

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL COURT DIVISION**

HCT-00-CC-MA-0368-2013  
(ARISING FROM CIVIL SUIT No. 102 OF 2012)

ZZIMWE ENTERPRISE HARDWARE'S AND CONSTRUCTION .....APPLICANT

**VERSUS**

HARED PETROLEUM LTD .....RESPONDENT

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

**RULING:**

The Applicant Zzimwe Enterprises, Hardware and Construction Ltd. filed this application against the Respondent, Hared Petroleum Ltd under S. 33 of the Judicial Act, O. 52 rules 1 & 3 of the Civil Procedure rules and S. 98 of the Civil Procedure Act. It is seeking for orders:-

1. That the Order Nisi issued on the 18.9.2012 by the Deputy Registrar, execution and the subsequent Order Absolute dated 12.12.2012 be set aside.
2. That Execution of the Garnishee Order Absolute dated 12.12.2012 be stayed.
3. That costs be provided.

The applicant was represented by M/S Kagwa and Kagwa Advocates, while Ms Kamugisha & Co Advocates were for the Respondent. The application was supported by the affidavit of Mr. Edmund Kyeyune, and Advocate of the Courts of Judicature and another affidavit in Rejoinder dated 14.5.2013 on the side of the Respondent, one Mr. Yahaya Yusufu, the director of the Respondent swore an affidavit in reply dated 13.5.2013 and another supplementary affidavit dated 15.5.2013. On top of the affidavits mentioned, both sides filed written submissions.

The gist of the applicant's submissions was that the Applicant was not served with the Decree Nisi as provided under the law, and that consequently the Garnishee Absolute was obtained illegally and ought to be set aside. It was further submitted that since the law requires that the Order Nisi be served on both the Garnishee and the Judgment debtor, and in the absence of the dispensation of the requirement to serve the Judgment Debtor with the Order Nisi dated

18.9.2012, then the Order of the Registrar date 12.12.12 without Notice to show cause to the Applicant was not proper.

Furthermore, the affidavit of service attached as J. to the Respondent's affidavit in reply was challenged as irregular and false, in that it was not the Decree Nisi served but the taxation hearing Notice and bill of costs. Counsel for the applicant therefore submitted that the Garnishee proceedings were taken out illegally to unjustly enrich the Respondent who purported to attach legal costs of the Ms Kasekende, Kyeyune & Lutaya Advocates together with Ms Kagwa and Kagwa Advocates which were Decreed by this honourable Court.

Counsel for the Applicant further cited the case of **Makula International Ltd Vs Cardinal Nsubuga 1982 HCB11**, to support the proposition that legal costs of Advocates are not subject to attachment to pay debts owed by a lawyer's client.

The commercial rate of 25% per annum was also challenged that court never awarded the same and therefore the respondent wrongfully made calculations on the basis.

In their equally lengthy written submissions which will be summarised for purposes of bringing out the salient points, counsel for the Respondent made reference to paragraph 10 of the affidavit in reply by "Yahaya Yusuf". It states:-

**"10 that the Applicant was served with the garnishee Order nisi as annexure "A" to its affidavit clearly indicates an acknowledgement by KKL Advocates who are still the Applicant's Lawyers"**

They therefore submitted that there was participation of all parties and that the garnishee order nisi never lapsed but was made absolute on 30.11.2012. As to whether the applicant should have been served with Notice to show cause, counsel for the respondent submitted that once a garnishee order had been made absolute, the garnishee assumes the responsibility for payment of the judgment creditor. And further that it would have made no sense to serve the notices to show cause on the applicant which had long been absolved of responsibility to pay the debt.

It was further submitted for the Respondent that the service of taxation hearing notices was done by a court process server and was effective service. It was further submitted that the Respondent in the affidavit in reply as per paragraph 3, 4, 5, and 13 dully acknowledges receipt of Ugx50,000,000 shortly before judgment was obtained. And that the same was deducted from the claimed sum of Ugx147,359,320/= to Ugx97459,320/= hence no double payment. Counsel for the respondent further submitted that the Applicant indebtedness is Ugx231,698, 049/= and that was only Ugx178,884,096/= was paid there was a balance of Ugx34,813,953/= was paid there and costs of Ugx2,711,000/= and that the amount arose to Ugx213,698,049/= by July 2011 because of interest.

Counsel for the respondent further submitted that the Application is brought in bad faith and that if the Advocates for the Applicant are genuinely aggrieved by the garnishee order absolute, they should have challenged it or brought independent proceedings objecting to the payment of the Respondent with their costs. And that since the applicant is trying to dodge its obligations, the application should be dismissed.

