



Tom Ojienda & Associates v National Land Commission; National Bank of Kenya & another (Garnishee) (Miscellaneous Application 29B of 2016) [2022] KEHC 11463 (KLR) (2 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 29B OF 2016
EKO OGOLA, J
AUGUST 2, 2022**

BETWEEN

TOM OJIENDA & ASSOCIATES APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

NATIONAL BANK OF KENYA GARNISHEE

CENTRAL BANK OF KENYA LTD GARNISHEE

RULING

The Application

1. The Notice of Motion for the determination herein is dated and filed on the 14/7/2022. The motion is brought under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule 1 and Order 50 of the *Civil Procedure Rules* and all enabling laws and provisions of the law. The motion prays for the following orders:
 1. That this application be certified urgent and heard ex-parte in the first instance.
 2. That the honourable court be pleased to make a Garnishee Order Nisi against National Bank of Kenya Hill Plaza Branch Account Numbers xxxxxxxx and xxxxxxxx, the 1st Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of National land Commission the Judgment Debtor herein; be attached to answer the Certificate of Order dated 15th June 2022 for the sum of Kshs.397,300,323,32.00/- being the amount in respect of which judgment was entered in favour of the applicant herein.



3. That the honourable court be pleased to make a Garnishee Order Nisi against Central Bank of Kenya Account Numbers xxxxxxxx and xxxxxx, the 2nd Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the 2nd Garnishee respectively to the credit of National land Commission the judgment Debtor herein, be attached to answer the Certificate of Order dated 15th June 2022 for the sum of Kshs.397,300,323,32.00/- being the amount in respect of which judgment was entered in favour of the applicant herein.
 4. That an order nisi upon the 1st and 2nd Garnishees do issue and the same be served on the 1st and 2nd Garnishees forthwith.
 5. That the 1st and 2nd Garnishees do appear before this court on an appointed date and time to show cause why they would not pay the applicant the sum of Kenya Shillings Three Hundred and Ninety-seven Million, three Hundred thousand and Three Hundred and Twenty three shillings and Thirty Two Cents (Kshs.397,300,323.32/-) being the decretal sums as per the certificate of order dated 15th June 2022.
 6. That upon the inter-partes hearing of the application the honourable court be pleased to issue a Garnishee Order absolute in terms of prayers 2 and 3 as is enough to satisfy the decretal amount of Kshs.397,300,323.32/- as per the Certificate of Order dated 15th June 2022.
 7. That the said sum of money being Kshs.397,300,323,32.00/- be remitted into the applicant/ judgment Holder's Bank Account particulars whereof are given hereunder: Prof. Tom Ojienda & Associates, Absa Bank of Kenya, Account No.xxxxxxx Hurlingham Branch (Swift Code Barckenx)within 24 hours from the date of the issuance of Garnishee Order Absolute.
 8. That the cost of this application be borne by the respondent/judgment debtor.
2. The motion is premised on the grounds set out therein and is supported by affidavit of Professor Tom Ojienda, SC sworn on 14/7/2022.
 3. The brief facts of the application are as follows: In Petition No.1 of 2013, the Petitioners therein filed a Petition against the then Commissioner of Lands (now National Land Commission) and five (5) Others praying that they be declared as the owners of land Parcel IR No.17542; LR No.10492 otherwise known as Eldoret Municipality Block 15/1 and Eldoret Municipality Block No.23 (King'ong'o). They also prayed for orders of mandamus compelling the 1st – 5th respondents to pay the 1st petitioner Kshs.1,601,173,020.50 billion as compensation for loss of 546 acres of his land and pay the 2nd petitioner Kshs.1,772,260,997.06/- as compensation for the loss of 604 acres of lawful land. Subsequently, the petitioners amended their petition on 2nd October 2014 wherein they prayed for orders of mandamus to compel the 1st – 5th respondents to pay the 1st petitioner Kshs.3,736,070,381.23/- billion as compensation for loss of 546 acres of his land and the 2nd petitioner kshs.4,132,942,326.49/- billion as compensation for the loss of 604 acres of his land. The petitioners also prayed for mesne profits in the sum of kshs.2,690,603,339 billion.
 4. The National Land Commission (hereinafter the Respondent) instructed the firm of Prof. Tom Ojienda & Associates (hereinafter the Applicant) through the instruction letter dated 21st November 2014. That Petition was opposed through various pleadings by the NLC including the Replying Affidavit sworn by the legal Director Brian Ikol.
 5. The petition was heard and determined through the Judgment dated 15th April 2016 where the Court issued orders of mandamus compelling the 1st -5th respondents to pay to the 1st petitioner kshs.3,736,070,381.23/- billion and the 2nd petitioner kshs.4,132,942,326.49/- as compensation for



