



Lantech Africa Limited v Geothermal Development Company; Co-operative Bank of Kenya Limited & 2 others (Garnishee); Attorney General (Interested Party) (Commercial Case E776 of 2020) [2023] KEHC 1328 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E776 OF 2020
DO CHEPKWONY, J
FEBRUARY 24, 2023**

BETWEEN

LANTECH AFRICA LIMITED APPLICANT

AND

GEOTHERMAL DEVELOPMENT COMPANY RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED GARNISHEE

KCB BANK OF KENYA LIMITED GARNISHEE

NCBA BANK KENYA PLC GARNISHEE

AND

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. Upon granting Garnishee Order Absolute in this matter on February 10, 2023, Mr Biko Angweny, counsel for the Judgment debtor urged the court to stay and or lift the garnishment on Account No 4761090015 held at NCBA Bank for the reason that the account holds funds procured from the German Government for a specific project and there is an agreement to that extent. In his view, there was likelihood of crisis between the Kenya Government and the German Government if the funds held in that account are used for other purposes.



2. Mr Masika, learned counsel for the Plaintiff opposed the request on account that the Judgment Debtor was an habitual seeker of stay of execution in the matter notwithstanding that the issue of stay had been considered and discharged by the Court of Appeal.
3. Upon considering the request and response thereof, this court directed the Judgment Debtor's counsel to file and serve a formal application in that respect and ordered that *status quo* be maintained on that particular account pending the hearing and determination of the proposed application.
4. Consequently, two applications intended to achieve the same cause and or outcome were filed. Both applications are dated February 13, 2023, with the first one filed by the Attorney General while the second one is filed by Geothermal Development Company.
5. The Attorney General's Notice of Motion application dated February 13, 2023 seeks the following orders:-
 - a) Spent;
 - b) Spent;
 - c) That the Garnishee Order Absolute made herein on February 10, 2023 be reviewed, varied and or set aside with an order discharging Account No 4761090015 at NCBA Bank, DCBA House Branch in the name of GDC-KFW Stean Field Development Bogoria –Silali from the garnishee absolute.
 - d) That the court do make such further order(s) and or directions as it may deem necessary in the circumstances.
 - e) That the costs of this application be provided for.
6. The grounds upon which the orders are sought are that Account No 4761090015 at NBCA Bank, holds EUR 80,000,000 obtained vide a loan agreement dated July 10, 2014 and financed by Kreditanstalt Fur Wiederaufbau(KFW) specifically for the completion of Steam Field Development in the Bogoria – Sidi Block Phase 1. That the account was opened specifically pursuant to the said agreement and the Attorney General gave a guarantee for repayment of the sums in the loan. Consequently, it is averred that the funds legitimately belong to the Attorney General and the Judgment Debtor is merely holding the funds in trust. The court is therefore sought to discharge the garnishee absolute on the said account. These grounds were further explicated in the affidavit of Hiram M Kahiro where in addition he annexed the agreement which commissioned the opening of the account.
7. The second application dated February 13, 2023 and filed by the Respondent herein (Geothermal Development Company) seeks the following orders:-
 - a) Spent;
 - b) Pending the hearing and determination of intended appeal by Court of Appeal, this Honourable Court stays the enforcement of the Garnishee Order Absolute made on Februaury 10, 2023 in the ruling of Honourable Lady Justice Dorah Chepkwony delivered on Februaury 10, 2023.
 - c) In the alternative to prayer (b), pending the hearing and determination of the intended appeal by the Court of Appeal, this Honourable Court stays the enforcement of the Garnishee Order Absolute made on Februaury 10, 2023 over the 3rd Garnishee, NCBA Bank Kenya Plc holding Account No 4761090015.



