



**Five Star Agencies Limited v National Land Commission; Kenya National Highways Authority (Intended Respondent); National Bank of Kenya (Garnishee) (Civil Case 445 of 2014) [2023] KEELC 16631 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16631 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL CASE 445 OF 2014  
OA ANGOTE, J  
MARCH 28, 2023**

**BETWEEN**

**FIVE STAR AGENCIES LIMITED ..... APPELLANT**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... INTENDED RESPONDENT**

**AND**

**NATIONAL BANK OF KENYA ..... GARNISHEE**

**RULING**

1. Before this court for determination are four applications dated January 20, 2023, February 21, 2023, February 22, 2023 and February 28, 2023.

The motion dated January 20, 2023 was instituted by the Appellant/judgement creditor seeking for the following reliefs;

- i. That pending the hearing and determination of this application, this honourable court be pleased to make a garnishee order *nisi* against National Bank of Kenya, the Garnishee herein, ordering that all monies deposited and being held in deposit by the aforesaid Garnishee to the credit of the Judgement Debtor-National Land Commission in A/C-00xxx be attached to answer the decree for the sum of Kshs 1, 202, 727,009, 41/= being the decretal sum plus interest at court rates from the date of judgement up to January 15, 2023 together with further interest thereon from January 16, 2023 until payment in full (spent).



- ii. That this honourable court be pleased to issue an order directing the garnishee to appear before this Court on an appointed date and time to show cause why they should not pay the Judgement Creditor the sum of Kshs 1, 202,727,009.41/= being the decretal sum plus interest at Court rates from the date of judgement until January 15, 2023 being the decretal sum plus interest from the date of judgement up to 15<sup>th</sup> January, 2023 together with any further interest thereon from the 16<sup>th</sup> January, 2023 until payment in full.
  - iii. That the costs of and incidental to this Motion be provided for.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of Abdulsalam Sharrif, the Managing Director of the Judgement Creditor of an even date. The Judgment Creditor's Director deponed that the Judgement Debtor acquired a portion of the Judgement Creditor's property being L.R. 209/9727 Nairobi, measuring 0.4281Ha (the suit property) for purposes of constructing a road.
  3. It was deposed by the judgment creditor's director that *vide* an appeal to this Court on April 8, 2014, the Judgement Creditor sought to have the compensation found due and owing to it as a result of the compulsory acquisition enhanced from the initial award of Kshs 87,804,225; that at the time of the hearing, KENHA, for whom the Judgement Debtor acquired the suit property had already taken possession thereof for construction of the Nairobi Southern By-pass and that *vide* a Judgement of November 24, 2014, the Court enhanced the award to Kshs 413, 192,500.
  4. It was deposed by the judgment creditor's director that sometime after the delivery of the judgement, they noted an error therein where interest had been awarded as accruing from the date of judgement till the date of taking possession; that this was untenable as possession had predated the Judgement; that the Judgement Creditor sought an amendment to have the interest calculated from the date of judgement till the date of payment in full, which amendment was allowed by the court and that the decree was consequently amended.
  5. The judgment creditor's director deponed that pursuant to the amended decree, the Judgement Creditor *vide* its letter of November 24, 2022 sought from the Judgement Debtor the sum of Kshs 1, 185,888,463.02/= being the decretal sum plus interests at court rates from November 24, 2014 to November 30, 2022 and that the Judgement Debtor has despite demands, willfully declined to make any payments notwithstanding the fact that the funds held to its credit at the Garnishee Bank A/C 00xxx are funds set aside to compensate landowners whose parcels have been compulsorily acquired.
  6. It is the Judgment Creditor's case that there is no reason why compensation has not been made more than eight years since Judgement and after the Judgement Creditor has long been disposed of its property and that the Judgement creditor's fundamental rights as set out in article 40(1) of the [Constitution](#) have been contravened and infringed upon by the Judgement Debtor who has declined to make compensation in breach of articles 40(2)(a) and 40(3)(b) of the [Constitution](#) and section 111 of the [Land Act](#).
  7. According to the Judgment Creditor, unless the orders sought are granted, the Judgement Debtor may put the funds in the account to other users leaving the Judgement Creditor without legal remedy; that the Judgement Debtor is indebted to the Judgement Creditor to the tune of Kshs 1, 202,727,009.41/ = until January 15, 2023 and that it is only just that the monies held by the garnishee to the credit of the Judgement Debtor be attached to satisfy the amended decree.



