REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 145 OF 2012

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

VERSUS

CITY COUNCIL OF NAIROBI. ……...……..…….. RESPONDENT

AND

IN THE MATTER OF A GARNISHEE APPLICATION

BETWEEN

WACHIRA NDERITU, NGUGI & CO. ADVOCATES. …….…….. RESPONDENT

AGAINST

INVESCO ASSURANCE CO. LTD. …….……. GARNISHEE/APPLICANT

R U L I N G

1. Before me is a Notice of Motion dated 19th June, 2014 brought under Sections 1A, 1B, 3A and 99 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The application seeks the following orders: -

> **"(3)** ***That this Honourable Court be pleased to review the orders absolute given on 25th June, 2013 to reflect all payments made.***
>
> ***(4) That the Honourable Court be pleased to make such orders that the decree in relation thereto has been fully settled and that the Applicants herein do not owe the Respondent in this suit any monies accruing from HCCC No. 1108 of 2006.***
>
> ***(5) That cost of the application be borne by the Plaintiff"***

2. The grounds in support of the application were both set out in the body of the motion and the Supporting and Further Affidavits of Caroline Shavulimo sworn on 19th June, 2014 and 16th October, 2014, the Further Affidavit of Paul Gichuhi sworn on 24th March, 2014 and an Affidavit by Edward N Omotii of 17th November, 2014 respectively. The Garnishees case is that the Respondent herein had attached a decree obtained by the Judgment-Debtor herein ("***the City Council of Nairobi***") **NBI HCCC No. 1108 of 2006 City Council of Nairobi Vs Invesco Assurance Co;** that although the application for attachment was for Ksh.10,516,557/08, the order

absolute was issued on 25th June, 2013 for Ksh.16,876,798/- the said sum was payable by monthly instalments of Kshs.1 million.

