



Mullimo, Muthomi & Co Advocates v Registered Trustees, Kenya Railways Staff Retirement Benefit Scheme; National Bank of Kenya Ltd & 2 others (Garnishee); Association of Kenya Railways Retirees (Intended Interested Party) (Miscellaneous Application 130 of 2018) [2022] KEHC 13519 (KLR) (Commercial and Tax) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 130 OF 2018**

**A MABEYA, J
SEPTEMBER 30, 2022**

BETWEEN

MULLIMO, MUTHOMI & CO. ADVOCATES DECREE HOLDER

AND

**REGISTERED TRUSTEES, KENYA RAILWAYS STAFF RETIREMENT
BENEFIT SCHEME JUDGMENT DEBTOR**

AND

**NATIONAL BANK OF KENYA LTD GARNISHEE
EQUITY BANK OF KENYA GARNISHEE
KCB LIMITED GARNISHEE**

AND

**ASSOCIATION OF KENYA RAILWAYS RETIREES INTENDED
INTERESTED PARTY**

RULING

1. Before court are two applications. The first one is dated September 17, 2021 by the decree-holder while the second one is dated March 10, 2022 by the intended interested party. I propose to start with the 2nd motion.
2. The 2nd motion was brought under sections 1A, 1B, 3A 91(1) of the *Civil Procedure Act*, order 22 rule 22, order 51 rule 1 of the *Civil Procedure Rules* and section 13 of the *Pensions Act*.



3. It sought the joinder of the interested party, the annulment of the garnishee order absolute issued on July 8, 2021, a declaration that the garnished accounts are not available to satisfy the judgment unless as provided under section 13 of the [Pensions Act](#) and for the refund of Kshs 36,938,918/- paid under the garnishee absolute aforesaid.
4. The motion was based on the supporting and further affidavits of John Gato Miano sworn on March 10, 2022 and March 29, 2022. The grounds were that; the intended interested party consisted of retired members of the judgment debtor, the monies in the garnisheed accounts were held in trust of those members, that under section 13 of the [Pensions Act](#), those monies were not available for execution.
5. The motion was opposed vide the replying affidavit of SJ Saenyi sworn on March 15, 2022. The grounds were that the issues being raised were *res judicata* having been determined by a ruling delivered by Ngenye J on September 8, 2021 and a ruling of the Court of Appeal made on February 8, 2022.
6. That there was no evidence to show that the deponent or officials of the intended interested party are pensioners of the judgment-debtor. That the monies in the garnisheed accounts belonged to the judgment-debtor and not the interested party. That in was too late in the day to enjoin the intended interested party.
7. The parties submitted at length and referred the court to various authorities which the court has considered.
8. In my view, the documents produced by the intended interested party show that it is incorporated, the deponent and the officials deposed to in the supporting affidavit were confirmed to be so by the registrar of societies. Further, that they were members of the judgment debtor by virtual of the pension statements produced. Accordingly, the objection by the decree-holder to that effect is hereby rejected.
9. As regards the objection raised that the issues are *res judicata*, I do not think that they are. This is so because, in the application that was determined in the subject rulings, the intended interested party was not a party. In any event, there was no allegation that the applications were being made on its behalf. In any event, it is the first time the issue of the application of sections 13 and 36 of the [Pensions Act](#) are being raised.
10. The other objection raised was that there cannot be joinder after judgment. That the intended interested party was introducing a new issue by way of pleading section 13 of the [Pensions Act](#). That that was not an issue between the principal parties.
11. I have considered the authorities relied on together with the provisions of order 1 rule 10 of the [Civil Procedure Rules](#). With due respect, the same do not bar an interested party from being joined for purposes of contesting execution. I take the application to be in the nature of an objection proceeding against the execution by way of garnishee.
12. The decree-holder submitted that the prayer for joinder was vague and could not therefore be granted. I agree with that criticism of poor drafting by the intended interested party. This is so because the name of the intended interested party was not specifically mentioned in the prayer.
13. However, the name of the intended interested party was clearly spelt out in the heading of the application and the affidavits in support. The misnomer did not mislead or prejudice the decree-holder. That was a technicality that is curable under article 159 (2)(d) of the [Constitution](#).
14. Accordingly, the objection to joinder is hereby declined and the intended interested party enjoined as an interested party in these proceedings.



