

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT – CV – MA – NO. 042 OF 2016**

**(Arising from CV – MA No. 031 of 2016)**

**(Arising from HCT – MA – No. 0014 of 2011)**

**KAMWENGE DISTRICT LOCAL GOVERNMENT  
COUNCIL.....APPLICANT**

**VERSUS**

**KABASA JOHN.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Ruling**

This is an application brought under **Sections 98, 34(1)** of the Civil Procedure Act, **Order 9 Rules 2 and 27, Order 21 Rule 7 (1)(2)(3)(4), Order 22 Rules 19, 23(1)(2),(3) and Order 52 Rules 1 and 2** of the Civil Procedure Rules.

The application is for orders that the garnishee Order Nisi vide MA No. 031 of 2016 be set aside, stayed, vacated and orders for the restitution of the Applicant’s bank account be made and costs of the application.

**Background**

The Respondent sued the Applicant in High Court Miscellaneous Application No. 14 of 2011 challenging his interdiction. The application was heard inter parties and the court ordered that the Respondent be paid his arrears. Since no payments were made to the Respondent, he obtained a garnishee order nisi exparte attaching the applicant’s account. It is these orders the Applicant seeks to set aside.

The application is supported by the affidavit of Mr. Tweheyo Batega the Applicant’s then Deputy Chief Administrative Officer and supplementary affidavit of Dr. Mucunguzi William the Applicant’s District Health Officer and the grounds are;

1. That the Respondent was sometime back interdicted, but later the interdiction was lifted shortly.
2. That the Respondent herein had previously filed an application for judicial review which was granted.
3. That Court in the above application ordered that the Respondent’s salaries and dues be paid and reinstated.

4. That the Respondent has never come to fill the relevant pay change forms as required by and the two parties have never agreed to part ways amicably.
5. That the Respondent had recently applied for garnishee proceedings *ex parte* in issue herein, at the back of and without the knowledge of the Applicant herein, in total bad faith, prematurely, irregularly and in breach of the governing laws.
6. That the Respondent had secured garnishee orders *nisi ex parte*, based on garnishee proceedings that were premised on misrepresentation, connivance and illegalities at law, which cannot be condoned.
7. That the said garnishee orders *nisi* have paralysed the Applicants official business greatly undermined Government programmes such as immunisation against deadly diseases which put at risk the lives of children and other community members.
8. That there is sufficient cause to grant the application herein and the Applicant has a good defence against the said garnishee proceedings.
9. That this is a proper case for the grant of the orders sought.
10. That if this application is not granted, the Applicant would suffer irreparably.
11. That it is just and equitable and in the interest of justice that the status quo be maintained until the main application is heard and determined.

The Application was opposed by the Respondent through his affidavit. And a rejoinder was made by Nuwamanya Didas.

### **Representation**

Counsel Nibareema Mwebaze Grace for the Applicant and Counsel Cosma Kateeba for the Respondent. By consent both parties agreed to file written submissions.

### **Issues:**

1. Whether the present application is a proper case for setting aside the *ex parte* orders?
2. Whether the present application is proper case for the grant of orders for stay of execution, vacation of the previous execution orders and restitution orders and restitution of the Applicant's bank account?
3. What are the remedies available to the parties?

### **Resolution of issues:**

#### **Issue 1: Whether the present application is a proper case for setting aside the *ex parte* orders?**

Counsel for the Applicant contended that the *ex parte* orders were obtained secretly, illegally and in bad faith. That even the person that drew, signed and filed them was incompetent and nonexistent as per Sections 6, 7 and 12(1)(i) of the Advocates Act which provide for admission and enrolment of advocates and who qualifies to be an Attorney. That Mr. Yafeesa Waiswa does not qualify as an advocate as per the Act. Thus, the proceedings were illegal and an abuse of Court process and Court cannot sanction an illegality as per the case of **Enid Tumwebaze versus Mpeirirwe Steven and Another, HCT – CA – No. 0039 of 2010** and in the same case it was held that;

*“An illegality supersedes everything else raised by the parties.”*

Further, that an order which is a nullity at law is something which the party affected by it is entitled to have set aside. [See: **Milly Masembe versus Sugar Corporate and Another, Court of Appeal Civil Reference No. 2 of 2003**]. Thus the applicant’s application be granted.

Counsel for the Applicant also submitted that the Applicant had a good defence on merit and cited the cases of **Sulaiman Nsambu versus Fred Balinda, HCB 102/98** and **Fr. Francis Payers versus Josephat Kawalya Mwebe and Others versus Kampala Bus Service (1966) E.A 480**. The Applicant therefore prayed to be heard and that he has a defence on merit, thus the *exparte* garnishee orders be set aside.

Counsel of the Respondent on the other hand raised preliminary objections to the effect that the proceedings between the Applicant and the Respondent were concluded by the order that was given in High Court Miscellaneous Application No. 014 of 2011. It is trite law that garnishee proceedings are between the Applicant for a garnishee order nisi and the garnishee bank whereby the garnishee bank is only required to appear in Court either to acknowledge or dispute the debt.