8. In response to the application, the judgement debtor, through its director of legal affairs and dispute resolution, filed a notice of preliminary objection dated February 8, 2023 as well as a replying affidavit sworn on February 28, 2023.
9. The preliminary objection by the Judgement Debtor is founded on three grounds being:
  - i. That the application is contrary to the provisions of section 21(4) of the [Government Proceedings Act](#).
  - ii. That the application is legally untenable as it contravenes order 22 rule 18 of the [Civil Procedure Rules, 2010](#).
  - iii. That the application is premature and misconceived and it ought to be dismissed with costs.
10. In the replying affidavit, the Judgement Debtor, through its director of legal affairs and dispute resolution, deposed that it is not disputed that all persons whose property has been compulsorily acquired are entitled to prompt compensation and that it is further undisputed that all acquiring entities are required to deposit with the Judgement Debtor compensation funds for purposes of remitting the same to the affected persons.
11. It was deposed by the Judgement Debtor (NLC), through its director of legal affairs and dispute resolution, that in furthering its mandate and pursuant to section 115(2) of the [Land Act](#), the Judgement Debtor authorized the opening of a special account called the Land Compensation Fund Account in National Bank of Kenya being Account No: 00xxx specifically for remittances of money for compulsory acquisition from acquiring agents and that the monies in the account have been deposited by various government departments and agencies for purposes of conveying payments to the project affected persons.
12. The Judgement Debtor's Director of legal affairs and dispute resolution deposed that the Judgement Debtor, being mandated to disburse funds from the said account to the affected persons, can only do so once it acquires funds from the relevant entity; that in the present circumstances, the Judgement Debtor has never received funds from KENHA for purposes of compensating the Judgement Creditor and that it would be unfair to compel it to pay the colossal sum of Kshs 1, 202,727,009.41 to the Judgment Creditor herein.
13. It is his deposition that contrary to the aversions by the Abdulsalam Shariff, the Judgement Debtor has severally written to KENHA to remit the decretal amount but to no avail; that the Judgement Creditor is not holding any monies due to the Judgment Creditor from KENHA; that the Judgement Creditor has not demonstrated that it is entitled to the funds held in the special account and that it would be against public policy to release the funds belonging to other project affected persons to the Judgment Creditor.
14. It is the Judgment Debtor's case that should the orders sought be granted, there is a danger that not only will payments to other project persons be affected, but ongoing government projects such as the Kenol-Sagana-Marua Road Project and the Kuabura Water Supply Project will be grounded and that other projects that have underlying costs and contractual obligations will be affected and public funds lost in the form of penalties for breach of contractual obligations since the project affected persons cannot be compensated for them to give vacant possession of their land where the projects are to be implemented.
15. The Judgement Debtor (NLC) filed the notice of motion dated February 22, 2023 seeking the following reliefs;



- i. That this Honourable Court be pleased to set aside the garnishee order nisi issued on the February 20, 2023 and varied on the February 22, 2023.
  - ii. That the Court be pleased to issue any other order it may deem fit to make in public interest.
  - iii. That the costs of this Application be granted to the Applicant.
16. The application is based on the same grounds enumerated in the affidavit in reply to the Judgment Creditors application. According to the Judgment Debtor, the Court order stopped all payments to project affected persons, that the order will halt all ongoing government projects such as the construction of the Kenol-Sagana-Marua Road Project and the Kuabura Water Supply Project and other critical projects and that without prompt compensation to other project affected persons, the Judgment Debtor will be sued for damages.
17. The Garnishee, National Bank of Kenya, through its Relationship Manager, deposed that the Judgement Debtor indeed holds Account Number 00xxx domiciled at Hill Branch and the same is sufficiently funded and that he is aware that the funds are held in trust for various designated recipients of compensation and are therefore not available for satisfaction of any decree. In the Further Affidavit, the Garnishee deposed that the available balance in the Judgement Debtor's account was Kshs. 9,044,089,148,36.
18. The Kenya National Highways Authority, KENHA, (the Third Party) filed the notice of motion dated 21<sup>st</sup> February, 2023 seeking for the following reliefs:
- i. That the Honourable Court be pleased to review and set aside the temporary orders of Garnishee Nisi granted by the Court on the February 20, 2023.
  - ii. That the honourable court be pleased to make an order that the sums of money held in deposit by the Garnishee in Account No 00xxx opened in the name of the Judgement Debtor cannot be attached to offset the judgement creditors decree for the sum of Kshs 1, 202, 727,009.41/=.
  - iii. That the honourable court be pleased to issue any other or further orders as the honourable court may deem fit to grant.
  - iv. That the costs of this Application be provided for.
19. The application is based on the grounds on the face of the motion and supported by the Affidavit of Eliud Munene, the Director, Head of Survey of KENHA who deponed that the Judgement Debtor has a bank account being Account No 00xxx domiciled at the Garnishees Hill Bank Account and that the funds therein do not belong to the Judgement Debtor but to KENHA and other third persons not before the Court.
20. It was deposed by the Director, Head of Survey of KENHA that amongst the monies in the account are sums sent to the Judgement Debtor for onward transmission to project affected persons in the following manner: Kshs 13,029,068/= to be paid to various persons as detailed in the letter of June 16, 2022; Kshs 62,500,000/= to be paid as detailed in the letter of September 8, 2021; Kshs 10,000,000/= to be paid as per the letter of August 9, 2021 and Kshs 5, 024,047.50/= to be paid as per the letter of October 5, 2022.
21. It is KENHA's case that owing to the urgent nature of the application, KENHA has been unable to retrieve documents showing the full extent of the monies held in the account; that the funds held in the account do not belong to the Judgement Debtor and cannot be attached to satisfy the Judgement Creditor's decree; that KENHA and other land owners stand to suffer if the garnishee *nisi* is not