- d) Any other order or directions that this Honourable Court may deem fit and just for the determination of this application.
- e) The costs of this application be provided for.
8. The grounds upon which the orders were sought are that all the monies held by the Applicant are likely to be withdrawn by the Applicant following the Garnishee Order Absolute notwithstanding that the Respondent has preferred an appeal against the court's ruling. The funds held in NCBA Bank Kenya PLC Account No 4761090015 contains funds procured by the Government of Kenya from KFW, Frankfurt purposely for running the Steamfield Development Bogoria – Silali Block, hence the account should be discharged from the Garnishee orders absolute. The application is further supported by the affidavit of Agnes Muthengi, who upon reiterating the grounds on face of the application has added that the intended appeal is likely to be rendered nugatory unless the orders sought are declined. She has further stated that the Respondent is willing to comply with any condition that may be imposed by court for stay of the orders.
9. The Applicant opposed the two applications vide two sets of Notice of Preliminary Objection dated February 13, 2023 with respect to the Judgment Debtors application and another dated February 14, 2023 with respect to the Attorney General's Notice of Motion application dated February 13, 2023. In the Notice of Preliminary Objection dated February 13, 2023 raised the following grounds:-
- a) That no leave to appeal has been sought or obtained against the ruling delivered on February 10, 2023 as required under Order 43 Rule 2 of the *Civil Procedure Rules, 2020* and accordingly no competent appeal to the Court of Appeal can be preferred against the said decision.
- b) That the application in any event offends the doctrine of *res-judicata* in its extended form estoppel in light of the decision of this Honourable Court delivered on June 23, 2022 and the decision of the Court of Appeal in Civil Application No E230 of 2022 delivered on December 16, 2022.
- c) That with respect to the allegation that the funds held by the 3rd Garnishee (NCBA Kenya Plc Account No 4761090015) are restricted, the applicant failed and/or neglected to avail itself of the provisions of Order 23 Rules 6 and 7 of the *Civil Procedure Rules, 2020*.
- d) That the security purportedly sought to be offered as security, being the fund held in the garnisheed accounts, is woefully inadequate in view of the quantum of the decretal sum.
- e) That the application is otherwise an abuse of the court process, against the principle of finality, misconceived and is plainly non-sustainable.
10. On the other side, the Notice of Preliminary Objection dated February 14, 2023 the Applicant has raised the following grounds:-
- a) That the application is a gross abuse of the court process, misconceived and is plainly non-sustainable bearing in mind that objection proceedings are not available in garnishee proceedings which has otherwise finalized and or crystalized in light of the Garnishee Order Absolute issued by this Honourable Court on February 10, 2023 and already served upon the Garnishee on February 13, 2023.
- b) That the application in any event offends the doctrine of *res-judicata* in its extended form in light of the decision of this Honourable Court delivered on February 10, 2023.



- c) That the only avenue available to the purported Objector/applicant is an appeal against the decision of this Honourable Court delivered on February 10, 2023.
 - d) That with respect to the allegation that the funds held by the 3rd Garnishee (NCBA Kenya Plc Account No 4761090015) are restricted and or allegedly belonging to the alleged Objector/Applicant, the Applicant failed and/or neglected to avail itself of the provisions of Order 23 Rules 6 and 7 of the Civil Procedure Rules, 2020 and cannot now resort to that provision.
 - e) That the Applicant is otherwise guilty of laches and or material non-disclosure.
11. The two Applications and the two Notices of Preliminary Objection were canvassed orally on February 16, 2023 by respective counsel for the parties. Having listened to all the counsel, and considered the material each has presented before court in support of their respective argument, I am persuaded that the issues crystalizing for determination are as follow:-
- a) Whether the Preliminary Objections dated February 13, 2023 and 14, 2023 are merited.
 - b) Whether an order can issue for review setting aside of the Garnishee Order Absolute made on Febraury 10, 2023 with respect to Account No 4761090015 at NCBA Bank, or in the alternative, can issue?
 - c) Whether orders for stay of execution of Garnishee Order Absolute made on Febraury 10, 2023 can issue;
 - d) What other orders can issue in the interest of justice?

