Siaka v County Government of Kakamega & 3 others (Judicial Review 4 of 2020) [2023] KEHC 1488 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1488 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

JUDICIAL REVIEW 4 OF 2020

PJO OTIENO, J

FEBRUARY 28, 2023

BETWEEN

ISAAC FULA SIAKA ..... PETITIONER

AND

COUNTY GOVERNMENT OF KENYA ..... 1ST RESPONDENT

COUNTY DIRECTOR OF SURVEY ..... 2ND RESPONDENT

KENYA RURAL ROADS AUTHORITY ..... 3RD RESPONDENT

KENYA COMMERCIAL BANK LIMITED (KAKAMEGA BRANCH) .... 4TH RESPONDENT

RULING

1. By a Notice of Motion dated October 21, 2022 the *ex-parte* Applicant prayed in the main that a garnishee order *nisi* issues attaching the 1st Respondent's credit on account No. 1141xxxxxx at Kenya Commercial Bank Limited, Kakamega Branch towards satisfaction of the sum of Kshs. 101,067/= being the balance decretal sum due to the ex-parte applicant upon a consent decree issued on the 3/11/2020. It further seeks that a garnishee order absolute issues attaching the said credit in the said account to answer and satisfy the said decree.

2. When the matter was placed before the Court on October 25, 2022, the Court directed that it be served for hearing inter-partes. It is of note that no garnishee order *nisi* was issued. In response to the application both Respondent and the garnishee did file Replying Affidavits on the December 2, 2022 and November 18, 2022 respectively.

3. The essence of the response by the Respondent is that the garnishee as a mode of execution against the Respondent is unlawful and offend section 21 *Government Proceedings Act* and Order 29 Rule 2 and order 29 Rule 2 and 4 of the *Civil Procedure Rules* prohibiting direct execution against the property of

government. On the merits it was contended that no sum was due on the decree as the entire sum of Kshs. 1,503,036/= was paid on the March 11, 2021 and that what is claimed as outstanding is actually retained taxes due from the decree holder which fact was explained to the ex-parte applicant in letters dated March 29, 2021 and March 30, 2021, annexed and marked VK 2.

4. The Affidavit exhibited the payment voucher and correspondence to support its position on payment. For the garnishee, the gist of the response was that it indeed held sums to the credit of the Respondent sufficient to meet the decree and only prayed that the garnishee's costs be met from the said account.

5. After service with the responses, the ex-parte applicant then filed a Supplementary Affidavit specifically purposed to respond to the Respondent's position on whether the sum due was due and payable. In that Supplementary Affidavit, the ex-parte applicant contends that the mode of execution adopted is not unlawful and that the sum sought to be recovered was a decretal sum due in Kakamega ELC Pet. No. 9 of 2015 then gave the history of the litigation in this Judicial Review file to underscore that an admission was indeed filed. The documents illustrating such history were duly exhibited.

6. Thereafter parties were directed to file submissions in which the *ex-parte* applicant isolated three issues for determination. The first of those issues is the propriety of an order of garnishee against the government as a tool of execution which the *ex-parte* applicant maintained was proper by citing *Shamz Enterprises Ltd v Isiolo County Government* [2018] eKLR for the proposition that garnishee proceedings would be taken against the government. Several other decisions were quoted to permit taking out of execution proceedings by way of garnishee against the government.

7. On the second question whether garnishee proceedings may issue before garnishee order *nisi* is issued, the *ex-parte* applicant maintains that the Court retains the discretion to issue such order as subsequent order and that by the orders of 3/11/2022 the Court did comply with Order 23 Rule 1 and the current proceedings are procedural and lawful and should not be declined on the procedural requirement that a garnishee order *nisi* precedes the order absolute. It was then submitted that with the garnishee admitting holding money to the credit of the Respondent, the Court's only task is to determine whether there is money due for payment for the *ex-parte* applicant. The decision in *Simon Ogada Andiwoi v Safaricom PLC* [2021] eKLR was cited for the proposition that rules of procedure should not overshadow the substance and that article 159 exists to cure such procedural lapses.

