IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & J. MURGOR, JJA)

CIVIL APPEAL NO. 232 OF 2009

BETWEEN

ODHIAMBO OWITI & COMPANY ADVOCATE …..... APPELLANT

AND

CFC STANBIC BANK LIMITED…….....RESPONDENT

(Being appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Koome, J) Dated 12th June, 2009

in

H.C.C.C. No. 168 of 2009 (OS))

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JUDGMENT OF THE COURT

Introduction and Background Information.

The appellant, ***Odhiambo Owiti & Company Advocates,*** in the course of their professional calling acted variously for ***Standard Assurance Kenya Limited,*** hereinafter referred to as the Judgment debtor". In the year 2008 the appellant moved to Kisumu High Court and filed Misc. Application No.88 of 2008 seeking taxation of costs as against the judgment debtor for professional services rendered. The Deputy Registrar taxed the bill of costs in favour of the appellant as against the judgment debtor to the total tune of **Kshs.2, 889,300.00.** A certificate of costs was issued by the Deputy Registrar Kisumu on the 24th day of February, 2009.

The appellants filed a chamber summons to realize the fruits of the certificate of taxation in their favour by instituting Garnishee proceedings against the respondent, ***CFC Stan Bic Bank Limited,*** under order xxii rules 1A & 10 and section 3A of the Civil Procedure Act, in the same file where the bill of costs had been taxed, by way of a chamber summons dated and filed the same 3rd day of March, 2009. The Garnishee order Nisi was issued on the 4th day of March, 2009, and served on respondent among others.

Substantively, the appellant sought first, to attach all the funds held by the respondent in bank accounts **numbers *[particulars withheld]/[particulars withheld]*** and any other account domiciled with the respondent for the benefit of the judgment debtor to answer the decree in favour of the appellant to the total tune of **Kshs. 2,889,300.65** together with costs incidental to the Garnishee proceedings. Second, that, the Garnishee order be made absolute at the *inter partes* hearing and the respondent, thereafter be directed to release funds to the total tune of the taxed costs to the appellant to satisfy the decree thereby issued in their favour.

The Garnishee proceedings were not challenged resulting in the Garnishee order absolute made on the 13th day of March, 2009; the decree extracted and served on Blue Services, a firm of Auctioneers, for execution of the decree then standing at **Kshs.2,903,300.65;** which execution was levied on the same date of 14th March, 2009 at 9.30a.m.

On the 11th day of March, 2009 the Commissioner of Insurance in the exercise of powers donated to him under section 67 (C) (2) of the Insurance Act Cap 487 of the Laws of Kenya appointed **M/S HLB Ashvir Consulting Limited** as the Statutory Manager for the judgment debtor for a specific term of twelve (12) months. On the same date of his appointment on 11th March, 2009, acting under the same provisions of **section 67C (2)** of the Insurance Act (supra), the Statutory Manager issued a moratorium on the payments by the judgment debtor to its policy holders and other creditors for a period of twelve (12) months effective 11th March, 2009.

On the 13th day of March, 2009, the Statutory Manager moved to Milimani Commercial Court and filed originating summons No. 168 of 2009 (OS) under **section 348** of the Companies Act, **Rules 3,4, and 9** of the Companies (High Court) Rules, **section 67C** of the Insurance Act, **order XXXVI** of the **Civil Procedure** Rules and all enabling provisions of the law seeking various reliefs, resulting in the orders granted in the interim on the 16th day of March, 2009 after the Garnishee order nisi had been made absolute on the 13th day of March, 2009 by the High Court sitting in Kisimu in Misc. Application No. 88 of 2008.

In a letter dated 18th March, 2009, the appellant notified the respondent's advocate then on record for the respondent of the existence of the Garnishee order nisi absolute and the execution process against them already levied against the judgment debtor on the 14th day of March, 2009. The letter required the respondent as the Garnishee to pay to the appellant the funds then held by the respondent on behalf of the judgment debtor. The respondent reacted to the appellant's letter vide their communication reference No.93/867/PO of 18th March, 2009 stating that they were unwilling to meet the appellant's demands on account of orders obtained by the Statutory Manager in the originating summons, which orders affected the funds the appellant was pursuing from the respondent. They indicated that they would file an inter pleader proceeding in the said originating summons for directions as to whether to pay the appellant as demanded or not.

The respondent moved to Milimani Commercial Court, Nairobi and presented an application in the same originating summons dated the 19th day of March, 2009 seeking various reliefs. The application was grounded on the the grounds in the body of the said application and the supporting affidavit of ***Jasper Mbiuki.***

The respondent appeared in Court on the same date of 19th March, 2009 when exparte orders were granted to them allowing the appellant and the respondent to be enjoined in the originating summons proceedings as parties. The appellant was served, entered appearance in the originating summons proceedings and unsuccessfully raised a preliminary objection contending that the Nairobi High Court had no jurisdiction to handle matters relating to the Garnishee proceedings as determined in the Kisumu High Court Misc. Application No.88/2008. Upon rejection of the preliminary objection, both applications the main originating summons and the respondents application were fused and heard together on the 27th day of May, 2009 resulting in the orders of the Court delivered on the 12th day June, 2009 sought to be impugned herein.

The appellant's Complaint.

