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Kenya Branch

## **CHARTERED INSTITUTE OF ARBITRATORS KENYA BRANCH LIMITED SUMMARY CASE LAW**

### **MISC. APPLICATION NO. E 453 OF 2019 CM CONSTRUCTION (E.A.) LIMITED VS NINE SISTERS LIMITED**

#### **FACTS**

The Applicant/ Decree Holder obtained judgment against the Respondent/Judgment Debtor. The Judgment Debtor failed to settle the judgment thus precipitated the filing of an application dated 27<sup>th</sup> August, 2020 seeking Garnishee Order Nisi against the Garnishee( Co-operative Bank of Kenya, Ukulima Branch). The Decree holder in the application sought to attach Account No. 01129110775100 domiciled at Co-operative Bank of Kenya, Ukulima Branch. The Garnishee however filed a Replying Affidavit indicating that the attached account was inactive and that it belongs to Maina Wanjigi Secondary School, and not the Judgment Debtor. An issue arose as to who should bear the costs of the application dated 27<sup>th</sup> August, 2020, being the subject of this ruling. The Applicant and the Respondent both failed to agree on who should pay the costs to the Garnishee and the Court directed parties to canvass the issue by way of written submissions.

The Judgment Debtor and the Garnishee submitted that the Decree Holder should bear the costs of the application as it did not conduct due diligence to establish the real owner of the attached account before filing the Garnishee Proceedings. The Applicant on the other hand submitted that it acted in honest belief that the account belonged to the Judgment Debtor.

#### **ISSUE FOR DETERMINATION**

Who should bear the costs of the application dated 27<sup>th</sup> August, 2020?

#### **RULE OF LAW**

The Civil Procedure Act, Section 27(1).

#### **ORDER**

The Court ordered the Garnishee's costs to be paid by the Applicant and the Judgment Debtor on a 50/50 basis.

#### **RATIONALE**

The Court's finding that justice will require the Applicant and the Judgment Debtor to share the Garnishee's costs equally was guided by the case of *Republic v Medical Practitioners and Dentists Board and 3 others Ex parte Kenya Hospital Association* (2014) Eklr. The Court stated that the Garnishee Proceedings could have been averted if the Judgment Debtor settled the decretal sum in time as agreed. In addition to this, the Applicant was obligated to confirm particulars of the Judgment Debtor's accounts before initiating the garnishee proceedings.

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL AND TAX DIVISION**  
**MISCELLANEOUS APPLICATION NO. E453 OF 2019**

**IN THE MATTER OF THE ARBITRATION ACT 1995 & THE ARBITRATION  
RULES,1997**

**IN THE MATTER OF ENFORCEMENT OF AN ABRITRATION AWARD**

**BETWEEN**

**CM CONSTRUCTION (E.A.) LIMITED.....APPLICANT/DECREE HOLDER**

**VERSUS**

**NINE SISTERS LIMITED.....RESPONDENT JUDGMENT DEBTOR**

**COOPERATIVE BANK OF KENYA LIMITED.....GARNISHEE**

**RULING**

1. The Applicant/ Decree holder herein obtained judgment/money decree against the Respondent/ Judgment debtor which judgment the Respondent did not settle thus precipitating the filing of an Application dated 27<sup>th</sup> August 2020 seeking Garnishee Order Nisi against the Garnishee herein. In the said application, the decree holder sought to attach account no.

01129110775100 domiciled at Co-operative Bank of Kenya, the Garnishee herein, at Ukulima branch.

2. The Garnishee however filed the Replying Affidavit of its Legal Officer **Ms. Naomi Mwangi** in which it indicated that the attached account was not only inactive as the same was closed in 2016, but that the account did not belong to the Judgment debtor herein. The Garnishee's case was that the account was held in the name of **MAINA WANJIGI SECONDARY SCHOOL**.
3. Following the revelation that the attached account did not belong to the Judgment Debtor, an issue arose as to who should shoulder the costs of the application dated 27<sup>th</sup> August 2020 which issue is the subject of this ruling. The Applicant and the Respondent failed to agree on who is to pay costs to the Garnishee herein. This honourable court directed parties to canvass the issue of costs by way of written submissions.
4. The Judgment Debtor and the Garnishee submitted that the Decree Holder should be condemned to pay the costs of the application as it did not conduct due diligence so as to establish the actual owner of the attached account before filing the garnishee proceedings. On its part, the Applicant

argued that it acted in the honest belief that the account in question belonged to the Judgment Debtor.

5. It is trite law that "**costs follow the event**" and that the issue as to costs is purely a discretionary matter for court to decide upon. Section 27 (1) of the Civil Procedure Rules Act stipulates as follows: -

*Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to exercise of those powers; provided that the event unless the court or judge shall for good reason otherwise order.*

6. In the case of *Republic v Medical Practitioners and Dentists Board & 3 Others Ex Parte Kenya Hospital Association* (2014) eKLR Odunga J. held that: -

*"A successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted."*



7. Taking a cue from the above cited case, one can say that the garnishee proceedings herein could have been averted had the Judgment Debtor settled the decretal sum in time as agreed. The Applicant can also not be absolved of blame in filing the subject application as it was obligated to confirm the particulars of the Judgment Debtor's accounts before initiating the garnishee proceedings. My finding is that the justice of this case will require that the Applicant and the Judgment Debtor share the Garnishee's costs equally.
8. Consequently, I order that the Garnishee's costs be paid by the Applicant and Judgment Debtor on 50/50 basis.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1<sup>st</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

  
W. A. OKWANY  
JUDGE

**In the presence of:**

Mr. Kibet for Applicant.

Ms Mugambi for Garnishee.

Mr. Gachihi for Respondent/Judgment Debtor.

Court Assistant: Sylvia.