



**Gitutho Architects and Planners Limited v Kenya Utali College; Co-operative Bank of Kenya Limited & another (Garnishee) (Miscellaneous Commercial Application E618 of 2022) [2024] KEHC 11558 (KLR) (Commercial and Tax) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS COMMERCIAL APPLICATION E618 OF 2022  
JWW MONG'ARE, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**GITUTHO ARCHITECTS AND PLANNERS LIMITED ..... APPLICANT**

**AND**

**KENYA UTALI COLLEGE ..... RESPONDENT**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... GARNISHEE**

**ABSA BANK PLC ..... GARNISHEE**

**RULING**

**Introduction and Background**

1. It is common ground that judgment was entered in favour of the Applicant and against the Respondent to the tune of Kshs. 25,317,216.60/= when the award stemming out of the arbitration between the parties was adopted and recognized as an order of the court and the Applicant was at liberty to enforce it as such.
2. Pursuant to the exercise of that liberty, the Applicant has commenced garnishee proceedings against the Respondent by way of the Notice of Motion dated 20<sup>th</sup> August 2024 made under section 3, 3A & 63 (c) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 23 Rule 1 & 2 and Order 51 (1) of the *Civil Procedure Rules, 2010* seeking inter alia a garnishee order nisi against inter alia the Garnishee for the money held in the Respondent's account 011xxxx7100 domiciled in Co-operative Bank of Kenya(1<sup>st</sup> Garnishee) and Account 094xxxxx746 in Absa Kenya Plc (2<sup>nd</sup> Garnishee) in satisfaction of the decree; that the Garnishees do appear before the Court on an appointed date to



show cause why the Garnishee order nisi so issued should not be made absolute and any sums up to a maximum of Kshs. 25,317,216.60/= being the decretal sum in favour of the Applicant be released to the Applicant's Advocates and costs of these Garnishee proceedings. The Applicant further seeks that the Garnishee order nisi be made absolute.

3. The application is supported by the grounds on its face and the supporting affidavit of the Applicant's director, Arch. Mugure Njendu sworn on 19<sup>th</sup> August 2024. It is opposed by the 1<sup>st</sup> Garnishee through the replying affidavit of its Legal Officer, Lucy Muthama, sworn on 4<sup>th</sup> September 2024.
4. On 23<sup>rd</sup> August 2024, the court allowed the Applicant's prayer for the issuance of a Garnishee order nisi against the Garnishees. This prompted the Respondent to file the Notice of Motion dated 29<sup>th</sup> August 2024 under section 3 and 3A of the [Civil Procedure Act](#), section 21 of the [Government Proceedings Act](#), Order 29 Rule 2 (2) (c), 4 (1) and 4 (3) and Order 51 (1) Rule 4 of the [Civil Procedure Rules](#) seeking to lift, vary and or set aside the Garnishee order nisi issued and that the court stays and/or sets aside the execution proceedings by the Applicant by way of Garnishee proceedings or through any other method that undermines the due discharge of the Respondent's statutory mandate. The application is supported by grounds on its face and the supporting affidavit of Peter Muindi, the Respondent's Ag. Chief Executive Officer and Principal, sworn on 29<sup>th</sup> August 2024.
5. The Respondent argued that the bank accounts affected by the Garnishee Order Nisi are its primary operational accounts, essential for the execution of its statutory mandate and that as a result of the order, it is unable to fulfill this mandate. It stated that at present, it has 1,230 active students, most of whom rely on the institution for boarding and other amenities, in addition to their educational needs and that these students have fully paid their school fees and hold a legitimate expectation that the Respondent will meet its obligations. On 31<sup>st</sup> August 2024 the court allowed the Respondent access to its funds in the 1<sup>st</sup> Garnishee. This application is opposed by the Applicant through the replying affidavit of Arch. Mugure Njendu sworn on 4<sup>th</sup> September 2024.
6. The Respondent has also filed the Notice of Motion dated 2<sup>nd</sup> September 2024 made under section 3 and 3A of the [Civil Procedure Act](#), section 21 of the [Government Proceedings Act](#), Order 21 Rule 7, Order 21 Rule 8, Order 29 Rule 2 (2) (c), 4 (1) and 4 (3) and Order 51 Rule (1) of the [Civil Procedure Rules](#) where it seeks to stay the execution and set aside the decree of the court issued on 21<sup>st</sup> February 2024 in respect of the Award. The court is now being called to determine the aforementioned applications which have been canvassed by way of written submissions which are on record and I will be making relevant references to in my analysis and determination below.

