



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT**

**NAIROBI**

**CAUSE NO.1162 OF 2018**

**NATIONAL UNION OF WATER AND**

**SEWERAGE EMPLOYEES UNION.....CLAIMANT**

**VERSUS**

**GARISSA WATER & COMPANY LIMITED .....RESPONDENT**

**AND**

**FIRST COMMUNITY BANK LIMITED.....GARNISHEE**

**RULING**

The claimant filed application and Notice of Motion seeking for orders that;

1. Spent;
2. Spent;
3. *This court do issue a Garnishee Order Nisi attaching the respondent's Account Number 297698290 held at First Community Bank, Garissa Branch for payment of ksh.1,932,000/= to the claimant's account 01120201219200 Co-operative Bank Buru Buru Branch Nairobi pending hearing and determination of the application;*
4. *The court be pleased to issue a Garnishee Order absolute attaching the accumulated amount of Ksh.1,932,000/= together with costs and interest at court rates from the respondent's Account Number 2976982901 at First Community Bank, Garissa Branch being the amount in respect of which an order was given in favour of the Applicant/Claimant herein on 14<sup>th</sup> February, 2019 from February, 2019 up to 15<sup>th</sup> March, 2019 and to continue deducting the applicant members and remitting the monthly union dues when it is due which amount has not been paid off in full and has accumulated as stated above.*
5. *This court does issue such Orders as it may deem fit and just to meet the ends of justice.*
6. *Costs of this application be borne by the respondent.*

The application is supported by the affidavit of Elijah Otieno Awach and on the grounds that the claimant and the respondent signed consent and filed in court on 14<sup>th</sup> February, 2019 directing the respondent to pay to the claimant. The terms of the consent were that the respondent to pay the claimant the sum of Ksh.764, 822 by way of instalments as follows;

- a) *A sum of Ksh.300,000.00 be paid on or before 21<sup>st</sup> February, 2019 to the claimant union;*
- b) *A sum of ksh.60,000.00 be paid per month on or before 15<sup>th</sup> March, 2019 and 15<sup>th</sup> day of each succeeding month from March 2019 till payment in full;*
- c) *The respondent to continue deducting and remitting the monthly union dues when it is due;*

d) *In default, execution to issue; and*

e) *Each party to bear its costs.*

The court order dated 14<sup>th</sup> February, 2019 was extracted and so far the respondent has paid ksh.3000,000.00 by March, 2019 and later paid off Ksh.60,000.00 in April, 2019 leaving a balance of ksh.404,000.00 as at April, 2019 and which amount has accumulated to ksh.1,932,000.00 as at July, 2020 accordingly to additional membership.

The respondent maintains an Account Number 2976982901 at First National Community Bank, Garissa Branch, and the garnishee.

The claimant union is unable to carry out business for lack of funds to pay salaries and allowances as the respondent owes Ksh.1, 932,000.00 as has not given any reason as to why this payment is withheld being union dues and despite the Court Order herein forcing the commencement of these proceedings.

In his affidavit, Mr Awach avers that despite there being a clear Order dated 14<sup>th</sup> February, 2019 directing the respondent to pay to the claimant deducted union dues monthly, there is no compliance hence forcing the claimant to invoke the default clause of the consent. There is no reasonable cause given by the respondent as to why there is no payment of Ksh.1, 932,000.00 and the Garnishee order Nisi should be made absolute and funds held by the garnishee to the credit of the respondent in account number 2976982901 be paid to the claimant through account number 01120201219200 held at Co-operative Bank Buru Buru Branch Nairobi.

The court considered the claimant's application and on 28<sup>th</sup> August, 2020 and pending service and attendance for directions on 2<sup>nd</sup> September, 2020 in the interim issued orders (3), a Garnishee Order Nisi attaching the respondent's Account Number 297698290 held at First Community Bank, Garissa Branch for payment of ksh.1, 932,000/= to the claimant's account 01120201219200 Co-operative Bank Buru Buru Branch Nairobi pending hearing and determination of the application.