The appellant was aggrieved by that ruling and he has appealed to this Court citing six grounds of appeal, that the learned trial Judge erred in law and in fact:-

1. ***By totally disregarding the appellant's submission to the effect that she lacked the requisite jurisdiction to stay execution of orders issued by the High Court in Kisumu H.C. Misc. Application No.88/2008 as envisaged by section 34(1) of the Civil procedure Act.***

2. ***In considering only the provisions of Section 67C(2) and (10) of the Insurance Act in total disregard to the clear provisions of section 34(1) of the Civil Procedure Act as well as the express provisions of order XXII rule 3 of the Civil Procedure Rules.***

3. ***In failing to appreciate that the Garnishee order nisi in favour of the appellant in Kisumu High Court Misc. Application No.88 of 2008 issued on 4th March, 2009 and served on 5th March, 2009 effectually attached all monies belonging to Standard Assurance Company (K) Ltd (then not yet placed under statutory management) in favour of the appellant and that the moratorium later declared by the Statutory Manager on 11th March, 2009 could not affect that attachment retrospectively.***

4. ***In further failing to appreciate that the said Garnishee order nisi made on 4th March, 2009 and served on 5th March, 2009 upon the respondent having been made absolute on 13th March 2009 served upon the respondent on 14th March, 2009 then the orders issued by the court in Milimani Commercial Court civil case No. 168 of 2009 (OS) on 16th March, 2009 could not operate against the Garnishee orders retrospectively.***

5. ***In holding that, because the Garnishee order absolute in Kisumu H.C. Misc. Civil Application No.88 of 2008 was made on 13th March, 2009 after the moratorium had been declared then the said Garnishee order would be unenforceable while completely ignoring the fact that the order nisi had been made by the court and served on the Garnishee well before the said moratorium and without considering that the order nisi already had the effect of fully attaching the monies held by the respondent and further without regard to the fact that after the service of the order nisi on 5th March, 2009 as aforesaid, the respondent then the Garnishee for all practical purposes merely held the said monies for the benefit of the appellant.***

6. ***By failing to make an express and specific finding as to whether or not the application before her ought to have been placed before the Kisumu High Court which issued the Garnishee order after she had expressly appreciated this as a crucial issue for determination and which issue went to the jurisdiction of the learned trial Judge as to whether or not she had capacity to grant the orders sought by the respondent in that application.***

In consequence thereof, the appellant proposed to ask for orders:

a. ***That the ruling and orders of the learned trial Judge dated 12th June, 2009 be set aside and the respondent be ordered to pay to the appellant the monies it holds in terms of the Garnishee order issued in Kisumu H.C. Misc. Civil Application No.88 of 2008.***

b. ***That the appellant be granted costs of this appeal.***

Appellant's submission.

On the date fixed for the hearing of the appeal both the appellant and the respondent were represented by learned counsel M***r. T.O. K'Opere and Mr. P.O. Ogunde*** respectively; but there was no appearance for the Statutory Manager. The court being satisfied that there was due compliance with orders previously

made herein on the 9th day of July, 2014 with regard to service of the hearing notice on the Statutory Manager, allowed the appellant and the respondent to proceed with the hearing of the appeal.

In his oral submissions to court, ***Mr. K'Opere*** urged us to allow the appeal on the grounds that the entire proceedings undertaken in Nairobi Misc. Application Number 168/2009 (OS) in so far as they affected the proceedings in Kisumu Misc. Application No. 88 of 2008 were all a nullity and void *abinitio* as these were undertaken in contravention of the provisions of **section 34** of the Civil Procedure Act **Cap 21** Laws of Kenya; since the respondent was already a party to the Garnishee proceedings initiated by the appellant in Kisumu High Court Misc. Application No.88 of 2008, they should have sought the court's intervention in those proceedings in terms of the provisions of **order 22 rule (3**) of the Civil Procedure Rules as it was then, and **order 23 rule (3**) as it is now, if they felt aggrieved by the Garnishee order proceedings successfully completed against them; the Statutory Manager who by virtue of his appointment became an interested party to the Garnishee proceedings should also have filed interpleader proceedings in the Kisumu file.

It is further ***Mr.K'Opere's*** argument that both the moratorium issued by the Statutory Manager and the consequential orders arising from the initiation of proceedings in Nairobi Misc. Application No. 168 of 2009 (OS) ought to have been filed and issued in Kisumu HCC Mic. Application No. 88/2008 if the Statutory Manager intended to halt the Garnishee proceedings concluded in Kisumu on the one hand, and on the other hand, they could only seek intervention to halt proceedings that had either not yet commenced or not yet halted unlike those in the case of the appellant which had been concluded and could not be reversed retrospectively.

Turning to the applicability of the provision of **section 67(C)** of the Insurance Act, it was ***Mr. K'Opere's*** argument that this provision does not have primacy over the provisions of **section 34** of the Civil Procedure Act whose invocation was earlier in time; this provision should not have been invoked by the learned trial Judge because it only applies in situations where funds were within the Statutory Manager's control. Whereas, in the circumstances of the case under review, the funds were not within the control of the Statutory Manager as these had already been attached through the Garnishee proceedings and the execution process which had been completed; the respondent by that time was a judgment debtor by the making of the decree nisi absolute; all of the above processes were completed before the orders of 16th March, 2009 were made; which orders could not operate retrospectively to undo the Garnishee proceedings without the respondent and interested party moving the correct venue that is the Kisumu High Court for that purpose.

Turning to the consent deposed to by ***Mr. Jackson Ndung'u,*** it was the appellant's contention that the funds mentioned therein were released contrary to a consent entered into between the appellant and the Statutory Manager securing the funds pending finalization of the appeal; there is no indication as to who applied for the release of the funds on the 4th day of December, 2009; such release of funds was only possible if the respondent could have applied to set aside the Garnishee proceedings in the Kisumu file. Further ***Mr. K'opere*** invited us to note that the orders of 12th June, 2009 sought to be impugned herein did not set aside the Garnishee proceedings orders which remain not only intact, but are also valid and enforceable to date. Additionally, the Statutory Manager had no authority to order the release of funds in the absence of a court order to that effect considering that the execution process in the Garnishee proceedings had been halted by a court order; the respondent as the entity holding the funds at the time the appellant attached them took a risk when it released the funds without the involvement of the appellant and it should therefore be called upon to make good those funds to the appellant.