- the loss of their land. Court also directed that the petitioners be paid kshs.500,000,000,00/- as mesne profit.
6. In effect, the Judgment dated 15th April 2016 awarded the petitioners a total sum of kshs.7,871,012,707.72/- and kshs.500,000,000/- as mesne profits. The Applicant avers that despite the spirited, zealous and sometimes strenuous representations, the Commission failed and/or refused to pay the applicant its legal fees as calculated under the Advocates Remuneration Order. Consequently, the applicant filed an Advocate-Client Bill of Costs dated 24th October 2015 being Misc. 29B of 2016 Prof. Tome Ojienda & Associates vs National Lands Commission against the Commission seeking a total of unpaid sum of Kshs.282,337,074.50. Through the ruling delivered on 20th September 2016 the Bill of Costs was taxed at Kshs,220,735,840.00 and a certificate of Taxation was then issued by the Deputy Registrar in respect of the taxed amount. The Applicant states that the Commissioner never filed any Notice of Objection within 14 days from the date of the decision of the taxing master nor did it file a reference to the Judge setting out the grounds of its objection as espoused under Rule 11 (1) of the Advocates Remuneration Order. As such the decision therein stood. The Applicant then filed the application dated 3rd November 2016 seeking for entry of judgment under section 52 of the Advocates Act which requires a taxation Ruling to be converted into a judgment for purposes of execution.
 7. The Respondent also filed the application dated 24th November 2016 seeking for stay of execution of the taxation ruling dated 20th September 2016 and enlargement of time for filing of a reference. The Court issued the Ruling dated 21st June 2017 allowing applicant's application for entry of judgment dated 3rd November 2016 and dismissing NLC's application dated 24th November 2016.
 8. Undeterred, the National Land Commission then filed yet another application dated 12th September 2017 seeking for stay of execution of the taxation Ruling. The Court then issued the ruling dated 11th July 2018 dismissing NLC's application for stay dated 12th September 2017, subsequent to which the Applicant moved court to Garnishee the Commission's Account No.xxxxxxxx held at National Bank of Kenya Hill Plaza Branch. Information provided to Court by the Garnishee (National Bank) was that as at 27th May 2019, the balance therein was kshs.5,512,458,159/- (Five Billion Five Hundred Twelve Million Four Hundred Fifty Thousand One Hundred Fifty-Nine Cents Sixty Only). A decree Nisi was issued on 28th May 2019 upon the confirmation by the Bank that the Account had enough monies to satisfy the decretal sums. Thereafter, the applicant filed the application dated 29th May 2019 seeking for garnishee order absolute. However, the National Land Commission also filed the application dated 29th May 2019 seeking to set aside the Garnishee Order Nisi issued on 28th May 2018. The Court then issued the ruling dated 10th June 2019 partially allowing the National Land Commission's application dated 29th may 2019 for setting aside the Garnishee Order Nisi issued on 28th May 2019 and dismissing the prayer for stay of execution of the taxation ruling.
 9. That the Applicant then filed the application dated 14th July 2019 seeking to review the order setting aside the garnishee order Nisi and asking for the cross-examination of the Legal Direction Brian Ikol and the Ag CEO Kabale Tache. The Court issued the Ruling dated 18th July 2019 allowing the law firm's application dated 14th July 2019 for the cross examination of the Legal Director Brian Ikol and Ag. CEO Kabale Tache. However, the Applicant avers that he has since withdrawn this application owing to the failure and/or refusal of the respondent's CEO to come to court for cross examination as had been directed by the Court. In the meantime, the applicant's debt remains unpaid to date, and has and continue to accrue interest as per the certificate of order dated 15th June 2022.
 10. The Applicant states that he is aware that the respondent has separate accounts with the 1st and 2nd Garnishees herein being national Bank of Kenya Account Numbers xxxxxx and xxxxxxxxxxxxxx and Central Bank of Kenya Account Numbers xxxxxx and xxxxxx.



11. The applicant is therefore praying that this court be pleased to issue a Garnishee Nisi Order and direct that all sums due and owing from the 1st and 2nd Garnishees to the Judgment Debtor/Respondent as shall be sufficient to satisfy the applicant's decretal sum of kshs.397,300,323.32.00/- as per the certificate of order dated 15th June 2022 be granted.
12. The Applicant avers that unless the orders being sought are allowed as prayed, the respondent will not satisfy the terms of the certificate of order dated 15th June 2022 and the applicant will be unable to enjoy the fruits of its judgment.

Decree Nisi

13. On 14/7/2022 when the applicant came to court through a certificate of urgency seeking a conservatory decree nisi herein, the Court was satisfied that the applicant had raised a prima facie case for the decree nisi, which was issued in the following terms:
 1. That interim conservatory Garnishee order nisi be issued against National Bank of Kenya Hill Plaza Branch Account Numbers xxxxxx and xxxxxxxx, the 1st Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of National Land Commission the Judgment Debtor herein; be attached to answer the certificate of order dated 15th June 2022 for the sum of kshs.397,300,323.32/- being the amount in respect of which Judgment was entered in favour of the applicant herein.
 2. That interim conservatory Garnishee order nisi be issued against Central Bank of Kenya Account Numbers xxxxxx and xxxxxxxx, the 2nd Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the 2nd Garnishee, respectively to the credit of National Land Commission the Judgment Debtor herein be attached to answer the certificate of order dated 15th June 2022 for the sum of kshs.397,300,323,32.00/- being the amount in amount in respect of which judgment was entered in favour of the applicant herein.
 3. An order nisi upon the 1st and 2nd Garnishees do issue and the same do issue and the same be served on the 1st and 2nd Garnishee forthwith.
 4. Application together with orders shall be served upon the respondent and the Garnishees for inter-parties hearing on 26th July 2022.