a. Whether the Notice of Preliminary Objections are merited

12. Time and again this court and others within our jurisdiction have repeatedly held that a Notice of Preliminary Objection is usually raised on a pure point of law which is argued on the understanding that the facts as pleaded are correct and if argued at a preliminary stage, may dispose of the suit. The point of law pleaded should be gleaned from the pleadings and should not require extensive analysis of facts and circumstances. Therefore, a Preliminary Objection cannot be raised where any of the facts relied on have to be ascertained or on matters within the discretion of the court. Courts have also attempted to enlist instances where a Preliminary Objection can be considered to have been properly raised, such as Objections to the jurisdiction of the court or a plea of limitation of time, or a submission that the parties are bound by a contract giving rise to refer the dispute to arbitration.
13. A plain reading of the Notice of Preliminary Objection dated February 13, 2023, the Applicant opposes the Respondents' application on grounds that:-
- a) No leave has been sought under Order 43 Rule 2 of the Civil Procedure Rules, 2020 to file an appeal;
 - b) The application is *res-judicata* in light of the decision of court delivered on June 23, 2022 and that of Court of Appeal dated December 16, 2022;
 - c) The Applicant failed to avail itself of the provisions of Order 23 Rule 6 and 7 of the Civil Procedure Rules, 2020;
 - d) The application is an abuse of court process and against the principle of finality; and,
 - e) The proposal to offer security is misguided.



14. In my view, the 1st, 3rd, 4th and 5th grounds set out above are not pure points of law which can dispense with the matter at preliminary stage. They need more buttressing facts to be ascertained. I find so because, whether or not a competent appeal has been filed is not relevant at this juncture. This is an argument that is to be considered once the appeal is filed. On whether the Respondent was enjoined to invoke the provisions of Order 23 Rule 6 and 7 of the Civil Procedure Rules 2020, is also an issue to be considered upon presentation of additional facts. The same fate lies with the claim that the Respondents' application is against the principle of finality and the assertion that the proposal to offer security is misguided. In my humble view, the only point of law I find raised in the Preliminary Objection is with regard to whether the application is *res-judicata* in light of this court's decision made on June 23, 2022 and the Court of Appeal decision dated December 16, 2022.
15. A ground of *res-judicata* if successfully argued can dispose of the matter since it touches on the jurisdiction of a court. Section 7 of the [Civil Procedure Act](#) on the other hand outlines the principles guiding an application for *res-judicata* and the three requirements which are, that the Applicant must, to the satisfaction of the court, show that:-
 - a) There have been a previous suit in which the matter was in issue;
 - b) The parties were the same or litigating under the same title;
 - c) The matter or issue in question must have been determined by a court having competent jurisdiction; and lastly,
 - d) That the issue has been raised again afresh.
16. The Applicant, while relying on the above summarized doctrine, has argued that the Respondent has previously sought stay of execution in this matter. The first application was before this court but the application was dismissed vide a ruling delivered on June 23, 2022. On second trial, the Respondent sought for orders of stay of execution before the Court of Appeal, but the same was declined vide a ruling dated December 16, 2022.
17. I have considered the two applications previously filed by the Respondent seeking stay of execution vis-à-vis the instant application dated February 13, 2023. Consequently, I have established that whereas the Respondent in the previous applications sought stay against execution of the arbitral award, in the present application the Respondent seeks stay or Garnishee Order Absolute made on February 10, 2023 and in particular, the garnishee order absolute in respect of Account No.4761090015 held at NCBA Bank. The breath of the stay orders sought in the two occasions is different and each case ought to be considered on its own merit. Since the Respondent had not previously sought stay with respect to Garnishee Order Absolute issued in respect of Account No 4761090015, the plea of *res-judicata* is not applicable in the circumstances. The Notice of Preliminary Objection dated February 13, 2023 is therefore without merit and the same is hereby dismissed.
18. Now, turning to the Notice of Preliminary Objection dated February 14, 2023, the Applicant has adduced grounds that the application dated February 13, 2023 and filed by the Attorney General;
 - a) Is a gross abuse of the court process and non-sustainable because the objection is unavailable on garnishee proceedings which have been finalized.
 - b) The application offends doctrine of *res-judicata* in light of the decision made on February 10, 2023.



