



**Lantech Africa Limited v Geothermal Development Company; Central Bank of Kenya Limited & 3 others (Garnishee) (Miscellaneous Application E776 of 2020) [2023] KEHC 18172 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18172 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E776 OF 2020**

**A MABEYA, J**

**MAY 26, 2023**

**BETWEEN**

**LANTECH AFRICA LIMITED ..... APPLICANT**

**AND**

**GEOTHERMAL DEVELOPMENT COMPANY ..... RESPONDENT**

**AND**

**CENTRAL BANK OF KENYA LIMITED ..... GARNISHEE**

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

**KENYA ELECTRICITY GENERATING COMPANY LIMITED ..... GARNISHEE**

**KCB BANK KENYA LIMITED ..... GARNISHEE**

**RULING**

1. Before Court are two preliminary objections filed by the respondent against the applicant’s motion dated 27/2/2023. The application sought to attach the debts owing from the 1<sup>st</sup>-3<sup>rd</sup> garnishees to the judgment debtor together with any receivables arising from the sale of steam by the 4<sup>th</sup> garnishee in order to answer to the decree issued on 28/1/2021.
2. The first preliminary objection was dated 8/3/2023. It was based on the ground that the citation of the Central Bank of Kenya as the first garnishee offended order 29 rule 2(c) of the *Civil Procedure Act* as read with section 4A(1) (e) & 44(1) of the Central Bank of Kenya.
3. The second preliminary objection was dated 28/3/2023. It was based on grounds that by an assignment dated 21/11/2018, the respondent assigned to the 2<sup>nd</sup> garnishee the steam charge receivables. That



- the 2<sup>nd</sup> garnishee held account no. 0xxx in the name of the respondent had a charge and title, benefit and interest in the monies therein from the steam generation. That that account cannot therefore be garnisheed.
4. The respondent filed its submissions dated 26/4/2023 and 24/4/2023 in support of the preliminary objections. The 4<sup>th</sup> garnishee also filed submissions dated 2/5/2023 in support of the objections. The applicant filed submissions dated 4/5/2023 in opposition to the preliminary objections.
  5. The submissions were highlighted orally in court on 5/5/2023. This Court has considered those submissions and the affidavits on record.
  6. A preliminary objection was in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 held to consist 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.
  7. In that case, Charles Nebbold, JA stated that: -

“ 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
  8. A preliminary objection therefore is one which raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.
  9. In *Oraro v Mbaja* [2005] 1KLR 141, the Court held that:-

“ Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
  10. The preliminary objection dated 28/3/2023 is based on the ground that there exists an Assignment Agreement dated 21/11/2018 wherein the respondent assigned the steam charge receivables to the 2<sup>nd</sup> garnishee. That the account held by the garnishee being Account No. xxx in the name of the respondent has a charge and title in favour of the 2<sup>nd</sup> garnishee and cannot be a subject of a garnishee order.
  11. In paragraph 4 of the Supplementary affidavit, the applicant stated that it was a stranger to the said Assignment Agreement including appendix C that had been produced. It submitted that the agreement had not been produced and it had issued a notice to produce the said documents.
  12. That although the alleged agreement was signed before the garnishee proceedings were instituted, the said account had been previously garnished for USD 5,000 to satisfy the claimant’s decree and that the 2<sup>nd</sup> garnishee has never objected despite allegedly having an interest in the account.
  13. I have seen the document produced by George Ominde in his affidavit of 27/3/2023. It is titled “Appendix A Notice Of Assignment”. It is a Notice by the respondent addressed to the 4<sup>th</sup> garnishee notifying the latter of the assignment of the proceeds from contracts set out in Appendix C of the agreement to the 2<sup>nd</sup> garnishee. The same directs the 4<sup>th</sup> garnishee to pay all such proceeds to what is referred to as the Receivable Account No. xxx at the 2<sup>nd</sup> garnishee, Cooperative House Branch. That notice was properly executed and the same duly acknowledged by the 4<sup>th</sup> garnishee.