Response

14. The 1st Respondent, being aggrieved by the above order of the decree nisi filed a replying affidavit sworn by Brian Ikol on 25/7/2022. Mr. Ikolo is the Legal Affairs and Dispute Resolution Manager of the respondent.
15. In addition, the respondent filed a Notice of Motion application dated 25/7/2022 and filed herein on 26/7/2022 praying for the following orders:
 1. That this application be certified as urgent and heard on the first instance.
 2. That pending the hearing and determination of this application inter – partes this honourable court be pleased to grant a stay of execution of the interim conservatory garnishee order nisi issued on 14th of July 2022.
 3. That this hournourable court be pleased to set aside and/or vary the interim conservatory garnishee order nisi issued on 14th of July 2022.



4. Any other order this court may deem fit to make in public interest.
5. That the costs of this application be granted to the applicant.
16. The aforesaid Replying Affidavit and the Notice of motion by the Respondent raise the same issues, and both are treated as the Respondent's double response to the Applicant's application dated 14/7/2022.
17. The application is premised on the grounds set out therein and is supported by affidavit sworn by Kabale Tache Abero on 25/7/2022. The deponent avers that he is the acting Chief Executive Officer/ Commission Secretary of the respondent and authorized and competent to depone to issues herein.
18. The respondent's case is that on 14th July 2022 this court inter alia made interim conservatory garnishee order nisi against its accounts held by the Garnishees herein requiring that all monies deposited, lying and being held in deposit by the garnishees be attached to answer the certificate of order dated 14th July 2022 for the sum of kshs.397,300,323.32. The Respondent avers that the said orders were obtained through material non-disclosure and hence an abuse of the Court process since the respondent had previously obtained Garnishee Order Nisi on 28th May 2019 but the same was set aside by this court on 10th June 2019 on grounds that the said account number xxxxx is a special compensation account created under the provisions of section 115 of the *Land Act*. The said orders are valid and subsisting and are yet to be set aside, varied, reviewed or appealed against.
19. The Respondent further states that the accounts provided for under the order dated 14th July 2022 being Account Numbers xxxxxxxx and xxxxxxxx and held by the 2nd Garnishee on behalf of the applicant are non-existent and are not accounts of the Respondent therefore the order as extracted should be set aside as the same cannot be enforced against the 1st Garnishee. That in any event, the Respondent's bank number xxxxxxxx held at the National Bank of Kenya, is contemplated under section 115 (2, 111(1) and Section 111 (1A) of the *Land Act* to be used only for purposes of receiving and making payments to persons whose parcels of land have been compulsory acquired by the Government; that the monies in the said account are deposited by Government agencies or departments for purposes of conveying payments to project affected persons and not for any other purposes. The said monies are therefore neither for use, benefit or disposal by the applicant, but are monies meant for compensation arising out of compulsory acquisition of land required for public purposes. The Respondent's case is that Article 40 of *the Constitution*, and Sections 111 (1) of the *Land Act* compel the Judgment Debtor/Respondent herein to make prompt compensation upon compulsory acquisition in the following terms:

If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.
20. The Respondent states that effectively, all payments of compensation to project affected persons stand suspended with the net effect of grounding all ongoing government projects since absent prompt compensation the project persons cannot yield vacant possession of the land upon which the project will be implemented.
21. The Respondent's case is that unless the Court urgently intervenes, thousands of project affected persons who are not before this Court risk being rendered homeless, displaced and without a source of income since their homes/businesses were demolished to pave way for the said public purpose projects but they cannot be compensated to purchase alternative land and set up new businesses as a result of the orders granted by this Court on 14th July 2022. Further, that unless this Court urgently intervenes, government projects that have underlying costs and contractual obligations will be affected and public



funds lost in the form of penalties for breach of contractual obligations since project affected persons cannot be compensated so that they can give vacant possession of their land wherein the projects are to be implemented.