- set aside and that the grant of the garnishee orders would be in contravention of article 40 of the Constitution and section 68 (b) of the Kenya Roads Acts which prohibits attachment of property belonging to KENHA.
22. In response to the application, the Judgement Creditor's Director deposed that the Court has not enjoined Kenya National Highways Authority as a Third Party to the proceedings; that the application is misconceived and intended to obscure issues; that the Third Party seems to allege that other land owners have priority over the Judgement Creditor and that the Third Party's claims impute that the Judgement Debtor is lesser in priority to other land owners which is discriminatory and offends article 27 of the Constitution.
23. It was deposed by the Judgement Creditor's Director that the failure to comply with the orders of the Court is an act of contempt which the Court should not sanitize by allowing the application and that the Judgement Debtor's refusal to compensate the Judgement Creditor is an affront to Article 40(1) as well as Articles 40(2)(a) and 40(3)(b) of the Constitution and section 111 of the Land Act.
24. KENHA filed another application dated February 28, 2023 in which it sought for the following orders:
- i. That the judgement dated, signed and delivered on the November 24, 2014 be and is hereby set aside.
  - ii. That Consequent to (3) above, the Honourable Court be pleased to issue an order joining the applicant herein as the 2<sup>nd</sup> respondent in the matter.
  - iii. That the honourable court be pleased to issue any other or further orders as the Court may deem fit to grant.
  - iv. That in the alternative to (3) above, the honourable court be pleased to order that the Judgement Debtor shall be solely responsible for the payment of the decretal amount in this matter and shall not demand nor require from nor use the funds of the Applicant set aside for other purposes to pay the decretal sums in this matter.
  - v. That costs of this application be provided for.
25. The application is supported by the affidavit of the assistant director, legal services of KENHA who deposed that on November 24, 2014, the Court delivered judgement ordering the Judgement Debtor to pay to the Judgement Creditor the sum of Kshs 413,192,500/= being compensation for the compulsory acquisition of a portion of its property being L.R No 209/9727(IR 37790) for the construction of the Nairobi Southern By-pass.
26. According to the assistant director, legal services of KENHA, the judgement was passed in breach of the fundamental rules of natural justice as the applicant, being a party most affected by the execution of the judgement, was not a party to the proceedings and that the judgement ought to be set aside *ex debito justitiae*.
27. The assistant director, Legal Services of KENHA deposed that Nairobi By-pass project was undertaken by KENHA pursuant to its mandate as the agency responsible for among others development of national roads; that KENHA was not a made a party to this case notwithstanding the fact that the property was acquired for its purposes and that pursuant to the judgement aforesaid, the Judgement Debtor has written to the applicant pressing it to pay the decretal sum notwithstanding the fact that the applicant was not party to the Appeal.
28. It was deposed that having not been a party to the proceedings, the Applicant was deprived of the opportunity to show the Court that the suit property was at all relevant time public land which was



set aside as a transport corridor was not lawful to compulsorily acquire the same; and that the interests of justice dictate that this application is allowed.

29. In response to the application, Ibrahim Adan, counsel for the judgement creditor, filed a replying affidavit in which he deponed that the applicant is not a party to this suit and hence has no locus to file any documents in the matter; that there is a clear procedure for joinder which is not as sought by the Applicant; that the present application is a blatant attempt to justify legal fees and illegally obtain public funds and that the presence of the Applicant is not necessary to enable the Court effectually and completely adjudicate the matter before it.
30. The judgment creditor's counsel deposed that the applicant's sole intent is to frustrate the Judgement Creditor who has yet to enjoy the fruits of its judgement almost 10 years later; that the Applicant has had adequate time to be properly enjoined in the suit but failed to do so and that the application should be dismissed and the law firm representing KENHA be condemned to pay the costs for filing these frivolous proceedings.

### Submissions

31. The applications were canvassed by way of oral submissions on March 2, 2023. Senior Counsel Fred Ngatia, for the Judgement Creditor, submitted that the uncontested facts are that sometime in 2013, land belonging to the Judgement Creditor was compulsorily acquired by the Judgement Debtor for construction of a road and that the acquisition was gazetted and the Judgement Debtor assessed the due compensation.
32. Counsel for the Judgment Creditor submitted that the Judgement Creditor being dissatisfied with the awarded sum appealed to this Court which enhanced the same; that subsequently, a decree was issued and the Judgment Debtor was served and that an Order nisi was issued by this court which the Judgement Creditor seeks to be made absolute.
33. Counsel submitted that all the applications by KENHA ought to be struck out as KENHA are not parties to the proceedings; that the present matter is at the execution stage; that it is only the proper parties to a case that are entitled to file and exchange pleadings and that subsequent parties cannot be allowed to take the case from the primary parties. Counsel relied on the Supreme Court case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014]eKLR.
34. According to the judgment creditor's counsel, the assertions that the money in the account, appropriated from the exchequer is for specific Kenyans and not the Judgement Debtor is discriminatory as money for compensation remains money for compensation; that as much as the ongoing compensation is important, it is also crucial for Kenyans whose land was taken in 2013 to be compensated and that the issue of payment is a budgetary one and not legal.
35. It was submitted that the current proceedings are attracting interest every day; that surcharge proceedings should be re-activated for mis-use of funds in public offices; that instead of reaching out to the Judgement Creditor, the Applicant wants to start another charade to misuse public resources and that advocacy should not take over a budgetary issue.
36. Counsel for KENHA, Professor Mumma, submitted that the law relating to compulsory acquisition is found in the *Land Act*, 2012; that land is acquired by the National Land Commission on behalf of the acquiring entity and as such, the role of National Land Commission is purely that of an intermediary to facilitate the acquisition pursuant to Section 111 of the *Land Act* and that the acquiring agency is required to deposit the funds before the acquisition is undertaken.



