



**Fort Properties Limited v Kenya National Highways Authority & another; Co -  
operative Bank of Kenya Limited & another (Garnishee) (Environment and Land  
Constitutional Petition 29 of 2020) [2023] KEELC 17627 (KLR) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17627 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 29 OF 2020**

**LL NAIKUNI, J**

**MAY 15, 2023**

**BETWEEN**

**FORT PROPERTIES LIMITED ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

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

**NATIONAL BANK OF KENYA LIMITED ..... GARNISHEE**

**RULING**

**I. Introduction**

1. This matter comes up for the ruling of the Notice of Motion application dated and filed on August 11, 2022 Petitioner/Decree Holder – 'Fort Properties Limited' herein. It was brought under Rule 3 of High Court Practice and Procedure Rules, Sections 1A, 1B, 3A and 63 ( e ) of the [Civil Procedure Act](#), Cap 21, Order 23 Rules 1 ( 1 ), ( 2 ) and (3), Rule 2, 3 and 4 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#) and all other enabling provisions of the law.
2. From the records, although all parties had been participating in these proceedings, but I have noted that none of them opposed this application whatsoever. In other words, the issues raised here are not disputed.

**II. The Petitioner/Decree's case**

3. The Petitioner/Decree Holder sought for the following orders therein:-



- a. Spent.
  - b. That this Honourable Court be pleased to issue an Order Nisi forthwith attaching the principal amount of Kshs 242,950,000.00 together with court interest of Kshs 386,667,886 at 12% of the principal amount from March 21, 2014 to August 11, 2022, mesne profits of 24,000,000.00 and court interest at 12% being Kshs 168,580,645.00 commencing from June 2, 2015 to August 11, 2022, penal interest of Kshs 109,447,144.00 at 12% commencing from June 2, 2015 to August 11, 2022 making a total of Kshs 931,645,675.00 which sum is held to the credit of both the 1<sup>st</sup> Judgment debtors bank account held by the 1<sup>st</sup> Garnishee herein Co-operative Bank of Kenya account no xxxx at its Head Office branch Nairobi and the 2<sup>nd</sup> Judgment debtor account number xxxx held by the 2<sup>nd</sup> Garnishee herein National Bank of Kenya Limited at is Hill Branch, Nairobi;
  - c. That this Honourable Court be pleased to order the above-named Garnishees and the judgment debtors to attend before the court on a date to be appointed, to show cause why the said garnishee should not pay to the decree holder the decretal balance herein or so much thereof as may be sufficient to satisfy the said sum of Kshs 242,950,000.00 together with court interest of Kshs 386,667,886 at 12% of principal amount from March 21, 2014 to August 11, 2022, mesne profits of Kshs 24,000,000.00 rent of Kshs 168,580,645.00 commencing from June 2, 2015 to August 11, 2022, penal interest of Kshs 109,447,144.00 at 12% commencing from 2<sup>nd</sup> June 2015 to August 11, 2022 making a total of Kshs 931,645,675.00;
  - d. That upon the inter parties hearing of this Application, this Honourable Court be pleased to issue a Garnishee Order Absolute in terms of prayer 3 herein above and/or in the alternative;
  - e. That pending the hearing and determination of this application and in the interim the Honourable Court be pleased to direct that the amount of Kshs 931,645,675.00 held in both the Respondent/Judgment Debtor's bank account number xxxx held by the 1<sup>st</sup> Garnishee Cooperative Bank of Kenya Nairobi and account number xxxx held by the 2<sup>nd</sup> Garnishee National Bank of Kenya Nairobi, be withheld or placed in a suspense account for security purposes pending further directions of this Honourable Court; and
  - f. That cost of this application be provided by the Respondent/Judgment Debtor.
4. The application is premised on the grounds, testimonial facts on the face of the application and the averments of the 12 Paragraphed Supporting Affidavit sworn by Jack W Matheka dated August 11, 2022 together with two (2) annexures attached thereto. He deposed being an Advocate of the High Court of Kenya with instruction and in conduct of these proceedings by the Petitioner/Decree Holder and therefore competent to swear the Affidavit.
  5. He deposed that, judgment was delivered on October 28, 2021 by this Honorable Court against the Respondent/Judgment Debtor in the sum of Kenya Shillings Two Fourty Two Million Nine Hundred and Fifty Thousand (Kshs 242, 950, 000.00) together with Court interest of a sum Kenya Shillings Three Eighty Six Million Six Sixty Seven Thousand Eight Eighty Six hundred (Kshs 386,667,886.00/=) at 12% of principal amount from March 21, 2014 to August 11, 2022, mesne profits of Kenya Shillings Twenty Four Million (Kshs 24,000,000.00), rent of Kenya Shillings One Sixty Eight Million Five Eighty Thousand Six Fourty Five Thousand (Kshs 168,580,645.00) commencing from June 2, 2015 to August 11, 2022, penal interest of a sum of Kenya Shillings One and Nine Million Four Fourty Seven Thousand One Fourty Four Hundred (Kshs 109,447,144.00) at 12% commencing from June 2, 2015 to August 11, 2022 making a total of sum of Kenya Shillings Nine Thirty One Million Six Fourty