### **Analysis and Determination**

7. From the pleadings and submissions filed by the parties, I note that the court is called upon to determine whether the Garnishee Order nisi should be made absolute, whether the Garnishee order nisi should be set aside and whether the decree should be stayed and set aside. I propose to first deal with whether to set aside the decree as this determination will determine whether I will deal with the Garnishee order.
8. The Respondent depones that the Decree issued on 21<sup>st</sup> February 2024 is unlawful and unenforceable as it was extracted covertly without service of the draft decree as required under the [Civil Procedure Rules](#). That as a result of the omission the same is unclear by virtue of being silent as to the interest and costs payable leading to the arbitrary and self-imposed computations by the Decree Holder as evidenced in the Decree. It also avers that the same is irregular as it imposes interest on the final award which amount was inclusive of Value Added Tax (VAT), a statutory deduction which ought not to have been subjected to interest, effectively inflating the Decretal Sum far beyond what was contemplated by



the Court in its Ruling. It states that the Applicant has imposed a global amount of Kshs. 851,581.00/= into the Decretal Sum which was not taxed by the Deputy Registrar therefore unjustly inflating the Decretal Sum payable by the Respondent.

9. On its part, the Applicant submits that the Award ordered the Respondent to pay the sum of Kshs. 12,669,415.00/=, interest at the rate of 13.69% per annum from 2<sup>nd</sup> February 2017 until payment in full and costs of the arbitration and reference and that on 18<sup>th</sup> March 2024, the Applicant shared the computation of the amount due and owing which stood at Kshs. 25,856,725/= as at the said date. The Applicant claims that this sum of Kshs. 25,856,725.00/= was not disputed by the Respondent but it ignored and or refused to make good payment of the said sum. It submits that lack of agreement between the Decree Holder and the Judgment Debtor regarding the content of a Decree does not render the Decree invalid and that the court retains the authority to issue the Decree, with or without the concurrence of the parties involved and it relies on the decision of the court in David Mutemi Ngumi v Kamili Packers Limited ML ELRCC No. 892 of 2015 [2019] eKLR held as follows:
  21. My reading of Order 21 rule 8(1) above shows that this rule is not couched in mandatory terms. Rule 8(7) above also show that the fact that the Court is not precluded from approving a draft order even if the procedure laid down in the rule is not adhered to.
  22. I believe the main purpose of the rule is to ensure that the decree corresponds to the judgement of the Court and in this case the main duty of the Deputy Registrar is to confirm as such. The Deputy Registrar is also not bound with what is in draft decree even if the parties have approved it.
  23. In my view then, the failure by the Claimant to share his draft decree with the Respondent/ Applicant herein does not render the executive process illegal or null and void as submitted by the Applicant.
  24. In the Nyamogo v Telkom Kenya Limited (*supra*) and Erad Suppliers General Contractors v National Cereals & Produce Board (2012) eKLR, the Learned Judges seen to agree with proposition that the main consideration is not the approval of the Parties but the confirmation by the Deputy Registrar and what is paramount is to ensure that the approved decree is in accordance with the Judgement.
10. I associate myself with the aforementioned decision and restate that the purpose of Order 21 Rule 8(1) of the Rules is to ensure that the decree corresponds with the judgment and I agree that the fact that the draft decree was not shared between the parties before submission to the court does not invalidate it. In this case, the Award was in favour of the Applicant for the sum of Kshs. 12,669,415.00/=, plus interest on this sum at a rate of 13.69% per annum from 2<sup>nd</sup> February 2017 until payment in full and costs of the arbitration and reference. The Applicant has computed the interest at Kshs. 12,314,728.55/= and costs at Kshs. 851,581.67/= which together with the awarded sum of Kshs. 12,699,415.00/= brings the said total of Kshs. 25,865,725.22/=, the same amount indicated in decree. The Decree was approved by the court's Deputy Registrar and I find that the same is in accordance with the court's Ruling of 23<sup>rd</sup> November 2023. I therefore find that there is no violation of Order 21 Rule 8(1) of the Rules that warrants the invalidation of the Decree.
11. On the contention that the computation is erroneous more so in respect of costs, I note that the Applicant has agreed to proceed and forgo the costs. In any event, any arithmetic errors can be corrected as provided by section 99 of the Civil Procedure Act without voiding the Decree. In short, I find that the Respondent's application dated 2<sup>nd</sup> September 2024 has no merit and must therefore fail.