22. Further, the Respondent states that the entire proceedings herein offend the provisions of sections 21 (4) of the *government Proceedings Act*, Order 29 Rule 2 (2) (c) of the Civil Procedure Rules, as the Judgment Debtor herein is a government entity and part of government. Similarly, that the operations of the applicant have come to a halt since the Court directed the attachment of the recurrent account of the Applicant number xxxxxxxx and development accounts of the Commission as well and the applicant herein cannot pay the salaries of its employees or meet its day to day running costs effectively paralyzing the operations of the Respondent. Further that, the Respondent is yet to receive its exchequer since the 2022 – 2023 budget has not been allocated/loaded into its accounts and effectively the recurrent account of the Respondent has no funds to satisfy the judgment debt herein.
23. In an attempt to offer some consolation to the Applicant, the respondent avers that the proper method of enforcement against government is to file for orders of mandamus seeking to compel compliance and thereafter file for contempt of court if there is disobedience but not to attach accounts which are essentially government assets.
24. The Respondent's case is that public interest outweighs the private interests of the judgment debtor and shifts in favour of allowing the Respondent's application herein and dismissing the Applicant's application herein

1st Garnishee's Response

25. The 1st Garnishee opposed the applicant's application dated 14/7/2022 through a replying affidavit sworn by Gloria J. Barmasai on 25/7/2022. The 1st Garnishee's case is that it does not have an account bearing the number cited under paragraph 1 of the Order Nisi dated 14/7/2022; that Account No.xxxxxxxx or Account no.xxxxxxxx are unknown to the 1st Garnishee Bank.
26. The 1st Garnishee prays for costs of these proceedings of kshs.100,000/- to be paid by the judgment debtor.

2nd Garnishee's Response

27. The 2nd Garnishee opposed the application dated 14/7/2022 through grounds of opposition dated and filed herein on 27/7/2022. The 2nd Garnishee's case is that the application is incompetent and incurably defective; That the application does not satisfy the conditions set out in Order 45 of the Civil Procedure Rules; that the applicant is bound by its own pleadings; that the application does not lie under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules 2010; and that the application should be dismissed with costs to the 2nd Garnishee.

Applicant's Response

28. The respondent's application filed on 25/7/2022 was opposed by the applicant vide a replying affidavit sworn on 27/7/2022 by Professor Tom Ojienda Senior Counsel.

Submissions

29. The two applications before the court were heard together. The applicant fled submissions on 26/7/2022 while the respondent filed submissions on 28/7/2022. The 2nd Garnishee file submissions on 1/8/2022. The 1st Garnishee did not file any submissions.



30. The submissions were orally highlighted in court on 28/7/2022. Professor Tom Ojienda Learned Senior Counsel submitted for the applicant; Mr. Kamande and Mr. Mbuthia, Learned Counsel submitted for the respondent. Mr. Kangu, learned Counsel submitted for the 1st Garnishee; while M/s Cherutich, learned Counsel submitted for 2nd Garnishee.

Applicant's Submissions

31. Professor Tom Ojienda, SC, learned Counsel submitted that the Applicant represented the Judgment Debtor in Petition No. 1 of 2013 Nathan Tirop Koech & Others vs The Commissioner for Lands & Others, and filed a Bill of Costs seeking Kshs. 282,337,074.50 against the Commission for legal services rendered after the Commission failed to pay it its legal fees. In a Ruling delivered on 20th September 2016, the Bill of Costs was taxed at Kshs. 220,735,840.00 and a Certificate of Taxation issued to that effect. This marked the beginning of a back and forth game initiated by the Commission spanning from 2016 to 2019. Judgment was subsequently entered for the Applicant for payment of the Kshs. 220,735,840.00/- plus interest until payment in full through the Ruling dated 21st June 2017. Despite several reminders and false promises to pay by the Judgment debtor of the decretal sums, the Judgment remains unpaid to date. The Applicant has since extracted a Certificate of Order dated 15th June 2022 where the debt has since accrued interest and stands at Kshs 397,300,323.32/-.
32. Prof. Ojienda submitted that the Applicant is aware that the Respondent has separate accounts with the 1st and 2nd Garnishees herein being National Bank of Kenya Account Numbers xxxxxxx and xxxxxxx and Central Bank of Kenya Account Numbers xxxxx and xxxxxxx that have sufficient funds to settle the judgment debt. It is on this basis that the Applicant is praying that the Court allows the garnishee application herein as the Judgment Debtor has taken deliberate steps to frustrate the Applicant and to ensure that the Applicant firm does not enjoy the fruits of its Judgment.
33. Prof. Ojienda submitted that the Application ought to be allowed for reasons that: one, Judgment was indeed entered for the Applicant for Kshs. 220,735,840.00 together with interest until payment in full on 21st June 2017; two, the Commission indeed has separate accounts with the 1st and 2nd Garnishees herein being National Bank of Kenya Account Numbers xxxxxx and xxxxx and Central Bank of Kenya Account Numbers xxxxxxx and xxxxxxx; three, all sums held by the 1st and 2nd Garnishees are sufficient to satisfy the Applicant's decretal sum together with the accrued interest of Kshs 397,300,323.32/- as per the Certificate of Order dated 15th June 2022; four, there is no bona fide dispute against the claim by the Garnishees, five; the Respondent has refused to satisfy the Judgment debt as per the Certificate of Order dated 15th June 2022 and thus defeating any possibility of the Applicant to enjoy the fruits of its judgment.

