



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC MISC 70 OF 2013

ANTHONY M MULEKYO ADVOCATES.....APPLICANT

=VERSUS=

KENDA INVESTMENT LIMITED.....RESPONDENT

=AND=

KCB BANK KENYA LTD.....GARNISHEE

=AND=

MACHARIA JAMES METHU.....INTERESTED PARTY

RULING

1. This is a ruling in respect of three separate applications. The first application is dated 27th August 2018. It is brought by the judgement debtor M/s Kenda Investments Limited. It seeks the following orders:-

a. Spent

b. That the applicant be allowed to deposit into Court pending the hearing and determination of this application in the sum of Kshs.1,363,359.58.

c. Spent

d. That the Honourable Court be pleased to recall and set aside the decision of the Honourable Taxing Officer made on the 22nd February, 2016 and the resultant certificate of Taxation dated the 2nd August, 2016.

e. That leave be granted to Kenda Limited to file an appeal against the decision of this Honourable Court made on 29th January 2018 and to file a Notice of Appeal out of time.

f. That the cost of this application be provided for.

2. The second application is dated 30th August 2018. It is brought by Macharia James Methu who seeks to be enjoined in these proceedings as an interested party.

3. The third application is dated 5th September 2018. It is brought by the decree holder and it seeks the following orders:-

1. Spent

2. Spent

3. Spent

4. Spent

5. That the Honourable Court be pleased to order the Garnishee to release ksh.4,458,561.40//= to the decree holder being the decretal sum accrued interest and further costs.

6. That the costs of this application be granted to the applicant/decreed holder.

4. The genesis of the three applications can be traced from an advocate /client bill of costs which was filed by the decree holder on 6th September 2013. Despite the Judgement debtor being served with the bill, it never bothered to defend it. The taxing officer proceeded to tax it ex-parte. The decree holder then filed an application for entry of judgement in respect of the taxed costs. Once more, despite service the judgement debtor never appeared in court. Judgement was entered in favour of the decree holder. The judgement debtor filed an application seeking to set aside the judgement. This application was dismissed on 29th January 2018.

The first application.

5. The applicant in this application has taken issue with the manner in which the taxing officer taxed the bill herein. The applicant contends that the taxing officer taxed the bill as drawn and that there was an order that interest on the taxed costs be at 14% instead of the 9% known in the law. The applicant is also contending that this court did not afford it an opportunity to be heard by setting aside the judgement; that if judgement was to be set aside, the issue of whether the decree holder/respondent was instructed would have been addressed.

6. The applicant further states that the decree holder /respondent has already been paid Kshs.1,240,865.70 out of the taxed amount of 2,604,255,28 leaving a balance of Kshs.1,363,359.58 which it is willing to deposit in court as it pursues an appeal from the ruling of this court delivered on 29th January 2018. It is on this basis that the applicant is also seeking leave to file a notice of appeal out of time.

7. The decree holder/respondent has opposed the applicant's application based on a replying affidavit sworn on 12th September 2018. The respondent contends that the applicant's application is an abuse of the process of the court; that the issue of taxation is res-judicata and that the application has been overtaken by events in that there has been partial execution. The applicant never indicated its intention to appeal from the ruling of this court and is seeking to do so too late in the day. The respondent also doubts the capacity of the deponent of the supporting affidavit to the application as he is aware that the deponent and the chairman of the applicant company had wrangles over the management of the company.

8. I have considered the applicant's application as well as the opposition to the same by the decree holder/respondent. I have also considered the submissions by the decree holder/respondent. The applicant had been given 14 days within which to file its submissions but they did not and if they filed submissions, then the same are not in the court file. The issues which emerge for determination are whether the applicant should be granted leave to file notice of appeal out of time, whether the applicant should be allowed to deposit the balance of the decretal sum in court and finally whether the decision of the taxing officer should be set aside.

9. The ruling dismissing the application for setting aside the judgement was delivered on 29th January 2018. The present application was not made until after about 7 months later. The applicant has not explained the inordinate delay in bringing this application and in the absence of any explanation, I cannot exercise my discretion to extend time for filing a notice of appeal out of time.

10. The decree holder/respondent has partially executed the decree in its favour through garnishee proceedings. The decree holder/respondent is pursuing the balance. There is no point of the applicant being allowed to deposit the balance in court as leave to file notice of appeal out of time has been rejected.

11. The applicant is seeking to have the taxing officer ruling set aside. The procedure for setting aside taxation by the taxing officer is clear. This can happen through a reference filed to this court. There is no reference which has been filed and the applicant cannot be allowed to have the taxation set aside. In any case this court had already rejected the applicant's bid to have the judgement resulting from the taxation set aside. I therefore find no merit in this application which is hereby dismissed with costs to the decree holder/respondent.

It is so ordered.

The second application

12. The applicant in this application states that he is a director and shareholder of the judgement /debtor. The judgement debtor is embroiled in litigation to determine the legitimate board of directors vide Milimani HCCC No.529 of 2011. There have been rulings in the aforementioned case where the two factions have been recognised and certain orders including an order not to withdraw any monies from the accounts of the judgement debtor except for operational costs only. The applicant therefore argues that if the attachment is allowed to proceed, it will adversely affect the interests of the shareholders. It is therefore necessary that he be brought on board to give this information to the court.

13. The applicant's application is opposed by the decree holder through grounds of opposition filed in court on 13th November 2018. The respondent contends that the application is an abuse of the process of the court and that the applicant has not met the criteria for joinder of an interested party.

14. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the applicant has met the threshold for joinder as an interested party.

15. This is a matter which is at execution stage. Already the decree has been partially met. The respondent is pursuing the remainder of the decretal sum. The applicant is a director and shareholder of the judgement debtor company. There is no need to bring him on board in these proceedings. The fact that there are proceedings relating to who are the bonafide board of directors of the judgement/debtor company has nothing to do with the obligations of the company to meet its financial obligations to third parties. The court can carry through the process of execution without the presence of the applicant in the suit. I therefore find no merit in this application which is hereby dismissed with costs to the decree holder.

It is so ordered.

The third application

16. Most of the prayers in the applicant's application were granted on 5th September 2018. The applicant is seeking to execute the balance of the decretal sum through garnishee proceedings. The garnishee has sworn a replying affidavit sworn on 12th October 2018. The garnishee does not dispute the fact that it is holding some monies in the account of the judgement debtor. It is willing to release the said amount. I therefore find that the applicant's application is merited. The same is allowed as per prayer (5) and (6). The costs of the garnishee proceedings shall be paid to the garnishee by the judgement debtor.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 24th day of January 2019.

E.O.OBAGA

JUDGE

In the presence of;-

M/s Luvai for Mr Mulyekyo for applicant

Mr Wanjai Kirima-Director of Kenda Investments

Court Assistant: Hilda

E.O.OBAGA

JUDGE