<u>The Respondent's Submissions.</u>

In response, ***Mr. Ogunde***, learned counsel for the respondent, urged us to dismiss the appellant's appeal. To ***Mr. Ogunde,*** the crucial issue for this Court's determination is which of the two competing provisions of law has primacy over the other, **section 34** of the Civil Procedure Act (supra) or **section 67C** of the Insurance Act (supra); there is no dispute that a Statutory Manager was appointed by the Commissioner of Insurance; the said Statutory Manager immediately upon assuming office issued a moratorium which the law permitted him to issue; by reason of the issuance of the said moratorium all legal processes had to

be halted; by the time the Statutory Manager issued the moratorium the appellant's Garnishee nisi order had not become absolute; the Garnishee order proceedings as well as the appointment of the Statutory Manager were all brought to the respondent's notice; faced with these two competing interests over the funds then held by them, the respondent had no alternative but to move to court to seek the court's intervention as to which of the competing interests was to be paid by the said funds; the moment the court issued the orders of 12th June, 2009, the respondent had no business holding the funds after the court's direction that the funds then held by it could not be attached; the funds were rightfully released to the Statutory Manager whose appointment had not been challenged by anyone; when the process of execution was halted the appellant became a creditor of the interested party like any other creditor with no other alternative but to queue like any other creditor for satisfaction of their decree by the judgment debtor.

Turning to the appellant's allegation that the High Court at Nairobi lacked jurisdiction to entertain the matter, ***Mr. Ogunde*** invited us not to interrogate this issue as the same had been interrogated by the High Court following a preliminary objection raised by the appellant to that effect, and upon the preliminary objection being rejected, the appellant filed no appeal against that order. This issue was therefore deemed settled. Furthermore, it was not part of the issues raised by the appellant in their grounds of appeal. Lastly, ***Mr. Ogunde*** argued that the making of the Garnishee order absolute did not of itself make that process inviolable. The order could be discharged and that is what the learned trial Judge did in the order of 12th June, 2009, and it mattered not whether those orders (Garnishee orders) had specifically been set aside or not by the said ruling.

Appellant's response to the respondent's submission.

In response to the respondent's submissions, ***Mr. K'Opere*** submitted that the orders made in Kisumu High Court Misc. Application No. 88 of 2008 were not meaningless and could not therefore be ignored; they bestowed rights on the appellant which were required to be given effect. He admitted that the Garnishee order absolute granted in favour of the appellant was not cast in stone, and could be violated but not in the manner occasioned by the respondent and wrongly endorsed by the Milimani Commercial court. ***Mr. K'Opere*** took issue with the respondent's assertion that, the orders of 13th March, 2009 issued in the originating summons cushioned the respondent and the interested party against the appellant's execution of the Garnishee proceedings orders against them because, if that had been the position, then the proceedings arising from the application of 16th March, 2009 would have been rendered unnecessary.

Principles of law relied upon by the appellant.

On the applicable guiding principles of law, ***Mr. K'Opere*** relied on (i) the provision of **section 34** of the Civil Procedure Act for the proposition that once a decree has been passed, (ii) it can only be set aside or discharged by the same Court, that passed it; the provisions of the then order 22 rules 1A, 2, 3 and 4 (current order 22 rules 1(1) 2, 3, 4, and 6 and extracts from ***Halsbury's Laws of England*** Fourth Edition paragraphs 526/527/536 and 541 for the propositions that Garnishee proceedings are proceedings where a third party holding funds or property on behalf of a judgment debtor can be called upon to honour the claim of a judgment creditor over those funds or property; (iii) such proceedings may be initiated at any time after obtaining judgment or order; (iv) a Garnishee order can only issue in instances where there is something which the law recognizes as a debt; (v) issuance of a notice to a Garnishee binds the funds in the hands of the Garnishee; (vi) once Garnishee proceedings have been commenced, they are pending proceedings and they cannot be restrained by prohibition or injunction; (vii) if the Garnishee does not appear to challenge the Garnishee proceedings the court may order execution against the garnishee; (viii) Garnishee order nisi gives no rights to the judgment creditor until it has been served on the Garnishee; (ix) service of the Garnishee order nisi upon the Garnishee binds the funds in his hands with regard to any debt specified in the order; (x) in instances where the Garnishee does not dispute the proceedings the Garnishee order may be made absolute; (ix) if the Garnishee disputes the debt or alleges that the debt or funds belong to some other third party and not the judgment debtor, the court may order such third party or person to appear and state the nature extent and particulars of his claim upon such funds; (xi) upon the Garnishee order being made absolute, the Garnishee becomes liable to pay to the judgment creditor the amount due from him to the judgment debtor as much as may be sufficient to pay the judgment debt and the costs of the Garnishee proceedings; (xii) a Garnishee order absolute is in the nature of a final order

and cannot normally be discharged except either with the consent of the parties or set aside following a determination *inter partes* by a court of law on the grounds that it ought not to have been made.

There was also reference to order 33 rule 1 and 2 (the current order 34 rule 1 and 2) for the proposition that where a party is holding funds or property in which it has no interest, it may initiate inter pleader proceedings in the same suit where the affected proceedings had taken place for purposes of placing either the property or funds at the disposal of the court or undertaking to dispose it by the interpleader itself as directed by the court; **section 67C** of the Insurance Act Cap 487 of the laws of Kenya for the proposition that under this provision the Commissioner of Insurance has a mandate or power to appoint a Statutory Manager to manage the affairs of any insurance company which has run into problems either with its financial liquidity issues or management issues generally as specified in the said section. A manager so appointed holds office for a period not exceeding twelve (12) months. The powers of such a manager are as specified in **subsection 10** of the same section.

Case law relied upon by the appellant.

On case law reference was made to a non-binding decision of the High Court in the case of ***Pricilla Nyambura Njue t/a Nairobi Moscow Airways versus Country side Suppliers Limited and another [2005] eKLR*** in which ***Njagi, J*** (as he then was) declined to grant reprieve for the protection of a Garnishee who had himself defied court orders; and the decision in the case of ***Abdalla Ali Hussein Mohammed versus Clement A. Ojiambo and another, Mombasa Civil Appeal No.118 of 1997 (UR)*** wherein this Court upheld a High court order declining to honour registration of ownership of property in favour of the new owner in an instance where the subject property had been disposed of in order to defeat an impending execution.

The Court's Mandate.

