



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC MISC. CIVIL APPL. NO. 225 OF 2000

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI PROHIBITION
AND MANDAMUS**

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300

IN THE MATTER OF: THE LAND (GROUP REPRESENTATIVES) ACT, CAP 287 AND

IN THE MATTER OF: LAND ADJUDICATION ACT, CAP 284

REPUBLIC

-VERSUS-

COMMISSIONER OF LANDS.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

AND

ISANGAWISHI GROUP RANCH.....INTERESTED PARTY/APPLICANT

EX-PARTE

1. EDWARD LENJO MUSAMULI

2. PASCALIN SHOLLO

3. MILTON MASALE MWIWAWI

4. RICHARD MWABILI

5. BERNARD NDOLE MBAYA

6. NOBERT LENJO MSHAMBA

BARCLAYS BANK KENYA LIMITED.....1ST GARNISHEE

STANDARD CHARTERED BANK KENYA LIMITED.....2ND GARNISHEE

RULING

1. The application for determination is dated 24th August 2016 brought under Order 23 rule 1 – 5 of the Civil Procedure Rules seeking the following orders:

i) Spent.

ii) That a garnishee order Nisi do issue against Barclays Bank of Kenya Limited (the 1st garnishee) and Standard Chartered Bank Kenya Limited (2nd garnishee) to recover the sum of Kshs. 7,434,045 currently held in the following accounts:-

a) 1st Ganishee

i) Barclays Bank of Kenya, Nkrumah Road Branch, account No. [Particulars withheld] jointly held with Dominy Lenjo Musamuli and Everest Matolo Lenjo.

ii) Barclays Bank of Kenya, Nkrumah Road Branch, account No. [particulars withheld] jointly held with Everest Matolo Lenjo and Alphonse Mkala Lenjo.

iii) Barclays Bank of Kenya, Nkrumah Road Branch, account No. [particulars withheld] jointly held with Everest Matolo Lenjo and Alphonse Mkala Lenjo, Perpetua Khalid Abdessalaam and the late Anna Samba.

b) 2nd Garnishee

i) Standard Chartered Bank of Kenya, Treasury Square, Mombasa, account No. [particulars withheld] jointly held with Dominy Lenjo Musamuli, Everest Matolo Lenjo, Aplphonse Mkala Lenjo, Perpetua Khalid Abdessalaam and the late Anna Samba.

ii) Standard Chartered Bank of Kenya, Treasury Square, Mombasa, account No. [particulars withheld] personal account.

iii) That the Court do fix a date for Notice to Show Cause by each of the Garnishees as per prayers iv) and v) below.

iv) That if any of the Garnishees does not dispute the debt due or claimed to be from it to the judgement debtor or if it does not appear upon the day of hearing named in the order nisi then the Court may order execution against the garnishee to levy the amount due from him or so much thereof as may be sufficient to satisfy the decree together with the costs of the Garnishee proceedings.

v) That if the Garnishee disputes his liability, the Court instead of making an order of execution be levied may order that any issue or question necessary for determining the indebtedness be tried and determined in the manner in which any issue or question in suit is tried and determined.

vi) That the costs of the application be provided for.

2. The application is grounded on facts listed on its face and the affidavit of Michael Bruno Mzungu. The applicant avers that the three accounts stated above are jointly held while account No [particulars withheld] in standard Bank is a personal account of the deceased. The 1st ex parte applicant died on 4th December 2012 and prior to his death, the liability was still outstanding. He urged the Court to grant the orders sought.

3. The application is opposed by the 3rd parties vide their replying affidavit jointly sworn. The 3rd parties

depose that they jointly own the said accounts but were not parties to these proceedings. That a joint account cannot be severed. The 3rd parties also depose that their deceased father had made an application for variation of the ruling issued on 26th March 2008 on the issue of costs although he died before prosecuting it. They urged the Court to consider and make an order that the deceased application first. It is the 3rd parties case that the funds held in the specified accounts are theirs 100%. They accuse the applicant of malice and urged the Court to dismiss the application.

4. Since it is admitted that the accounts are jointly held with persons who are not parties to this suit, this Court's duty is to consider and determine whether the same can be attached in execution of the decree herein. Under the law of joint tenancy, it is presumed that the joint owners have undivided share over an interest in property unless the shares are specified (section 91 of the Land Registration Act). Before the new land laws, upon death the surviving joint owner takes the whole share of the deceased. The law has since changed and now for joint or co-ownership, unless there is specific instructions quantifying each person's share then the balance in a joint account will pass to the by right of survivorship (beneficiaries).

5. In the present case, the 3rd parties have stated that the funds belonged to them 100% and they only included their father's name for convenience given they live outside the country. On the basis of contrary instructions whether the funds were wholly owned by the 3rd parties but by virtue of the application of the rules of joint ownership, the funds cannot be attached until the share of the deceased is quantified. Consequently I hold that the accounts that the 1st exparte applicant (now deceased) held jointly with the 3rd parties who are not judgement debtors in this suit are not liable to attachment whether by garnishee or otherwise. For the reason that the accounts were jointly owned, I find the case law of **Agnes Wanjiku Wagondu vs Uchumi Supermarket Ltd (2008) eKLR** and **Keneth Kimari Kahuro & 2 others vs James Maina & Another (2014) eKLR** cited for the position that there was no need for the plaintiff to substitute or seek to make as a party to the suit the legal representative of the deceased in execution proceedings distinguishable.

6. The only account liable for attachment for which I do grant the garnishee order absolute is the one referred to as personal account with Standard Chartered Bank, Treasury Square account No [particulars withheld]. Although the deceased filed an application to review the orders made in March 2008; the 3rd parties confirm that that application had never been prosecuted because of the death of the applicant. The applicant died in 2012 and to date the legal representatives have not taken any steps to have the application prosecuted. Since there was no order of stay of execution there is nothing stopping the decree holder from realizing his costs from any of the exparte applicants.

7. In conclusion, the application **is allowed in part in terms of prayer 2 (b) (ii) attaching funds held in account No [particulars withheld] Standard Chartered Bank Treasury Square.** The prayers 2 (a) (i) – (iii) and 2 (b) (i) are disallowed for the reason that they are joint and/or co-owned accounts and cannot be severed in this application. Each party to bear their respective costs of these proceedings.

Dated & signed at Mombasa this 28th day of JUNE 2017

A. OMOLLO

JUDGE

Delivered at Mombasa this 29th day of JUNE 2017 BY

C YANO

JUDGE