8. On the last question as to who pays the costs, the decision in *Cecilio Murunga Mwenda v Isiolo County Government* [2017] eKLR was cited for the proposition that where a party necessitates the litigation which ends against it, it ought to pay the costs.

9. Both Respondent and Garnishee did not file submissions and elected to rely on the Affidavits filed then brief oral submissions. For the Respondent, the decision in *Kennedy Wainaina Njoroge v County Government of Nairobi* was cited for the proposition that garnishee order as a means of execution is improper as against the government. *Kiliminjaro Safari Club Ltd v Govenrnor Kajiado* [2014] eKLR was cited for the proposition that County Government as a level of government is covered by provisions of the *County Government Act*.

10. There was then the alternative submissions by the respondent that the law aside, the Judgment was settled in full and nothing outstands to warrant a garnishee order issuing. What is claimed by the Applicant is actually withheld tax for which certificate ought to have been issued but none had been issued. On the propriety of the garnishee proceedings ongoing without an order nisi having been issued, Counsel for the Respondent took the position that an order absolute cannot issue prior to the one *nisi*.

11. For the garnishee, the position taken was that pursuant to article 6 of the *Constitution*, a County Government is government and thus execution against it is prohibited by both Section 21 of the

Government Proceedings Act as well as Order 29 Rule 2 and 4 of the Rules and cited *Takaful –vs- County Government of Garissa* [2021] eKLR for the proposition that garnishee order cannot issue against government.

12. Having reviewed the material availed to Court, the Court considers the dispute here to be principally whether there is a decree in the sum of Kshs. 101,067 pending satisfaction by the Respondent. The resolution to that question then asks what weight is to be given to the assertion by the Respondent that it did pay the sum in full by withholding the sum now claimed on account of taxes.

13. Payment of taxes is a duty to every Kenyan, natural and juristic[1]. By the *Tax Procedures Act*, Parliament legislated for purposes of harmonization and consolidation of the Procedural Rules for the administration of taxes and connected purposes. One can call the statute a statute of general application in matter of procedure in the field of Revenue administration. Section 41 and 43 under Part VII – Collection and Recovery of Tax and Refund of Tax – stipulate for the withholding of Value Added Tax and provide for penalties for a withholding agent who fails to withhold or withholds and fails to remit to the Authority within the set timelines.

14. The general theme of part VII is that due tax is deemed a debt due to the government and mandatorily made payable to the Commissioner General. Section 42 gives the Commissioner the power to appoint withholding agent for purposes of any taxes due while 42A is specific to V.A.T. One may ask, what is the rationale of appointing agents for purposes of withholding tax? To this Court the purpose is to broaden the tax net so that once a portion of the tax is withheld, and with the use of technology, the Authority is notified of the earnings of a taxpayer and his obligation. It also facilitates payment of advance tax.

15. In this matter the Replying Affidavit by the County Attorney exhibits a payment voucher with an aggregate payment of Kshs. 1,503,036/= aggregated to be made up as follows: -

    A210702380891xxxx 2% 25,914.40

    A21070664329xxxx 5% 75,151.80

    A21070947849xxxx - 1,401,969.80

    T O T A L 1,503,036.00

16. To the Court, the Respondent has accounted for the sum due to the ex-parte applicant pursuant to the Judgment of 3/11/2022. In fact the ex-parte applicant should have disputed that the withheld tax had not been credited to its tax account by getting a communication from the Authority of none payment so that the obligation to pay tax for the common goal is achieved.

17. To the extent that the Respondent has demonstrated that it did pay the sums claimed as a tax obligation upon the *ex-parte* applicant to the Authority, I do find that there is no sum due to the *ex-parte* applicant from the Respondent. For a garnishee order to issue, there must be a demonstration that there is a sum due upon a decree that pends satisfaction. Where there is no Judgment debt, there cannot be any justification to issue any execution process against any litigant before the Court. On that basis the application dated October 21, 2022 is dismissed with costs.