This is a first appeal. This being the case, our mandate is as set out in **Article 164(3)** of the **Kenya Constitution 2012, section 78** of the **Civil Procedure Act** and **rule 29(1)** of this Court's Rules. It simply is to reappraise the facts and arrive at our own conclusions on the matter and give reasons either way. See also the decision in the case of ***Sumaria & another versus Allied Industries Limited [2007] 2KLR 1*** for the proposition that in a first appeal the court is obligated to reconsider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial Court unless: (a) it was based on no evidence. (b) it was based on a misapprehension of the evidence; or (c) the judge was shown demonstrably to have acted on wrong principles in reaching the final decision. Also in the case of ***Musera versus Mwechelesi & another [2007]2KLR 159*** for the proposition that an appellate Court should be slow to interfere with the trial Judge's findings unless it is satisfied either that there was absolutely no evidence to support such finding, or that the trial judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an usupportable conclusion.

General observations on the learned Judge's ruling .

In the ruling sought to be impugned, the learned Judge drew out the following principal issues for determination:- ***"first, whether Ms. CFC Stanbic Bank and Odhiambo Owiti & Company advocates should be joined in these proceedings. Secondly, the effect of the declaration of the moratorium by the Statutory Manager of the Standard Assurance Kenya Limited (under statutory management) thirdly, whether the present application should have been determined in the High Court Kisumu which issued the Garnishee order absolute.***

In response thereto, the court set out in extenso the provisions of **section 67C** of the Insurance Act (supra) and then proceeded to make observations thereon *inter alia* that by reason of the contents of that section all the creditors were to be considered equally; the money held by the respondent bank was not attachable after the declaration of the moratorium; the moratorium was declared on the 11th day of March, 2009 before the Garnishee order nisi had been made absolute; on the 13th day of March, 2009, the beneficiary of the Garnishee order absolute had to form part of the list of creditors.

By reason of the above reasoning, the court handed out the following directions:-

> ***" (1.)The moratorium was declared on 11th March, 2009 all the creditors and claims will have to be considered together by the statutory manager.***

2. ***When the moratorium was declared and in the face of the order of this Court stopping all the payments, it is in order for CFC Stanbic Bank to seek directions and to seek to join M/S Odhiambo Owiti company advocates who intended to attach money held on account of Standard Assurance under statutory management.***

3. ***Costs of this application will be awarded to CFC Stanbic and M/S Odhiambo Owiti Advocates to be paid as other creditors upon assessment of the costs.***
4. ***It is so ordered."***

It is the above orders/directions that the appellant has invited us to upset and the respondent to affirm.

Determination.

General construction/ interpretation of applicable principles of law.

The rival arguments present to us two limbs of argument for our determination. The first limb deals with the construction and or interpretation of the intent and purport of the provisions of **section 67C** of the Insurance Act (supra). Whereas the second limb deals with principles of law pertaining to Garnishee proceedings. **Section 67C (1) (a) (b) (c) (d) (e) (f) (g) (h) (i) and (j)** enumerate instances in which the Commissioner of Insurance intervenes in the running of the affairs of an insurance company by appointing a Statutory Manager.

Vide **Section 67C (3)** a Statutory Manager may be appointed for a period but for just cause to be shown; **Section 67C (4)** donates the powers of the Statutory Manager; **section 67C (5) (6) (7) (8) and (9)** donate the obligations of the Statutory Manager, while **Section 67C (10)** spells out the effect and or impact of the appointment of the Statutory Manager to the consumers of the really business of the insurer placed under statutory management namely the policy holders, beneficiaries of the proceeds of policy holders and creditors. It reads:-

> ***"(10) For the purposes of discharging his duties a manager shall have power to declare a moratorium on the payment by the insurer of its policy holders and other creditors and the declaration of a moratorium shall;***

a. ***be applied equally to all classes of policy holders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify;***

b. ***suspend the running of the time for the purposes of any law of limitation in respect of any claim by any policy holder or creditor of the insurer;***

c. ***Cease to apply upon the termination of the manager appointment whereupon the rights and obligations of the insurer, its policy holders and creditors shall, save to the extent provide in paragraph (b), be the same as if there had been no declaration under the provisions of the subsection"***

The second limb deals with principles of law as pertains to the purport and intent of Garnishee proceedings. Section 34(1) of the Civil Procedure Act provides that:-

> ***"All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."***

Order 1 rule 10 is the section that makes provision for inter pleader proceedings by a party who has no interest in the substratum of the litigation and makes provision for the addition, substitution or the removal of a party to any ongoing litigation. **Order 22 rule 1A(1)** (as it was then) made provision that funds held in a deposit account with a bank or a building society on behalf of a judgment debtor are attachable. **Order 22 rule** (2) provides that upon service of a Garnishee order nisi upon the entity holding funds on behalf of a judgment debtor, the Garnishee order nisi binds such debts in his hands. **Order 22 rule 3** states that if the Garnishee does not dispute the debt due or claimed to be due from him to the judgment creditor or if he does not appear on the day of hearing named in an order nisi, then the court may order execution against the person and goods of the Garnishee to levy for 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. **Order 32 rule 4** on the other hand states that in instances where in the Garnishee disputes his liability, the court instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in such manner as an issue or question is tried or determined in a suit. **Order 32 rule 1** makes provision for the mode of presentation of inter pleader proceedings namely to be originated by way of an originating summons if there is no pending suit, and by a chamber summons in instances where already exists an ongoing litigation; where as **order 23 rule 2(a) (b) (c)** defines an inter pleader as a party who is willing to pay or transfer the subject matter into court or to dispose of it as the court may direct.

Application of principles of law to the rival arguments.

Applying these to the rival arguments herein we proceed to make findings inter alia that the appellant moved to Kisumu High Court and presented Misc. Application No.88/2008 to secure payment for professional services rendered to the judgment debtor by way of taxation of a bill of costs. These bills were taxed by the Deputy Registrar Kisumu on the 24th day of February, 2009; in the sum of Kshs. 2,889,300.65 which order still stands in favour of the appellant to date. Garnishee proceedings were initiated against the respondent by the appellant with a view to executing them for the taxed costs. The Garnishee order nisi was made on the 4th day of March, 2009.

From the principles of the Civil Procedures Rules and those of Halsbury's Laws of England summarized above, the issuance of the Garnishee order nisi had the effect of securing and binding the funds due to the judgment debtor into the hands of the respondent. By such securing and binding, we understand this to mean that the said funds were thus removed from the control of the judgment debtor into the hands and control of the respondent thus making the respondent fully accountable to whoever would be ultimately adjudged to be a rightfully entitled beneficiary to those funds at the conclusion of the Garnishee proceedings then fixed for *inter partes* arguments on the 13th day of March, 2009.

