



REPUBLIC OF KENYA



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Abdi & another v Angwenyi & another (Civil Case 406 of 2013)
[2024] KEHC 928 (KLR) (Commercial & Admiralty) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 928 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE 406 OF 2013
A MABEYA, J
JANUARY 30, 2024

BETWEEN

ADEN IBRAHIM ABDI 1ST PLAINTIFF

HASSAN ABDI GULEDI 2ND PLAINTIFF

AND

EZEKIEL ANGWENYI 1ST DEFENDANT

**SAMUEL ANGWENYI T/A UKAY CENTRE FOREX BUREAU 2ND
DEFENDANT**

RULING

1. This is a ruling on 2 applications by the plaintiffs. The first is dated 3/12/2018 seeking three orders; ie to attach funds in the hands of the garnishee belonging to the defendants, order nisi to release a sum of Kshs. 22,046,329/= and if the garnishee disputes the same, it appears to show cause why it should not pay the amounts it holds for the defendants.
2. The 2nd application is dated 16/12/2021 seeking prohibitory orders over LR. Nos. Kajiado/Kitengela/71167, Kajiado/Kitengela/71168 and Kajiado/Kitengela/71169 respectively. I propose to deal with the 1st application before determining the 2nd application.

Application dated 3/12/2018

3. This is an application for garnishee orders brought under order 23 rules 1, 9 and 10 of the [Civil Procedure Rules](#). As already stated, the prayers sought in this application were first to attach any funds in the possession of the garnishee on behalf of the defendants, an order nisi for release of Kshs. 22,046,329/= and if disputed, a notice to show cause why the garnishee should not release all the funds in its possession on behalf of the defendants.



4. The grounds for the application were that there was an unsatisfied decree in the sum of Kshs. 43,584,593/= against the defendants. That the garnishee had compulsorily acquired the 1st defendants properties known as Kajiado/Kitengela/71167,71168 and 71169 (“the properties”) and was liable to pay compensation therefor Kshs. 22,046,329/=. That the said compensation had been approved for payment.
5. An order for decree nisi was issued by Kasango J on 4/12/2018. She then referred the matter to Muigai J for the garnishee on 23/1/2019 to show cause why it should not pay Kshs. 22,046,329/=. Nothing happened thereafter on the application as there were other intervening applications for stay and setting aside that were dealt with until now.
6. I have considered the entire record; I do not see any response to that application either by the garnishee or the defendants. On their part, the plaintiffs produced a copy of the decree which they contend is unsatisfied, copies of Awards by the Garnishee dated 12/11/2018 for Kshs. 6,944,993/=, Kshs. 9,220,930/= and Kshs. 5,880,406/=:, respectively for the properties.
7. Although the parties were directed to file and exchange submissions, only the plaintiffs who filed theirs dated 6/6/2023. I have carefully considered those submissions.
8. Garnishee proceedings are in two stages. The first stage is where an order nisi is made directed at a debtor of a judgment-debtor called a garnishee to hold the stated sum. The second stage is where the garnishee appears in court to either dispute the alleged debt to the judgment-debtor or acknowledges the same. In the event there is no plausible explanation from the garnishee, the order nisi is made absolute and the garnishee becomes liable to pay over the stated amount to the judgment-creditor.
9. In *James G. K. Njoroge T/A Baraka Tools & Hardware vs APA Insurance Co. Ltd & 3 Others* [2018] eKLR, it was observed:-

“Therefore, for the court to issue a garnishee order, the appellant had to satisfy the court that the 1st respondent was holding money belonging to or due to the judgment debtor which monies should be attached to meet the decree or part of the decree that had been issued in favour of the appellant ...”
10. In the present case, the plaintiffs have established prima facie, that there are 3 Awards for compensation by the garnishee to the 1st defendant. The total sum is for the amounts garnished. The garnishee did not appear and has therefore not given any plausible explanation to controvert the order nisi.
11. Accordingly, I am satisfied that the plaintiffs have established their case against the garnishee and the order nisi issued on 5/12/2018 is hereby made absolute. The plaintiffs will have the costs of the application.

Application dated 16/12/2021

12. This application was brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and order 22 rule 48 of the *Civil Procedure Rules*. It sought prohibitory order against the properties and an injunction to stop any registration of any dealings in the properties.
13. The grounds were that there was an unsatisfied decree against the defendants. That the properties are owned by the 1st defendant. That part of the properties had been compulsorily acquired by the Garnishee and the remainder still remained in the name of the 1st defendant. That there was no order to stop the execution of the decree. That a notice to show cause had been issued to the defendants on



18/11/2020 for hearing on 31/1/2021. That the plaintiffs are apprehensive that the defendants may tamper with the remainder of the properties.

14. The application was not opposed. The plaintiff filed submissions dated 6/6/2023 which I have considered.
15. As already stated, the application was brought under Order 22 Rule 48 of the Civil Procedure Rules. It seeks a prohibitory order against the properties. I have already issued a garnishee order absolute for the compensation made for excision of part of the properties. It means that only parts of the properties still remain and they are the ones which I am being asked to issue a prohibition order.
16. Proceedings under order 22 are execution proceedings. I believe that a prohibitory order under order 22 rule 48 is properly issuable by the Deputy Registrar and not the court. This is usually issued when settling the terms of sale of immovable property. It is at that stage that the Deputy Registrar investigates if the attached property belongs to the judgment-debtor, whether it is free of any encumbrance, and the conditions to attach to the sale. The decision of the Deputy Registrar in those proceedings is then appealable to this Court.
17. By coming directly to this Court to seek the orders they seek, the plaintiffs have side stepped the Deputy Registrar and therefore impeded the right of access to justice to the defendants. It is for the Deputy Registrar to make directions on settlement of terms of sale including issuing the prohibitory order being sought.
18. I have seen the submissions of Ms Asli Learned Counsel for the plaintiffs. She sought to persuade me that what was being sought was akin to an injunction under order 40 of the Civil Procedure Rules. That is not so. If the plaintiffs were seeking an injunction they should have brought a proper application under that Order so that the known principles for granting injunctions could be applied.
19. One other thing, if portions of the properties have already been alienated to the garnishee, what areas are to be prohibited? Has the titles changed? Was it not necessary for the plaintiffs to specifically state the exact areas the properties to be prohibited rather than a blanket order of prohibition over the titles? How would that affect the alienated portion for which the plaintiffs have a garnishee order absolute?
20. All the foregoing questions are issues that are properly in the preserve of the Deputy Registrar and not this court. Accordingly, I find that the said application is misconceived and is for striking out.
21. In view of the foregoing, I make the following orders in respect of the two applications: -
 - a. The application dated 3/12/2018 is allowed and the order nisi issued on 5/12/2018 is hereby made absolute. The garnishee is to pay over to the decree holders a sum of Kshs. 22,046,329/=. The costs of the application to the plaintiffs.
 - b. The application dated 16/12/2021 is hereby struck out with no order as to costs as it was undefended.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb, EBS

JUDGE