3. Pursuant to the said Order, the Garnishee paid the said instalments for five (5) months they stopped the payment when it discovered that the amount payable to the City Council of Nairobi under the decree in HCCC No. 1108 of 2006 had been fully liquidated. That the realization came about when it was discovered that two payments of Ksh.5 million and Ksh. 2million made to the City Council of Nairobi in January, 2006 and April 2007 respectively had not been taken into account; that upon that realization, a consent was recorded in the said **NBI HCCC No. 1108 of 2006** between the Garnishee and the City Council of Nairobi.
4. Ms Shavulimo swore that at the time the Garnishee Order was made, the Garnishee had just come out of statutory management and the company records were still in disarray; that it is upon final accounts being taken with the Advocates acting for the City Council of Nairobi in the said **HCCC No. 1108 of 2006** Ms Omotii & Company that it was discovered that there had been an overpayment of Ksh.68,006/- on the decree. The Garnishee produced various correspondence, copies of cheques and statements of accounts in support of its contention that there was no more monies due to the Judgment-Debtor herein on the decree in **NBI HCCC No. 1108 of 2006**.
5. In his Affidavit of 17th November, 2014, Edward N Omotii swore that he is an Advocate of this court practicing in the name ad style of E N Omotti & Company Advocates; that he had acted on behalf of the City Council of Nairobi in **HCCC No 1108 of 2006** wherein a decree was obtained in favour of City Council of Nairobi against the Garnishee. That the Garnishee was to liquidate that decree by way of instalments; that a consent order was recorded in that suit whereby it was recorded that the amount due from the Garnishee to the City Council of Nairobi as at 3rd July, 2012, was Ksh.28,939,868/- which was to be liquidated by monthly instalments of Ksh. 1 million. That later another consent was recorded whereby a sum of Ksh.7 million was factored in and the amount due as at 3rd July, 2012 was shown as agreed to be Ksh.18,731,605/70. That that consent was recorded on 14th November, 2013.
6. Mr. King'ara Learned Counsel for the Garnishee relied on his written submissions and stated that, after the 3rd July, 2012, a sum of Ksh.19,000,000/- had been paid in respect of the decree in **NBI HCCC No. 1108 of 2006** as follows: - Ksh.9,800,000/- to the City Council of Nairobi, Ksh. 5 million to the Respondent and Decree Holder herein and Ksh.4,200,000/- to Ms Omotii and Company Advocates. According to him, the Garnishee had overpaid the said decree by a sum of Ksh.68,000/- Mr. King'ara took the court through the cheque payments and accounts between the Judgment-Debtor and the Garnishee to show how the overpayment of Ksh.68,000/- had been arrived at. According to him, the Garnishee proceedings are not meant to be punitive but to meet the ends of justice. He urged that the application be allowed.
7. The Application was strenuously opposed by the Respondent through the Supplementary Affidavit of Wachira Nderitu sworn on 16th April, 2014; Replying Affidavit of Wachira Nderitu sworn on 25th June, 2014 and his Further Replying Affidavit sworn on 18th November, 2014 respectively. In those Affidavits, it was contended that the Garnishee Order was for Ksh.10,516,557/08 together with interest at 9% per annum upon expiry of 30 days; that the amount due as at 16th April, 2014 was Ksh.7,028,312/16; that having served the Garnishee Order, it was not open for the Garnishee and Judgment-Debtor to vary the decree in **NBI HCCC NO. 1108 of 2006** having been garnisheed; that Karisa Iha for the City Council of Nairobi had only conceeded receiving Kshs. 2 million and not the additional Kshs. 5 Million as claimed by the Garnishee; that in the premises, the Garnishee was trying to perpetrate a fraud upon the Respondent in a manner abusive to the court process.
8. It was further sworn that the provisions of Order 45 of the Civil Procedure Act were not applicable as there was no discovery of any new and important matter to warrant an order of review; that there was no any sufficient reason to justify the prayers sought for; that the material relied on was the same exhibited in the Further Affidavit filed by the Garnishee in answer to the application dated 24th March, 2014, that at all times the City Council of Nairobi has been served by the Respondent and the Judgment-Debtor has never confirmed that the Garnishee had settled its claim. That the matter had continued for too long and the Garnishee cannot be allowed to write a judgment for itself. Finally, it was contended that the Garnishee had unilaterally ignored the order of this court of 25th June, 2013 and is determined to do so by declining to pay the balance of the

amount garnisheed.

9. Mr. Wachira relied on his written submissions dated 12th November, 2014 and further submitted that the figure of Ksh.16,876,798/- came from Mr. Paul Gichuhi's Supplementary Affidavit dated 15th May, 2013. That that was the amount that was the basis of the garnishee order absolute of 25th June, 2013, pursuant to which the Garnishee had paid the Respondent a total of Ksh. 5 million. Mr. Wachira further submitted that the application was misconceived in that, it should have been filed in the **NBI HCCC No. 1108 of 2006** and not in the present proceedings.
10. The further submissions for the Respondent were that the court had all the present facts and in particular the amended statement of accounts when the ruling of 25th June, 2013 was made. That it will be extremely unjust and unfair to the Respondent to admit the purported further adjustments to the accounts between the Garnishee and Judgment-Debtor at the juncture as the Respondent cannot make any meaningful input thereto. Mr. Wachira took issue with the order of 14th November, 2013. He submitted that the same sought to vary an order of 3rd July, 2013 which was none existent. He submitted that there was clear collusion between the Garnishee and the Judgment-Debtor to defeat the Garnishee order. Finally, that since Karisa Iha had in his Replying Affidavit of 2nd October, 2013 admitted only Ksh.2 million as having been paid and not the sum of Ksh. 5 million, the consent of Ksh.7 Million made on 14th November, 2013 was a collusion between the Judgment-Debtor and the Garnishee. Counsel, therefore, urged that the application be dismissed with costs.
11. This is an application for review. I have carefully examined and considered the Affidavits on record, the written submissions of counsel and the oral highlights. The jurisdiction of this court under Order 45 is very clear. The court can only review its order firstly if there is an error apparent on the face of the record, secondly, if there is discovery of material or evidence that was unavailable after exercise of diligence at the time of making the order sought to be reviewed and thirdly, for sufficient reason. Accordingly, the Garnishee must bring itself within these parameters if it has to succeed in its application.
12. The Garnishee's case is threefold. That there was an error on record in that the amount attached was Ksh.10,516,557/08 yet the decree absolute was issued for Ksh.16,878,790/-.
13. That there was new evidence of the decree in **NBI HCCC NO. 108 of 2006** having been settled and finally that it will be punitive to the Garnishee if it is made to fully settle the claim herein. All the parties were agreeable that there was an error on the face of the decree absolute issued on 25th June, 2013 in that the amount attached should have been Ksh.10,516,557/08 and not Ksh.16,876,798/-. Although the counsels indicated that the anomaly had been corrected, I have examined the record and cannot see where that correction or amendment was made. Accordingly, I hereby amend and review the amount payable under the decree absolute from Ksh.16,876,798/- to Ksh.10,516,557/08 as per the decree nisi dated 30th April 2013.