We are alive to the fact that before the Garnishee order nisi granted on 4th March, 2009 was made absolute, the Commissioner of Insurance placed the judgment debtor Standard Assurance Kenya Limited under statutory management through the appointment of a Statutory Manager on the 11th day of March, 2009 for a period of twelve (12) months. On the same 11th day of March, 2009 the Statutory Manager, **M/S HLB Ashvir** Consulting Limited, issued a moratorium under **section 67C (1)** of the Insurance Act (supra) affecting payments by the said insurer to its policy holders and all other creditors for the entire stipulated period of twelve (12) effective month the date of the said notice.

The question we have to ask ourselves is whether the declaration of the moratorium by the Statutory Manager had any effect on the Garnishee order nisi issued by a court of law before the placing of the judgment debtor under Statutory Management and the declaration of the moratorium. Our understanding of the learned trial judge's holding is that it had the effect of saying that any funds held by whatever entity on account of the judgment debtor stood tainted by the Statutory Manager's appointment and the issuance of the moratorium. The respondent supports this stand and has argued that the learned judge was right in holding that any funds held by any entity on behalf of the judgment debtor as at the time it was placed under statutory management and moratorium issue stood tainted and any contending beneficiary had its/her/his rights curtailed by those two intervening executive/administrative actions.

The appellant's argument on the other hand is that, the learned judge fell into an error when she failed to consider relevant provisions of the Civil Procedure Act, Rules and principles pertaining to Garnishee proceedings along side those of **section 67C** of the Insurance Act; that had she done so, she would have arrived at the only logical and reasonable conclusion that by the time the executive/administrative actions were executed as above, the funds the appellant was interested in were no longer within reach or under the control of the judgment debtor insurer. They had been safely tucked away into the control of the respondent who was not affected by the said Executive administrative actions. We agree with the appellant's argument on this as it is well founded on the principles governing Garnishee proceedings set out above.

Soon after his appointment, the Statutory Manager filed Milimani Commercial Court HCC No. 168 of 2009 (OS) by way of originating summons seeking a stay of all proceedings subsisting against Standard Assurance Kenya Limited (under statutory management); all taxation proceedings currently on going against Standard Assurance Kenya Limited (under Statutory Management) and for which the said company would have become liable; an order that proceedings of whatever nature or form against Standard Assurance Kenya Limited (under statutory management) or its policy holders, be barred; an order that no statutory notices, demands or claims of whatever nature or form shall be effective against Standard Assurance Kenya Limited (under statutory Management) its property or its policy holders; an order that the running of time for the purpose of any law of limitation in respect of any notice, demand or claim by any policy holder or creditor of Standard Assurance Kenya Limited (under statutory management), be suspended during the currency of the moratorium declared by the Statutory Manager on March, 11, 2009; an order for leave to publish the resulting orders in the Kenya Gazette and two newspapers with a national circulation; such other or further orders as it may deem just and expedient and costs.

The resulting orders were granted on the 16th day of March, 2009 and extracted on the 17th day of March, 2009. By the 16th March, 2009 the Garnishee order nisi had already been made absolute on the 13th day of March, 2009; a resulting decree drawn; warrant of attachment of movable property in execution of the decree had been applied for on the same date of 13th March, 2009. These warrants were served on Victoria Blue Services Auctioneers on the 14th day of March, 2009. Ground (f) and paragraph 5 of the supporting affidavit in support of the respondent's application in the originating summons dated 19th March, 2009 both confirm that the said execution had in fact been levied by the appellant as against the respondent. These read:-

> **"**ground ***(f) the Advocate has inspite of the order made in this matter on the 16th of March, 2009, issued execution against the Bank to enforce the (Garnishee) order Absolute, and will continue*** unless restrained by this Court.
>
> Paragraph 5. ***On the 16th of March, auctioneers moved into the***
>
> ***Bank premises and issued a proclamation attaching movable assets pursuant to warrants of attachment and sale that were issued in Kisumu High Court Misc. Case No.88 of 2008 to enforce the (Garnishee) order Absolute. A copy of the proclamation and the warrant of attachment is in the exhibit."***

The respondent presented in the originating summons aforesaid (Nai HCC No. 168 of 2009 (OS) an application by way of notice of motion dated the 19th day of March, 2009 and filed on the same date. Substantively, seeking orders of Court to grant leave to CFC Stanbic Bank Limited (The bank) and Odhiambo Owiti & Co. Advocates (the Advocates) to be joined in the originating summons proceedings as interested parties; a stay of execution of the Garnishee order absolute issued in Kisumu High Court Misc. Case No. 88 of 2008; a determination as to whether the Bank should pay the Advocate pursuant to the Garnishee order absolute issued in Kisumu High Court Misc. case No.88 of 2008 as well as the connected auctioneer's charges or whether the bank should hold all the money it had on account of Standard Assurance to the order of the Statutory Manager of Standard Assurance in light of the order made in the originating summons on the 16th March, 2009; costs for the application to be paid to the

respondent on account of Standard Assurance on a full and indemnity basis and lastly, liberty to the court to issue such further or other orders as may be just and expedient.

The grounds the respondent put forth in support of the said application were, *inter alia*, that the bank had no claim over the money it then held on account of Standard Assurance Kenya Limited; the appellant (advocate) had a claim against the judgment debtor for **Kshs.2,905,900/=** together with auctioneer's charges in the sum of **Kshs. 223,347/=** arising from taxation proceedings against Standard Assurance in Kisumu High Court Misc. Case No.88 of 2008; the advocate was seeking to recover the said amount from the funds in the accounts held by Standard Assurance Kenya Limited (judgment debtor) with the bank (the respondent); the order made in the originating summons on the 16th day of March, 2009 had stopped all the taxation proceedings against Standard Assurance; the Advocate had inspite of the order issued in the originating summons on the 16th day of March, 2009, carried out execution against the bank to enforce the Garnishee order absolute and will continue with the execution unless restrained by the court; the bank (the respondent) was under an apprehension that if the amount sought against it through the execution of the Garnishee order absolute proceedings were paid over to the advocate, then that would have been made it (the respondent bank) susceptible to a claim by the Statutory Manager; the bank (respondent) was ready and willing to pay over the money the subject matter of the claim put forward by the advocate and or dispose of it in any manner as the court may direct.

