



**Nyakundi & Co Advocates v Council of Governors; Cooperative Bank of Kenya Limited (Garnishee) (Judicial Review Miscellaneous Application 40 of 2019) [2023] KEHC 1035 (KLR) (Judicial Review) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1035 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 40 OF 2019  
AK NDUNG'U, J  
FEBRUARY 17, 2023**

**BETWEEN**

**NYAKUNDI & CO ADVOCATES ..... APPLICANT**

**AND**

**COUNCIL OF GOVERNORS ..... RESPONDENT**

**AND**

**COOPERATIVE BANK OF KENYA LIMITED ..... GARNISHEE**

**JUDGMENT**

1. A brief background to the case before this court is that the Applicant herein filed an application dated December 9, 2021 seeking two primary prayers as follow;
  - i. That all debts accruing from the garnishee, the Cooperative Bank of Kenya to the judgement debtor, the garnishee to the judgement debtor, the Council of Governors in account No xxxxx or any other account in the same bank be attached to answer the decree together with the costs of garnishee proceedings and that the garnishee shall appear in court to show cause why it should not pay the decree holder the debt due from it to the judgement debtor and
  - ii. That a decree nisi be issued for the sum of Kshs 8,370,695.50/=.
2. The Deputy Registrar on December 21, 2021 issued an Order of Decree Nisi to the effect that the primary orders sought in the Applicant's application were granted. The Respondent in a bid to prevent the said order from being executed filed a Notice of Preliminary Objection dated January 17, 2022. The objection was premised on the grounds that Section 21 of the *Government Proceedings Act* as read together with Order 29 Rule 2 (2) of the *Civil Procedure Rules* prohibits the grant of Garnishee Orders



- against the Government. A ruling on the Preliminary Objection was delivered by the Deputy Registrar on July 7, 2022 whereby she agreed with the position of the Respondent herein and found in favour of the Respondent dismissing the Applicant's application dated December 9, 2021 on grounds that it lacked merit.
3. Aggrieved by the Deputy Registrar's decision the Applicant has filed an Appeal before this Court on the following grounds;
    - i. The learned Deputy Registrar erred in law in framing the issues of determination but also when she found as a matter of law and for fact that the respondent/client is subject to [government proceedings Act](#) hence no execution can levy against them.
    - ii. The learned Deputy Registrars ruling violated Article 163(A) 6 and 7 (g) of the [Constitution](#).
    - iii. The learned Deputy Registrar erred in not making the decree absolute.
  4. Based on these grounds, the applicant prays that the orders of the Deputy Registrar and the entire ruling dated July 7, 2022 be set aside and in its place there be an order that the garnishee order be absolute as against the garnishee. The Applicants also pray for costs for the appeal and proceedings before the Deputy Registrar.
  5. In support of the appeal, the Applicants filed written submissions. In the submissions, it is contended that the Deputy Registrar failed to properly direct herself as to the distinction between Execution Of Decrees And Orders as provided under order 22 of the [Civil Procedure Rules](#) and Attachment Of Debts as provided under order 23 of the [Civil Procedure Rules](#). It is submitted that the effect of a garnishee order is to allow execution proceedings against the garnishee in the event of default. The Applicants submit that the warrants of attachment and the execution process was never contested by the Judgement Debtor. Further, that Order 23 of the [Civil Procedure Rules](#) provides for attachment of debts and not execution of decrees which is a preserve of order 22 of the [Civil Procedure Rules](#). It is argued that execution of decrees and orders is against the Judgement Debtor while attachment of debts is against the garnishee.
  6. It is their submission that given that the garnishee proceedings were against the Cooperative Bank of Kenya, the question of the alleged status of the Judgment Debtor did not arise. In addition, that they were not execution proceedings but garnishee proceedings and under Order 23, execution would only arise as per rule 4, that is, after the garnishee nisi is made absolute.
  7. The Applicants also argue that contrary to the Deputy Registrar's position the Supreme Court held that the Respondent herein is not a state organ.
  8. The Respondent in rebuttal filed written submissions dated November 29, 2022. In the submissions the Council contends that it is a government institution established by didn't of section 19 of the [Intergovernmental Relations Act](#) and it is also funded by the ex-chequer as is provided under section 37(b). It is their argument that the Supreme Court in Advisory Opinion No 2 of 2017 only addressed the issue of whether the respondent is a state organ within the context of Articles 163 (6) and 260 and not in the context emphasized by the Applicant herein. The case of [Council of County Governors v Lake Basin Development Authority & 6 others](#) [2021] eKLR is cited to further support this argument.
  9. It is submitted that the Garnishee proceedings leading up to the grant of the Garnishee Nisi Order as issued by the court on December 21, 2021 were between the Applicant and the Garnishee and that although such proceedings are normally between the creditor and the garnishee, the judgment debtor has the right to address court on the correctness or lawfulness of garnishee proceedings as was held by the court in [Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co Ltd Diamond Trust Bank](#)



