



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 23 OF 2010

LILY K. MUSINGA

JOSEPH M. MUNYITHYA

WILLIAM O. WAMEYO (formerly trading as

MUSINGA MUNYITHYA & CO. ADVOCATESPLAINTIFFS

V E R S U S

MUNICIPAL COUNCIL OF MOMBASA DEFENDANT

AND

THE CO-OPERATIVE BANK OF KENYA LTD 1ST GARNISHEE

KENYA COMMERCIAL BANK LTD 2ND GARNISHEE

CONSOLIDATED BANK OF KENYA 3RD GARNISHEE

NATIONAL BANK OF KENYA 4TH GARNISHEE

BARCLAYS BANK OF KENYA 5TH GARNISHEE

STANDARD CHARTERED BANK OF KENYA LTD 6TH GARNISHEE

ECO BANK LIMITED 7TH GARNISHEE

FAMILY BANK LIMITED 8TH GARNISHEE

RULING

1. This has been a long and protracted dispute between the Plaintiff and the Defendant. The Plaintiff who is a firm of Advocates was retained by Defendant to represent Defendant in various legal matters. The Defendant failed to pay Plaintiff's legal costs which were taxed at Kshs. 17,570,670.24. Judgment was entered for Plaintiff in this case for that amount. It is then that the long process of recovery of this judgment amount began. Some of that process involved applying

for attachment of Defendant's deposit in its bank account under Order 23 of the Civil Procedure Rules. Plaintiff in their Notice of Motion dated 11th December 2012 sought to attach deposits held on behalf of Defendant in various banks. One such bank is the 2nd Garnishee, Kenya Commercial Bank Ltd (KCB).

2. A Garnishee nisi was issued against KCB on 9th July 2012 but it was stayed by a consent order of 15th August 2012 between Plaintiff and Defendant. There was default in the payment schedule in the consent of 15th August 2012 and Plaintiff successfully applied for the Garnishee nisi against KCB to be reinstated. That order of reinstatement was made on 11th December 2012.
3. The Defendant issued to the Plaintiff two cheques of Kshs. 2.5 million in satisfaction of its debt with Plaintiff. Plaintiff paid those cheques into their account with KCB in March 2013. The KCB Bank Manager confirmed that the cheques had been honoured and even proceeded to allow Plaintiff to withdraw Kshs. 800,000/- from that account.
4. KCB however in June informed Plaintiff that their account was withdrawn because the amount of Defendant's cheques had been reversed out of Plaintiff account.
5. It is that act of reversing those cheque payments out of Plaintiff's account that led to Plaintiff filing a Notice of Motion dated 29th July 2013. Plaintiff sought for an order that the Court do order that the amount paid by Defendant by two cheques of Kshs. 2.5 million each be deemed to be in satisfaction of Garnishee nisi, which was reinstated on 11th December 2012. Plaintiff also sought a prayer that the costs of that Notice of Motion and of all the other Garnishee proceedings be paid by KCB.
6. The Plaintiff and Defendant entered a consent for the payment of Kshs. 5 million and that seems to have taken care of the first prayer sought by Plaintiff. What was left hanging was the issue of costs of the Notice of Motion and the Garnishee proceedings. That is the issue to be determined by this Ruling.

PLAINTIFFS SUBMISSIONS

7. Plaintiff was of the view that KCB in debiting their account was an act of disobedience of this Court's order. Plaintiff relied on case of **REFRIGERATORS AND KITCHEN UTENSILS LTD -Vs- GULABCHAND POPATAL SHAH & OTHERS CIVIL APPLICATION NO. NAIROBI 39 OF 1990** where the Court observed-

“For the rule of law and good order, it is essential that the authority of and dignity of the Court be upheld at all times.”

It is for that reason Plaintiff argued they are entitled to recover costs of the Garnishee proceedings against KCB. Plaintiff relied on the case **JANMOHAMED -Vs- TWENTSCHE OVERSEAS TRADING COMPANY (1967) E.A. 290** where the Court had this to say-

“The onus is on the party seeking to deprive the successful party of his costs since costs should follow the event unless good reason exists to the contrary.”