- c) The remedy available to the Attorney General objector is appealing against the ruling of February 10, 2023.
 - d) That the Applicant failed to avail itself the provisions of Order 23 Rule 6 and 7 of the Civil Procedure Rules 2020.
 - e) That the Applicant is guilty of *laches* and material non-disclosure.
19. With regard to the 1st ground as to whether objection proceedings may be brought upon finalization of garnishee proceedings, I am of the view that objection proceedings may be commenced at any stage of execution before change of title crystallizes provided that the Objector establishes the right to have the attached property realized. In this case, it is not in dispute that the monies in Account No 4761090015 are yet to be released to the Judgment Creditor. In my humble view, the Attorney General is well within its liberty to file the objection proceedings before the said monies are released provided that it bears the burden to establish that the same is held in trust on its behalf. Consequently, I find this ground of Preliminary Objection to be without merit.
 20. On the 2nd issue, which is whether the application is *res-judicata* in view of the orders made on February 10, 2023, I have considered the ruling dated February 10, 2023 wherein the court allowed the garnishee order absolute alongside the objection application dated February 13, 2023. The latter seeks review and setting aside of the orders dated February 10, 2023. In my view, that was not an issue for consideration in the said orders so as to meet the threshold of // *res-judicata* as discussed in the preceding paragraphs. This ground is as well not merited and the same fails.
 21. In regard of the 3rd ground being whether the only remedy available to the Objector is to appeal against the ruling of February 10, 2023, I am guided by the provisions of Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule 1 of the *Civil Procedure Rules* which provide a party who is aggrieved by an order of the court the liberty to pursue an appeal or review on the same order. Consequently, any party aggrieved by the ruling and order of this court delivered on February 10, 2023 could as well opt for an appeal or review of the same. This ground therefore does not meet the threshold of a sustainable Preliminary Objection.
 22. As for the 4th and 5th grounds of the Preliminary Objection dated February 14, 2023, I find that the same can only be dispensed with upon further presentation of material facts hence cannot be argued as pure points of law. The upshot is that, this court finds the Notice of Preliminary Objection dated February 14, 2023 also wanting in merit and the same is hereby dismissed.

b. Whether an order for review can issue as requested.

23. The Attorney General has sought in the objection application dated February 13, 2023 that the court reviews and/or sets aside the ruling dated February 10, 2023 to the extent of discharging Account No 4761090015 held at NCBA Bank. It is averred that the funds therein are held in trust by the Judgment Debtor on behalf of the Government, the same having been procured vide a loan agreement dated July 10, 2014 executed between the Government of Kenya and KFW Frankfurt am Main purposely for financing Steamfield Development Bogoria – Silali Block for which the Judgment Debtor was commissioned to undertake the works thereon.
24. On the other hand, the Applicant objects to the prayer on ground that the Attorney General brought the Objection late in the day in total disregard of Order 23 Rule 6 and 7 of the Civil Procedure Rules which preclude such late objection proceedings. I have considered the provisions of the said Order 23,



and in my view, Rule 7 confers upon the court the discretion to preclude objection proceedings. A party who wishes to object to the garnishee proceeding is therefore at liberty to file such an application even after an execution order levying the garnishee is issued. Nonetheless, each case is to be considered on its own merit. In the circumstances, I wish to consider the merits of the Objection by the Attorney General since any feature that may throw light to the contention between the parties ought to be regarded.

25. As it is trite in law, the Objector bears the burden of proving that he is entitled to or has a legal or equitable interest in the whole or part of the attached property, in execution of the decree in question. This was laid down by the court in the case of *Precast Portal Structures v Kenya Pencil Company Ltd & 2 Others* [1993]eKLR, where it held thus:-

“The burden is on the Objector to prove and establish his right to have the attached property released from the attachment on the evidential material before the court, a release from attachment may be made if the court is satisfied:-

- a) That the property was not, when attached, held by the Judgment debtor for himself, or by some other person in trust for the Judgment Debtor; or,
- b) That the Objector hold that property on his own account.