37. Counsel for KENHA submitted that money is allocated in the budget for the acquiring agent as the National Land Commission has no money of its own but holds the same in trust; that the origin of the monies deposited into the account and its intended purposes has been demonstrated and that as such, the Judgement Debtor cannot pay out money as it wishes.
38. According to counsel, where a garnishee order is sought like in this case, KENHA, as the acquiring entity should be heard on the same; that KENHA has an interest in the matter pursuant to Order 23 of the Civil Procedure Rules and was a necessary party in respect of the proceedings regarding compensation and that the Judgement Creditor having left out the principal in the proceedings and targeted the agent, the judgement should be set aside.
39. It was submitted on behalf of KENHA that Order 1 Rule 10 of the Civil Procedure Rules makes it clear that necessary parties ought to be joined in the proceedings; that the decisions cited by Counsel for the Judgement Creditor relate to Interested Parties in Petitions and the stakes are different as no orders can issue against such parties and that vide the application of 28<sup>th</sup> February, 2023, they have annexed a letter from the Judgement Debtor bringing to KENHA's attention the decree.
40. It was submitted by counsel that despite not having been a party to the decree, the Applicant is being called upon to settle the same; that whereas indeed the land owner is entitled to compensation, its refusal to take up the assessed amount of Kshs. 87 million prolonged the matter and that KENHA only learnt about the decree when the money escalated from Kshs 87 million to 1.2 billion.
41. Counsel for KENHA submitted that section 68(b) of the [Kenya Roads Act](#) prohibits the attachment of KENHA's assets; that there is no order against the Authority and that it is apparent that the garnishee proceedings are in the nature of attachment of the assets of the Authority.
42. Mr. Odoyo, on behalf of the Judgement Debtor, submitted that garnishee proceedings require due diligence to avoid a situation where a party that is not indebted is made to pay; that Order 23 Rule 1 of the Civil Procedure Rules requires the Court to summon the garnishee to prove its indebtedness and that where the garnishee disputes its indebtedness, the issue should be proved in court.
43. It was submitted that in the present case, the funds in the Judgment Debtor's account are held for special use; that the account in question is a special account known as the Land Compensation Account set up to receive monies for compensation from various entities such as KENHA, KURA, KERA, and KETRACO and that the monies in the said account do not belong to the Judgement Debtor but the acquiring entities.
44. Counsel submitted that the Judgement Debtor is just an intermediary which receives and disburses the money to the project affected persons; that evidence has been adduced demonstrating this position; that there is no indication that the Judgement debtor received money meant for the Judgement Creditor; that third parties will be affected if the monies in the account are attached and that having not received money pursuant to section 111 of the [Land Act](#), it will be unfair to attach the Kshs 1.2 billion meant for other projects.
45. Reliance was placed on the Ugandan case of [Administrator General v Kakooza Umaro & Stanbic Bank](#), Misc App 11 of 2017 as well as the case of [Prof Tom Ojienda & Associates v National Land Commission; National Bank of Kenya \(Garnishee\)](#) [2019]eKLR where the Court was satisfied that the monies held by National Land Commission are not its monies. Mr. Musembe, counsel for the Garnishee, associated himself with the submissions by counsel for the Judgement Debtor.
46. In response, counsel for the Judgment Creditor submitted that section 111 of the [Land Act](#) is clear that compensation should be fully and promptly be paid and provides that the acquiring authority



should deposit the funds to the Judgment Debtor before the acquisition. Counsel submitted that the Judgement Debtor should not have proceeded with the acquisition before monies were deposited on its account and that KENHA is not a necessary party because the issue in dispute is one of compensation and not the project;

47. It was submitted that the account in question is not a trust account but a special account for affected persons; that in the case of *Prof Tom Ojienda (supra)* referred to, he tried to attach the account for his legal fees which is not the position here; that the Judgement Creditor is an affected party and that it is not feasible that the Kshs.9 billion in the account is only for the persons referred to in the letters produced by KENHA. According to counsel, section 68 of the *Kenya Roads Act* is not applicable in the circumstances.
48. Counsel for the Judgment Creditor submitted that the Affidavit by Mr Ikol of February 28, 2023 clearly illustrates that KENHA have been aware of the decree through the letters of March 13, 2017, June 30, 2018, November 8, 2018, January 29, 2019 and <sup>November 30, 2022</sup> asking them to pay up and that there is no reasonable explanation for KENHA's inertia.

### Analysis & Determination

49. The court has considered the applications, the responses and submissions by counsel. The court has also considered the authorities that the parties have relied upon. The following issues arise for determination:
- i. Whether KENHA had the requisite locus to file the applications of February 20, 2023 and February 28, 2023 and if so, whether the applications are merited.
  - ii. Whether the application of January 20, 2023 is competent and if so, whether the same is merited?
  - iii. Whether the application of February 22, 2023 is merited?
50. Where a party's *locus* is in question, the court must address itself on that question first before making any substantive determinations. The presence of KENHA in these proceedings has been strongly objected to by the appellant/judgment creditor. Locus standi has been defined by *Black's Law Dictionary* 9<sup>th</sup> Edition as-
- “The right to bring an action or to be heard in a given forum.”
51. The court in the case of *Alfred Njau and others v City Council of Nairobi* (1982) KAR 229, defined *locus standi* thus;
- “The term *locus standi* means a right to appear in Court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings.”
52. KENHA filed the application of February 21, 2023, as a “third party.” In the application, KENHA has sought for an order to review and set aside the temporary orders of garnishee nisi granted by the Court and for an order that the sums of money held in deposit by the garnishee in account No 00xxx opened in the name of the judgement debtor cannot be attached to offset the judgement creditor's decree for the sum of Kshs 1, 202, 727,009.41.
53. Looking at the pleadings, it is clear that KENHA is not a party to this suit and has not been enjoined in the suit in any capacity, be it as a third party or otherwise. The application of February 21, 2023 in itself



does not seek any orders of joinder. It is therefore apparent that there is no basis upon which the court can entertain the application, the same having been brought by a stranger to these proceedings. The application is therefore a non-starter. It would appear that KENHA sought to address that anomaly by filing the application dated February 28, 2023.

54. In the application of February 28, 2023, KENHA has sought for the setting aside of the Judgement of November 24, 2014; an order for its joinder in the proceedings as the 2<sup>nd</sup> respondent in the matter and in the alternative, an order that the judgement debtor is solely responsible for the payment of the decretal amount in this matter and not to demand nor require from nor use the funds of KENHA set aside for other purposes to pay the decretal sum in this matter.