Respondent's Submissions

34. On the part of the respondent, Mr. Kamunde, learned Counsel submitted the issues for determination as follows:
- a. Whether the Applicant/Judgment debtor is a government entity.
 - b. Whether the Applicant/judgment debtor can be subjected to garnishee proceedings and if not what would be the appropriate mode of execution against the Applicant.
 - c. Whether the Application dated 14th July 2022 is res judicata.
 - d. Whether there is an error apparent on the face of the order issued on 14th July 2022.



- e. Whether the amount of Kshs 397,300,323.32 in the garnishee order nisi is certain or correct vis a vis the taxed amount of Kshs 220,735,840.86 as per the judgment entered by the court.
35. Mr. Kamunde submitted that the National Land Commission is Established under Article 67 (1) of *the Constitution* of Kenya, which provides:

67. National Land Commission

1. "There is established the National Land Commission.
 2. The functions of the National Land Commission are—
 - (a) to manage public land on behalf of the national and county governments;
 - (b) to recommend a national land policy to the national government;
 - (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own Initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - f. to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - k. to monitor and have oversight responsibilities over land use planning throughout the country" •
 - l. Counsel referred to *the Constitution* of Kenya which further provides in Article 260 on the various entities/bodies that comprise the state, and as such government by stating:
36. Counsel referred to *the Constitution* of Kenya which further provides in Article 260 on the various entities/bodies that comprise the state, and as such government by stating:
260. "Interpretation In this Constitution, unless the context requires otherwise—
- "State"- when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution; and
- "State organ"- means a commission (emphasis mine), office, agency or other body established under this Constitution;"
37. Counsel submitted that it is the Respondent's contention therefore that by virtue of being a Commission established under *the Constitution* of Kenya, the same is a state organ which falls squarely within the ambit of the definition of state and government, and therefore cannot be denied protection guaranteed by the Civil Procedure Rules, and more specifically, Order 29, Rule 2 which states:



- (2) 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);-Order which the Respondent's Application for Garnishee is founded.
 - c. Order 23 (Attachment of debts);
 - d. Order 40 (Injunctions); and
 - e. Order 41 (Appointment of receiver)."
38. Mr. Kamunde cited *Okiya Omtatab Okoiti & Another vs Attorney General & 7 Others* [2013] eKLR wherein the Court held as follows in finding that Commissions form part of "government" to warrant protection under the *Government Proceedings Act*:
- “ Article 248 of *the Constitution* creates Commissions some of which have been named above and also creates independent offices which are the Auditor General and the Controller of Budget and taking all the definitions above together, it is difficult to understand the worth of the objection raised. One cannot reasonably fail to note that Commissions and Independent Offices are part of the national governmental structure of the State of Kenya and to say otherwise would be absurd”■
39. Mr. Kamunde further cited *Samuel Ngari Gitbinji vs Constituency Development Fund Board & Another: Equity Bank Limited (Garnishee)* [2021] eKLR where it was stated thus:
- A government agency I believe is the same as a public agency. In Black's Law Dictionary, 8th Edition at page 67 "Public agency" is defined as:
- “ A government body with the authority to implement and administer particular legislation Also termed government agency; administrative agency; public agency; regulatory agency.”
- I find the same distinguishable. Having reached the conclusion that CDFC/ NGCDFC is a government agency, it follows that the same is protected from execution by the provisions of the GP Act and Order 29 of the Civil Procedure Rules. In the circumstances, the plaintiff could only recover the judgment debt owed by the 2nd defendant in accordance with the provisions of the GP Act and not otherwise.
40. Mr. Kamunde referred the Court to Section 21 of the *Government Proceedings Act* provides as follows:
1. Where in any civil proceedings by or against the government or any 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 21 days from the date of the order or, in case the order provides for the payment of costs and the costs are required to be taxed, at any time after the costs have been taxed, whichever is the latter, issue to that person a certificate in the prescribed form containing the 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.



2. 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.
 3. If the order provides for the payment of any money by way of damages or otherwise, or any costs, the certificate are to state the amount 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 orders are 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.
 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.
41. This section shall, with necessary modification, apply to any civil proceeding by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party. Mr. Kamunde submitted that Section 21 (4) of the [Government Proceedings Act](#) expressly forbids attachment against the government in execution of a decree or order of the Court since [the Constitution](#), statutory legislation and case law all infer that the National Land Commission is a government entity.
 42. Mr. Kamunde submitted that the only appropriate/ sensible mode of execution should be for the Applicant to file a Judicial Review application seeking mandamus orders as has been held by the Courts inter alia in [Republic vs County Secretary Migori County Government & Another](#) [20191 eKLR where the Court held as follows:

“In dealing with the application I have to address my mind to the procedure to be followed in execution of money decrees against government. It is settled that before an order of mandamus is issued the elaborate procedure provided for under Section 21 of the [Government Proceedings Act](#) (emphasis mine), Cap. 40 of the Laws of Kenya (hereinafter referred to as 'the Act') and Order 29 of the Civil Procedure Rules must be strictly complied with. For ease of this discussion I hereby reproduce Section 21 of the Act..
 43. Mr. Kamunde referred to Mulla Code of Civil Procedure, 18th Ed 2012 and observed that " the principle of resjudicata, is a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293): The principle of finality or resjudicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."
 44. Counsel referred to Section 7 of the [Civil Procedure Act](#) which reveals that for the bar of resjudicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms as follows: No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially



in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

45. Relying on the doctrine of resjudicata, Mr. Kamunde submitted that Applicant Decree holder had previously obtained a Garnishee Order Nisi on 28th May,2019, which was set aside by this court on 10th June,2019. The Parties and matters heard in the Application were directly and substantially in issue the same as the current application resulting to the Court order dated 14th July,2022. The said order has not been set aside varied or appealed against. Therefore, Counsel submitted that this Court is bound by section 7 of the Civil Procedure Act to set aside the Orders issued on 14th July,2022 and dismiss the Application therein.
46. Mr. Kamunde also submitted that there was error apparent on the face of the record of the order issued on 14/7/22. Counsel submitted that the Accounts held at the National Bank of Kenya and the Central Bank of Kenya are Special Compensation Accounts contemplated under Section 115 of the Land Act 2012. These accounts are used only for purposes of receiving and making payments to persons whose parcels of land have been compulsorily acquired by the government. The said monies are neither for the use, benefit and or disposal by the Applicant but are for compensation arising out of compulsory acquisition of land for public use. The Accounts hold monies from the government meant for employees of the Applicant and are not funds due to the Respondent. If such funds are attached, livelihoods of the employees will be negatively affected.
47. Further, counsel submitted that the account numbers cited in the order issued on 14th July,2022 are strange and not known to the applicant and that they do not hold the said amounts stated therein; that the 1st Garnishee ought to clearly state to the court the two bank accounts stated on the Order herein above, since those accounts stated do not belong to the Respondent. Mr Kamunde submitted that the error on the face of the order is substantive and does go to the root of the garnishee proceedings, whose object is to enable the Decree holder satisfy a decree. However, the Respondent cannot purport to satisfy a decree on bank Accounts that do not belong to the Judgement Debtor/Respondent.
48. On whether the amount of Kshs 397,300,323.32 in the garnishee order nisi is certain or correct vis a vis the taxed amount of Kshs 220,735,840.86 as per the judgement entered by the Court, Counsel submitted that the said amount contained in the certificate of Order dated 14th July,2022 is incorrect since such interest is not granted by the taxing master and there is no basis for the figure being sought for in the order.
49. Counsel submitted that if the Order nisi issued is not stayed by this Court it will halt all government projects as the monies do not belong to the Applicant and Government projects that have underlying costs and contractual obligations will be affected and public funds lost in the form of penalties for breach of contractual obligations since the project persons cannot be compensated after giving vacant possession of their land wherein the projects have been implemented. Counsel submitted that the Applicant has not exhausted all avenues of ensuring its fees is paid; that the Respondent has remitted monies to the Applicant in respect to payment of legal fee in other matters in which the Applicant acted on its behalf and is further willing to negotiate a reasonable amount with the Applicant in the present suit and therefore the Respondent's application dated 25th July,2022 be allowed as prayed in order to pave way for further out of court negotiations with the view of settling this matter amicably.



Determination

A. Principles Governing Garnishee Proceedings

50. Order 23 of the Civil Procedure Rules provides the statutory anchoring for Garnishee proceedings. Rule 1 of the Order provides for the issuance of a Garnishee ex parte Order Nisi, while Rule 4 provides for a Garnishee Order Absolute. The court in Miscellaneous Civil Application 405 of 2017 *Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee)* [2020] eKLR while citing the case of *Choice Investments Ltd vs Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225 stated that: “The word ‘garnishee’ is derived from the Norman-French. It denotes one who is required to ‘garnish’, that is, to furnish, a creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. The creditor can get a ‘garnishee’ order against the bank by which the bank is required to pay into court or direct to the creditor, out of its customer’s £150, the £100 which he owes to the creditor. There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: See *Pritchard vs Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow vs Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days’ notice, the order nisi operates as the notice. As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: see *Joachimson vs Swiss Bank Corpn* [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be ‘attached’, again derived from Norman-French. But the ‘attachment’ is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay.”
51. Furthermore, the court in *Otieno Ragot & Co Advocates vs City Council of Nairobi* [2015] eKLR provided a further explanation when it stated that; “Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the Garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.”
52. A reading of Order 23 therefore indicates that the test an Applicant must prove to obtain a garnishee order absolute, is that first, a decree was entered in favour of the Applicant, second, that the Applicant served upon the Garnishee and judgment debtor the order nisi seven days before hearing of the order and third, that there is no plausible explanation advanced by the garnishee as to why the order nisi should not be made absolute. It is the Applicant’s submissions, which is correct in my view, that it has satisfied all the requirements herein above as Judgment was indeed entered for the Applicant through the Ruling dated 21st June 2017 for Kshs. 220,735,840.00 and this Judgment has since accrued interest



to Kshs 397,300,323.32/- as per the Certificate of Order dated 15th June 2022. Further, the Applicant has served the Garnishee Order Nisi upon the Garnishees and the Respondent. The Applicant has further established that the Garnishees hold funds for the Judgment debtor that are sufficient to settle the outstanding debt of Kshs 397,300,323.32/- as per the Certificate of Order dated 15th June 2022. Consequently, this Application ought to be allowed as prayed.