KCB SUBMISSIONS

8. KCB referred the Court to Order 23 Rule 10 of the Civil Procedure which it sought it be a guide for the Court on the issue before it. That Rule provides-

“10. The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court, and the costs of the decree-holder shall, unless otherwise directed, be retained out of

the money recovered by him under the Garnishee order, and in priority to the amount due under the decree.”

KCB also cited the case **ISLAND UNIFORMS LIMITED –Vs- MUNICIPAL COUNCIL OF MOMBASA & 8 OTHERS [2013]eKLR** which considered the implications of that Rule as follows-

“Decision on who meets the cost of the first Garnishee will also be guided by that Rule. Like any discretion, the discretion under that Rule will be exercised judicially and on reasons connected to this case.”

9. KCB submitted that in accordance with Section 27 of the Civil Procedure Act, the costs should follow the event and should therefore be paid by the Defendant because it was the Defendant who gave rise to the chain of events in this case.

ANALYSIS

10. Indeed as submitted by KCB Section 27 provides that costs should

follow the event unless the Court shall for good reasons otherwise order. For good measure let me set that Section in full as follows-

“27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order.”

11. What is the event here? Plaintiff as stated before obtained Garnishee

nisi order against KCB in July 2012. That was stayed when Plaintiff reached a consent with the Defendant on the payment of the judgment debt. Defendant reneged on that consent. Plaintiff applied for an obtained the reinstatement of Garnishee nisi order against KCB. As far as I can tell from the proceedings that Garnishee nisi order was never made absolute. What Order 23 Rule 4 provides is that a Garnishee nisi attaches debts owed by the Garnishee to the Defendant. There is no obligation, at that stage when Garnishee nisi is in place for the Garnishee to pay the Decree Holder the amount so attached. The obligation to pay over to the Decree holder only arises when the Garnishee order is made absolute.

12. What however seemed to have happened here is that Defendant

independent of the order of Garnishee nisi, issued against KCB, issued to Plaintiff’s favour two cheques both for Kshs. 2.5 million. At this stage it is not clear to me why KCB, after assuring Plaintiff that these two cheques had been credited to Plaintiff’s account, reversed that credit leaving Plaintiff with a debit balance in their account. What I however find is that if there was any wrong doing by KCB against its client, the Plaintiff, such wrong doing calls upon the Plaintiff to bring action against KCB. Such action cannot be litigated in this action at all. I say so because the two cheques for Kshs. 2.5 million were not paid to Plaintiff following an attachment under Order 23 but rather the Defendant paid Plaintiff directly the cheques, which on being banked by Plaintiff into their account were reversed out by KCB.

13. In considering the issue of costs I am well guided by the case

NEDBANK SWAZILAND LTD –Vs- SANDILE DLAMINI NO (144/2010) [2013]SZHC 30 (2013) where Maphalala J referred to LEVBEN PRODUCTS –Vs- ALEXANDER FILMS (SA) (PTY) LTD 1957(4) 225 (SR) where he stated-

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (FrippvsGibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at ... In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

I should state that the above case was quoted in our local case **PARTY OF INDEPENDENT CANDIDATE OF KENYA & ANOTHER –Vs- MUTULA KILONZO & 2 OTHERS [2013]eKLR.**

14. In answer to the question I posed to myself (what is the event?) I

respond by saying that the Plaintiff having not received the two cheques from Defendant in respect of Garnishee proceedings can only have sued KCB in a separate suit for the act of reversing the credit in their account. Having not done so, they cannot be entitled to costs of Garnishee as they seek.

15. In the end prayers No. 2 and 3 of Notice of Motion dated 29th July

2013 are hereby dismissed with no orders as to costs since Kenya Commercial Bank did not seek any costs.

DATED and DELIVERED at MOMBASA this 5TH day of JUNE, 2014.

MARY KASANGO

JUDGE