The appellant entered appearance and then filed a preliminary objection and a replying affidavit arguing, *inter alia*, that the High Court in Nairobi had no jurisdiction basically to handle matters pertaining to prayers 3 and 4 of the said application and it should down its tools; on this account, and then direct the matter to the proper forum for interrogation by the very forum which had handled both the taxation and the Garnishee proceedings.

The merit disposal of the respondent's application of 19th March, 2009 is what resulted in the ruling sought to be impugned herein. To us, the questions that arise for our interrogation from the above assessment are as follows:-

i. *What was the scope of the orders granted by the High Court in the Nairobi High Court Civil case No. 168/2009 (OS)?*

ii. *In view of our response to question (i) above, were the appellant and the respondent necessary parties to the originating summons? If the response to this limb of the question is in the positive then to what extend?*

iii. *Considering our responses to both limbs of the question in number (ii) above were prayers 3 and 4 of the respondents application of 19th March, 2009 properly laid in the originating summons?*

(iv) *Considering our responses to questions (i) (ii) and (iii) above, which is the most appropriate order(s) that commends itself to us in the disposal of this appeal?*

Determination of question (i)

In response to question (i) above, it is our construction of the reliefs sought from the Court is that, all that the Statutory Manager sought from the court exparte was to shield Standard Assurance Kenya Limited (the judgment debtor) forms of subsequent and subsisting proceedings of whatever nature against it or its policy holders; any statutory notices, demands or claims of whatever nature directed against it, its property or policy holders and; the halting of the running of the period of limitation for purposes of any law in respect of any notice demands or claim by any policy holder or creditor of the judgment debtor all of which stood suspended during the currency of the moratorium period.

The scope of the aforesaid reliefs and the orders resulting there from did not operate to affect both the appellant and the respondent herein, reason being that as at the time the Statutory Manager was appointed and the moratorium declared, neither the appellant nor the respondent had any form of proceedings

subsisting as against the judgment debtor. Neither were there any taxation proceedings ongoing as against the judgment debtor as the only taxation proceedings affected by these proceedings were the taxation proceeding between the appellant and the judgment debtor culminating in the taxation order of the Deputy Registrar Kisumu of 24th February, 2009 which subsequently led to the appellant's initiation of the Garnishee proceedings afore said. Neither of these two contestants had directly issued any statutory notice, claim or demand against the judgment debtor as at that point in time. (When the Statutory Manager was appointed and the moratorium issued).

The only possible claim or demand that could be said to have been issued for purposes of the said orders was the Garnishee order nisi. This was however not direct, as it had been directed at the respondent, the entity then holding funds on account of the judgment debtor. From the principles of law on the Garnishee proceedings assessed above, by the time the Statutory Manager was appointed and moratorium declaration made, these funds were no longer at the disposal of the judgment debtor. The Garnishee order nisi issued on the 4th day of March, 2009, long before the appointment of the Statutory Manager and issuance of the declaration of the moratorium, had secured and bound those funds in the hands of the respondent. To this end, these funds were in essence incapable of being effected by way of notice, demand or claim from any other party other than the appellant.

As for the period of limitation under any law, it is only the appellant who could have been affected by this condition. This is the party in whose favour the issuance of the Garnishee order absolute sealed the funds bound in the hands of the respondent by the Garnishee order nisi absolutely and made these funds attachable by the appellant. We appreciate as mentioned earlier that the appointment of the Statutory Manager and the declaration of the moratorium on the same date of 11th March, 2009 were first in time as compared to the making of the Garnishee order absolute on the 13th day of March, 2009. But also as opined, the events of 11th March, 2009 were executive/administrative actions and could not override orders that had been made earlier by the Court against the judgment debtor. We have no doubt that it is this lack of force of law that prompted the Statutory Manager to move to Court on 16th March, 2009; by which time the Garnishee order absolute issued on the 14th day of March, had already crystallized those funds in favour of the appellant.

Determination of question (ii).

In response to question (ii) above, we are in agreement that the respondent rightly moved under **order 1 rule 10** of the Civil Procedure Rules and the learned trial iudge rightly exercised her discretion to bring itself on board itself and the appellant, considering that the outcome of the reliefs sought in prayers 3 and 4 thereof were bound to affect their status with regard to the funds that the appellant had Garnisheed and bound in the hands of the respondent and which funds the Statutory Manager would have definitely moved to lay his hands on upon being clothed with the force of law as was done by the orders of 16th March, 2009. Such participation should however have been limited to the issues raised by the appellant as to whether prayer 3 and 4 were properly sought in the originating summons in Nairobi HCCC No. 168 of 2009 (OS) as opposed to being sought in Kisumu High Court Miscellaneous application Number 88 of 2008.

Determination of Question (iii).

In response to prayer (iii) above, it is undisputed that prayers 3 and 4 of the respondent's application have their roots in the certificate of costs and the Garnishee order nisi and absolute that had been obtained in favour of the appellant in Kisumu HCCC. Misc. No. 88 of 2008. The only point of departure is on the issue as to which of the two High Courts (Kisumu or Nairobi) should have been approached by the respondent to make a pronouncement on the said prayers. The appellant relies on order **22 rules 1A, 2, 3 and 4, 33 rules 1 and 2** of the Civil Procedure Rules, **section 34(1)** of the Civil Procedure Act as fortified by principles governing Garnishee proceedings drawn from Halsbury's Laws of England. In arguing that the proper forum should have been the Kisumu High Court; whereas, the respondent and as supported by the High Court in Nairobi contended that the reliefs were directed in the right forum that is the High Court in Nairobi which rightly made a pronouncement on them.

Jurisdiction Generally.