I have considered the submissions of both sides as summarised and the affidavits in support, in reply, in rejoinder as well as the supplementary affidavit sworn on behalf of the respondent. It is my most considered view that the issue of service of a Decree nisi was very pertinent. And for the avoidance of doubt, I shall reproduce the relevant provisions of O.23 of the Civil Procedure Rules.

**“O23. R (I) A court may upon the ex-parte application of a decree holder, and either before or after oral examination of the judgment debtor, and upon affidavit by the decree holder or his or her advocate, stating that a decree has been issued and that it still unsatisfied and to what amount and that another person is indebted to the judgement debtor and is within the jurisdiction, order that all debts owing or accruing from the third person (herein after called the garnishee) to the judgment debtor shall be attached to answer the decree together with the costs of the garnishee proceedings.**

(2) by the same or any subsequent order, the court may order that the garnishee shall appear before the court to show cause why he or she should not pay to the decree holder the debt due from him or her to the judgment debtor or so much of the debt as may be sufficient to satisfy the decree together with the costs aforesaid.

**(3) at least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered on the judgement debtor.**

**(4) Service on the judgment debtor may be made either at the address for service if the judgment debtor has appeared in the suit and give an address of service, or on his or her advocate if he or she has appeared by advocate, or if there has been no appearance by leaving the order at his or her usual residence or place of business or in such other manner as the court may direct.**

In view of the above provisions of the law, it is mandatory that the order nisi must be served on both the Garnishee and the Judgment debtor. Counsel for the Respondent submitted on page 2 of their submissions that it would have made no sense to serve the notice to show cause on the applicant who had long been absolved of the responsibility pay the debt. That argument cannot stand as the provisions of the law are mandatory. Failure to serve the Applicant with the Decree Nisi and the consequent issuing of Decree Absolute without according to the Applicant the fundamental right to be heard, was a grave error which warrants the setting aside of the order Absolute dated 12 .12.2012.

And I entirely agree with Counsel for the Applicant that the affidavit of service attached as “J” to the Respondent’s affidavit in reply is irregular and not acceptable. In the first instance, under paragraph 4 of the affidavit, Oboth Lawrence, the process server did not serve the Decree Nisi, but received a taxation Hearing Notice plus bill of costs from Executions Divisions for service upon the judgment debtor. Even under paragraph 5, the process server did not mention the exact place and location out merely asserted that it was well known to him. How can a place be well known to a process Server who does not state its location, street name or number or any details at all? Furthermore, the process server did not state who Dennis was and in what capacity he

purportedly left the papers with him. Those grave discrepancies in the affidavit of service render the same ineffective and at worst, a forgery. So this court finds and holds that there was no service at all, let alone of the taxation Notice and bill of costs, instead of a decree nisi.

The reason for service of a Decree Nisi is to give the Respondent their fundamental right to be heard, and also to notify the judgment debtor to appear in court, particularly in the present case where the applicant asserted that all monies due to the Respondent had already been attached and a sum of Ugx178,884,096/= obtained from Kampala Capital City Authority. The Decree Nisi and consequent making it absolute cannot in such circumstances be said to be proper since the whole process leading thereto was flawed.

The other ground submitted by counsel for the Applicant which this court agreed with is the principle that legal costs of Advocates are not subject to attachment to pay debts owed by the lawyer's client. This is indeed inconformity with the holding in Makalu International Ltd (ibid) that

**“the general level of remuneration of Advocates must be such as to attract recruits to the legal profession.”**

So taxed costs are payable to the Advocate as in the present case and not subject to attachment under illegal Garnishee proceedings. The argument or submission by counsel for the respondent that the applicant should prove that it sued as a pauper and did not pay instruction fees is strange and is hereby rejected. I do not see any logic in imputing that Hardware and Construction Company of Applicants Status would sue as pauper.

In the premises, and in view of what I have outlined, I find and hold that the proceedings before the learned Registrar in charge of Execution, of attaching the costs of the applicant's lawyers were a nullity as there was no service of the Decree Nisi. In the result, those proceedings are hereby set aside and the applicants Advocates should be paid their legal fees amounting to Ugx111,315,000/= with immediate effect.

If the respondent's feels that the Applicant company still owes them any other money other than what was paid to them by Kampala Capital Authority by a Garnishee Order, notably

Ugx178,884,096/= they are free to open up separate legal proceedings to recover the same other than denying the Advocates for the applicant their legal fees under flawed proceedings.

The application accordingly succeeds. The applicant is also awarded costs of this application. I so order.

Judge

5/6/2013

Mr. Kemugisha for the Respondent present

Mr. David Kagwa and George Kasekende for the applicant present

Mr. Ojambo Court Clerk

Court: Ruling read out in open court.

Justice W. M. Musene

**High Court Judge**