



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 789 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 13th February, 2018)

ROBERT NYONGESA.....CLAIMANT

VERSUS

THE SACCO SOCIETIES

REGULATORY AUTHORITY.....1STRESPONDENT

HARAMBEE CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED.....2ND RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED.....GARNISHEE

RULING

1. The Application before Court is the Garnishee Application dated 24th January 2018 filed under Certificate of Urgency by the Decree Holder herein. This Application was filed through a Notice of Motion filed under Order 23 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

2. The Applicant seeks orders that:-

1. THAT this Application be certified urgent and heard ex parte at the 1st instance.

2. THAT this Honourable Court be pleased to issue a Garnishee Order attaching Kshs.13,155,085/= in the Co-Operative Bank of Kenya Limited, the Garnishee Bank at Ukulima Branch Account No.01120040120701 belonging to the 2nd Respondent Judgement Debtor to answer to a Decree issued on 6th December 2017 to pay the Claimant through his Advocates Account Wafula Simiyu & Company Advocates, Standard Chartered Bank of Kenya Limited, Kenyatta Avenue Branch, Account No. 01012448065400.

3. THAT costs of this application be borne by the Respondents.

3. The Application is premised on the following grounds:-

1. That the Judgement and Decree of this Court has been issued against the Respondents for payment of the sum of Kshs.13,155,085/=.

2. That a 30 day stay of execution order was granted at delivery of the Judgement which stay has since lapsed.

3. That a demand letter for satisfaction of the decree has been issued to the 2nd Respondent to satisfy the decree in vain. No orders were sought against the 1st Respondent in the Amended Memorandum of Claim filed herein subject matter of the

Judgment on 30th November 2017.

4. That the 2nd Respondent has defaulted in payment of the decretal amount despite expiry of the 30 days stay of execution period. The Applicant has applied for execution by issue of Garnishee Orders.

5. That the 2nd Respondent's monies sufficient to satisfy the Decree lie with the Garnishee but they will either move the money or obstruct satisfaction of the decree if they knew about it prior to the Garnishee Order.

6. That it is imperative that the funds with the Garnishee Bank be utilized to settle the decretal amount.

7. That it came out in cross-examination of the witness for Harambee Sacco namely Gladys Gichohi that no liability were outstanding to the Claimant, as a guarantor assets had been attached.

8. That the Claimant deserves to enjoy the fruits of his judgement soonest possible in terms of Article 159 of the Constitution.

9. That it is in the interest of justice that the Garnishee Order be made against the 2nd Respondent.

4. The application is supported by the Claimant Decree Holder's affidavit deponed to on 24th January 2018 and filed in Court on the same date where he depones that he is the Decree Holder herein and that there is no stay order nor any application for stay pending in Court.

5. He avers that he has not sought any orders against the 1st Respondent in the Amended Memorandum of Claim filed as per the subject matter of the judgment dated 30th November 2017.

6. He avers that 2nd Respondent has defaulted in payment of the decretal sum and the Claimant has opted to execute by way of Garnishee Order against the 2nd Respondent. The Applicant contends that the 2nd Respondent monies are sufficient to satisfy the decree. They also aver that there is no liability outstanding to the Claimant as guarantor assets had been attached.

7. The Garnishee filed their Replying Affidavit deponed to by one George Murerwa Ikiara the Garnishee's Branch Manager at Co-Operative Bank Ukulima Branch on 9th February 2018 who depones that the Account no. 01120040120701 domiciled in their branch and the other account has a credit balance sufficient to pay the decretal sum of Kshs.13,155,085/= claimed by the Claimant as at 7th February 2018.

8. That the amounts however keeps fluctuating as there is no Garnishee NISI Order in force since the time of filing the application to date. They are however ready and willing to obey Court order as long as there are sufficient funds in the Account. They however wish the Court to order the retention of their costs in this application to the tune of 35,000/=.

9. The Respondent on the other hand opposed this application. They filed their grounds of opposition on 9th February 2018. They contend that the claimant has not complied with Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016 read with Order 22 of the Civil Procedure Rules on execution procedures. Order 22 Rule 7 states as follows:-

(2) ".....every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars:-

a) the number of the suit;

b) the names of the parties;

c) the date of the decree;

d) whether any appeal has been preferred from the decree;

e) whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;

f) whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;

g) the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

h) the amount of the costs, if any, awarded;

i) the name of the person against whom execution of the decree is sought; and

j) the mode in which the assistance of the court is required, whether....."

