



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISCELLANEOUS CAUSE NO. E112 OF 2018**

**BETWEEN**

**ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED.....JUDGMENT DEBTOR**

**AND**

**QUALITY INSPECTORS LIMITED .....DECREE HOLDER**

**AND**

**CFC STANBIC BANK LIMITED.....1<sup>ST</sup> GARNISHEE**

**KENYA PIPELINE COMPANY LIMITED.....2<sup>ND</sup> GARNISHEE**

**RULING NO.2**

1. There is no dispute that the decree-holder herein obtained a decree in its favour for the principal sum of USD 1,662,109.59 together with costs and interest thereon accruing to 14% per annum for the enforcement of an arbitral award in its favour. When the decree-holder requested the judgment debtor to settle the decretal sum, it failed to do so. The decree holder thereafter moved the court under **Order 23 Rule 1** of the *Civil Procedure Rules* seeking garnishee orders contained in the Notice of Motion dated 7<sup>th</sup> August 2019 as follows:

2. That pending hearing and determination of this application, this Honourable Court be pleased to issue a Garnishee Order Nisi to attach and bind all such sums of USD 1,662,109.59, costs of Kshs. 4,555,710.66 plus interests at 14% p.a, which are held for and on behalf of the Judgment Debtor as follows:

i) Amounts in Account Number xxxxx or any other account held by the Judgment Debtor at the 1<sup>st</sup> Garnishee Bank;

ii) Amounts due to the Judgment Debtor and held by Kenya Pipeline Company Limited, the 2<sup>nd</sup> Garnishee herein under Contract No. SU.QT/032N/13 for procurement, construction, testing and commissioning of Line 1 replacement project;

3. That this Honourable Court be pleased to issue an order directing the 1<sup>st</sup> and 2<sup>nd</sup> Garnishee to appear before this Court on an appointed date and time to show cause why they should not release to the Decree Holder all monies or such monies as are sufficient to answer to the Decree issued on 26<sup>th</sup> July, 2019 held in deposit for the benefit of the Judgment Debtor as follows:

i. Amounts in Account Number xxxxxx or any other account held by the Judgment Debtor at the 1<sup>st</sup> Garnishee Bank;

ii. Amounts due to the Judgment Debtor and held by Kenya Pipeline Company Limited, the 2<sup>nd</sup> Garnishee herein under Contract No. SU.QT/032N/13 for procurement, construction, testing and commissioning of Line 1 replacement project;

4. That this Honourable Court be pleased to issue a Garnishee Order Absolute compelling the 1<sup>st</sup> and 2<sup>nd</sup> Garnishees to remit to the Decree Holder such sums held by them to satisfy the decree issued on 26<sup>th</sup> July 2019 for the principal sum of USD 1,662,109.59, costs of Kshs. 4,555,10.66 plus interests at 14%.

2. On 14<sup>th</sup> August 2019 Okwany J., issued an order *nisi* calling upon the garnishees to show cause why the order *nisi* should not be made absolute.

3. According to the supporting deposition of Chege Kiragu sworn on 7<sup>th</sup> August 2019, the 1<sup>st</sup> garnishee (“Stanbic Bank”) holds monies for and behalf of the judgment debtor in its accounts. The 2<sup>nd</sup> garnishee (“Kenya Pipeline”), holds monies due to the debtor on account of a Contract No. xxxxx for the construction of Line 1 Kenya Pipeline Replacement Project for works performed by the judgment debtor.

4. Both garnishees responded to the order *nisi* by depositions and submissions of their respective advocates. The judgment debtor also opposed the application through its advocate, Owuor Thatcher, in his deposition dated 23<sup>rd</sup> September 2019.

5. Stanbic Bank through the deposition of its Senior Legal Counsel, Elisha Nyikuli, sworn on 24<sup>th</sup> September 2019 stated that it held two accounts and that at the time of receiving the garnishee order *nisi* dated 27<sup>th</sup> August 2019 it held the following amounts:

*Account No. xxxxxxx – Kshs. 111,727.98*

*Account No. xxxxxxx – USD 2,822.64*

6. Stanbic Bank does not object to releasing the amount less its costs for this matter. Despite the assertion by counsel for the decree holder that the statements of account were not a true reflection of the state of accounts based on the appearance of the statements. I do not find any basis for this assertion as the statements were produced on oath and there being no other basis to conclude otherwise, I grant the order absolute.

7. As regards Kenya Pipeline, there are two depositions by Jane Joram, its acting Company Secretary, sworn on 23<sup>rd</sup> September 2019 and 14<sup>th</sup> October 2019. The thrust of the two depositions is that it had a contract with the judgment debtor governed by specific terms which included a clause that payment of sums due shall be conditioned upon completion of agreed works and issuance of a completion certificate in addition to the fact that the amount to be paid was subject to a retention sum. The amount retained is the sum of USD 14,03,750.16 which arises out of 10% of the contractual amount so far paid and certificates are issued. Its position is that until those amounts are ascertained, it cannot amount to a debt due and owing and should not be construed as such.