A subsisting decree in favour of the Applicant

53. On 20th September 2016, the Taxing Master delivered a Ruling on the Applicant's Bill of Costs, taxing the same at Kshs. 220,735,840.00 and issued a certificate of taxation dated 20th September 2016 to that effect. On 10th November 2016, the Applicant subsequently filed the Application for entry of judgment to convert the Taxation Ruling and Certificate of Taxation into a Judgment.
54. Consequently, on 21st June 2017, the Court entered judgement for the Applicant for the taxed sums together with interest until payment in full. In the absence of any objection to the Taxing Master's decision by the Commission, the Applicant embarked on the task of executing its decree, as such, the decision stood. There is no pending reference and/or appeal against the taxation ruling and the ruling dated 21st June 2017 that entered judgment for the Applicant. There is therefore no reason whatsoever why the Respondent/Judgment debtor has refused to settle the decretal sums owing to the Applicant as per the Certificate of Order dated 15th June 2022.
55. In my view therefore, the first limb of the test is easily proven from an examination of the record. In *Nyandoro & Company Advocates vs National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee)* [2021] eKLR, the Court stated; "The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with."
56. The Court has further held that it will not matter that the funds are for other purported purposes in a garnishee application. All that matters is that the funds in the hands of the garnishees are sufficient to settle the Judgment debt. The Court in *Millimo, Muthomi & Co. Advocates vs Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme; Co-operative Bank of Kenya Limited & another (Garnishee)* [2021] eKLR stated that: "77. Be that as it may, the Judgment Debtor has not denied holding the said accounts with the Garnishees. It only claims that the Garnishee Order will have a ripple effect on over 8500 pensioners of the Judgment Debtor Scheme and their families since the said Bank accounts hold rental income used to pay the amount due to the Scheme's pensioners. In my view, this excuse does not hold because the Judgment Debtor's obligation to the pensioners does not rank higher than paying its other debts such as the advocate fees owing to the Decree Holder herein. 78. In the premises, I am satisfied that the Decree Holder has established a proper case for the making of the garnishee order."

Was the Decree Nisi 7 days before hearing of the same.

57. Order 23 Rule 1(2) provides that at least seven days before the day of hearing, the order nisi shall be served on the garnishee and, unless otherwise ordered, on the judgment debtor.
58. This position was buttressed in *Mengich t/a Mengich & Co Advocates & Another* where the court held, "It is a requirement that a copy of the order nisi must be served on the Garnishee and judgment Debtor at least 7 days before the adjourned date for hearing"
59. Having these requirements in mind, the Applicant filed the present Application on 14th July 2022 and obtained interim orders of Garnishee Nisi. The Applicant subsequently served the garnishee Order nisi



dated 14th July 2022 together with the Application dated 14th July 2022 upon the 1st and 2nd Garnishee on 18th July 2022 as per the Affidavit of Service sworn by one Kyalo Kamina annexed herein. That is, eight days before the hearing scheduled for 26th July 2022, therefore satisfying the second limb of the test.

Have garnishees proffered a reason as to why the garnishee order nisi should not be made absolute

60. The general rule, as espoused in *Otieno Ragot & Co Advocates (Supra)* is that the burden of proof lays with the Garnishee to show that the funds in its possession are not due to the Applicant, or that a third party's rights are involved. The Applicant submitted that since serving the garnishee order nisi upon the Garnishees, neither of them has raised an objection against the order nor disputed the sums claimed. It therefore follows that in the absence of any dispute as to the sums claimed by the Applicant, the Court is not barred from issuing an order absolute. See decision in *Nyandoro & Company Advocates (Supra)* where the court stated that: "...4. The above provision is explicit where the debt is not disputed. The Garnishees admitted the claim in its affidavit sworn by Gordon Winani dated 21st May 2020. It not only confirmed the credit balances in the accounts but it also attached Bank Statements in support thereof. The garnishee confirmed willingness to comply with this court's orders. Consistent with the provisions of Order 23 Rule 4 of the Civil Procedure Rules, 2010, I find absolutely no bar either legal or equitable preventing this court from invoking the provisions of Order 23 Rule 4." In this Case, both garnishees have merely denied the process of the Court, and have generally raised doubts, to the correctness of the accounts. But none has filed a statement of account to show whether or not there are monies in those accounts. These very meek and general denial must be dismissed by this Court. I am satisfied that the stated garnished accounts are properly cited, and that they contain enough money to satisfy the decree nisi herein once the decree is made absolute.
61. The Applicant as a bona fide service provider, is entitled to the fruits of its labour. The court in *Nyandoro & Company Advocates (Supra)* further noted that :“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.”
62. Professor Ojienda, SC in his submission satisfied the Court the Applicant has made several attempts to recover sums owed to it by the Respondent, which attempts have been disregarded by the later. Instead, the Respondent has acted in bad faith, going as far as misrepresenting the purpose of the funds contained in its accounts at the Garnishee bank accounts when in fact the monies in the accounts have been used for other purposes such as acquisition of motor vehicles for commissioners, repairs, air ticketing and quarterly rents, and can therefore be used to settle the Commission's debt to the Applicant. The Judgment debtor has not even made an attempt to have the parties agree on a payment formula despite intimating to the Court that it wanted to have the matter settled out of court. The Applicant has since the year 2017 had a mere paper in the name of a Judgment. This Court will not allow its processes for misuse in the manner that the Respondent is doing. The 1st and 2nd Garnishees on the other hand, and as I have observed above, have not expressed any dispute against the claim made by the Applicant with regard to the present order nisi despite having been served with the Garnishee order nisi dated 14th July 2022 on the 18th day of July 2022. In the view of this Court, it is in the interest of justice that the garnishee order nisi is made absolute.



