



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISCELLANEOUS APPLICATION NO 145 OF 2012**

**WACHIRA NDERITU NGUGI & CO, ADVOCATES.....APPLICANT**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....RESPONDENT**

**AND**

**INVESCO ASSURANCE CO LTD .....GARNISHEE**

**IN THE MATTER OF A GARNISHEE APPLICATION**

**RULING “B”**

1. By a ruling dated 19<sup>th</sup> and delivered on 21<sup>st</sup> June 2013 herein the court (Waweru, J) granted a *garnishee order absolute* upon the term that -

**“the Garnishee shall pay to the Applicant the debt owed by the Garnishee to the Respondent sufficient to discharge the decree herein by monthly instalments of KShs 1 million with effect from 15<sup>th</sup> July 2013 and on the 15<sup>th</sup> of each succeeding month until payment in full of the decree”**

2. In granting the order the court observed –

(a) That the decree that the Applicant had against the Respondent was not disputed.

(b) That the Garnishee did not dispute its indebtedness to the Respondent, which indebtedness the Garnishee revealed stood at KShs 16,876,798/00.

(c) That the Garnishee’s indebtedness to the Respondent was encapsulated in a consent order recorded in **Nairobi HCCC No. 1108 of 2006** between the two on 3<sup>rd</sup> July and issued on 2<sup>nd</sup> August 2012.

(d) That the Respondent did not oppose the Applicant’s application for the garnishee order absolute.

3. It is common ground that the Garnishee paid to the Applicant some five (5) instalments (a total of KShs 5 million) pursuant to the *garnishee order absolute* and then stopped payments before the

Applicant's decree against the Respondent had been fully discharged.

4. The Applicant then applied by **notice of motion dated 17/01/2014** to enforce the *garnishee order absolute* in order to recover the unpaid decretal sum. The Applicant sought two main orders –

(i) An order for execution for the sum of KShs 11,876,798/00 (the figure was later amended to read KShs 7,028,312/16) against the Garnishee for being in default of the *garnishee order absolute*.

(ii) An order for committal to civil jail of one **Paul Gichuhi**, the Legal Manager of the Garnishee for being in contempt of the *garnishee order absolute*.

5. I have read the supporting and replying affidavits. The Applicant filed, in addition to the **supporting affidavit** annexed to the application, a **further supporting affidavit on 17/04/2014**. The Garnishee on its part filed **replying affidavit on 10/02/2014** and a **further (replying) affidavit on 01/04/2014**. Both are sworn by the aforesaid Legal Manager of the Garnishee. Two main points have been taken by the Garnishee –

(i) That there was an adjustment in the accounts between the Garnishee and the Respondent in Nairobi HCCC No. 1108 of 2006 to the effect that the Garnishee no longer owed any monies to the Respondent, which adjustment resulted in a consent order entered on 14/11/2013 in the said suit by which the previous consent order of 3<sup>rd</sup> July 2012 was varied “to take into account of the sum of KShs 7,000,000/00 paid by the (Garnishee) to the (Respondent)”.

(ii) That the remedy of contempt proceedings in execution of the *garnishee order absolute* was not available because –

a. the Garnishee was not a public body; and

b. Paul Gichuhi was in any event, not a director of the Garnishee.

6. I have considered the submissions of the learned counsels appearing. Whatever adjustments there may have been in the accounts between the Garnishee and the Respondent in Nairobi HCCC No 1108 of 2006, and notwithstanding their further consent recorded in that suit on 14/11/2013, the Garnishee was not at liberty to simply ignore the *garnishee order absolute*. That order was and still is in place and the Garnishee must obey it as long as it remains in place. What the Garnishee should have done is to apply to vacate or vary that order in light of the claimed changed circumstances regarding its indebtedness to the Respondent. It would then have to persuade the court, in light of any challenges that might be mounted by the Applicant, that it no longer owed any money to the Respondent and could not therefore continue to make payments to the Applicant as per the *garnishee order absolute*.

7. I repeat that it was not open to the Garnishee to simply ignore the *garnishee order absolute* when it sued it. The Garnishee must obey that order as long as it remains in place. It is still in place and has not been varied or set aside.

8. I therefore have no hesitation whatsoever in granting prayer 2 of the notice of motion dated 17/01/2014. The Applicant is hereby granted leave to execute for the outstanding decretal sum against the Garnishee. It is so ordered.

9. As for the contempt prayer, I find no cause at all to permit execution of the Applicant's money decree by way of contempt proceedings. There was no order made directing the Garnishee's Legal Manager, Paul Gichuhi, to pay the decree. Further, the Garnishee is not a public body whose accounting officer would be amenable to contempt proceedings where ordinary execution of decree against such public body is not permitted by law. That prayer is therefore dismissed.

10. I will grant the Applicant half the costs of this application. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE 2014**