



PETER NJOROGE NGAHU T/A NGAHU ASSOCIATES... PLAINTIFF

Versus

TETU HOUSING CO-OP. SOCIETY..... DEFENDANT

R U L I N G

This is an application by Co-operative Bank of Kenya Limited, Nyeri branch (*Garnishee*) under section 3A and 80 of the Civil Procedure Act, orders XLIV rules 1(1) and 6, XXII and L rule I of the civil procedure rules and other enabling provisions of the law for basically two orders namely, that this court do review, vacate and set aside its garnishee order absolute made on the 27th July 2009 and costs of the application. The application was premised on the grounds that the order was made in the absence of evidence from the garnishee to challenge the same, the Garnishee had since obtained the evidence to the effect that it was not indebted to the judgment debtor, Tetu Housing Co-operative Society (Tetu) and above all Tetu was indebted to it which under the law and loan contract was entitled to the right of set off in garnishee proceedings before other debtors are paid. Tetu's indebtedness to the garnishee arises from banking facilities in excess of Ksh.29,000,000 granted to it. The garnishee was entitled to the right of set off in garnishee proceedings before other debtors are paid. That the equitable remedy of a garnishee order cannot operate to prefer one creditor over another. Finally it was the contention of the garnishee that its interest stood to suffer prejudice if the application was not granted as **peter Njoroge Ngahu** (*Ngahu*), the decree holder would proceed to attach its assets in execution of the garnishee order absolute.

The application was further supported by an affidavit of **Andrew Kuria**, the business development officer of the garnishee. Where relevant, he deponed that the garnishee was served with a garnishee Nisi pursuant to the order of this court dated 13th November, 2006. The Garnishee disputed the debt claimed and entered appearance. On 13th July, 2009 the proceedings were adjourned to 27th July, 2009 to enable the garnishee to reply to the application. On 27th July, 2009, the garnishee had not filed its affidavit in reply to the application because documents and or evidence relating to Tetu's indebtedness to it had not been retrieved from the garnishee's security document storage archives, the court nevertheless made the garnishee order absolute. The garnishee had since obtained the evidence to the effect that it is not indebted to Tetu. Indeed it was Tetu that was indebted to it to the tune of Ksh.29,000,000/= which under the law and loan contract is entitled to the right of set off before other debtors are paid. Currently Tetu is indebted to the garnishee to the tune of Ksh.7,563,990/45 and the book balance in Tetu's account stood at Ksh.1,037,707/20. That Tetu being indebted to the garnishee to the tune of Ksh.29,000,000/= the garnishee was not effectively indebted to the **Ngahu** and as such could not in law have been the subject of a garnishee order in respect of a debt allegedly owed by it to **Ngahu**. The effect of the court's order was to enable the equitable remedy of a garnishee order to operate to prefer one creditor over another.

As expected, the application was met with stiff resistance from **Ngahu**. Through **Messrs Kangethe & company Advocates** he filed 9 grounds of opposition to the application to wit; the application was incompetent and misconceived both in law and fact. That there was a clear conflict of interest on representation of the parties herein, no plausible reason (s) had been advanced to satisfy the grant of the orders sought, the delay in disputing the debt by the garnishee had not been sufficiently or at all explained, the application had not satisfied the conditions precedent for grant of review orders, that the application was a disguised application for stay of execution on behalf of Tetu but purportedly by the

garnishee and finally that the application was filed on 30th July, 2009 but was not served on **Ngahu** until 3rd September, 2009 more than a month later.

At the inter partes hearing of the application, **Ms Mwangi** learned counsel for both garnishee and Tetu submitted that the garnishee had not been given adequate time to put in a reply to the application, that the purpose of order XXII was not to replace Tetu with the garnishee but to attach any debt owed by garnishee. It was not disputed that Tetu was still indebted to garnishee to the tune of Ksh.7,563,990/45 whereas its book balance was Ksh.1,037,707/20. The garnishee was thus entitled to set off at any time all the monies held by the garnishee. Thus there was no money available to which the garnishee order absolute could attach. For those reasons the garnishee sought the review of the garnishee order absolute. Counsel maintained however that it was not open to **Ngahu** to raise the issue of conflict of interest in her representation of both the garnishee and Tetu.