55. The law with respect to joinder is found in order 1 rule 10(2) of the [Civil Procedure Rules](#) which gives the Court wide discretion to join parties to the proceedings. The said order provides as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

56. The principles to be considered in an application for joinder were set out by the Court of Appeal in [Pravin Bowry v John Ward and another](#) [2015]eKLR which made reference to the [Ugandan case of Deported Asians Custodian Board v Jaffer Brothers Ltd](#) [1999] 1 E.A. 55 (SCU) as follows:

“A clear distinction is called for between joining a party who ought to ‘have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...”

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

57. A reading of the aforesaid provision makes it clear that joinder is envisioned during the pendency of the proceedings. However, if the matter has been disposed off, then the decision of the court has to be set aside first. In the present case, the appeal has been concluded and what is before the Court relates to execution. Is joinder possible in the circumstances?

58. The Court of Appeal in [J.M.K v M.W.M & another](#) (2015) eKLR addressing a similar question stated thus;

“Order 1 rule (10) (2) of the [Civil Procedure Rules](#) empowers the court, at any stage of the proceedings, upon application by either party or *suo motu*, to order the name of a person



who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of *Sarkar's Code of Civil Procedure* (11<sup>th</sup> Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

This Court adopted the same approach in *Central Kenya Ltd v Trust Bank & 4 others*, Ca No 222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that order 1 rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. *Sarkar's Code*, (*supra*) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of order 1 rule 10 (2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Ltd v Said & others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage...”

59. In the case of *JMK* (*supra*), the Court of Appeal, while noting that proceedings had indeed ended went ahead and held that the prayer for review that had been made alongside the application for joinder ought to have been considered by the Judge. The Court proceeded to allow the application for review, set aside the judgement and directed that the matter be heard *de novo*.
60. Guided by the foregoing it follows that the applicants' application for setting aside judgment in which the applicant seeks joinder is legally competent. Having affirmed the applicants *locus* to file the application dated February 28, 2023, the court will proceed to consider the merits of the same.
61. In an application seeking the setting aside of a judgement and joinder of a party, the Court must first make a pronouncement as to whether it should set aside the judgement. This Court in *Lois Holdings Limited v Ndiwa Tamboi & 184 others; Co-operative Society (Proposed 2nd Defendant)* [2021]eKLR dealing with a similar application expressed itself as follows;

“I agree that seeking a setting aside order forms the first hurdle in seeking joinder in a concluded suit and the application is therefore properly before the court for consideration.”



62. The applicant seeks to have the Judgement delivered on April 24, 2014 to be set aside *ex debito justitiae*, that is, as a matter of right. The principle of *ex debito justitiae* was explained by the court in *Isaacs v Robertson*, [1984] 3 All E.R. 140 at 143 where Lord Diplock stated thus:

“[T]here is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.”

63. Ordinarily, judgements are amenable to be set aside unless through the process of review or appeal. This position was affirmed by the Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Ltd t/a Wyco Paints* C.A. Civil Appeal No.132 of 2014 (2016)eKLR who stated thus;

“Apart from the provisions of order 10 rule 11, order 12 rule 7 and order 36 rule 10 of the *Civil Procedure Rules* dealing with the setting aside of default judgements, the *Civil Procedure Rules* does not have a provision for the setting aside of the final judgement. A party aggrieved by a final judgement can either move the court under order 45 for a review of the resultant decree or by lodging an appeal in terms of order 42.”

64. However, the court can in its inherent jurisdiction set aside a judgement *ex debito justitiae* once it is satisfied that the principles of natural justice were breached. As stated by the court in *Bahola Mkalindi Rhigho & 9 others v Michael Seth Kaseme & 4 others* [2021] eKLR;

“Where the principle of natural justice is breached, the person affected is expected to have the determination against him set aside *ex debito justitiae*. The principle of *ex debito justitiae* is founded on a recognition of a debt that the justice delivery system owes to a litigant to correct an error in a judicial dispensation.”

65. The facts of this case are largely undisputed. Sometime in 2013, the Judgement Debtor compulsorily acquired a portion of the Judgement Creditors’ property at the behest of the applicant for purposes of a road construction project- Nairobi Southern Bypass. After the acquisition, the Judgment Debtor assessed the compensation due to the Judgement Creditor.

66. The judgement creditor, aggrieved by the award, moved to this court by way of appeal seeking the enhancement of the award, which was enhanced to Kshs 413,192,500. Together with the accrued interest, the sum now stands at a staggering Kshs. 1, 202,727,009.41

67. According to the Applicant, despite being a crucial party to the proceedings, it was never made aware of the suit and was not heard before the Judgment dated April 24, 2014 was delivered; that the above notwithstanding, the Judgement Debtor now seeks from it monies to pay the Judgement Creditor and that the Judgment Debtor is increasingly pressuring it to pay the same. It is the applicant’s case that the failure to involve it in the proceedings was a blatant violation of the *audi alteram partem* principle, which demands that no person should be condemned unheard.