8. Kenya Pipeline further contended that Kenya Revenue Authority (“KRA”) issued an agency notice dated 29<sup>th</sup> May 2019 directing it to pay Kshs. 17,912,262,818.00 on account of alleged taxes due to it from the judgment debtor. That position was confirmed by Patrick Chege, an officer with Kenya Revenue Authority, in his affidavit sworn on 28<sup>th</sup> October 2019. The position of KRA is that it has power under **Section 42** of the **Tax Procedures Act** to issue such notices. He pointed out that the Notices issued were indeed challenged not only at the Tax Appeal Tribunal in **Nairobi Tax Appeal No. 26 of 2019** but also at the High Court in **Milimani HC Income Tax Appeal No. 1 of 2019** resulting in orders preserving the amount subject of the notice pending determination of the cases. Mr Chege deponed that the outstanding amount to be paid by Zakhem International is USD 76,191,811.38 which is approximately 40% of the assessed tax. He urged that this amount and any other amounts due from Kenya Pipeline to the judgment debtor was still subject to resolution of the tax dispute.

9. Another aspect of the case brought out by Mr Thatcher and Kenya Pipeline concerns the existence of a dispute between Ecobank Nigeria Limited and Ecobank Kenya Limited and the judgment debtor being **Milimani HCCC No. 292 of 2018**. In that case Kenya Pipeline, also a party to the suit, was restrained by a *Mareva* injunction dated 29<sup>th</sup> August 2018 issued by Kasango J., from paying out any monies due under the contract to any other person other than Ecobank Nigeria Limited and Ecobank Kenya Limited.

10. Counsel for the decree holder submitted that neither the agency notice nor the order of Kasango J., could stop it from realizing the fruits of its judgment. He submitted that neither of them affect the rights of the judgment debtor who is not a party to either that case or to the revenue dispute. He added that the purpose of the *Mareva* injunction was to protect the judgment debtor’s assets against disposal and was not intended to interfere with the rights of other parties including the judgment creditor.

11. The question I have to ask is whether the amount held by or on account of the judgment debtor is available to the judgment creditor. On this issue, any monies held by Kenya Pipeline are the subject of the clear and unequivocal order of Kasango J., dated 29<sup>th</sup> August 2018 in **Milimani HCCC No. 292 of 2018** on the following terms:

(b) A temporary injunction is hereby granted restraining and/or barring the Respondents ..... from paying, transferring, remitting, alienating and/or otherwise disposing any proceeds or monies under the Agreement dated 1<sup>st</sup> July 2014 between the 3<sup>rd</sup> and 5<sup>th</sup> Respondents other than the applicants. [Emphasis mine]

12. This order remains in force, it has not been appealed against or set aside and it is binding on Kenya Pipeline. Kenya Pipeline is restrained from paying anyone else other than Ecobank Kenya and Ecobank Nigeria. This is the same conclusion Muigai J., arrived at in her ruling dated 21<sup>st</sup> July 2019 in **Zakhem International v Commissioner of Domestic Taxes Milimani HC ITA Appeal No. 1 of 2019**.

13. The totality of my findings is that the garnishee order *nisi* against the Kenya Pipeline is discharged in view of the fact that the money held on account of the judgment debtor by Kenya Pipeline is not, “a sum of money held by the garnishee that is due and recoverable by the judgment debtor” (see **Barclays Bank of Kenya Limited v Kepha Nyabera and 191 Others NKU CA Civil Appeal No. 169 of 2007**

[2013] eKLR).

14. I allow the Notice of Motion dated 7<sup>th</sup> August 2019 on the following terms;

**a. The garnishee order *nisi* is now made absolute in favour of the judgment creditor as against the 1<sup>st</sup> garnishee in respect of Account No. xxxx and Account No. xxxxx to the extent of the amount held less Kshs. 40,000 costs due to the 1<sup>st</sup> garnishee.**

**b. The order nisi against the 2<sup>nd</sup> garnishee is now hereby discharged.**

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> day of DECEMBER 2019.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Muturi with Ms Mugi instructed by Mwaniki Gachoka and Company Advocates for the Judgment Creditor.

Mr Thatcher instructed by LJA Associates Advocates for the Judgment Debtor.

Mr Kubai instructed by Gumbo and Associates Advocates for the 1<sup>st</sup> garnishee.

Ms Mugo instructed by J. K. Kibicho and Company Advocates for the 2<sup>nd</sup> garnishee.