63. There still remains the issues whether or not the application herein by the applicant is res judicata. It is worth noting that the initial orders of Garnishee was lifted on 10/6/2019 on the basis that the garnished account in question was a compensation account, and this was to be verified by across examination of the CEO and other Senior Officers of the Respondent, who however, on the basis of uncontroverted evidence before the court, failed to subject themselves for cross examination by the Court. Despite them being State Officers and obligated to observe the law, they refused to subject themselves to the process of the Court. That process then became inchoate. The Respondent cannot now turn around and state that these proceedings are res judicata. They are accordingly estopped by equitable estoppel. In any event, once the NLC officials failed to attend Court for cross-examination, there was sufficient grounds for new application and so the issue of res judicata does not arise.
64. On the issue of the Respondent being a government agency and therefore subject to Government Proceedings Act, I am not convinced that by that fact alone, the accounts of the Respondent cannot be attached. There are various ways and reasons as to why entities are deemed government entities. It has never been a reason that they are deemed government agencies so as to escape satisfying legal liabilities which are due. Section 3 of the NLC Act clothes NLC with capacity to undertake its proceedings; to sue and to be sued, and to instruct counsel to take up legal proceedings for or against NLC. It cannot therefore be that the NLC can appoint an advocate without resort to the opinion of the Attorney General, but when it comes to paying the advocates then it hides behind the government. This conduct is legally mischievous and must not be allowed to continue.
65. In any event, the NLC has been paying its debts due to other entities. The failure to pay the debt due to the applicant is unexplained. The CEO and other top officers of the Respondent are public servants subject to Article 10 of the Constitution. Their failure to pay the applicant his fees, and thereby allowing the amount to grow in terms of interest is a dereliction of public duty and the same has caused the public to shoulder astronomous amount of interest. The CEO and other responsible NLC officials should be personally held accountable for the accrued interest on the amount due if they continue to operate public office with impunity.
66. On the issues raised by Mr. kamunde as to whether or not there is an error apparent on the face of the Order issued on 14/7/2022, I am not satisfied that there is any error. However, any error which may be there in stating the correct applicable account can be rectified or amended. Such error does not go into the root of the matter.
67. Lastly, on whether the amount of kshs397,300,323.32 in the Garnishee Order nisi is certain or correct vis-à-vis the taxed amount of kshs.220,735,840.86 as per the judgment entered by the Court, Professor Ojienda submitted, correctly in my view, that the annexed certificates of Order from the Court indicated interest at 12% p.a. Therefore the amount sought in the garnishee is a specific amount.

Conclusion

68. I have carefully reviewed the two applications before the Court, responses thereto and submissions. In the end, I am satisfied that the applicant's application is merited while the respondent's application does not have any merit.

Orders

1. The Respondent's application herein dated 25/7/2022 and filed herein on 26/7/2022 is dismissed in its entirety.
2. Costs therein shall be for the Applicant.



3. The applicant's application dated 14/7/2022 has merit and is allowed as prayed.
4. In particular Garnishee Order absolute in terms of prayers 2 and 3 as is enough to satisfy the decretal amount of kshs.397,300,323.32 as per the Certificate of Order dated 15th June 2022 be and is hereby issued.
5. That the sum of money being Kshs.397,300,323,32.00/- be remitted into the Applicant/Judgment Holder's Bank Account particulars whereof are given hereunder: Prof. Tom Ojienda & Associates, Absa Bank of Kenya, Account No.xxxxx Hurlingham Branch (Swift Code BARCKENX) within 24 hours from the date of the issuance of Garnishee Order Absolute.
6. That the cost of this application be borne by the Respondent/Judgment Debtor, who shall also pay the costs herein incurred by the garnishees.

DATED, SIGNED AND DELIVERED THIS 2ND OF AUGUST 2022.

E. K. OGOLA

JUDGE