Mr. Njuguna, learned counsel for Ngahu countered those submissions by stating that it was not a mere coincidence that the garnishee and Tetu were being represented by the same firm of lawyers. There was therefore serious conflict of interest. The reasons advanced in support of the application ought to have been laid before court on the day that the garnishee order was made absolute. The court exercised its discretion and made a conscious decision. The application was thus seeking the court to sit on its own appeal. The garnishee was merely required to show that it did not hold any money on account of Tetu. It was only after the court made the order absolute that the garnishee moved this court purely to stall and defeat the execution of the order. The garnishee had admitted that it had a book balance with Tetu in the sum of Ksh.1,037,707/20. Under order XXII rule 1 (i) (a), this amount qualifies as a credit due and owing and capable of being executed. Counsel further submitted that nothing had been put forward to persuade the court to review its order. Indeed the garnishee after the order absolute was made sought and was granted leave to appeal. No such appeal had been preferred. He therefore sought the dismissal of the application. In support of his submission, counsel relied on the following authorities:-

- (i) **National Bank of Kenya Ltd V Ndungu Njau C.A. NO.211 of 1996 (UR) and**
- (ii) **George Loch Mbuya Ogola V Elish Okea & another C.A. 199 of 2001 (UR)**

I have now considered the application, supporting affidavit and the annexures thereto, the grounds of opposition, rival oral submissions and the authorities cited. However before I delve further into the issues raised in the application it is perhaps necessary to set out albeit in a summary form the genesis of this dispute so as to appreciate the issues at hand.

This dispute dates back to 1999 when **Ngahu** as a professional firm of quantity surveyors rendered professional services to Tetu at its request and instance. On completion, Tetu declined to pay for the services. After futile efforts to get paid, **Ngahu** commenced the instant proceedings claiming Ksh.7,032,311/50 together with accrued interest at 25% pa from 12th October, 1999 until payment in full. Tetu denied **Ngahu's** claim. Eventually this suit was heard and by a judgment delivered on 13th November, 2006, **Okwengu J.** found in favour of **Ngahu** to the tune of Ksh.1,739,450/- together with interest and costs. Tetu apparently being unhappy with the judgment threatened to appeal by filing a notice of appeal. The appeal never came to pass. On 6th March, 2007 **Ngahu's** advocates filed their bill of costs for taxation. It was subsequently taxed at Ksh.550,138/678 on 19th September, 2007. On 8th November, 2007 **Ngahu's** advocates commenced the execution of the decree. However unknown to them on 4th November, 2007, Tetu had filed an application for stay of execution of the taxed costs. On 15th January, 2008 again it filed yet another application to set aside the judgment of 13th November, 2006. Both applications were heard by **Kasango J.** and by a ruling delivered on 19th March, 2008, the learned judge dismissed both applications. Pursuant to the said ruling, execution proceedings were renewed. However the auctioneer who had been detailed to execute the decree was unable to trace any attachable assets owned by Tetu. Thereafter **Ngahu** commenced private investigations to establish if Tetu owned assets for purposes of execution. Those investigations revealed that Tetu received substantial amount of money on account monthly rents through Jamar Estate Agents and property consultant totaling Ksh.1,120,000/=. On 27th August, 2008, **Ngahu** instituted garnishee proceedings in order to attach the

said amounts from the estate agent. However Tetu beat him to the game by changing, the estate agent and thereby defeating the purpose of the application. **Ngahu** was not about to give up. He again instituted further investigations which revealed that Tetu held account No.01100031216002 with the Garnishee which had substantial deposits hence these Garnishee proceedings.

From the history of this matter as detailed above it is apparent that Tetu is determined not to settle the decretal sum due to **Ngahu**. It has been 3 years since the judgment was delivered in favour of Ngahu, yet he has been unable to enjoy the fruits of the same. The decree has not been set aside and or varied. There is no appeal pending nor stay of execution yet Tetu is not giving any reasons why it should not meet the terms of the decree. But from annexures "AK2" in the affidavit in support of this application it is apparent that Tetu owns several prime properties in Nairobi and Nyeri to wit; **LR No. 209/403/5 (Ndemi Lane Nairobi)** valued at Kshs.35,250,000/=, **LR Nos. 209/1049/3, 209/1049/4 and 209/1049/5** all valued at Kshs.145,000,000/= and **Nyeri/Municipality/Block 1/93** valued at Kshs.3,000,000/=. These properties must be bringing in some income. If that be the case and I have no doubt that indeed that is the case, why is Tetu refusing to settle the decretal sum? I can think of no reason but to spite **Ngahu** since it was unhappy with the judgment passed against it. These subsequent proceedings, in my view must be seen in that light. The garnishee has unwittingly been sucked in. These proceedings are thus definitely scandalous, frivolous, vexatious and total abuse of the court's process.

Before me is an application for the review of my order made on 27th July 2009. The application therefore falls for consideration under section 80 of the Civil Procedure Act as well as Order XLIV rule 1 (1) of the Civil Procedure Rules. In particular the application must be considered under order XLIV rule 1 (1) which provides interalia:-

Any person considering himself aggrieved –

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

It is to be observed however that an application for review should be made without unreasonable delay. In the present case, I observe that the order sought to be reviewed was made on 27th July 2009. This application for review was made three days later. Accordingly, the application was no doubt made without inordinate delay.