The garnishee filed Replying Affidavit sworn by Claris Ajwang Ogombo the legal manager of the garnishee. This affidavit is undated and place of commissioning is not stated save for year noted as 2020.

The Court of Appeal in the case of **Toshike Construction Company Limited versus Harambee Co-operative Savings & another [2019] eKLR** held that;

***..the statutory provision which renders it mandatory to date the affidavit before tendering it in court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors and omissions regarding the date, place and the commissioner cannot vitiate an application.***

the Oaths and Statutory Declarations Act requires that the jurat must appear before the Commissioner for Oaths on the stated date and place and take oath. In this respect section 5 of Oaths and Statutory Declarations Act provides as follows;

***Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.***

In the case of **Gideon Sitelu Konchellah versus Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR**, The Supreme Court of Kenya held that;

*A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on 17<sup>th</sup> August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. ...*

The Replying Affidavit of Claris Ajwang Ogombo which is undated and the place of taking oath not stated has no probative value.

There is no reply to the claimant's Notice of Motion.

The claimant and the garnishee made oral submissions.

The claimant submitted that the Garnishee Order Nisi was served upon the garnishee on 31<sup>st</sup> August, 2020 and an affidavit of service filed to confirm such service. despite the Order Nisi the garnishee has been undertaking transaction with overdraft facilities and there is nothing to stop the court from granting order absolute.

The garnishee submitted that the account held for the respondent is fully utilised and the same is in the negative after advancing an overdraft facility to the respondent and the balance is -Ksh.14, 897,241.00 and while the garnishee may wish to comply with the court orders the respondent's account is in the negative. There are no funds to warrant an attachment and the application should be dismissed.

Advocate for The garnishee also submitted that they were instructed on 7<sup>th</sup> November, 2020 and cannot confirm when the garnishee was served.

Court adjourned to allow the garnishee to confirm the date of service of the Order Nisi and to file Affidavit in this regard.

There is no Replying Affidavit as addressed above.

The Order Nisi herein is dated 28<sup>th</sup> August, 2020. The same attached the respondent's account held by the garnishee being Account Number 297698290 for the amount of Ksh.1, 932,000.00.

The matter was in court on 8<sup>th</sup> October, 2020 for hearing and the court was not satisfied that the respondent and garnishee had been served and directed for service and attendance on 10<sup>th</sup> November, 2020.

On record is Affidavit of Service by Peter Muendo Keli dated 4<sup>th</sup> October, 2020 and who avers that on 1<sup>st</sup> November, 2020 he travelled to Garissa and served the garnishee on 2<sup>nd</sup> November, 2020 with the hearing Notice and which is stamped and received on equal date.

On the same date there was service upon the respondent.

The court is satisfied that the garnishee and the respondents were served on 2<sup>nd</sup> November, 2020.

Despite service upon the garnishee with the Order Nisi attaching the respondent's account number 297698290, the garnishee has continued transactions with the respondent on the same account to the detriment of the claimants.

**Accordingly, the Order Nisi is hereby declared absolute and the following orders issued;**

- (a) the claimant shall forthwith be paid from deposits held by the garnishee in the attached account to the credit of the respondent, judgement debtor, namely, Kshs. 1,932,000.00 from account No. 297698290 Garissa Branch;**
  
- (b) Where the garnishee has since moved amounts over and above the sum of Ksh.1, 932,000.00 to the benefit of the respondent after the 2<sup>nd</sup> November, 2020 and there is no sufficient balance to effect payment, there shall be payment from the garnishee own account(s) to the satisfaction of the decree and total sum of Ksh.1, 932,000.00 and until paid in full to the claimant's account 01120201219200 Co-operative Bank Buru Buru Branch Nairobi; and**
  
- (c) The respondent shall meet the costs of these proceedings.**

**DELIVERED AT NAIROBI THIS 1ST DAY OF DECEMBER, 2021.**

**M. MBAR?**

**JUDGE**

In the presence of: .....