10. The Respondent submit that failure to follow execution procedures renders any application for execution premature as the claimant shall expose the Respondent to double jeopardy in executing a portion of the claim and thereafter pursuing the remainder of the claim in a further execution.

11. Order 32 (1) provides as follows:-

1. "The Registrar shall issue an order in execution of a decree.

2. Rules on execution of an order or decree shall be enforceable in accordance to Civil Procedure Rules"

12. The Respondent also submits that the Claimant has not complied with the provisions of Order 22 Rule 6 which provides as follows:-

"Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions herein before contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A".

13. The Respondents therefore submit that the Garnishee Proceedings are premature and the Decree Holder has not demonstrated that the Respondent is unable to satisfy the decretal sum by issuing a Notice to Show Cause (NTSC).

14. Order 23 rule 1 of the Civil Procedure Rules provides as follows:-

"A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid".

15. My understanding of this provision is that this Court may grant a Garnishee order upon an application being made before Court by a Decree Holder and this can be before or after an oral examination of the Judgment Debtor. This therefore means that this can precede or be after the issuance of a Notice to Show Cause (NTSC). The Applicant must also prove that a decree has been issued and is unsatisfied and to explain what extent the same remains unsatisfied.

16. The Respondent has also submitted that the Judgment is against 2 Respondents but the Decree Holder has singled them alone for execution purposes which is unlawful. They also submit that the Decree Holder is indebted to them to the tune of Kshs.7,024,897/= on account of various loans and salary advance which, moneys remain unpaid and are recoverable against the Claimant.

17. I have considered the averments of the parties. I note as explained above that under Order 23 of the Civil Procedure Rules, there is no provision that a Garnishee Order can only be sought after examination of the Judgment Debtor.

18. The Respondents have submitted that these are execution proceedings but that they are premature because the Claimant has not followed execution proceedings provided for under Order 22 rule 7(2) above.

19. I would like to distinguish Garnishee proceedings from normal execution proceedings. Blacks Law Dictionary 9th Edition at Page 749 of the defines a Garnishee as:-

"A person or institution (such as a bank) that is indebted to or in bailee for another whose property has been subjected to garnishment".

20. Also termed garnishee – defendant (as opposed to the "principle defendant") Garnishee proceedings or Garnishment defined by Blacks Law Dictionary (supra) at page 750 as follows:-

"A Judicial proceeding is which a Creditor (or Potential Creditor) asks the Court to order a third party who is indebted to or in bailee for the debtor to turn over to the Creditor any of the Debtor's property (such as wages or bank account) held by that third party. A Plaintiff initiates a garnishment action as a means of either prejudgment or post judgment collection" (emphasis is mine.

21. An execution will always arise out of a judgement unless ordered by Court. Despite the Respondent's submissions, it is apparent that Garnishee proceedings can be instituted even in anticipatory judgment and even before a decree is issued. In the current situation a judgement has been issued and therefore the submissions by the Respondent that the application is premature is not true and neither do all processes of execution have to be completed before the Garnishee proceedings are instituted.

22. On the issue of the Decree Holder pursuing only the 2nd Respondent as opposed to the 1st Respondent, the judgment delivered by the Court is against the Respondents individually or collectively. Thus the Decree Holder can choose to execute either against one or both. In any case the decree being executed at the moment is not a full and final account.

23. The Decree Holder has indicated he can choose to execute partly pending final account of any liabilities due from the Decree Holder which the Respondent has asked Court to consider.

24. It is my finding therefore that since there is currently no order of stay of execution and neither has an application for the same been made, and given that the Garnishee has confirmed availability of funds in the account in question – I direct that **Kshs.6,130,180/=** only be released to the Decree Holder's Advocates less Garnishee costs of 35,000/= from **Account No. 01120040120701** domiciled at Co-Operative Bank Ukulima Branch immediately in part satisfaction of the Judgment herein pending final settlement of the account and further execution proceedings.

25. Costs in the cause.

Read in open Court this 13th day of February, 2018

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Angwenyi holding brief Muriuki for Garnishee Holder

Simiyu for Claimant – Present

Kanyiri for 2nd Respondent – Present