



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.1 OF 2013

DISNEY INSURANCE BROKERS.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

1. There are two applications for consideration and subject for this Ruling. The first application is the Plaintiff's **Notice of Motion** application dated **19th May, 2021** and the second is the Defendant's **Notice of Motion** application dated **11th June, 2021**.
2. The Plaintiff's **Notice of Motion** dated **19th May, 2021** is a garnishee application, by which on **31st May, 2021** the court granted a garnishee order nisi freezing the Defendant's Bank Account Nos.116xxxxxxx and 118xxxxxxx, both held in KCB Bank and Account Nos.010xxxxxxxxxxx held in National Bank on 31st May 2021. The only prayer pending determination in that application seeks the garnishee order nisi to be made absolute and the sum of Kshs.118,460,320/= collectively held in the listed bank accounts be released to the Plaintiff.
3. The grounds upon which the application is premised are on face of the application and further in the **Supporting Affidavit of Charles Kanyi Kuiyuka**, the Plaintiff's Managing Director. He has averred that a Judgment was entered in favour of the Plaintiff in this matter on **28th February, 2018** and the decretal sum now stands at Kshs.118,460,325/- with interest accruing at the rate of 12% p.a.
4. He avers that the Plaintiff has tried all avenues set by law to get the fruits of its Judgment but the efforts have been fruitless. He goes on to state that *first* the Plaintiff obtained a mandamus order on **11th March 2019** compelling the Defendant to satisfy the decree in this matter but the Defendant has failed to comply with the said order. *Secondly*, that on **25th July, 2019**, the court issued an order that the Defendant be committed to civil jail for six months and thereafter warrants of arrest were issued on **29th July 2019** but the Plaintiff has been unable to enforce them. It is averred that the Defendant unsuccessfully challenged the orders of arrest.
5. The Plaintiff further avers that it filed a **Petition No.37 of 2020** seeking a declaration that the Defendant and the Governor of Mombasa county Government are unfit to hold public offices. The Petition is still pending.
6. According to the Plaintiff, having tried all other avenues, it is unlikely that the Defendant will ever settle the decretal sum and the sum now identified and subject of these garnishee proceedings, should be released to the Plaintiff in satisfaction of the debt.
7. Lastly, the Plaintiff has averred that it would not be in the interest of justice if the County Government is left to ignore the decrees issued against them and thereafter fails to settle the same. That in such circumstances, various courts have upheld the garnishment against the County Government and this court should follow the same trend.
8. The second application is the Defendant's **Notice of Motion** application dated **11th June, 2021**. It substantially seeks the garnishee order nisi issued by this court on **31st May, 2021** be stayed and the court declares the entire garnishment proceedings incompetent, irregular and a nullity ab initio. In my view, the Defendant's application is a disguised response to the Plaintiff's application and technically a response to the garnishment application.
9. In any event the Defendant has averred that the proceedings were undertaken without due regard to the law, specifically **Section 21(4)** of the **Government Proceedings Act** and is an affront to provisions of **Order 29 rule 2 & 4** of the **Civil Procedure Rules, 2010**. The germane of those provisions is that no execution can be undertaken against the Government in the form of garnishee attachment. That notwithstanding, the Defendant avers that the garnishee order nisi issued by this court has curtailed its ability to pay its staff salaries and has made it impossible to run its day to day operations.

10. Nonetheless, the Plaintiff opposed the Defendant's application by filing a **Notice of Preliminary Objection** dated **15th June, 2021**. The grounds relied on are; firstly that the Defendant is in contempt of the court order issued in **Judicial Review Case No.63 of 2018** having been ordered to repay the decree sum owing to the Plaintiff and subject of the garnishee proceedings herein. Secondly, that **Section 21(4)** of the **Government Proceedings Act** and **Order 29(2)** and **(4)** of the **Civil Procedure Rules, 2010**, are in conflict with **Articles 22, 23, 27, 28, 40, 43, 48** and **50** of the **Constitution of Kenya, 2010**.

11. In view of the **Preliminary Objection**, the Defendant also filed **grounds of opposition** dated **15th July, 2021** and averred that the Constitutionality of **Section 21(4)** of the **Government Proceedings Act** and **Order 29 of the Civil Procedure Rules** has never been challenged before any constitutional court and they are thus binding.

12. Directions were issued for parties to dispose the application by way of written submissions and both parties dutifully filed their submissions.

13. The Plaintiff filed its submissions on **23rd July 2021** while those for the Defendant were filed on **22nd June, 2021**. I have read through those submissions and they reflect the grounds canvassed by each party in their respective pleadings. I therefore need not to replicate the same here having given a summary thereof above.

ANALYSIS AND DETERMINATION

14. I have considered the applications and the responses thereof. I have as well read through the authorities relied on by the parties and in my humble view, find that only two issues arise for determination which are:-

a. Whether the Defendant is in contempt of court and if so, whether the Defendant can be heard notwithstanding the contempt.

b. Whether the Defendant is subjected to garnishment proceedings and consequent order thereof.