For an application for review to succeed the applicant must prove an error or mistake apparent on the face of the record, discovery of new and important matter or for any sufficient reason – See **Shah v/s Dhavamchi (1981) KLR 561**. The applicant must also prove that he did not have in his possession the discovered new and important matter or evidence at the time and it could not have been obtained despite due diligence.

I did not hear the garnishee advancing its argument in support of the application on any of the aforesaid grounds. The gravamen of its complaint was that it was condemned unheard. That is not a ground for review. In any event such an allegation is unfounded as the record herein speaks for itself. This matter first came before me for hearing interpartes for Notice to Show Cause why garnishee Nisi issued earlier should not be made absolute on 13th July 2009. On that occasion, counsel for the garnishee applied for adjournment as he had just come on record and also needed time to file a replying affidavit. Adjournment was duly granted and the matter was then stood over for two weeks to 27th July 2009 for hearing and to enable the garnishee file its papers in opposition. Come that day and the garnishee again sought an adjournment on the grounds that its counsel was yet to come by some certain vital documents.

The application was opposed by counsel appearing for **Ngahu**. Having carefully considered the merits of the application for adjournment, I rejected it on the grounds that the garnishee had been served with order nisi on 30th June 2009. Thus it had, had more than sufficient time to respond. The documents sought were in any event in its possession and therefore it could not take a month or so for the garnishee to avail them to its counsel. In the exercise of my discretion I refused the application as I believed that it was made in bad faith. Thereafter counsel for **Ngahu** applied to have the garnishee order made absolute. This was within the hearing of counsel for the garnishee. He made no response at all. Accordingly I acceded to the request. Thereafter, counsel for garnishee applied for leave to appeal and also 30 days stay of execution which I granted. With the foregoing in mind, how can the garnishee claim that it was condemned unheard. The garnishee was accorded every opportunity to tender evidence before the garnishee order was made absolute and it failed to do so. It cannot therefore turn around and blame the court for its failure.

When I refused to accede to the request of counsel for the garnishee to adjourn the matter a second time, I was exercising my unfettered discretion. I want to assume that in doing so, I exercised it judicially and not capriciously. An exercise of discretion even if it is wrong cannot be a good ground for appeal and or even a review. See for instance **National bank of Kenya Ltd** (supra).

Even assuming that I was to accept that the garnishee had now discovered new and important matter or evidence which was not available at the time the order was made, I would still reject the application. Of course, the new evidence the garnishee is referring to are the documents that it has annexed in its affidavit in support of the application. However it should be noted that all the said documents were always in the possession of the garnishee. It cannot therefore be claimed by the garnishee that it had just discovered them which after exercise of due diligence was not within its knowledge or could not be produced by it at the time when the order was made. The garnishee has categorically stated in its affidavit that the said documents were stored away in its security document storage archives. Those documents were thus within its reach and could have been produced easily at the time the order was made. All that was expected of it is to exercise some diligence which it didn't.

I can also say that no other sufficient reason has been advanced by the garnishee to persuade me to find in its favour on the application. Indeed going through the supporting affidavit as well as the submissions in support of the application, I am left wondering whether those submissions and the affidavit were meant for this application. What the garnishee has actually done clothed as evidence in support of the application is to introduce through the back door what it ought to have advanced on the day the order absolute was made. Those would have been sufficient grounds to demonstrate why the garnishee nisi should not be made absolute. It is now too late in the day to raise them.

Finally I have no doubt at all in my mind that there is serious conflict of interest in the representation of the garnishee and Tetu by the same firm of Advocates. If indeed the garnishee is of the view that Tetu is indebted to it in the amount claimed, why should it retain counsel for it? Much as the garnishee claimed that Tetu was indebted to it in the amounts mentioned and that it held a sum of Kshs.1,037,707/20 to the credit of Tetu, it did not as much as tender any documentary proof to sustain that allegation. Why for instance couldn't it annex the latest bank statement of Tetu in verification of that fact which is its possession. If anybody is looking for evidence of collusion between the garnishee and Tetu, this is it. Further the Garnishee has exhibited in its affidavit the securities of Tetu it holds on account of its indebtedness. Those securities total in excess Kshs.183,250,000/= a far cry from Kshs.29,000,000/= allegedly owed to it by Tetu. Besides Tetu has in its account with them a sum of Kshs.1,037,707/20. Why should the garnishee insist on not parting with Kshs.1,037,707/20 to **Ngahu** when as it is, it is actually over secured by Tetu. The amount in Tetu's account as aforesaid as correctly submitted by **Mr. Njuguna** is a credit due and owing in terms of order XXII rule 1 (i) (a) of the Civil Procedure Rules.

The upshot of what I am saying is that the application lacks merit and is accordingly dismissed with costs to **Ngahu**.

Dated and delivered at Nyeri this 8th day of October 2009

M. S. A. MAKHANDIA

JUDGE