



REPUBLIC OF KENYA



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Futurerock Limited (Formerly Futureways Limited) v National Oil Corporation of Kenya (Miscellaneous Civil Application 532 of 2018) [2023] KEHC 26555 (KLR) (Commercial & Admiralty) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
MISCELLANEOUS CIVIL APPLICATION 532 OF 2018**

A MABEYA, J

DECEMBER 18, 2023

**IN THE MATTER OF THE ARBITRATION ACT, 1995 AND IN THE OF
AN**

**APPLICATION FOR SETTING ASIDE AN ARBITRATION AWARD.
(APPLICATION FOR LEAVE TO APPEAL AGAINST THE RULING OF
THE HIGH COURT COMMERCIAL AND ADMIRALTY DIVISION AT
NAIROBI BY HON. LADY JUSTICE MAUREEN A. ODERO DATED
29TH MAY 2020 AND DELIVERED ON 1ST JUNE 2020**

AND

**STAY OF EXECUTION OF THE ARBITRAL AWARD DATED 8TH
OCTOBER 2018 PURSUANT TO THE RULING OF THE HIGH COURT
COMMERCIAL AND ADMIRALTY DIVISION AT NAIROBI BY HON.
LADY JUSTICE MAUREEN A. ODERO DATED 29TH MAY 2020)**

BETWEEN

FUTUREROCK LIMITED (FORMERLY FUTUREWAYS LIMITED) PLAINTIFF

AND

NATIONAL OIL CORPORATION OF KENYA DEFENDANT



RULING

1. The Motion for determination is dated 31/7/2023. It was brought under Order 23 Rules 1 and 2 of the Civil Procedure Rules. It sought Garnishee Order Nisi and absolute against A/C No. 056xxxxxxxxxx to answer the claim for Kshs. 62,317,051/= being the unpaid decree to this matter.
2. The same was supported by the affidavit of Paul Maina Gathara sworn on 31/7/2023 and the further affidavit of Maryanjeline Barasa sworn on 14/8/2023. It was contended that there was an unsatisfied decree in this case for Kshs. 62,560,708/=. That it was believed the Garnishee held funds in the subject account capable of satisfying the decree.
3. The Judgment debtor opposed the application vide a replying affidavit of Robai Musilivi sworn on 28/8/2023. He deposed that the Garnishee application was premature as the decree holder had not attempted to engage the judgment debtor and no notice of execution had been given. That the demand for full payment was unreasonable as the judgment-debtor as a State Corporation has to operate under the Public Finance Management Act, 2012 with regard to budget and allocation.
4. That the judgment-debtor acts within the State Corporation Act. The said statute requires preparation of estimates for approval by Treasury. No expenditure can be incurred without the approval of Treasury. That the Public Finance Management Act had stringent directions on how to spend the Corporations funds. That the funds garnished was for business meant for specific use, ie Local Purchase Order. That the judgment-debtor has no funds to settle the decree because its business was affected by Covid 19. That the war in Ukraine had disrupted oil supply leading to costly fuel in Kenya. That the judgment in this matter was decreed in November, 2022 when the budget estimates for 2022 and 2023 had been made.
5. The parties filed their respective submissions dated 4/10/2023 for the decree holder and 25/8/2023 for the judgment-debtor. It was submitted for the decree holder that since an earlier application for garnishee had been allowed, the Court should apply the principle of stare decisis. (*George Mike Wanjobi vs Steven Kariuki & 2 others* (2014) eKLR relied on). That the issues being raised now were res judicata as the Court has ruled on them on 31/7/2023. That the judgment-debtor was a Commercial enterprise. That the monies in the LPOs belonged to the judgment-debtor. That there was Kshs. 70 M for legal contingencies for 2023/2024.
6. For the judgment-debtor it was submitted that pursuant to Article 226 of the Constitution, the Public Finance Management Act, 2012 (“PFMA”) was enacted to ensure that Public Finances are properly utilized in accordance with the principles set out in the Constitution eg. accountability, transparency and public participation. That in view of the provisions of the PFMA, it was unreasonable.
7. The case of *Ano Shariff Mohammed T/A Mohamed Investment vs abdukkadir Shariff Abdirahim & 5 others* [2007] eKLR was cited in support of the submission that since the funds in the account belonged to 3rd parties, the same were not available for garnishment.
8. Despite the garnishee being served with the application, it never appeared as required by law.
9. This is an application for garnishee. It is not opposed by the garnishee. However, it is opposed by the judgment-debtor on legal grounds. It does not deny that there is a lawful decree which remains unsatisfied. It however objects to the same on the grounds that being a state corporation, it is unable to pay the decretal sum due to the requirements of the State Corporations Act and PFMA. That the latter



- statute requires strict compliance when dealing with public finances. The second objection is that the monies attached belongs to dealers in terms of the LPOs issued.
10. On the first objection this Court is alive to the requirements of the PFMA. That in dealing with public finances, the constitutional principles of accountability, transparency and public participation is crucial. That public finances are not to be spent without being budgeted for. That government entities of which the judgment-debtor is one, prepare their estimates in advance for approval by the parent ministries before parliament approves allocation.
 11. However, the question that arises is, would claims against such entities have to wait ad infinitum before they are paid? Since those entities engage in businesses with private entities thereby incurring legal obligations, why can't those entities plan and/or budget for such eventualities. I think the law has to apply evenly and equally in the Commercial World. The drafters of *the constitution* knew about the operations of the government entities when they had it decree that all persons are equal before the law. The *constitution* outlaws discrimination. I do not think such entities have to be treated in any special manner than the rest of the commercial world. Once they enter the commercial world, the rules of engagement are the same.
 12. In *Jaribu Credit Traders Ltd vs Nairobi County Government* [2018] eKLR, the Court held:-

“It should be noted that the law does not condition settlement of decrees on budgetary allocations. In any case, the decree the subject of these proceedings is over one year from 29/2/16 and each year that passes, the respondent County Government is allocated funds and generates revenue from its own sources to cater for such eventualities/meeting their legal obligations especially for a civil suit that proceeded to hearing inter parties hence there can be no genuine claim that the respondent has been ambushed with these mandamus proceedings.”
 13. I reiterate the foregoing here and state that the moment a statutory body enters the arena of the commercial world, it must be prepared to play by the rules applicable in the world of commerce. It cannot claim to be a sacred cow that should be allowed to obey and be bound by legal liability at its own time and pace. I reject the first ground.
 14. On the second ground, it was alleged that the garnished funds do not belong to the judgment-debtor but 3rd parties. Firstly, the alleged 3rd parties were not disclosed. Secondly, the alleged LPOs were in the name of the judgment-debtor meaning the monies set out therein belong to it.
 15. In any event, the account that was garnisheed was in the name of the judgment-debtor and no one else. In simple banking law, the funds that lie in an account held by an individual are deemed to belong to him unless proved otherwise. The otherwise has not been proved here.
 16. Accordingly, I find the application to be meritorious and I allow the same as prayed.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2023

A. MABEYA, FCI Arb

JUDGE