15. The first issue has already been addressed vide a Ruling I delivered when the applications came up for hearing and I will not belabour in duplicating the same here.

16. As regards the second issue, the laid down procedure in law for executing decrees against the Government is provided for under **Section 21** of the **Government Proceedings Act**. It provides that:-

(1) 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.

(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 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.

(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.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is party."

17. The Civil Procedure further provides in **Order 29 rule 2 & 4** as follows:-

Rule 2: rules to apply to proceedings by or against the government;

(1) Except as provided by the Government Proceedings Act (Cap. 40) or by these Rules—

(a) these Rules shall apply to all civil proceedings by or against the Government; and

(b) civil proceedings by or against the Government shall take the same form as civil proceedings between subjects and shall, if no special form is applicable, take the form of a suit instituted by a plaintiff.

(2) No order against the Government may be made under—

(a) Order 14, r. 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).

Rule 4(1)

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.

18. Aside from the law, the courts have expressed their views on this subject. In the case of **Kennedy Wainaina Ngenga –vs- County Government of Nairobi & Co-operative bank of Kenya (Garnishee) 2019 eKLR**, Muigai J stated inter alia:-

“The above legal provisions confirm that the process of execution with regard to Government Institutions is prescribed by the Government Proceedings Act. The Civil Procedure Act & Rules 2010 also prescribe the execution process and exempts the Government from the said process. This means although execution is a right enforced by a decree holder against a Judgment debtor execution shall be carried down where it involves government and it shall be within the purview of Government Proceedings Act. Therefore, the garnishee proceedings herein against the judgment debtor; the County Government of Nairobi are improper in law to the extent of the recovery process”.

19. Based on the statutory provisions and the authority cited above, the process of execution in relation to Government institutions is confirmed. They preclude the issuing of garnishee orders as against the Government.

20. The Plaintiff on the other hand terms these provisions as unconstitutional vis-à-vis **Articles 22, 23, 27, 28, 40, 43, 48 and 50 of the Constitution of Kenya 2010**. And in response to the Defendant’s contention that no Petition has ever been filed to challenge the constitutionality of **Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules**, the Plaintiff has asserted that the court would be abdicating its duty were it to direct the Plaintiff to file a Petition to challenge the constitutionality of those provisions.

21. The Plaintiff has added that courts, including this court, have held the garnishee proceedings in circumstances similar to the case at hand. It is submitted that this court upheld garnishee orders in the case of **Blue Shield Insurance Company –vs- County Government of Mombasa** and therefore this court should not depart from its earlier decision by virtue of the doctrine of stare decisis and the principles of good governance as provided for under **Articles 10 and 47 of the Constitution of Kenya, 2010**.

22. I have read through the **Blue Shield Insurance case** and the case of **Shamz Enterprise Ltd –vs- Isiolo County Government**, which the Plaintiff has relied on. A commonality in both cases is that the decree holders, besides having pursued Judicial Review had further taken out notices to show cause against the county officials and thereafter a consent on payment of the decretal sum recorded. It is after the Defendants had reneged the consent Judgments that the garnishee orders absolute were confirmed. The scenario in those cases is thus different from the circumstances of this instant case.

23. Just to add, this court in the case of Blue Shield Insurance case expressed the view **that Section 21 of the Government Proceedings Act contravened Article 48 of the Constitution**, to the extent of elevating the County Government against the principle of equality before the law. It impedes access to justice, where after exhausting and laid down procedures on execution against the Government, the decree holder cannot be allowed to resort to other modes of execution provided for under the law.

24. Further, it is my view that a party should not be allowed the protection under the law when it chooses to disobey court orders or purports to comply with the orders on its own terms. There is therefore a dire need for an amendment of those provisions or a declaration for the unconstitutionality of those provisions to be sought formally before the constitutional court.

25. Be that as it may, I embrace the position that besides pursuing the Judicial Review Order for Mandamus, the Judgment Debtor has to issue a notice to show cause against the Government officers responsible for payment of claims against the Government before moving the court under garnishee proceedings. Therefore the garnishee proceedings herein should have been taken out had the Plaintiff/Applicant exhausted all other forms or avenues of execution against the County government, including notice to show cause issued against the county officers. For that reason, no garnishee proceeding ought to have been brought at this stage and in this regard the garnishee order nisi and any subsequent order made must and are hereby set aside.

26. Having stated the above and for avoidance of doubt it is to be noted that the Judgment and the decree of this court for now remain in

force unless ordered otherwise. What has been affected are the garnishee proceedings.

27. Each party shall bear its own costs.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 25TH DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gikandi counsel for the Plaintiff/Decree Holder

Mr. Mbogo Counsel for Defendant/Judgment Debtor

Court Assistant - Bancy