Five Thousand Six Seventy Five Hundred (Kshs 931,645,675.00), as shown by his annexed copy of the Decree issued on November 17, 2021 marked as '1'.

6. He averred that the Respondent/Judgment Debtor had neither settled the decretal sum nor moved the Honorable Court by an application to either set aside or appeal the judgment. He added that the Respondent/Judgment Debtor has no known property under its name that is capable of being attached for purposes of satisfying the judgment of the court.
7. He deponed that both Cooperative Bank of Kenya and National Bank of Kenya limited, the Garnishees, are holding funds to the credit of the 1<sup>st</sup> Respondent/Judgment Debtor in account number xxxx domiciled with the 1<sup>st</sup> Garnishee and account number xxxx domiciled with the 2<sup>nd</sup> Garnishee.
8. He further deposed that the 1<sup>st</sup> Respondent, in a bid to satisfy the decretal sum transferred to the 2<sup>nd</sup> Respondent's bank account Kenya Shillings One Hundred and Fifty Million (Kshs 150,000,000.00) for onward transmission to the Petitioner on July 1, 2022 as per his annexed copy of a letter dated July 1, 2022 marked as '2'. He added that the 2<sup>nd</sup> Respondent had been sitting on their hands and shifting goal posts as to the transfer of funds albeit negligible to the Petitioner/Decree Holder thus necessitating the current application.
9. He deponed that the Petitioner/Decree Holder was at the mercy of the Respondents and their officers, who are acting in bad faith maliciously and in total disregard of not only this Court's express judgment but also in complete disobedience of the Constitution and the right to compensation upon compulsory acquisition of property.
10. He added that unless the orders sought were granted, the Petitioner/Decree Holder is apprehensive that the judgment debtor may withdraw and/or move the funds held to its credit by the Garnishees. In conclusion, he averred that it is in the interest of justice that the Petitioner/Decree Holder's application was allowed.
11. The Honorable Court has noted that despite service, none of the Respondents filed any responses to the application by the Petitioner/Decree Holder herein. Thus, the Honorable Court had proceeded to rendering its ruling with the proceeding as it is herein.

### **III. Analysis and determination**

12. I have carefully considered all the issues raised from the Notice of Motion application dated August 11, 2022 by the Petitioner/Decree Holder application, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
13. In order to reach an informed, reasonable, Just and fair decision, the Honorable Court has crafted the following three (3) salient issues for its determination in this matter as follows:-
  - a. Whether the Notice of Motion application dated August 11, 2022 by the Petitioner/Decree Holder has any merit.
  - b. Whether the parties herein are entitled to the relief sought – of the Garnishee proceedings be instituted for execution of the decree issued on November 17, 2021 against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Judgment Debtors.
  - c. Who should bear the costs of this application?



**ISSUE No a). Whether the Notice of Motion application dated August 11, 2022 by the Petitioner/ Decree Holder has any merit.**

14. Under this Sub – heading, this being a Court of Law, its critical to appreciate two broad issues. First the n Order 23 Rules 1 ( 1 ), ( 2 ) and (3), Rule 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 legal nature, scope and effect of the garnishes orders sought by the Petitioner/Decree Holder and secondly the parties in the matter. To begin with, garnishee is one form of execution by way of execution of the decree of Court. It means notifying or warning of certain debt that must be paid before the person is entitled to receive property as an heir and the proceedings have been commenced and an order be issued by Court for the attachment. It may be attachment of a persons salary or property. The provisions of Order 23 Rules 1 ( 1 ), ( 2 ) and (3), Rule 2, 3 of the Civil Procedure Rules, 2010 makes the provision for garnishee. The said provision of the law provides:-

' The service of the order that debts due to a Judgement – Debtor liable under a decree shall be attached or notice to the garnishee as the Court may direct. If the garnishee does not dispute the debt due or claimed to be due from him or them to the Judgement Debtor or 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 costs of the garnishee proceedings and the order absolute shall be in Form No 17 or 18 of Appendix A.