12. Turning to whether the Garnishee order nisi ought to be made absolute or whether it should be set aside, it should not be lost that the object of Garnishee Proceedings is to enable a Decree Holder to reach a debt due to the Judgment Debtor from the Garnishee as may be sufficient to satisfy a Decree. Crucial thereof is that the Garnishee is indebted to the Judgment Debtor. Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the Garnishee is indebted to the Judgment-Debtor. Ordinarily, the Judgment-creditor only makes allegations of the Garnishee's indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable (See [Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya \(Garnishee\)](#) EMBU HC Misc. Civil App. No. 73 of 2018 [2020] eKLR)
13. The 1<sup>st</sup> Garnishee has stated in its deposition that the Respondent's account domiciled with it is not sufficient to satisfy the decretal sum as the account only hold Kshs. 15,059,443.38/= and to support its position, it has attached a statement of account showing the book balance as at 27<sup>th</sup> August 2024 . Section 176 of the [Evidence Act](#) creates a presumption in favour of the Garnishee Bank as follows:
176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.
14. Since the Garnishee's statement has not been validly objected to and there is no other statement of accounts to dislodge this position by the Garnishee, I am satisfied Garnishee has shown sufficient cause that it is unable to fully satisfy the decretal sum and that as it stands, it can only satisfy the decree to the extent of Kshs. 15,059,443.38/=. As at the time of writing this ruling, the 2<sup>nd</sup> Garnishee was yet to file its response. The 2<sup>nd</sup> Garnishee, Absa Bank Kenya Plc has since confirmed that it holds sufficient funds to discharge the judgment debt.
15. However, the Respondent has submitted that allowing the Garnishee proceedings will cause it substantial loss being that it is performing public and statutory functions and the same execution will disrupt the running of its operations, I must determine this issue before making any final orders. Further, the Respondent argues that public interest tilts in favour of staying the execution since for any dispensation of the attached Funds claimed, the Respondent would have to acquire prior approval from the Cabinet Secretary Tourism as contemplated by the Court of Appeal in the case of [Five Star Agencies Limited & another v National Land Commission & 2 others](#) (Civil Appeal E290 & 328 of 2023 (Consolidated)) [2024] KECA 439 (KLR) (12 April 2024) (Judgment). In this decision, the appellate court was dealing with the procedure and formalities of execution against "Government" within the context of the [Government Proceedings Act](#). The question is thus whether the Respondent can be described as "government" and thus shielded from the Garnishee proceedings.
16. The Respondent has stated in its depositions that it is a state corporation. The Applicant has cited the cases of [Greenstar Systems Limited v Kenyatta International Convention Centre \(KICC\) & 2 others](#) [2018] eKLR and [Kimoi Ruto & Another v Samuel Kipkosgei Keitany & Another](#) 2014 eKLR where the court stated that a state corporation is not "government" or a "government department" as envisaged by the [Government Proceedings Act](#) and that it is an independent agent of Government, formed by government in order to undertake and perform certain functions on behalf of government, which functions cannot adequately or efficiently be performed within the structure of Government Ministries. I associate myself with these decisions and find that the same and the facts in this case are distinguishable from the Court of Appeal case of [Five Star Agencies Limited & another v National Land Commission](#)(*supra*) as the Respondent is a state corporation and is not shielded from garnishee proceedings as stated by the [Government Proceedings Act](#). I therefore find no valid reason to stay the



execution of the decree by way of Garnishee proceedings. The Respondent's application dated 29<sup>th</sup> August 2024 also fails.

### **Conclusion and Disposition**

17. In conclusion, it is my finding that both the Respondent's applications are unmerited and therefore fail. The Applicant's application dated 20<sup>th</sup> August 2024 is merited and is hereby allowed with the Garnishee order nisi being made absolute against the 2<sup>nd</sup> Garnishee. The order nisi against the 1<sup>st</sup> Garnishee (Co-operative Bank of Kenya Limited is therefore discharged. Costs are allowed to the Applicants and the two Garnishees against the Respondent.
18. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....  
**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Njoki Gachihi for the Applicant/Decree-Holder

Mr. Kiragu Wathuta for the Respondent/Judgment-Debtor

Ms. Kyalo for the 1<sup>st</sup> Garnishee

Mr. Olunga for the 2<sup>nd</sup> Garnishee

Amos - Court Assistant