To us, these rival arguments centre on the question as to which of the two forums had the jurisdiction to make a pronouncement on those two prayers. In the case of ***Owners of the Motor Vessel Lillians Versus Caltex Oil (Kenya) Ltd [1989] KLR 1*** at page 14 paragraph 20-30 ***Nyarangi, JA.*** (as he then was), had this to say:-

> "***Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

The respondent cautioned us not to interrogate this issue because the appellant filed no appeal against the ruling rejecting the preliminary objection in which the appellant had contended that the court seized of the originating summons had no jurisdiction to interrogate matters pertaining to prayers 3 and 4 therein.

In response to the respondent's assertions, the appellant urged that we have jurisdiction to revisit the issue because first, it was an issue in the *inter partes* hearing giving rise to the ruling of 12th June, 2009 but which the Court never made any specific pronouncement on it; and second, it is one of the major issues for determination in this appeal and there is no way this Court can fold its hands and perch itself on the Judicial fence and fail to make a pronouncement on it.

The High Court which handled the twin proceedings (Kisumu HC Misc. Application No.88 of 2008 and Nairobi HCCC No 168 of 2009) (OS) was the one then envisaged by **section 60(1) and (5**) of the retired constitution and now article 165 (3) (a) of the Kenya Constitution 2010. It had and still has unlimited civil and criminal jurisdiction and designated to sit in such places as appointed by the Hon. the Chief Justice. The appointment of a place where a High Court is to be located falls into the powers then donated to the Hon. the Chief Justice by **Order 46** as it was then, and the current order 47 of the Civil Procedure Rules 2010. Our perusal of this provision reveals that, Nairobi was and still is considered as the High Court's central Registry, while the other High Court stations are considered as sub registries. Kisumu High Court is listed in the 1996 revised Edition schedule of order XLVI as a sub Registry. The conduct of business as between the central registry is set out in **rules 3, 4 and 5** of the rules made there under **Rules 5(1) (2)** provides:-

> ***"5(1) Every suit whether instituted in the central office of District registry of the High Court shall be tried in such places as the court may direct; and in the absence of any such direction a suit instituted in the central office shall be tried by the High Court sitting in the area of such District Registry.***
>
> ***(2) The Court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court; provided always that in appointing such particular place for trial, the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place and all the other circumstances of the case"***

Our construction of these provisions is that, though the High Court as a court irrespective of where located or operates from has concurrent jurisdiction but, the conduct of business in each of these High Court stations is separate and distinct. There is no provision for work to flow from one High Court station to another clandestinely. As the provision indicates, the court seized of the business in any one particular station has the mandate to transfer such business to another station of concurrent jurisdiction on its own motion or upon application by a party. What this really means is that there is no way the Nairobi High Court could have become seized of matters which had been transacted in the Kisumu H.C. Misc. 88 of 2008, in the absence of the aforesaid proceedings either being transferred to the Nairobi High Court at the Kisumu High court's own motion or upon application by the respondent. In the absence of the invocation of the procedure set out in **rule 5 of order 46** as it was then, the respondent had no alternative but to follow the procedure set out above with regard to variation of Garnishee proceedings.

Turning to the question as to whether the garnishee orders granted in the Ksumu proceedings were inviolable or not, we agree with the submission of both contestants that the Garnishee proceedings were not absolute upon conclusion. They were violable. One mode of such violation could have been by way of the respondent responding to the Garnishee order nisi upon service upon them of the said order. By way of response, the respondent could have given demonstration as to why the Garnishee order nisi should or should not have been made absolute. Likewise, the making of the Garnishee order absolute on 13th March, 2009, and the resulting decree did not in any way foreclose for good the respondent's right to intervene in the Garnishee order absolute proceedings. It had an avenue through the provisions of **section 34(1)** of the Civil Procedure Act.

This provision donated power to the respondent to move to Kisumu High Court, the very Court that had concluded the Garnishee proceedings and inter plead under the said provision by seeking the leave of that Court to demonstrate why the Garnishee order nisi or the subsequent making of it absolute should not have been so made, or alternatively to show cause why the said Garnishee order should not have been finally determined in favour of its ultimate beneficiary, the appellant. In the absence of invocation of the above outlined procedure, we make no hesitation in finding that the respondent adopted the wrong procedure when it sought the Nairobi High court's intervention with regard to prayers 3 and 4 of the application that resulted in the ruling of 12th June, 2009.

It therefore follows that the entire process that culminated in the determination of the said prayers was flawed and stands faulted as the said reliefs were not properly anchored in the originating summons. In other words, the High Court in Nairobi that granted reliefs pertaining to prayers 3 and 4 in the respondent's application had no jurisdiction to determine them.

Case law on principles of nullity.

In ***Mac Foy versus United Africa Co. Limited [1961] 3ALLER 1169*** at page 1172 paragraph 1 ***Lord Denning*** (as he then was) had this to say:-

> ***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so...."***

Since the decision in the case of ***Mac Foy (supra)*** this Court has numerously not only frowned on acts of illegalities but also gone a head to pronounce that these should neither be allowed to pass or be perpetuated.

In the case of ***Yalwala versus Indimuli & another [1989] eKLR*** this Court faulted and rendered the exparte proceedings null and void *abinitio* on account of failure to effect proper service of the summons to enter appearance on the defendants; the decision in ***National Bank of Kenya Ltd versus Wilson Ndolo Ayah [2009] eKLR*** wherein this Court was categorical that it is a public policy that citizens obey the law of the land. Likewise, it is good policy that courts enforce the law and avoid perpetration of acts of illegality; that allowing such acts to stand is in effect a perpetuation of the illegality; and that it is a public policy demand that courts of law should not aid in the perpetration of an illegality. Lastly, in the case of ***Suleiman Said Shabhal versus Independent Electoral & Boundaries Commission and 3 others [2014] eKLR*** while drawing inspiration from the decision in ***Mac Foy (supra)*** the Court had this to reiterate:-

> ***"Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularly is not void but voidable. An act that is voidable is void until it is made or declared void. It ceases to have effect after it is declared void. It is not void abinitio. What has been done or accomplished pursuant to that act is not affected by the declaration. On the other hand a nullity is really something that is void, a nothing right from the beginning."***

Applying the above principles to the rival arguments on prayers 3 and 4,we have no hesitation in making

a finding that all that the High Court did with regard to its determination of prayers 3 and 4 of the respondent's application inter pleaded before it in the application of 19th March, 2009 was nothing but an exercise in futility. Ruling otherwise would amount to not only condoning but also perpetuating an illegality which the case law assessed above has enjoined us to frown upon.