15. On the second issue is on the parties being sued or involved in this matter whereby execution of the Decree is concerned. These are the Kenya National Highway Authority (KENHA) and the National Land Commission (NLC) the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein respectively. While the 1<sup>st</sup> Respondent/ Judgment Debtor is established by the [Kenya Roads Act](#) under the provision of Section 3, its functions in section 4 and composition of its board of authority in section 5 is State Corporations established under the State Corporation Act, Cap 446 and Section 3 of the [Kenya Roads Act](#), No 2 of 2007 of the Laws of Kenya. The provision of Section 3 ( 1 ) of both the State Corporation Act and the [Kenya Roads Act](#), provide as follows:-

- (1). The President may by order establish Corporation as a body corporate to perform the functions specified in order.
- (2). A state Corporation established under this Section shall:-
  - (a). Have perpetual succession;
  - (b). In its corporate name of suing and being sued.
  - (c). Subject to this Act, be capable of holding and alienating movable and immovable property.

For these reasons the application by the Petitioner/Decree Holder has merit.

16. The 2<sup>nd</sup> Respondent is established as a Constitutional body under Article 67 ( 1 ) of the [Constitution](#) and further Article 67 ( 2 ) read with the [National Land Act](#), No 5 of 2012 which makes the provision for the function and powers of the NLC. The transitional and saving provisions of the NLC Act provide that any function, transition, Civil proceedings or other processes in respect of any public land administration matter within the docket of the Ministry of Land before the commencement of the Act is deemed to be carried by the Act as per the provision of Section 30 of the NLC Act. The enactment of the NLC Act is in furtherance of the objects and the principles of devolved government in land management and land administration.



17. Primarily, the first issue to ponder is whether NLC should be treated strictly as Government per se on matters of execution of Court Decrees. An analysis of the functions of the Respondents/Judgment Debtors leaves no doubt in the court's mind that NLC is a government agency or organ. Government is not defined either in the *Government Proceedings Act*, Cap 40 or the *Civil Procedure Act*, Chapter 21 Laws of Kenya and the rules made thereunder. However, reading of Sections 2, 12, 19 and 21 of the *Government Proceedings Act* as to what constitutes civil proceedings by and against the Government, and orders against the Government, which is reproduced in Order 29 Rule 1(1) of the Civil Procedure Rules, leaves no doubt that the Government includes Government departments, Government organs, agencies of the Government and officers of the Government.
18. Having established that the 2<sup>nd</sup> Respondent/Judgment Debtor herein is a government agency, it follows that the laid-out procedure in law in executing decrees against the Government is provided through the law. To begin with, the provision of Order 29 Rule 2 (2) of the Civil Procedure Rules 2010 provides as follows:

' 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)

Further, the provisions of Order 29 Rule 4 (1) of the Civil Procedure Rules, 2010 provides:

' 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.'

Section 21 (1) of *Government Proceedings Act* provides:

'Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.'

Section 21 (3) of *Government Proceedings Act* provides:

A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

Section 21 (3) of *Government Proceedings Act* provides:



If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

Section 21 (4) of *Government Proceedings Act* provides:

'Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.'

19. The upshot of the above provisions of law and rules is that although execution is a right enforced by a Decree Holder against Judgment Debtor, execution of decrees against Government agencies should be carried out within the purview of *Government Proceedings Act* or seeking specific prerogative writs in form of 'Mandamus' or 'Prohibition' under the Administrative Law in form of Judicial Review proceedings. For these reasons therefore, the execution intended by the Petitioner/Decree – Holder against the 2<sup>nd</sup> Respondent Judgement/Debtor in the manner envisaged from the filed Notice of Motion application dated August 11, 2022 is far fetched and hence disallowed.

'ISSUE No b). Whether the parties herein are entitled to the relief sought – of the Garnishee proceedings be instituted for execution of the decree issued on November 17, 2021 against the Respondents/Judgment Debtors.'