14. My view is that the existence of the aforesaid assignment is a matter of fact within the knowledge of three parties, the respondent, the 2<sup>nd</sup> garnishee and the 4<sup>th</sup> garnishee. Indeed, in the supplementary affidavit of Aquinas Wasike of 4/5/2023, all he stated was that the applicant was a stranger to that document. There was no positive averment that the said documents do not exist.
15. The fact that the applicant is a stranger to the document produced by the 4<sup>th</sup> garnishee, does not mean that the same does not exist. In my view, the document produced by the 4<sup>th</sup> garnishee is a prima facie evidence of the assignment agreement notified therein.
16. In the case relied on by the respondent of *Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others* [2013] eKLR, the Court of Appeal was categorical that where funds held in an account are charged to a 3<sup>rd</sup> party, the same cannot be a subject of garnishment.
17. The question that arises is, are there funds held by the 2<sup>nd</sup> garnishee in the account disclosed as Receivable Account No. xxx that belong to the respondent? Order 23 rule 6 of the *Civil Procedure Rules* provides: -

“Whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court may order such third person, to appear, and state the nature and particulars of his claim upon such debt.”
18. As I have already stated, the Court has seen the Notice of Assignment and Acknowledgement. The same clearly states that the proceeds from steam charge by the respondent is to be deposited in the aforesaid Receivables Account. It was sworn and not denied that the said funds are for the maintenance of 59 wells at Olkaria. The same is assigned to the 2<sup>nd</sup> garnishee. Having been assigned as such, the Court finds that the amounts held therein are not a debt by the 2<sup>nd</sup> garnishee to the respondent that is due and recoverable by the respondent.
19. The applicant submitted that the alleged assignment was executed on 21/11/2018 before the garnishee, that already a sum of US\$ 5,000 had been paid therefrom in a previous garnishee proceeding, that the 2<sup>nd</sup> garnishee had stated that the account belonged to the respondent and it had not objected to garnishment. That may be so, the fact that there had been no objection previously on the existence of the assignment cannot be an estoppel. Those were separate and independent proceedings.
20. Accordingly, the Court is satisfied that the funds in the Receivables Account are not available for garnishment and the objection succeeds to that extent. However, the other accounts are subject to garnishment.
21. The Court now turns to the objection dated 8/3/2023. It was based on the ground that the citation of the Central Bank of Kenya as the first garnishee offended order 29 rule 2(c) of the *Civil Procedure Act* as read with section 4A(1) (e) & 44(1) of the *Central Bank of Kenya*.
22. The respondent extensively submitted that it was a government agency thus execution cannot be levied against it unless in the prescribed form. That it was within the confines of the *Government Proceedings Act* and that order 29 of the *Civil Procedure Rules* applied to it.
23. The Court has seen the ruling of 10/2/2023. The issue of whether the respondent was a government agency or not was considered extensively and determined at paragraphs 37-47 of that ruling. The Court found that the respondent did not qualify to be a government entity. Respectfully, the attempt by the respondent to re-open the issue is *res judicata* and therefore may not be pursued further by the same parties;



a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}.

24. That ruling has not been set aside or reviewed. Any attempt to determine that issue how will be tantamount to sitting on appeal against the decision of a court of equal jurisdiction. That ground is dismissed.
25. The other issue raised was that the 1<sup>st</sup> garnishee is a government entity within the meaning of the [Government Proceedings Act](#). That in the premises, it cannot be a subject of garnishee proceedings.
26. It is trite that execution of decrees against the government is not undertaken as in the ordinary civil cases but must be in accordance with provisions of the [Government Proceedings Act](#) (“the Act”). The appropriate procedure is to be found in section 21 of [Government Proceedings Act](#) and order 29 [Civil Procedure Rules](#).
  27. Section 21 (4) of the [Government Proceedings Act](#) provides: -
    - (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.”
28. 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).
29. Sections 2 of the [State Corporations Act](#), cap 446 defines a state corporation in the following terms: -

“State corporation” means-

  - (a) a State Corporation established under Section 3.
  - (b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament of other written law”.
30. The 1<sup>st</sup> garnishee is established under section 4A 1 (e) of the [Central Bank of Kenya Act](#), (“the CBK Act”) which provides that the object of the Bank is to act as banker and advisor to, and as a fiscal agent of the Government. Under section 44, of the [CBK Act](#), the Bank also performs the function of fiscal agent and banker for other public entities.
31. Section 21(4) makes reference to the government, any government department, or any officer of the government. Does the 1<sup>st</sup> garnishee fall under any of these considering that no specific reference is made



at all to State Corporations? *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.”