Counsel quoted the case of **Kampala Capital City Authority and Stanbic Bank U Ltd and DFCU versus John Mugisha ?& 3 Others, High Court Miscellaneous Appeal No. 290 of 2012**, where it was stated that;

*“... Garnishee proceedings are separate proceedings between the judgment creditor and the garnishee, regardless of the fact that the judgment debtor may be examined before or after the making of an order for attachment of debts.”*

That the Applicant therefore has no locus to apply for the garnishee proceedings between the Respondent and Finance Trust Bank to be vacated, set aside or stayed. The Applicant was not party to the garnishee order nisi and thus the application should be dismissed with costs.

Secondly that this type of application is not a stand alone or final application, the applicant has an option to challenge it through an appeal, review or revision which she has not done. Thus, making the instant application incompetent and unmaintainable.

Counsel for the Respondent further submitted that **Order 23** of the Civil Procedure Rules particularly **Rule 1(1)** provides that upon the *exparte* application of a decree holder, an order of attachment of debts due to the judgment debtor may be made. There is no provision for first notifying the judgment debtor and an application for attachment of a debt by the issue of a garnishee order nisi is always made *exparte*. There is also no provision to defend the application. Thus, there was no illegality.

Counsel for the Applicant in rejoinder submitted that under **Order 21 Rule 7(2)** of the Civil Procedure Rules a draft decree or order must be approved by the opposite part and this provision is mandatory. That the order relied upon under the garnishee proceedings by the Respondent were irregular and illegal at law.

Counsel for the Applicant also submitted that an aggrieved party against a decision of the Assistant Registrar can only apply to set it aside which garnishee orders is part of the orders an Assistant Registrar issues. **[See: Attorney General versus Mark Kamoga, Supreme Court Civil Appeal No. 8 of 2004 Page 9-11].**

I have addressed my mind to the submissions of both Counsel and I find that the Respondent extracted a decree without the approval of the Applicant.

I also find that the Applicant's biggest contention is the breakdown of the arrears owed to the Respondent as attached on the decree yet the same never formed the part of the ruling and the Applicant is contesting as to their accuracy and being right. Counsel for the Applicant also noted the same was never rebutted or challenged by the Respondent. Thus, it should be presumed as admitted.

It is true that garnishee orders are applied for *ex parte* and the Respondent was not wrong in this regard. However, the Respondent ought to have attached the right amount of monies owed to him.

In regard to the Applicant's failure to appeal, I do concur with the submissions of Counsel for the Applicant that the decision of the Assistant Registrar can only be applied to be set aside which the Applicant pursued.

I accordingly find that the attached to the order/decreed relied on by the Respondent was illegal and this Court cannot sanction an illegality. This issue is therefore resolved in the affirmative.

**Issue 2: Whether the present application is proper case for the grant of orders for stay of execution, vacation of the previous execution orders and restitution orders and restitution of the Applicant's bank account?**

Counsel for the Applicant submitted that the garnishee proceedings were instituted by an incompetent person and have only been party executed thus a good ground for them to be stayed.

On the issue of the person that file the garnishee proceedings being incompetent, Counsel for the Respondent submitted that there is no proof that Mr. E. Yateesa Waiswa is not an advocate and he who alleges must prove and besides the documents he filed cannot be invalidated. That this kind of technicality is eschewed by **Article 126(2) (e)** of the Constitution of the Republic of Uganda, 1995. And besides the person holding out is the one that commits the offence and not the litigant. The Advocates (Amendment) Act **Section 14A** was added to protect such proceedings and acts done on behalf of innocent clients. **[Rita Natayi versus Ali Sekanjako, High Court Miscellaneous Appeal No. 333 of 2014.]**

Lastly, that **Order 3 Rule 2(a)** of the Civil Procedure Rules makes provision for a party to be represented by a recognised agent that is a person with a power of Attorney which E. Yateesa Waiswa had. Thus, the issue of illegality does not arise in the instant case.

Counsel for the Applicant in rejoinder also noted that it is in the submissions that it is being pointed out that Yafeesa Waiswa was an appointed an agent and it is not on Court record that he was appointed as such. That the power of Attorney has even never been served on the Applicant and is therefore an afterthought otherwise it would have been attached on the affidavit in reply and not come up in submissions.

In regard to the person that instituted the garnishee proceedings, the same are protect by the provisions of Section 14A of the Advocates (Amendment) Act. However, the Power of Attorney being brought at the level of submissions is disregarded as the same was never brought up before. The Respondent and the actions are only protected in as far as the action for garnishee proceedings is concerned. Yafeesa Waiswa will not be considered as an agent of the Respondent yet the same was never brought before the Court before submissions. However, as already resolved above the Respondent should have attached a right break down of the arrears owed to him and also extracted the decree jointly with the Applicant to avoid such contention.

This issue is also resolved in the affirmative.

**Issue 3: What are the remedies available to the parties?**

Counsel for the Applicant prayed for costs of the application.

This being a case of employer and employee kind of relationship, this Court finds no reason to award costs for the avoidance of further rope pulling. Each party is ordered to bear its own costs.

In a nutshell, the Respondent is ordered to extract a true summary of the Court ruling in as far as the Court ruling is concerned with the approval or input of the Applicant and also file the true break down of the arrears owed to him. The application is therefore allowed; the *exparte* garnishee orders are set aside. Each party bears its own costs.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**20/09/2017**