- (Garnishee)* [2020] eKLR. It is the Respondent's case that a Judgment Debtor is not a nominal party or mere spectator to the garnishee proceedings.
10. The Respondent also contends that the ultimate effect of Garnishee Proceedings is the levying of execution after garnishee absolute is issued. It was also contended that contrary to the Applicant's assertion that the Deputy Registrar stated in her ruling that the Attorney General was a necessary party to the proceedings, the right position was that the Deputy Registrar observed the Attorney General could not be expected to be present in all instances where any organ of the National Government has been sued.
  11. The Garnishee on the other hand also filed written submissions dated November 25, 2022 in response to the Memorandum of Appeal. In the submissions, it is reiterated that the Respondent herein is a government institution by dint of its statutory status as donated by its founding Act and the fact that it serves the public through its core functions and the fact that it receives its funding from the National Government.
  12. It is the Garnishee's submission that having established that the Respondent is a government institution, the provisions of the *Government Proceedings Act* ought to be applied and as such a Certificate of Order ought to have been placed before this court. Further, that the said execution ought to be done through judicial review proceedings as prescribed under Order 53 of the *Civil Procedure Rules*.
  13. I have considered the Application, response, and party's submissions. The issues for determination crystalize into;
    - i. Whether the judgment debtor is established as a Government institution.
    - ii. Whether the garnishee proceedings were procedural.
    - iii. Who bears the costs.
  14. The Supreme Court in the case of *Council of Governors v Attorney General & 7 others* [2019] eKLR aptly addressed the issue of whether the Respondent herein is a state organ. I have had the advantage of reading the judgement by the Supreme Court of Kenya in those proceedings, which judgement is binding to this court. Contrary to the Respondent's and Garnishee's arguments, the law as interpreted by the Supreme Court clearly shows that the Respondent herein is not a state organ.
  15. In the Judgement the Court discusses at length the issue of the Respondent herein being a state organ. In the first instance the court begins by observing that the Respondent herein does not meet the definition of a state organ as is defined under Article 260 of the *Constitution* as it is not a commission or an office under the *Constitution*.
  16. The Court observed that in interpreting Article 260, it need not re-write the law but declare what the drafters stated and intended. The Court gives examples of the Institutions expressly established under the *Constitution* such as the Kenya National Human Rights and Equality Commission established under Article 59, National Land Commission established under Article 67 and Commission on Revenue Allocation established under Article 215 among others. The Court reiterates that the establishment of a State Organ must be traceable to the *Constitution*.
  17. The Court made a finding that there is no equivalent provision for the Respondent herein as Article 189(4) only provides for creation of the Respondent as an entity in which it vests the procedures for settling of inter-governmental disputes. Such a body does not acquire the status of a State Organ. The Court concluded that the constituting statute of the Respondent herein is the *Intergovernmental Relations Act* which by any definition cannot grant the Applicant constitutional credentials.



18. Having looked at the law as provided for in the constitution and relevant statutes and guided by the Supreme Court decision in *Council of Governors v Attorney General and 7 Others* (supra), I reach the conclusion that the Respondent herein is not a state organ and therefore the Government Proceedings Act cannot apply to it in execution proceedings.
19. The second issue for determination is whether the Garnishee proceedings before the Deputy Registrar were procedural.
20. The Court in the case of *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee)* [2021] eKLR addressed its mind on garnishee proceedings as follows;

“I find it useful to start by referring to the definition of the word garnishee proceedings in the Black’s Law Dictionary<sup>[1]</sup> which is: - “a statutory proceeding whereby a person’s property, or credit in possession or under control of, or owing by, another are applied to payment of former debt to third person by proper statutory process against debtor and garnishee.

The Nigerian Supreme Court in *CBN v Auto Import Export*<sup>[2]</sup> offered an explanatory yet concise definition of garnishee proceedings in the following words:

“Garnishee proceedings are special specie of process by which a judgment creditor may attach (or garnishee) debts due in satisfaction of the judgment debt. The debt owed by the third party to the judgment debtor, on being attached, shall ultimately be paid by him to the judgment creditor on the order of court. Thus, garnishee proceedings involve the attachment of debt due from a third party to the judgment debtor, and the use of the amount of that debt in liquidating the judgment debt. In garnishee proceedings, the third party indebted to the judgment debtor is called the garnishee. The judgment creditor, on the other hand, is referred to as the garnishor.

6. Garnishee proceedings serve to facilitate the satisfaction of judgment debts. Garnishees, in this regard, often have no objections to garnishee orders being made final, so long as there is a discernible debt due and owing to the judgment debtor; once such indebtedness is established, it is inconsequential to the garnishee who the debt is paid to. However, garnishee orders are premised on indebtedness – without such indebtedness to the judgment debtor, it would be plainly unjust to order a party to pay a sum to the judgment creditor.”