Status of the Statutory Manager in this appeal.

Before we conclude, we find it prudent to make some observations as regards the status of the Statutory Manager in this appeal. The Statutory Manager was included in this appeal as an interested party. He was served with the record of appeal as the particulars of the advocate then appearing for them is indicated in the appellant's statement of the last known address of service of the parties. The said learned counsel participated in the proceedings herein up to and inclusive of the time their application by way of notice of motion seeking leave of court to cease acting for the said Statutory Manager dated and lodged on the 22nd day of March, 2012, citing lack of sufficient instructions to proceed further in this appeal was heard and determined resulting in this Court's orders of 24th day of May, 2013 allowing the said firm leave to cease so acting for the Statutory Manager vide this Court's ruling of 11th day of March, 2014. On the 9th day of July, 2014 this Court gave the following directions:

a. ***The Commissioner of Insurance shall furnish the appellant's advocates with full information regarding the name and address of the current Statutory Manager of Standard Assurance Ltd (under Statutory Management) within SEVEN (7) days of service on him of this order.***

b. ***Once such information is availed to the appellant's counsel, the said counsel shall serve a copy of the record of appeal upon the said Statutory Manager.***

c. ***A new dated shall be fixed for the hearing of the appeal on priority basis notice whereof the appellant's counsel shall serve upon the Statutory Manager.***

d. ***The parties being agreed, the Respondent shall file and serve an affidavit detailing the full circumstances, under which it released the funds indicated to have been released to the Statutory Manager in the Supplementary Record of Appeal filed on 29th February, 2012.***

e. ***The costs shall be in the appeal.***

In compliance with the above directions, one ***Ndung'u,*** describing himself as the Processing Centre Manager of the respondent, filed an affidavit deposed and lodged in this Court's registry on the 1st day of December, 2014. Of concern to us are the depositions in paragraph 3, 4,5,6,7 and 8. These read:

> ***"1. The respondent does not hold any funds on account of or in the name of Standard Assurance Company Limited.***
>
> 2. ***I have seen the supplementary record of appeal filed herein which contains a copy of the credit advice note that was issued on the 4th of December, 2009 showing that a sum of Kshs. 4,804,619.40 was transferred, on that date, from the respondent, to the account of Standard Assurance Company Limited being account number 01136093371500 at Co-operative Bank Limited.***
>
> 3. ***I am aware that in the ruling that the High Court delivered on the 12th of June, 2009, at page 7, it declared that any money the respondent was holding on account of Standard Assurance Company was not attached by the Appellant.***
>
> 4. ***No order was sought or made to restrain Standard Assurance Company Limited, or the defendant for that matter, from dealing with money held in the name of Standard Assurance Company Limited with the respondent after 12th June, 2009.***

5. ***On the 21st of August, 2013, the Advocate for the respondent wrote to the Insurance Regulatory Authority (IRA), which had appointed the Statutory Manager of Standard Assurance, asking the IRA to cause payment to be made to the Appellant on the basis of a consent that was executed between the advocates for the appellant and those that were representing the Statutory Manager of Standard Assurance Limited.***

6. ***In response, the IRA, on the 3rd of October 2013, indicated that the consent was signed on instructions of a Statutory Manager whose term had expired and therefore who had no capacity to transact any business for the Standard Assurance Company Limited. Copies of the letters are annexed hereto and marked exhibit "JN 1"***

The above is sufficient proof that the funds the appellant was and still is interested in left the custody of the respondent following directions given by the High court in its ruling of 12th June, 2009 sought to be impugned herein. From the content of the depositions set out above, it is clear that at some point there appears to have been a consent executed between the appellant's advocates and the Statutory Manager with regard to the release of the affected funds. What we make of the Regulator's response as borne out by paragraph 7 and 8 of the afore said affidavit is that the regulator declined to honour the said consent because it had allegedly been executed by a Statutory Manager who had no authority /capacity to execute it.

By reason of the above, we are left with the task of doing justice to the apparent innocent party who by the time the said orders were made already had a legitimate claim that had crystallized over those funds and would be left either remediless or alternatively may be forced to initiate other offshoot litigation to realize the fruits of any positive order from this Court.

In resolving this, we have to bear in mind our findings above that as at the time the orders of 12th June, 2009 were made the appellant's claim as against the respondent through the Garnishee order absolute proceedings had crystallized.

It is therefore correct as argued by the appellant's that is the respondent that must meet the consequences of the Garnishee order absolute proceedings against them, which order remains intact to date and requires to be given effect. As mentioned, the respondent took a risk, consequence of which it must bear alone, and seek remedy elsewhere.

The fact of signing a consent to pay the appellant executed between the appellant and the then Statutory Manager whose authority/capacity to do so was denied by the Regulator, did not in any way absolve the respondent from its obligation to the appellant. Neither did it give rise to any enforceable contractual obligation between the parties to the dishonoured consent. The legal capacities of the parties in relation to the transaction giving rise to this appeal remained the same.

Conclusion.

In the result, we are satisfied that the appellant placed before us a genuine complaint for interrogation. On the basis of the totality of the above assessment, we are minded to allow this appeal, which we hereby do, set aside the orders of the High Court made on the 12th day of June, 2009 and substitute therefor an order that the respondent do pay the appellant the monies in terms of the Garnishee order absolute dated 13th March, 2009 together with interest at court rates from 13th March, 2009 until payment in full. The respondent shall also pay the auctioneer's charges.

2. Considering the circumstances that gave rise to the impugned High Court orders that we have set aside, we order that each party bears its own costs in respect of this appeal.

3. The respondent is at liberty to seek indemnity from the Statutory Manager of Standard Assurance Limited if deems fit to do so.

Dated and Delivered at Nairobi this 13th day of March, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

D. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.