14. The other challenge mounted by the Respondent on the application was that the decree in **NBI HCCC No. 1108 of 2006** could not have been varied since the Garnishee Order had been made absolute and had been served upon the Garnishee. Further, it was contended that the present application should have been filed in the **NBI HCCC No. 1108 of 2006** and not in the present proceedings.
15. I think the answer to these two objections are to be found in the ruling of Waweru J of 13th June, 2014 wherein he held: -

> *"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 No.1 108 of 2006, and notwithstanding their further consent recorded in that suit on 14th November, 2013, the Garnishee was not at liberty to simply ignore the garnishee order absolute. That order was and still is in place and 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 silly ignore the garnishee order absolute when it suited 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." *(Emphasis supplied)*

16. To my mind, what the court directed was that, for the Garnishee to be able to legally and procedurally resist the decree absolute of 25th June, 2013 on the basis of what had transpired in **NBI HCCC NO. 1108 OF 2006**, it was imperative that it applies in the present proceedings to either review or set aside the decree absolute.
17. In any event, I am of the view that considering the orders that were finally made on 14th November, 2013 in **NBI HCCC No. 1108 of 2006,** there could be no further proceedings to be undertaken by the Garnishee in that suit. The orders now in force in that case are not nnfavourable to the Garnishee to warrant a review as are the orders in these proceedings. Accordingly, I am of the view that, this is the correct forum to make the subject application and as contended by the Respondent.
18. The present application is premised on the basis that there is new evidence to the effect that, there are no more monies the decree in **NBI HCCC No. 1108 of 2006** to warrant the decree absolute given by this court on 25th June, 2013 to continue to be in force. On its part, the Respondent submitted that there is no new material to warrant interference on the order of 25th June, 2013. According to Mr. Wachira learned counsel for the Respondent, the averments made in the Affidavits in support of the application are the very same that were relied on in opposition to the application that led to the Garnishee absolute being made. In his view, the evidence presented before Waweru J included the very same amended statements of account relied on in this application.
19. I have examined the documents relied on in the present application. It is not in doubt that the application was prompted by the Ruling of Waweru J of 13th June, 2014. In that ruling, the court observed that until and unless the Garnishee applied to set aside the Garnishee Order absolute of 25th June, 2013, the same was still lawful and binding upon the Garnishee.
20. The Garnishee relies on two documents. Firstly, the Order of 14th November, 2013 and secondly, the Amended statement of Account filed in court on 21st November, 2013 pursuant to the Order of 14th November, 2013. In that order recorded in NBI HCCC No. 108 of 2006, a sum of Khs.7 million was ordered to be taken into account on a consent recorded on 3rd July, 2012. By virtue of the said consent of 14th November, 2013, the amount due from the garnishee to the City Council of Nairobi was agreed Ksh.18,731,605/70. As regards the amended statement of account as between the Judgment-Debtor herein and the Garnishee filed in court on 21st November, 2013, the same shows calculations on how the amount of Ksh.18,731,605/70 was arrived at.
21. The Respondent contends that this was not new evidence. Nothing had been discovered to warrant a review. It is true that both the alleged payments that led to the consent of 14th November, 2013 were allegedly made in January 2006 and April, 2007 respectively. Although that was evidence available when the Garnishee order absolute was made on 25thJune, 2013, that payment was not brought to the attention of the court. It would seem that it was also not in the knowledge of the Garnishee.
22. I say so because in paragraph 4 of her second Further Affidavit sworn on 16th October, 2014, Caroline Shavulimo swore: -