26. This court has taken into account the grounds of objection raised and the contentions by the Attorney General. I have considered the loan agreement dated July 10, 2014 in which the objection proceedings are premised. Indeed, it is confirmed that the same was executed between KFW Frankfurt am Main and Republic of Kenya, represented by the National Treasury for financing EUR 80,000,000.00 for project described as Steamfield Development Bogoria – Silali Block. The works were to be undertaken by the Judgment Debtor. I do confirm that Clause 3.6 thereof provides that an account would be opened purposely for such funding and it is the Attorney General’s case that that Judgment Debtor opened an account in the name GDC and KFW Steam field Development Bogoria – Silali Project, Account No 4761090015 at NCBA Bank, which is now subject of the garnishee orders issued herein.

27. A fair glance on its face, the account shows it is in the joint names of the Judgment Debtor and KFW which is the entity named as the lender in the loan agreement dated July 10, 2014. Thus on a balance of probability, the consistency in the material placed before the court by Attorney General shows that the subject account was purposely opened for the deposit of funds loaned to the Government of Kenya to fund the exploration of Steam Field Development Bogoria – Silali Project and the Judgment Debtor does not operate the said account or hold the monies therein for itself, but in trust for the Government of Kenya through the National Treasury. I am therefore persuaded, and it is my conclusion that the Attorney General has established to the required standard of proof that it has legal and equitable interest on the subject account held by the Judgment Debtor with NCBA Bank on behalf of the Government of Kenya.

28. In the upshot, it is my finding that the objection proceedings by the Attorney General are justified and in the resultant, I allow the Attorney Generals application dated February 13, 2023 in terms of prayer No (c).

29. The last issue pending determination is whether the Judgment Debtor has made a case for stay of the Garnishee Order Absolute made on February 10, 2023. The reason for stay of the said order that has been advanced by the Judgment Debtor is that unless stay is granted the intended appeal may be rendered nugatory upon execution of the Garnishee Order Absolute.



30. Order 42 Rule 6(2) of the Civil Procedure Rules specifies the circumstances under which the court may order stay of execution. It stipulates that the Applicant must establish that the application is filed timeously, that the Applicant stands to suffer substantial loss and lastly the Applicant must show willingness to offer security.
31. In this case, the Applicant filed its application on February 13, 2023 whereas the garnishee orders sought to be stayed were delivered on February 10, 2023. I am therefore satisfied that the application was filed timeously. As for whether a substantial loss was established, it is the Judgment Debtor's case that it would suffer substantial loss and the intended appeal rendered nugatory if the Garnishee Order Absolute is executed.
32. In law, and as it has previously been affirmed by courts within our jurisdiction, the fact that the process of execution has been put in motion by itself does not amount to substantial loss under Order 42 Rule 6(2) of the Civil Procedure Rules. Execution is a lawful process and the Applicant ought to establish other factors which show that the execution would negate the very essence of the appeal. Such factors have not been demonstrated in this particular case. I am of the view that the Judgment Debtor has not established that it would suffer substantial loss which is the corner stone to granting stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules. Consequently, the Judgment Debtors application dated February 13, 2023 is without merit and the same is dismissed with no orders to costs.
33. In conclusion and for avoidance of doubt, the following are the orders of the court:-
 - a) That Applicant's two Notice of Preliminary Objections dated February 13, 2023 and 14, 2023 are hereby dismissed.
 - b) The Award Debtor's Notice of Motion dated February 13, 2023 is dismissed for want of merit.
 - c) The Attorney General's Notice of Motion application dated February 13, 2023 is allowed in terms of prayer No (c).
 - d) Each party shall bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

D O CHEPKWONY

JUDGE

In the presence of:

Mr A S Masika appearing alongside Mr Ohaga counsel for Applicant

Mr Bett counsel for Objector/Applicant in application dated 13th February, 2023.

Mr Buko Agwenyi holding brief for Emmanuel Wetangula appearing for Respondent (Geothermal Development Company)

Mr Kabaiko counsel for 3rd Garnishee (NCBA Bank Kenya Ltd)

Mr Wenga counsel for 1st Garnishee (Co-operative Bank of Kenya Ltd)

Court Assistant - Sakina