18. The foregoing determines the matter before the Court on the substance but other issues were raised by the Court and have been addressed by the parties which the Court has a duty to comment upon.

19. The first is the question whether a garnishee order, as a tool of execution by which money owed by a third party to the decree, technically called the garnishee, is issuable against the Government as

[1] Article 201 (b) (i) and 210 (3)

Judgment debtor. Parties have cited to Court different decisions, most, persuasive, and one by the Court of Appeal with a binding effect on the Court. The Court has had a chance to read those decisions and it boils down to the question whether any of the decisions conclude that, notwithstanding, Section 21 (4) of the *Government Proceedings Act* as read with Order 29 Rule 2 & 4 of the *Civil Procedure Rules* are otiose or just inoperative. For clarity purposes, those two provisions read: -

Section 21 (4) & (5) *Government Proceedings Act*

> " 21
>
> (4) 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.
>
> (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party."
>
> O.29 R.4
>
> (1) No order for the attachment of debts under Order 23 or for the appointment of a receiver under Order 41 shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the Government.
>
> 2. In a case where it is alleged that such an order could have been obtained and would have had effect in respect of such money if it had been due or accruing from a subject the court may on the application by summons of the decree-holder make an order restraining the judgment-debtor from receiving such money and directing payment by the Government to the decree-holder or receiver; and the court may appoint a receiver for that purpose."

20. My reading of Shanz's case (*Supra*) Blueshield Insurance Case (*Supra*) and even *Joseph Nyanamba v Kenya Railways Corporation* [2019] eKLR case does not reveal that any of the Courts invalidated the two provisions, I have reproduced hereinabove. To be precise, Ong'injo J, in Shamz's case did dismiss the Preliminary Objection challenging the application for garnishee order against the County Government for reasons that the Judgment was by consent, was not impugned and the County Government had taken no steps to discharge its liability under the decree. Even though the Court, issued a garnishee order absolute, I do not read the Judgment to have invalidated Section 21 *Government Proceedings Act* and Order 29 Rule 2.

21. That decision of Shanz and that in Blueshield Insurance Company's case are to this Court only persuasive and the Court in the circumstances of this case is not persuaded to follow them. However,

both Courts were persuaded by the decisions *African Commuter Services Ltd v The Kenya Civil Aviation Authority* in which the Judge stressed the need for parties litigating before the Court to enjoy equal treatment and application of the law. That decision upon reading its full text did not invalidate Section 21 *Government Proceedings Act* and Order 29 Rule 2. Instead the decision interrogated the provisions of Section 43 of the *Civil Aviation Act* not Section 21 of the *Government Proceedings Act*.

22. While the reasoning would lead one to the conclusion that provisions in any statute that seeks to unfairly protect any individual, whether public entity or private person from equal application and benefit of the law is to be frawned upon, the constitutionality of the two provisions under consideration here has not been determined and before me no submissions were offered urging me to make such a declaration. A Court of law must be moved for it to retain its position as an independent and uninterested arbiter.

23. I adopt the same reasoning and find that even the decision of the Court of Appeal in Joseph Nyanamba's case did not invalidate the provisions under consideration in this ruling. To the contrary, I am persuaded by the decision in *Nahashon Omwuaho Osiako & 66 Others v Attorney General* [2017] eKLR where the Court did uphold the constitutionality of the two provisions and said: -