15. The other issue raised was that the monies in the garnisheed accounts did not belong to the judgment-debtor but the members of the intended interested party. The decree-holder submitted that that provision was not applicable as the judgment-debtor was incorporated pursuant to the provisions of the Retirement Act. That being a separate and independent entity, the funds in those accounts belong to it.
16. The intended interested party relied on section 13 of the Pensions Act and 36 of the Retirement Benefits Act. Section 13 aforesaid provides: -
- “ 13. A pension, gratuity or other allowance granted under this Act shall not be assigned or transferable except for purposes of satisfying-
- a. A debt due to the government; or
 - b. An order of any court for payment or periodical sums of money towards the maintenance of the wife, or former wife, or minor child, of the officer to whom the pension, gratuity or other allowance has been granted,
- And shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatever except a debt due to the government.”
17. On the other hand, section 36 of the Retirement Benefits Act provides: -
- “ 36. Notwithstanding anything to the contrary contained in any other written law, where a judgment or order against a member of a scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme rules and such contributions shall not form part of the assets of the member or his employer in the event of bankruptcy.”
18. It is clear from the foregoing that, pension funds are ringfenced against execution. This is for good reason. Pension funds are savings made by persons during their active years of service for their comfort during their sun set years when all perils are abound. Parliament was alive that after retirement, the only thing that a retiree can depend on is the savings made during active service, the pension. Parliament ringfenced the same to protect this vulnerable group from the embarrassment of abject poverty.
19. The decree-holder contended that the judgment-debtor is not a scheme established under the Pensions Act but the Retirement Benefits Act.
20. Firstly, it is not in dispute that the members of the intended interested party were former or retired employees of the Kenya Railways which was a public body. They were not contributing to the pension fund which was passed on to the judgment-debtor to manage. The funds were applied to acquire properties from which the judgement-debtor collects rent and pays over to the said members as their monthly pension.
21. Indeed, it was deposed and was not denied that, the sequestration or garnishment of the subject accounts had led the members of the intended interested party to go without their monthly pension for over three months.
22. Secondly, even if the pension funds held by the judgment-debtor was not funds of a public body, the funds remained still pension which is not garnish able or attached in execution of a court proceeding under section 36 of the Retirement Benefits Scheme.



23. The view the court takes is that, while the judgment-debtor may hold in its own name the properties which bequeathed to it by Kenya Railways, the income therefrom is utilized and liquidated as pension and therefore subject to protection by section 36 of the *Retirement Act*.
24. It is a sorry state that, the judgment-debtor wronged its advocate and the advocate is entitled to recover his fees from the property of the judgment-debtor. I hold that the funds in the subject accounts are held as pension in trust of the members of the intended interested party. The advocate may execute against the properties that are in the name of the judgment-debtor.
25. In view of the foregoing, I hold that the intended interested party has partially succeeded in its application.
26. The question that arises is what orders are to be made. Prayer nos. 5 and 7 of the motion cannot be granted. The orders cannot be granted under the application as it would be to sit on appeal of the ruling of July 8, 2021. Each execution proceeding constitute an independent and distinct proceeding. The garnishee proceedings that culminated in the ruling of September 8, 2021 were concluded and cannot be revisited here.
27. The other application is motion on notice by the decree holder pursuant to section 38 of the *Civil Procedure Act* and order 23 rule 1 and 2 of the *Civil Procedure Rules*. In view of the outcome of the application by the interested party, that application cannot succeed.
28. Accordingly, the application dated March 10, 2022 is allowed in the following terms: -
 - a. Association of Kenya Railways retirees is hereby enjoined as an interested party herein.
 - b. A declaration hereby issues that the funds in the garnisheed accounts are not available to satisfy the decree herein as it would be contrary to sections 13 of the *Pensions Act* and 36 of the *Retirement Act*.
 - c. The application dated September 8, 2021 is dismissed with no order as to costs.
 - d. Since the application dated March 10, 2022 was only partially successful, I will order that each party do bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

A. MABEYA, FCIArb

JUDGE