20. There is no doubt or challenge from any of the parties that a Judgment Debt exists. In fact, a perusal of the court record shows that on June 8, 2022 this matter came up a Notice to show cause against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Judgment Debtors and their Learned Counsels informed the Honorable Court that they were making strides to comply with the Decree issued by the Court on November 17, 2021 despite budgetary constraints. This shows cooperation on the Respondents/Judgement Debtors part and the Court is aware to the fact that the process of complying with the said Decree on the part of any Government agency may be a long and bureaucratic one.
21. Nonetheless, the Petitioner/Decree Holder obtained Judgment for a total of Kenya Shillings Nine Thirty One Million Six Fourty Five Thousand Six Seventy Five Thousand (Kshs 931,645,675.00/=) against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Judgement Debtors and is entitled to enjoy the fruits of the said judgement. My view is that this sustainable as far as the 1<sup>st</sup> Respondent Judgement/Decree Holder is concerned. However, as it is evident that the 2<sup>nd</sup> Respondent/Judgement Debtor is a Government agency and therefore, the Garnishee proceedings herein against it is improper in law to the extent of the recovery procedure. What then is the recourse available to the Petitioner/Decree Holder as far as the 2<sup>nd</sup> Respondent Judgement/Debtor is concerned?



22. In the case of '[\*Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza \[2012\] eKLR\*](#) Githua J opined that:

' In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the [\*Government Proceedings Act\*](#).

The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the [\*Government Proceedings Act\*](#) (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment.

Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.'

23. There is no evidence that the Petitioner/Decree Holder has made any effort to apply for the certificate of costs to be served upon the Attorney General and the accounting officer for execution of the decree as per Section 21 of the [\*Government Proceedings Act\*](#), which is the proper procedure for execution of decrees against the Government. Judgment debts due from or to Government carry interest as prescribed under Section 26 of the [\*Civil Procedure Act\*](#), Cap 21 and Section 20 of the [\*Government Proceedings Act\*](#).

ISSUE No c). Who will bear the costs of the application.

24. It is now well established that the issue of costs in any suit is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of any legal action or process in litigation. The proviso under Section 27 (1) of the [\*Civil Procedure Act\*](#), Cap 21 holds that costs follow the event. By event it means the result or outcome of the said legal action. This position was supported by the Supreme Court decision of '[\*Jasbir Rai Singh – Versus – Tarchalon Singh \(2014\) eKLR\*](#).
25. In the instant case, the result is that the Petitioner/Decree Holder has partially succeeded in prosecuting its application as far as the orders are issued against the 1<sup>st</sup> Respondent Judgement/Debtor but not against the 2<sup>nd</sup> Respondent Judgement/Holder. Therefore, it is just fair, reasonable and equitable that



the Petitioner/Decree Holder be granted Costs against the 2<sup>nd</sup> Respondent Judgement/Debtor and 1<sup>st</sup> and 2<sup>nd</sup> Garnishee herein.

#### **IV. Conclusion & Disposition**

26. The upshot of all this after conducting an indepth anaylsis of the framed issues herein, the Honorable Court finds that Notice of Motion application dated and filed on August 11, 2022 by the Petitioner/ Decree Holder partially succeeds. Hence, in the premises of the forgoing discourse, the Honorable Court makes the following orders: -
- a. THAT the Notice of Motion application dated August 11, 2022 by the Petitioner/Decree Holder herein be and is hereby allowed as against the 1<sup>st</sup> Respondent Judgement Debtor, the 1<sup>st</sup> and 2<sup>nd</sup> Garnishees but disallowed against the 2<sup>nd</sup> Respondent Judgement/Debtor.
  - b. THAT the Petitioner/Decree Holder may pursue execution of the decree against the 1<sup>st</sup> Respondents /Judgment Debtors in the laid down, proper and legal process; and
  - c. THAT costs of the application to be borne by 1<sup>st</sup> Respondent, 1<sup>st</sup> and 2<sup>nd</sup> Garnishee jointly and severally awarded to the Petitioner.

27 IT IS SO ORDERED ACCORDINGLY.

**RULING DELIVERED THROUGH MICROSOFT TEAMS MEANS VIRTUALLY, SIGNED AND DATED AT MOMBASA THIS 15<sup>TH</sup> DAY OF MAY 2023.**

**HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:-

- a. M/s. Yumnah, the Court Assistant
- b. Mr. Matheka Wandai Advocate for the Petitioner/ Decree Holder/Applicant.
- c. No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents Judgement/Debtor.
- d. No appearance for 1<sup>st</sup> & 2<sup>nd</sup> Garnishee.