21. The continues to state as follows;

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- “ 13. A litigant is entitled to reap the fruits of his successful litigation. As a result, where a Judgment-Debtor fails to comply with the terms of a judgment, the Judgment-Creditor is entitled to enforce such judgment by adopting a suitable procedure provided under the law. By the process of garnishee, the court has power to order the garnishee to pay directly the sums it owes the Judgment-Debtor to the garnishor or so much of it as may be sufficient to satisfy the amount of the judgment and the cost of the garnishee proceedings. In this regard, the provisions of Order 23 Rule 4 provide with sufficient clarity what this court should do where the Garnishee admits the debt as in this case.



[Order 23, rule 4.] Execution against garnishee.

4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.”

22. On the proper parties in Garnishee proceedings the court in the case of *Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others* [2018] eKLR held thus;

“ 12. Second, being a garnishee application, the only proper party to be garnisheed is the Bank. The rest of the Respondents are improperly enjoined in the application since they are not holding any money capable of being garnisheed nor has it been alleged they hold any funds either individually or jointly. There is nothing to show that they are indebted to a judgment debtor as the law requires.

13 My above view is fortified by Order 23, Rule 1 of the Civil Procedure Rules, 2010 on attachment of debts which provides that: -

- 1 A court may, upon the ex parte application of a decree- holder,
  - (1) and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.”

23. It is an established truth that there is a judgment pending satisfaction by the Respondent herein leading to the Garnishee proceedings vide the application dated December 9, 2023. The decree has not been satisfied, neither is there an indication by the Respondent on how and when the decree would be satisfied. The Respondent’s and the Garnishees’s position is that the application cannot lie as the Respondent is a Government entity. That position has been debunked by the exposition of the law. Even assuming that the Council of Governors could, under any definition be a “government” they had not raised this at the time of instruction, during the Judicial Review Proceedings where the applicants acted for them, in the Court of Appeal, inception of taxation proceedings, proceedings where judgment was proclaimed by the Honorable Lady Justice Nyamweya and in the initial execution proceedings. Lady Justice Maureen Odero in Misc Civil No 278 of 2017 *Greenstur systems Ltd -VS*



*Kenyatta International Convention Centre and Cooperate Bank of Kenya* (1<sup>st</sup> Garnishee) and Kenya Commercial Bank Ltd (2<sup>nd</sup> Garnishee) addressing a similar circumstance like the present one raised the issue of estoppel and stated;

"From 2015 when the Arbitration commenced to the point of execution, the Applicant has always participated and held itself out as a body cooperate and not as a government department or agency. It is too late in the day of the Applicant to now seek to don a different coat. Its invocation of the Government Proceedings Act is but a last-ditch attempt to scuttle execution proceedings against it. Based on its previous engagement in this matter the Applicant is estopped from relying on the provisions of the Government Proceedings Act as a challenge to execution against it."

24. I need to say one more thing in light of this application and many others that continue to clog our courts. The bonafides of the Respondent in this matter are questionable and stands out as an example of an unwelcome trend that has gained traction in our litigation arena. We have on many occasions parties who have not challenged a decree coming to court on post judgement/decree applications challenging execution processes more often than not on technicalities without a whiff of an indication of how such a party intends to satisfy the lawful decree of court. Whereas the right to approach the court and to be heard is sacrosanct and may not be limited or curtailed, good faith must require of such a party to offer how to settle the decree, any infirmity in an execution process notwithstanding.
25. The resultant effect has been unending litigation in our corridors of justice where a judgement creditor is kept away from the fruits of judgement as a judgement debtor clings onto legal straws thereby frustrating a successful litigant.
26. This kind of attitude pours scorn on court proceedings, is contemptuous of court orders and renders court judgements paper judgements not worth the paper they are written on. It is a trend that must be nipped at the bud to restore the true force of court judgements as envisaged in our laws.
27. I hold the view that time is nigh to move away from the strict adversarial system in our judicial system and apply, where appropriate, an inquisitorial system that would allow the court, like in this case to pose a question to the Respondent like "Even as you exercise your right to oppose the application at hand, what is your commitment to obeying the orders of court by making the necessary payment in satisfaction of the decree?" I have scoured through the record herein and save for the robust opposition to the appeal herein, I see no indication at all on how the Respondent intends to satisfy the decree herein bearing in mind that even if they were to succeed in the instant appeal, the decree of court would remain due for satisfaction.
28. In my view and in light of Article 159 of the *Constitution*, nothing stops the court to adopt such an approach to preserve the sanctity of court orders and to meet the ends of justice.
29. That said, the law in the circumstances of this case, is in favour of the applicant. Having established that it is not in contention that indeed a valid decree of court is in existence against the Respondent, that the Respondent herein is not a State Organ and that there are monies held in favour of the Respondent by the Garnishee, it is my finding that the Applicant's appeal is merited and I allow it. I make the following Orders;
  - i. That the Deputy Registrar's entire ruling dated July 7, 2022 is hereby set aside.
  - ii. That the Garnishee order nisi is made absolute.
  - iii. The Applicant is granted the costs of this appeal and the proceedings before the deputy registrar.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY 2023**

**A. K. NDUNG’U**

**JUDGE**