32. In *Association of Retirement Benefits Scheme v Attorney General & 3 others* [2017] eKLR the Court cited with approval the Indian Supreme Court case of *International Airport Authority of India & others* [1979] Sc.R. 1042 where in the test for determining whether an entity was a Government body or not, was considered 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.”

33. From the foregoing, though the 1<sup>st</sup> garnishee does not meet the strict definition of a government as defined in *Black's Law Dictionary*, it has most of the attributes defined in the foregoing authority.

34. The 1<sup>st</sup> garnishee is 100% owned by the state such that it becomes an agent or instrumentality of the government. It also enjoys a monopoly status as the banker and advisor to government. Its functions are also closely related to government functions in the control of the economy such that the 1<sup>st</sup> garnishee becomes so intrinsically related to the government that it cannot be separated therefrom. The functions of the 1<sup>st</sup> garnishee are so important to the running of the government such that it can only be considered as an agency of the government.

35. Having found that the 1<sup>st</sup> garnishee is a government entity, the next question would be whether garnishee proceedings can be brought against it. Better put, is the CBK the government for purposes of the *Government Proceedings Act*?

36. The 1<sup>st</sup> garnishee, though a recognized state corporation and agent of the government is an independent entity. It is capable of suing and being sued on its own behalf. Indeed, it does not rely on the government's Attorney General to represent it in legal proceedings as is the case herein. The 1<sup>st</sup>



garnishee carries its functions without interference by any arm of government, all that it does is cooperate with other state organs to achieve the objectives of the government.

37. While defining what independence means in *Communications Commission of Kenya and 5 others v Royal Media Services and 5 others*, [2014] eKLR, the Supreme Court of Kenya held that: -

“‘Independence’ is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance...”

38. These are the parameters under which the 1<sup>st</sup> garnishee performs its functions. Undeniably closely related with government, but independent of control. In this Court’s view, the 1<sup>st</sup> garnishee is amenable to the usual legal processes and consequences including execution as the *CBK Act* does not provide any specific protections from execution against CBK.

39. In Petition No. 513 of 2013: *Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 others* [2015] eKLR, it was held that: -

“Foremost though, it is important to point out that it would not be tenable to invoke the *Government Proceedings Act* (cap 40) as a bar to any execution herein. The 1<sup>st</sup> Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on Government funding but it is not government or servant of or agent of Government for the purposes of the *Government Proceedings Act*. The 1<sup>st</sup> Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1<sup>st</sup> Respondent are not judgments against the government but against an independent juridical body...”

40. And in *Tom Ojienda & Associates v National Land Commission & another* [2019] eKLR, the court dealt with a similar issue. A preliminary objection was raised on grounds that the Court had no jurisdiction to hear and determine the Garnishee application by dint of section 21(4) of the *Government Proceedings Act* and order 29 rule 2(2)(c) of the *Civil Procedure Rules*. The court held that: -

“I take the view that, in as much 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”



41. In view of the foregoing, proceedings against the 1<sup>st</sup> garnishee cannot be said to be proceedings against the government such that execution cannot issue against it. Moreover, what is before Court is garnishee proceedings and not execution proceedings against CBK.
42. In the circumstances, this Court holds that though the 1<sup>st</sup> garnishee is a government agency, garnishee proceedings can be brought against it. The 1<sup>st</sup> garnishee would only be absolved by bringing sufficient reasons that the funds in its hands are not payable or are not a debt due or payable to a judgment debtor.
43. Consequently, the preliminary objection dated 8/3/2023 is dismissed with costs to the claimant.
44. Accordingly, the preliminary objection dated 8/3/2023 is dismissed with costs. The preliminary objection dated 28/3/2023 is allowed. The decree nisi issued herein on 28/2/2023 against Account No xxxx is hereby raised. The order on the rest remains *in situ*.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