68. On its part, the Judgment Creditor maintains that it has no claim against the applicant and that the applicant's presence is not and has never been necessary in the proceedings. The Judgment Debtor on the other hand maintains that it has on several occasions requested the applicant to settle the decretal amount to no avail.
69. The law on compulsory acquisition is found in the *Constitution of Kenya* and the *Land Act*, 2012. Part VIII of the *Land Act*, 2012 elaborately sets out the procedure for compulsory acquisition. This procedure was succinctly discussed by the court in *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR].
70. As regards compensation, section 111(1) and 111 (1A) of the *Land Act*, 2012 provides as follows:
- “ 111. If land is acquired compulsorily under this Act, just compensation shall be  
(1) paid promptly in full to all persons whose interests in the land have been determined.
111. The acquiring authority shall deposit with the Commission the compensation  
(1 funds in addition to survey fees, registration fees, and any other costs before  
A) the acquisition is undertaken.”
71. Section 112 of the Act provides for what is known as inquiry into Compensation whereby the National Land Commission (the Judgment Debtor herein) undertakes a probe to determine proprietary and compensation claims by persons interested in the land.
72. Upon conclusion of the inquiry thereof, section 113 of the *Land Act* mandates the Commission to prepare a written award in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.
73. Section 115 of the *Land Act* provides for the deposit of money meant for compensation in the Commission's special compensation account awaiting a determination as to the person to be compensated for the acquired land. Section 120 (1) of the *Land Act* provides the taking of possession of the acquired land by the Commission as follows:
- “ After an award has been made, the Commission may take possession of the respective land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county government as the case may be, provided that such taking of possession will not result in persons being rendered homeless.”
74. Section 120 (4) of the *Land Act* provides that upon taking possession and payment of just compensation in full, the land shall vest in the national or county government absolutely free from encumbrances. It is this inquiry and subsequent award by the Judgment Debtor that formed the subject of the Appeal herein.
75. The law gives the Judgment Debtor the sole mandate of carrying out an inquiry and determine the payable compensation. According to Section 112(6) of the *Land Act*, during the inquiry process, every person interested in the land, including the public body for whose purposes the land is being acquired, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.
76. KENHA has not informed this court that it had any reservations on the acquisition of the suit property. If it did, it would have raised the issue during the inquiry stage. Further, in the ordinary course of



things, compensation ought to be given to the project affected person before the Commission and the acquiring entity can take possession of the acquired property.

77. Indeed, under section 111 (1A) of the [Land Act](#), KENHA being the acquiring authority, ought to have deposited with the Judgment Debtor the funds for acquiring the suit property before the acquisition was done, which they now claim they never did, despite being aware of the inquiry.

78. It is only in exceptional circumstances that compensation may be done after acquisition. Section 120 of the [Land Act](#) provides as follows in this regard;

“ 120. Only after the award has been made, and the amount of the first offer has been

(1) paid, the Commission shall take possession of the land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county governments as the case may be.

(2) In cases of where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under this Act, the Commission may take possession of uncultivated or pasture or arable land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire, and on the expiration of that time the Commission shall, notwithstanding that no award has been made, take possession of that land in the manner prescribed by subsection (1).”

79. It has not been shown that at any time during the inquiry and even on appeal, the Judgment Debtor informed the Judgment Creditor that it had not received funds from KENHA as the acquiring entity, or that KENHA, as the acquiring entity, was disputing the inquiry that was being undertaken by the Judgment Debtor. That being the case, and considering that it is the Judgment Debtor that acquired the suit property pursuant to the provisions of the law, the Judgment Creditor had no claim as against KENHA.

80. It has been demonstrated by no one else but the Judgment Debtor that it acquired the suit property on behalf of KENHA; that KENHA never objected to the said inquiry and that KENHA was made aware of the decree of this court way back in the year 2017 but never sought to be enjoined in this suit.

81. Was the Judgment Creditor to foretell that the acquiring entity had not, as required by law, deposited funds with the Judgment Debtor hence join them in the suit? The court thinks not. That being the case, and in view of the provisions of the [Land Act](#), and specifically section 111 (1A), KENHA was not a necessary party in these proceedings.

82. KENHA cannot equally claim to be a necessary party pursuant to Garnishee proceedings. I say so because the account in question is held in the name of the Judgment Debtor and not KENHA pursuant to the provision of section 115 of the [Land Act](#) which provides as follows:

“(1) After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where—

(a) there is no person competent to receive payment; or



- (b) the person entitled does not consent to receive the amount awarded; or
- (c) there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which the compensation is to be paid.

(2) In any of the cases referred to in paragraphs (a), (b) and (c) of subsection (1), the Commission may at any time pay the amount of the compensation into a special compensation account held by the Commission, notifying any persons interested accordingly.”

83. The implication of the provisions of sections 111 and 115 of the *Land Act* are that once the acquiring entity submits a request for acquisition of land to the Judgment Debtor to acquire land on its behalf, its role ends there. The acquiring entity has no other role in the whole process of acquiring the land, other depositing the compensation award with the Judgment Debtor.
84. Indeed, considering that it was the sole mandate of the Judgment Debtor to value the suit property, which valuation was challenged by the Judgment Creditor, the Judgment Creditor was not under any obligation to join KENHA in the suit challenging the said valuation. The issue of KENHA being agreeable to paying Kshs. 87,000,000 and not any other amount does not arise
85. In the end, the court is not convinced that KENHA had any known interest in the suit filed by the Judgment Creditor warranting its presence in the proceedings. As such, it cannot be said that the rules of natural justice were breached. In any event, even after being informed about the Judgment in the year 2017, KENHA did not bother to file the current application until when the Judgment Creditor commenced the current execution proceedings. The disinterest exhibited by KENHA for more than six years from the time they were made aware of the decision of the court dictates that the court should not exercise its discretion in its favour.
86. That being so, the Court declines to set aside the Judgement dated April 24, 2014. Having so found, it follows that there are no proceedings within which the Applicant can be joined. In the end, the application dated February 28, 2018 fails.
87. I will now consider the Judgment Creditor’s application dated 20<sup>th</sup> January, 2023, in which it has sought for an order directed to the Garnishee to appear before the court and show cause why it should not pay the Judgement Creditor the sum of Kshs. 1, 202,727,009. 41 being the decretal sum plus interest at Court rates. The Judgement Debtor filed a response as well as a Preliminary Objection impugning the legitimacy of the application. As the preliminary objection is potentially dispositive, the court will determine it first.
88. The threshold of a preliminary objection was set out by the Court of Appeal in the *locus classicus* case of *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that;

