 2009 until payment in full. The 3rd Garnishee/Applicant was also ordered to pay the auctioneer's charges. This Court is now being asked to review that order of the Court of Appeal on the ground that while the appeal was ongoing the funds held by the Garnishee were released to the Statutory Manager now known as the Policy Holders Compensation Fund who should in fact be joined to these proceedings and who should then be ordered to satisfy the decree and in default execution to be levied against her. That is the gist of the application in the Notice of Motion dated 27th July 2015. It is my finding that that application is devoid of merit. A close reading of the judgment of the Court of Appeal shows that this issue was raised in that Court. The then Statutory Manager was a party to those proceedings but nevertheless the Court stated:-

**"The above is sufficient proof that the funds the appellant was and still is interested in left the custody of the respondent following directions given by the High Court in its ruling of 12th June 2009 sought to be impugned herein. From the content of the depositions set out above, it is clear that at some point there appears to have been a consent executed between the appellant's advocates and the Statutory Manager with regard to the release of the affected funds. What we make of the Regulator's response as borne out by paragraph 7 and 8 of the afore said affidavit is that the regulator declined to honour the said consent because it had allegedly been executed by a Statutory Manager who had no authority/capacity to execute it.**

**By reason of the above, we are left with the task of doing justice to the apparent innocent party who by the time the said orders were made already had a legitimate claim that had crystallized over those funds and would be left either remediless or alternatively may be forced to initiate other**

**offshoot litigation to realize the fruits of any positive order from this Court.**

**In resolving this, we have to bear in mind our findings above that as at the time the orders of 12th June, 2009 were made the appellant's claim as against the respondent through the Garnishee order absolute proceedings had crystallized. It is therefore correct as argued by the appellants that it is the respondent that must meet the consequences of the Garnishee order absolute proceedings against them, which order remains intact to date and requires to be given effect. As mentioned, the respondent took a risk, consequence of which it must bear alone, and seek remedy elsewhere."**

(Underlining mine)

In making its decision the Court of Appeal was alive to the fact that the funds had moved from the 3rd Garnishee/Applicant to the Statutory Manager. In its conclusion and being alive to the aforementioned fact it reiterated that the respondent was at liberty to seek indemnity from the Statutory Manager of Standard Assurance Limited as it deemed fit. That Statutory Manager might as well be the Policy Holders Compensation Fund and clearly the 3rd Garnishee/Applicant has not raised anything new and as this Court cannot sit on appeal against the decision of the higher Court the application dated 27th July 2015 is dismissed.

As for the execution (Notice of Motion dated 7th August 2015) Order 22 rule 18 of the Civil Procedure Rules provides:-

**"1. Where an application for execution is made -**

**(a) more than one year after the date of the decree**

**(b) .....**

**(c) .....**

**the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him."**

**Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him."**

My finding is that the Decree Holder/Respondent's case falls under the proviso. Whereas the decree herein is more than a year old the last order in the case is that contained in the judgment of the Court of Appeal dated and delivered on 13th March 2015 and there is also evidence on the record that previously this Court had ordered execution against the 3rd Garnishee/Applicant. Accordingly that application is also dismissed.

Costs follow the event and accordingly the costs of the two applications shall be to the Decree Holder/Respondent.

**Signed, dated and delivered at Kisumu this 5<sup>th</sup> day of November, 2015**

**E. N. MAINA**

**JUDGE**

In presence of:-

Mr. Kouko for Decree Holder/Respondent

N/A for Respondent/Judgment Debtor

N/A for 1st Garnishee

N/A for 2nd Garnishee /Applicant

N/A for 3rd Garnishee

CA: Felix Magutu