> "We agree with the reasoning and rationale stated in the Kisya Case. This recognizes that due to the special role played and the central position held by the Government in the management of the affairs of the country, it is necessary for further proceedings to be undertaken before the judgment can be implemented.
>
> Further the Constitution has not changed the manner in which monies are appropriated for specific purposes. Under Article 206(2) of the *Constitution*, money may be withdrawn from the Consolidated Fund only in accordance with an Act of Parliament...
>
> We also agree with the basis for this differentiation so clearly explained in the minority judgment of Nkabinde J., in the Nyathi Case (*Supra*) as follows;
>
> "It cannot be disputed that government functions differently from private individuals and legal entities and that it has no resources which are truly its own. As I have indicated, the special nature of the state, its legislative and executive processes and other relevant considerations as to how government functions, including its obligation to deal with limited state resources in the public interest, must be taken into account. As correctly pointed out by counsel for the respondents, there are mechanisms which apply to the administration of state resources, particularly as to how state funds are to be expended in order to ensure proper accountability".
>
> Section 3 is designed to prevent disruptions in the social fabric which may take place in the wake of attachments and executions against state assets. The High Court did not apply the test laid down in Prinsloo before making the finding of constitutional invalidity. In my view, the prohibition serves a legitimate governmental purpose. The disruption that would be caused by the attachment or execution of state property, especially in essential services such as health and state security, is too frightening to contemplate. For example, the realisation of the constitutional right of access to healthcare of members of the public would be severely compromised if public assets were to be attached. While it cannot be disputed that the prohibition on executing against state assets in favour of a judgment creditor places the latter at a comparative disadvantage, generally allowing attachment and execution of public assets may have disastrous consequences. It must be emphasised, furthermore, that the impugned section does make provision for the payment of any amount required to

satisfy any judgment or order by the nominal respondent or defendant out of the National or Provincial Revenue Fund, as the case may be.

In our view and we find and hold that the rationale provided for the differentiation between ordinary litigants and the Government in the impugned provisions of the GPA and CPR is well founded and is not discriminatory. Further, there is no evidence that the petitioners have been afforded some differential treatment or different standards have been applied as against them in comparison to other persons in a similar situation."

24. It is crystal clear that the law remains that the enforcement of a monetary decree against the government, and indeed all decrees, is done by way of mandamus only and not otherwise.

25. In this matter, even though the notice of motion dated 5.2.202o sought orders of mandamus, the same continues to pend undetermined. Instead parties converted the special vehicle called judicial review into an ordinary civil suit and entered judgment on admission. That order, to this court, was most inappropriate in a judicial review matter. Judicial review application can only result in the three orders of Certiorari, Prohibition or the Mandamus issuing. It ought not to duplicate, as it has done here, a decree earlier on issued in a civil matter. It must always be remembered that judicial review is a special procedure and vehicle that is neither civil nor criminal, but sui generis and must be used so and as specially designed remedy.

26. The improper invitation of the application of Order 13 in a matter that was explicitly governed by order 53 was untidy and confusing. It is so confusing that the entry of judgment gives the impression that the matter is concluded when it is not.

27. For purposes of neatness of the court records, let the ex-parte applicant elect how to proceed with the notice of motion dated February 5, 2020. Let the election be made within 60 days from today so that parties attend court on the for further directions

28. For the foregoing reasons, I find that it is not legally tenable to initiate and sustain the process of execution against government by way of attaching money held to its credit by a bank like the garnishee here or by any other debtor.

29. On the propriety of proceeding with garnishee proceedings inter-partes before a garnishee order *nisi* is issued, the Court's view is that it is for the neatness and efficacy of the order absolute to be issued after parties are heard that it is critical to have an order *nisi* issued *ex-parte*, and before service upon the decree holder and a garnishee. Order *nisi* is a conservatory or preservatory in nature intended to preserve the debt so that it is not disposed before the final determination is made. It is therefore the finding of the court that failure to issue an order *nisi* is not fatal to the garnishee proceeding, but it reduces the efficiency of the ultimate order absolute, when issued, where a mischievous judgment-debt may choose to defeat the court process before the order absolute is made and enforced.

DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 28TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of

Mr. Alego holding brief for Bwonchiri for Applicant

Ms. Munihu for the Respondent

Mr. Atira for the Garnishee

Court Assistant: Polycap