"4. That the Garnishee had just come out of statutory management and the company records were still in disarray. The company had therefore, decided to honour all court orders on payment by instalments."

23. That is a fact that was not denied nor challenged by the Respondent. Although Ms Shavulimo did

not tell the court when the statutory management of the Garnishee ceased, nevertheless, it is expected that when there is change of management certain dealings by the statutory manager may not be readily available to the incoming management. That may explain why the two payments were not discovered earlier but were only accounted for alter in November, 2013.

23. Further, when the Garnishee order absolute was made on 25/06/2013, the same was on a basis of the then existing accounts which showed that the amount outstanding between the Judgment-Debtor herein and the Garnishee as at 3rd July,2012 was Kshs.28,939,869/-. Upon adjustment between them, a consent was recorded on 14/11/13 to the effect that the correct amount outstanding as at 03/7/2012 was Kshs.18,731,606/=. That consent was recorded before Onyancha J on 14/11/13 who directed that an Amended statement reflecting the consent be filed within seven (7) days. This statement shows the payments made by the Garnishee from the date of judgment until 3rd July, 2012.
24. An issue was raised by Mr. Wachira that there was collusion between the Judgment-Debtor herein and the Garnishee in the recording of the consent of 14th November, 2013. He was of the view that, since Mr. Karisa Iha who had sworn the Replying Affidavit in opposition to the application that had led to the subject consent had denied that the Judgment-Debtor had received the sum of Kshs. 5 million, the consent of 14th November, 2013 could not have been arrived unless out of fraud.
25. I have looked at the subject Replying Affidavit. It is true that Mr. Karisa Iha denied that Kshs.5million had been received. However, he admitted the sum of Kshs. 2million having been paid by the Garnishee as contended by the latter. In my view, the fact that part of the claim by the Garnishee was admitted by the Judgment-debtor (that it had received a sum of Kshs.2million which sum had not been accounted for) shows that may be the entire claim by the Garnishee was not misplaced. There may have been some truth in the claim that is why the parties ended up recording the consent of 14th November, 2013. There is nothing in my view to suggest collusion or fraud in the recording of that order.
26. The other reason why I am not satisfied that there is collusion is that looking at the statements of accounts filed by the Garnishee, there was not a single payment made to the Judgment-Debtor after the Garnishee order absolute of 25/06/13. Indeed after that date, only the Respondent seems to have received payments from the Garnishee on the decree of **NBI HCCC NO.1108 of 2006**.
27. Mr. Wachira further attacked the consent of 14/11/13 on the basis that it sought to vary a non-existence order of 3rd July, 2013. That as matters stand, the consent of 3rd July, 2012 remains intact and therefore the decree in **NBI HCCC No. 1108 of 2006** remains unsatisfied. I have looked at that order. It stated:-

> ***"2. THAT the consent order dated 3rd July, 2013 (sic) be and is hereby varied to take into account a sum of Kshs.7,000,000/= paid by the Defendant to the Plaintiff.***
>
> ***3. THAT the parties herein undertake to file an amended statement of accounts between them within 7 days."***

28. In the Affidavit of Edward Emotii sworn on 17th November, 2014, Counsel stated that the consent to be varied was that of 3rd July 2012. He produced the Notice of Motion dated 30th August,2013 which had been filed by the Garnishee in those proceedings and which resulted in the consent of 14/11/13. Prayer 4 of that motion stated:-

