



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 90 of 2012**

**TONY KETTER.....PLAINTIFF**

**-VERSUS-**

**STANLEY KANG'ETHE KINYANJUI.....1<sup>ST</sup> DEFENDANT**

**MAWJI PATEL.....2<sup>ND</sup> DEFENDANT**

**PAUL GICHERU t/a**

**GICHERU & COMPANY ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**JOHN MUITA t/a JOMUKI ENTERPRISES.....4<sup>TH</sup> DEFENDANT**

**RULING**

The Notice of Motion Application dated 13<sup>th</sup> November 2012 by the 1<sup>st</sup> Defendant came up for hearing before me on 14<sup>th</sup> February 2013 when the same was taken out of the hearing list for that day and fixed for hearing on 20<sup>th</sup> February 2013 to afford the Chief Registrar Judiciary an opportunity to confirm whether the funds stated to be held by the Judiciary on account of the Plaintiff in Account No. 0100R026 held at the Central Bank of Kenya were indeed held in the account.

On 20<sup>th</sup> February 2013 when the application came before me for hearing Mr. Issa Advocate appearing for the Chief Registrar Judiciary confirmed that the funds stated to be Kshs. 20,094,817.45 were indeed held by the Judiciary in the said account at the Central Bank of Kenya. Mr. Issa stated that the Judiciary would comply with any order that the court may issue in regard to the funds held in the said account.

Mr. Havi Advocate on behalf of the 1<sup>st</sup> Defendant/Applicant urged the court to make an order for the payment of Kshs. 5,685,395/00 out of the said account operated by the Judiciary to the 1<sup>st</sup> Defendant being on account of the settlement of the taxed costs due by the Plaintiff to the 1<sup>st</sup> Defendant. The Central Bank of Kenya upon being served with the application appeared through the Firm of Oraro & Company Advocates and Mr. Baluto Advocate who appeared at the hearing on behalf of the Firm of Oraro & Company Advocates stated that the Central Bank of Kenya would abide with any lawful order of the court affecting the subject account operated by the Judiciary.

Mr. Bwire appeared during the hearing of the application on behalf of the Plaintiff and placed reliance on the Notice of Preliminary Objection dated 22<sup>nd</sup> November 2012 filed on behalf of the Plaintiff on the same date. The gist of the preliminary objection is that the Plaintiff contended that the application by the

1<sup>st</sup> Defendant is misconceived, legally unmaintainable and was an abuse of the process of the court for the reasons that:-

(a)The application seeks execution of a decree by way of garnishee, yet there is no decree extracted or decree extracted as prescribed by order 21 of the Civil Procedure Rules;

(b)The application as drawn and filed violates mandatory provisions of Order 23 of the Civil Procedure Rules. There is no decree order Nisi neither issued nor served as required by law.

Indeed as at 12<sup>th</sup> November 2012 when the 1<sup>st</sup> Defendant filed the instant application the decree had not been extracted but the certificate of taxation of costs had been issued. The decree was subsequently issued and certified by the court. Mr. Bwire Advocate for the Plaintiff conceded at the hearing of the application that since the decree has since been issued and certified the first limb of the Plaintiff's preliminary objection cannot be sustained but reiterated the second limb of the preliminary objection still held good and urged the court to hold that the applicant failed to comply with the provisions of Order 23 of the Civil Procedure Rules. Specifically the counsel stated that no order Nisi had been served on the garnishee as provided under Order 23(2) of the civil Procedure Rule and it was his contention that rendered the application untenable and that the same should be struck out.

When the 1<sup>st</sup> Defendant's application came before Hon. Justice Kimondo on 22<sup>nd</sup> November 2012 in the presence of Counsel for the 1<sup>st</sup> Defendant and the Plaintiff's counsel the Hon. Justice Kimondo made interalia the following orders:

1. "That as the Motion seeks to garnishee monies held by the Judiciary at Central Bank of Kenya the motion shall be served upon the Chief Registrar of the Judiciary and who will be at liberty to reply".
2. "That the applicant shall extract a copy of today's order and serve it together with the notice of motion upon the Chief Registrar of the judiciary".

The Honourable Judge correctly held that the judiciary rather the Central Bank of Kenya was in real terms of garnishee and proceeded to make appropriate orders for the service of the garnishee proceedings on the garnishee. It is my view that the directions given by the Hon. Justice Kimondo operated to vary the process procedure as set out under Order 23 to the extent that the Hon. Judge did not direct a order nisi to be extracted and served upon the garnishee. A order nisi is intended to let the garnishee know the extent of the judgment creditors claim as against the judgment and further that the judgment creditor's assets that the Garnishee is indebted to the Judgment debtor to the extent of the sum the judgment creditor claims against he judgment debtor and/or such other sum as the order nisi may disclose.

The order nisi affords the garnishee to either affirm or deny the contents (information) at the hearing of the garnishee application. In the present case the Notice of Motion application contained all the information and indeed both the Judiciary and Central Bank of Kenya appeared and affirmed the information as laid out by the 1<sup>st</sup> Defendant claimant and in the premises I am not prepared to hold that failure to strictly comply with the process/procedure as set out under order 23 of the Civil Procedure Rules rendered the application by the 1<sup>st</sup> Defendant fatally defective. The court under Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) is enjoined to render substantive justice to all the parties in an expeditious manner and without undue regard to procedural technicalities. In the present application it is clear that the plaintiff was adjudged to pay the taxed costs to the 1<sup>st</sup> Defendant and the judiciary has admitted it holds the stated amount on account of the plaintiff as claimed by the 1<sup>st</sup> Defendant.

Accordingly I find the application by the 1<sup>st</sup> Defendant meritorious and grant an order in terms of prayer No. 2 of the Notice of Motion dated 13<sup>th</sup> November 2012 and award the costs of the application to the 1<sup>st</sup> Defendant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>ST</sup> Defendant

..... for the 2<sup>nd</sup> Defendant