



**REPUBLIC OF KENYA**

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

**CAUSE 1262 OF 2015**

**MAURICE M. MUNYA & 148 OTHERS** (suing on their own behalf and on

behalf of the other members of beneficiaries of the Kenya Ports Authority

Pension Scheme affected by the averaging of the Pensionable Salary and

freezing of the Pensionable House Allowance (pursuant to the Order made

by the Honourable Justice Maraga J on the 28<sup>th</sup> November, 2007.....**CLAIMANTS**

**VERSUS**

**CFC STANBIC BANK LIMITED**

(FORMERLY STANBIC BANK OF KENYA LIMITED).....**RESPONDENT**

**RULING**

1. By an application dated 26<sup>th</sup> November, 2014 the Garnishee/Applicant sought orders among others that there be a stay of execution of the attachment levied by the claimants agents Ms Mutibara auctioneers upon the garnishees goods and that the proclamation be set aside and or discharged.

2. In support of the application Mr Allen Gichuhi for the Garnishee/Applicant submitted that at all material times an order had been issued in ELRC No 1262 of 2015 on 26<sup>th</sup> November, 2014 staying execution of the proclamation levied by Mutibara Auctioneers upon the bank's goods pending the hearing and determination of the application seeking inter alia, the nullification of the proclamation. From the foregoing, counsel submitted no order for costs payable to the auctioneer could have been made during the pendency of the application that stayed the proclamation.

3. According to Mr Gichuhi the attempt to attach the garnishees property was illegal and unconstitutional. The garnishee order absolute dated 7<sup>th</sup> November, 2014 followed the order nisi made on 1<sup>st</sup> September, 2014 that identified the judgement debtor's bank account number 0130063201. At no time did the order absolute permit the attachment of the bank's property since the bank was not a judgement debtor. In support counsel relied on the Court of Appeal decision in **Barclays Bank of Kenya Ltd Vs Kepha Nyabara & 191 Others** where the court held that a garnishees property cannot be subject to adverse action in realization of a debt due to a judgement debtor.

4. Counsel further submitted that the applicant bore no liability to the auctioneer to meet his costs. For as long as the stay order was in place, it was an abuse of the court process for the auctioneer to proceed to tax his costs against the garnishee on an auctioneer/client basis when the proclamation had been stayed.

5. Mr Tandiko for the claimant submitted that the claimants had the right to and did proceed to seek execution against the garnishee. According to counsel the order of the court made on 7<sup>th</sup> November 2014 was clear that the garnishee order absolute was granted together with costs of the suit and garnishee proceedings. The garnishee was therefore bound to comply with the court order or face consequences thereof. Mr Tandiko further submitted that the garnishee was aware of the orders of the court made on 7<sup>th</sup> November, 2014.

6. According to counsel execution was levied within the law and that the same could not be set aside. In any event the execution was levied, payment made subsequent thereto thus there was nothing to set aside in so far as proceeding herein were concerned. According to counsel a formal order was extracted and served on the garnishee on 10<sup>th</sup> November, 2014 the order had the details of the account. On 11<sup>th</sup> November, 2014 the claimant did a letter to the bank stating if the bank did not comply with the order, there would be contempt proceedings.

7. The bank questioned the way the order was extracted and a fresh one was done on 12<sup>th</sup> November, 2014 and served in the presence of the garnishees advocate and Senior manager of the Garnishee. The manager assured that the money would be released but that did not happen. Execution was therefore valid and the remedy open to the garnishee was to appeal or apply for review. According to the claimant, the bank should pay the auctioneer not the instructing client.

8. Mr Munyithia for the auctioneer on his part submitted that the court had no jurisdiction to interfere with a certificate of costs issued by the Registrar. According to counsel, the garnishee had a chance before Makau J and raised the issues and they were determined. In reply Mr Gichuhi submitted that there was an order for attachment of deposits but there was no order directing the attachment of banks personal property counsel further submitted that there was a letter threatening the bank with contempt of court and wondered why the claimant did not pursue the contempt proceedings. According to counsel the money was paid 7 days after the garnishee order absolute.

9. The only issue that stands to be decided in this application is whether it was lawful for the decree holder/claimant to attach the bank/garnishees personal property in execution of the decree against the judgement debtor who happened to be the banks customer and held in the Judgement debtors account funds enough to satisfy the decree against the judgement debtor. In other words would it be lawful to execute against that personal property of a garnishee where there are allegations of failure to honour or demand a garnishee order absolute"

10. Order 23 rule 1(1) of the Civil Procedure 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 judgement 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 judgement debtor and is within jurisdiction order that all debts (other than salary or allowances within the provisions of Order 22 rule 42 owing from such third person (hereinafter called the "garnishee") to the judgement debtor shall be attached to answer the decree together with costs of the garnishee proceedings..."*

11. From the above the garnishee is not the judgement debtor. The attachment being levied is against the judgement debtor's property in the custody of the garnishee. Upon payment of the decretal sum to the extent demanded, the garnishee shall remain discharged from his obligations to the judgement debtor to the extent of the amount garnished. In simple terms the garnishee becomes the agent for the principal debtor who is the judgement debtor hence would not ordinarily bear any personal responsibility for the principal unless it can be shown that he acted outside his mandate as an agent.

12. Order 23 cited above further provides that the attachment shall be to answer the decree together with costs of the garnishee proceedings. The order does not yield an interpretation that the garnishee would dig up his own resources to pay for the costs of the garnishee proceedings where the amount of debt owed to the judgement debtor cannot fully satisfy the decretal amount.

13. The case of **Societe Eram Shipping Co Ltd & Others Vs Compagnie Internationale de Navigation [2003] All ER 465** relied on by counsel for the Garnishee is quite on point. It states in the material part that:

*"....The order took effect against the property of the judgement debtor. The property of the third party was in no way involved, save by the diminution of its debt to the judgement debtor. If the effect of an order in the .....case would be to compel the third party to disburse its own funds, that would be a very clear indication that the order was one which should never have been made".*

14. The claimant contended that the order of Makau J while granting garnishee order absolute was that the garnishee pays the decretal amount together with costs of the suit and garnishee proceedings and that the garnishee was obliged to honour the court order or face the consequences which in this case was execution by way of attachment of garnishee's personal property. This does not seem to be the correct reading of the learned Judge's order. The order stated in material part that:

*"The court further grants garnishee order absolute against the garnishee to forthwith pay the claimant Kshs 267,819,043.20 plus costs of the suit and garnishee proceedings from the Kshs 532,658,641.56 held on behalf of the respondents".*

15. It is clear from the learned Judge's order that the decretal sum and the costs of the suit plus garnishee proceedings were payable from an already identified source. There was therefore no need to attach the garnishee's personal property even if that was lawful. The claimant and the auctioneer complained of some delay by the garnishee to honour the court order and therefore triggered the executions by way of attachment of the garnishee's personal property. However as observed above the garnishee was not a judgement debtor. The decree was not issued against it hence there was no lawful basis for attachment of the garnishee's personal property. If there was delay or refusal to obey the order of the court by the garnishee, the proper procedure to pursue would have been contempt proceeding and not attachment.

16. From the foregoing the court finds and holds that the application dated 26<sup>th</sup> November, 2014 hereby succeeds and is hereby allowed with costs.

17. It is ordered.

**Dated at Nairobi this 11<sup>th</sup> day of July, 2019**

**Abuodha J. N.**

**Judge**

**Delivered this 11<sup>th</sup> day of July, 2019**

**Hellen Wasilwa**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.



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