> ***"4. <u>THAT</u> the consent made on 3rd July, 2012 be varied to the effect that as at 3rd July, 2012 the balance of the decretal sum in this suit was Kshs.18,931,994/="***

29. In this regard, I am satisfied that the reference in the order of 14/11/13 to a consent of 3rd July, 2013 must have been an error. That error in my view does not affect the fact that as between the parties in that suit, the consent varied was that of 3rd July, 2012. I believe that under the slip rule in Section 100 of the Civil Procedure Act, that error can be corrected by the court summarily. If

however there had been in existent another consent order dated 3rd July, 2013, then Mr. Wachira's argument could hold water. I reject that contention.

30. It was finally submitted for the Respondent that it will be unjust to allow the Judgment-Debtor and Garnishee to vary the decree in NBI HCCC NO. 1108 of 2006 as the Respondent cannot make any meaningful input. In the ruling made by Waweru J on 13/06/14 on the Respondent's application to execute, the court was categorical as to what the parties should do. The court observed:-

> ***"What the Garnishee should have done is to apply to vacate or vary that order in the light of changed circumstances regarding its indebtedness to the Respondent. It would have to persuade the court..... 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."***

31. In my view, the application alluded to by the court is the present one. The Garnishee order absolute of 25/06/2013 was predicated on the unsatisfied decree held by the Judgment-Debtor against the Garnishee in **NBI HCCC No.1108 of 2006**. The Judgment-debtor and the Garnishee have recorded a consent in that suit and filed an account from whose calculations, that decree has been satisfied. The Advocate appearing for the Judgment-debtor in those proceedings has sworn an Affidavit in these proceedings to vouch for that fact. The Respondent has not challenged the consent of 14/11/13 in those proceedings. He had the right to do so in my view having in mind that that decree had been merged with his Garnishee order absolute of 25/06/13.
32. In view of the evidence on record, that there are no more monies due to the Judgment-Debtor herein under the decree in **NBI HCCC No.1108 of 2006** what should this court do? It must be remembered that these are Garnishee proceedings. By their very nature, Garnishee proceedings are secondary and are always predicated on the garnishee being indebted to the Judgment-debtor. The primary liability of the Judgment-Debtor to satisfy the decree passed against it remains intact. What would be the effect of declining the present application?
33. In my view, it has been established to the satisfaction of this court that the decree in **NBI HCCC No.1108 of 2006** has been satisfied. Although the Judgment-Debtor was served with the application and the court indulged that Judgment-Debtor twice, it did not appear at the hearing of the application to oppose or support the application. If the Garnishee is made to pay the balance of the amount decreed under the Garnishee Order absolute to the applicants, it would have overpaid the decree in NBI **HCCC No.1108 of 2006** by over Ksh. 7 million. From whom and on what basis would the Garnishee claim that money? Won't the Garnishee have been punished to a loss in excess of Kshs.7million for no fault? On the other hand, since the Judgment-Debtor is still primarily liable to liquidate the decree in this suit, the Applicant can still pursue the judgment-debtor.
34. In view of the foregoing, I am satisfied that there is new evidence to warrant the review of the order of 25/06/13. I am further satisfied that the fact that the Garnishee cannot be made to suffer double jeopardy i.e. having paid the judgment-debtor in **NBI HCCC No. 1108 of 2006** be made to pay the Respondent on an already satisfied decree. There is sufficient reason to review the order of 25th June, 2013.
35. Accordingly, I allow the application as prayed. The funds deposited by the Garnishee in the sum of Kshs.7,028,312/16 in pursuance of the Garnishee order absolute may be released to the Garnishee forthwith.

It is so ordered.

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A. MABEYA

JUDGE

Dated, signed and delivered at NBI this 5th day of December 2014

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D. A. ONYANCHA

JUDGE