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



89. Newbold, P further held as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

90. The Supreme Court in the case of *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, Petition No. 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the Mukisa (*supra*) case stating as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

91. According to the judgement debtor, the garnishee proceedings as commenced cannot lie against it by virtue of section 21(4) of the *Government Proceedings Act*. The said section states as follows;

“...save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

92. Order 29 rule 2(2) of the *Civil Procedure Rules*, on the other hand provides that:

“No order against the Government may be made under-

- (a) Order 14, rule 4 (Impounding of documents);
- (b) Order 22 (Execution of decrees and orders);
- (c) Order 23 (Attachment of debts);
- (d) Order 40 (Injunctions); and
- (e) Order 41 (Appointment of receiver.”

93. The import of these provisions is that execution proceedings against a government cannot lie in the ordinary course provided for under the *Civil Procedure Rules* but are regulated by the *Government Proceedings Act*. The rationale for the same was succinctly discussed by the Court of Appeal in *Kisya Investments Ltd v AG* (2005) 1 KLR where the learned justices stated thus;

“...If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and



judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.”

94. Having affirmed the procedure of execution against the government, the question that lends itself is whether the Judgement Debtor, the National Land Commission, is a government for purposes of section 21(4) of the *Government Proceedings Act*.
95. So what is the Government? The *Government Proceedings Act* does not define the word “Government”. The closest to a definition of the same is in section 2 of the *Interpretation and General Provisions Act*, which simply provides “the Government” means the Government of Kenya.” *Black's Law Dictionary*, 8<sup>th</sup> Edition defines the term “government” as being:
- “(1) The structure of principles and rules determining how a state or organization is regulated.
  - (2) The sovereign power in a Nation or State
  - (3) an organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.”
96. Dixon J. in *Burns v Ransley* [1949] ALR. 817 defined “Government” to signify the established system of political rule, the governing power of the County consisting of the executive and the legislature considered as an organised entity and independently of the persons of whom it consists from time to time.
97. The High Court in the case of *Association of Retirement Benefits Scheme v Attorney General & 3 others* [2017] eKLR cited with approval the Indian Supreme Court case of *Sbetty v Airport Authority of India & others* (1979) 1 S.C.R 1042 in which the test for determining whether an entity was a Government body or not, was stated as follows:-
- “(a) Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government.
  - (b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;
  - (c) It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State.
  - (d) Whether the body has deep and pervasive State control,



- (e) Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and
- (f) If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.”

98. Pursuant to article 1(3) of the *Constitution*, the sovereign power of the people of Kenya is exercised by the following State organs: Parliament and Legislative Assemblies in the County Governments, National Executive and Executive Structures in the County Government and the Judiciary and Independent Tribunals.

99. Article 67 of the *Constitution* establishes the National Land Commission as a constitutional commission. Article 260 on the other hand sets out the definition of ‘state organ’ to mean a commission, office, agency or other body established under the Constitution. The same section defines “State” as the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution.

100. A reading of the above provisions and the decision of the Supreme Court of India in International Airport Authority of India leaves no doubt that the Judgment Debtor is a state organ with certain defined functions within the governmental structure. In *Okiya Omtatah Okoiti & another v Attorney General & 7 others* [2013] eKLR, the court held as follows:

“ Article 248 of the *Constitution* creates Commissions ... and independent offices ... and taking all the definitions above together, it is difficult to understand the worth of the objection raised. One cannot reasonably fail to note that Commissions and Independent Offices are part of the national governmental structure of the State of Kenya and to say otherwise would be absurd...”

101. Whereas it appears settled that constitutional commissions are state agencies and therefore part of the “Government”, there appears to be two schools of thought as to whether they are “Government” for purposes of section 21(4) of the *Government Proceedings Act*. Whilst one school of thought affirms that execution against the Judgment Debtor can only proceed pursuant to the provisions of section 21(4), the other position is that a Judgment Debtor is not the “government” for purposes of section 21(4) and execution against it can proceed through the ordinary modes of execution provided for by the Civil Procedure Rules.

102. In the case of *Tom Ojienda & Associates v National Land Commission & another* [2019] eKLR the court stated as follows:

“ There is no dispute that the respondent is an independent commission and therefore a state organ for purposes of chapter 15 of the *Constitution*....

I take the view that, inasmuch as the respondent is independent, and clothed with requisite constitutional powers to sue and be sued in its own corporate name, it is not “the Government” or a “Government Department” for purposes of the *Government Proceedings Act*. Indeed, it was in recognition of this independence that it engaged the services of the Applicant herein to offer it legal representation. Consequently, my considered view is that the Respondent is amenable to the usual legal consequences flowing from such processes, including execution of ensuing decrees. This is because there is no such protection afforded by its organic legislation, the *National Land Commission Act*, to shield the Respondent



from the execution process. Moreover, it is telling that whereas the [Government Proceedings Act](#) was amended by the [Government Proceedings \(Amendment\) Act, 2015](#) to include County Governments, Parliament, in its wisdom, did not consider it apposite to extend the same shield to independent commissions such as the Respondent.”

103. The Court in [Rose Aoko Ogwang v National Gender and Equity Commission](#) [2020] eKLR while placing reliance on the case of [Tom Ojienda](#)(*supra*) dismissed an objection on the warrants of attachment and sale against the National Gender and Equity Commission on account of being contra to section 21(4) of the [Government Proceedings Act](#) stating;

“I have considered arguments by both parties on this issue and agree with the Claimant’s submissions that the Respondent is not covered by the provisions of Section 21 of the [Government Proceedings Act](#) that the section refers strictly to the ‘Government’ and/or Government departments and as such independent commissions cannot rely on the said provision.”

104. In contrast, the Court in [Republic v National Land Commission & 2 others ex-parte Cabin Crew Investments Limited](#) [2019] eKLR opined thus;

“The National Land Commission is established under Article 67 of the Constitution and its primary function under article 67 (2) (a) is “to manage public land on behalf of the national and county government”. I respectfully consider that it is a government department for purposes of section 21 of the [Government Proceedings Act](#) because of its public element of management of public land on behalf of the two government levels, and the transfer of rights, assets, liabilities, obligations and even staff for the Ministry of Lands under sections 23, 31 and 32 of the Act.”

105. Whereas the Court in [Vivo Energy Limited \(Formerly Known as Kenya Shell Limited\) v National Land Commission](#) [2020] eKLR stated as follows:

“In addition, constitutional commissions are one of the state organs under Article 260 of the [Constitution](#). Section 21 of the [Government Proceedings Act](#) provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings.”

106. While appreciating the position in the case of [Tom Ojienda](#) (*supra*) the Court respectfully disagrees with the same. As aforesaid, the Judgement Debtor herein is a state organ. Indeed, its main function as set out in the [Constitution](#) is to primarily manage land on behalf of the National and County Governments.

107. In addition, the Judgment Debtor enjoys monopoly status conferred by the Constitution; its functions are of public importance and closely related to Governmental functions; and it is wholly funded by the State to meet almost its entire expenditure. Although independent, it is impregnated with governmental character

108. The Court is alive to the fact that pursuant to the provisions of Article 253 of the Constitution, the Judgement Debtor is a body corporate capable of suing and being sued in its corporate name and further that it is required to be independent in carrying out its functions. In the Court’s opinion however, these two factors do not take away the Judgement Debtor’s core identity as a state organ.



109. That being the case, the argument that the fact that the [Government Proceedings Act](#) does not expressly provide for the National Land Commission, and the [National Land Commission Act](#) does not expressly forbid execution in the ordinary manner means that attachment of the assets of the Commission in execution of a decree is permissible is not correct.
110. This is especially so in light of the constitutional underpinnings discussed above. The court's position in this regard is fortified by the fact that the Judgment Debtor is subject to article 249(3) of the [Constitution](#) which provides that Parliament shall allocate funds to enable each commission to perform its functions, and the budget of each commission and independent office shall be a separate vote.
111. Therefore, in respect to the funds that are allocated to the Judgment Debtor by Parliament for its operations, or funds deposited in its account by acquiring entities for the purposes of compensating project affected persons, such funds cannot be attached by garnishee proceedings, or in any other manner provided under the [Civil Procedure Rules](#). Indeed, as already explained above, the protection afforded to the Judgment Debtor by the law is to allow it function seamlessly, its indebtedness notwithstanding.
112. The mode of execution against the government is provided under section 21 of the [Government Proceedings Act](#), which includes applying for a certificate of order and costs against the government, and enforcing the same by way of an order of *mandamus*, which is a writ issued by the court as a command ordering a government official to perform a public duty.
113. The [Government Proceedings Act](#) only recognizes one mode of execution against the government, including the state organs. In [Permanent Secretary Office of the President, Ministry of Internal Security & Another ex parte Nassir Mwandih](#) (2014) eKLR, Odunga J observed that the procedures in seeking an order of *mandamus* under the [Government Proceedings Act](#) is to be strictly complied with in respect of issuance of certificate of costs and certificate of order against the Government.
114. It is not clear to this court if that procedure has been complied with by the Judgment Creditor. The court notes that on December 13, 2018, this Court granted to the Judgment Creditor an order of *mandamus* as against the Judgment Debtor. An attempt to review the same was declined on 25<sup>th</sup> February, 2021. Why that mode of execution was abandoned by the Judgment Creditor if at all, has not been explained.
115. Whereas the Judgment Creditor is constitutionally entitled to receive compensation for the compulsory acquisition of its property, and agrees that it is discriminatory for the Judgment Debtor to prioritize compensation to some project affected persons at the expense of others, the court is not convinced that the money in the special account held in the name of the Judgment Debtor can be garnisheed.
116. The upshot of the above is that the mode of execution against the Judgment Debtor as adopted by the Judgment Creditor is contrary to the provisions of the [Government Proceedings Act](#) and order 29 rule 2 (2) of the [Civil Procedure Rules](#).
117. For those reasons, the court makes the following orders:
  - a. The Judgment Creditor's application dated January 20, 2023 be and is hereby dismissed.
  - b. The applications by KENHA dated 20<sup>th</sup> February, 2023 and 28<sup>th</sup> February, 2023 be and are hereby dismissed.



- c. The Judgement Debtor's application dated 22<sup>nd</sup> February, 2023 succeeds and the garnishee order nisi issued on 20<sup>th</sup> February, 2023 and varied on 22<sup>nd</sup> February, 2023 be and is hereby set aside.
- d. The parties shall bear the costs of their respective Applications.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

**Mr. Ngatia and Adan for Decree Holder**

**Mr. Odoyo for Judgment Debtor**

**Mr. Obok for KENHA**

**Ms Ngumo for Mugesha for Garnishee**

**Court Assistant - Tracy**

