



Commissioner of Lands (National Land Commission) v Heirs of the Late Wambugu Mathangani Family/Viz, Anna Wanjiru Mathangani & 100 others; Central Bank of Kenya & another (Garnishee) (Environmental and Land Originating Summons 9 of 2009) [2023] KEELC 20064 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 9 OF 2009**

**JO OLOLA, J
SEPTEMBER 28, 2023**

BETWEEN

THE COMMISSIONER OF LANDS (NATIONAL LAND COMMISSION) PLAINTIFF

AND

THE HEIRS OF THE LATE WAMBUGU MATHANGANI FAMILY/VIZ, ANNA WANJIRU MATHANGANI AND 100 OTHERS DEFENDANT

AND

CENTRAL BANK OF KENYA GARNISHEE

NATIONAL BANK OF KENYA LIMITED GARNISHEE

RULING

1. By the Notice of Motion herein dated January 16, 2023, Peter Muthoni Advocates, styling themselves as the Advocates for the Applicants (hereinafter “the Applicants”) pray for orders framed as follows:
 2. That this Honourable Court may be pleased to make a garnishee order nisi against the First Garnishee herein, the Central Bank of Kenya and the Second Garnishee herein the National Bank of Kenya Limited, in respect to Accounts at their branches within Nairobi City, ordering the immediate attachment of all the monies deposited, lying, being held in deposit by both named Garnishees to the credit of the Plaintiffs/Respondent Commission, the National Land Commission, to satisfy the claim for Kshs.8,500,000/- only, in pursuance of the Order this Honourable Court issued herein on the 23rd June 2021, and remit the stated sum to the Deputy Registrar of this Honourable



- Court, who will in turn, share it among the beneficiary seven (7) firms of Advocates, listed in the said Order, for each of logistics;
3. That this Honourable court may be pleased to issue notices to show cause to both Garishees (and that they) may be ordered to appear (before) this Honourable court to show cause why they should not release the said monies so as to satisfy the said claim in the said order; and
 4. That the costs of this application be paid by the Respondent Commission.
2. The application which is supported sworn by an Affidavit by Mr. Peter Mwangi Muthoni Advocate is based on the grounds stated on the face thereof as follows:
- (i) That the Respondent Commission has unreasonably declined to comply with the honourable court's order of the June 17, 2021, denying Counsels legal fees for their service's;
 - (ii) That the Respondent Commission's failure to pay the stated amount has greatly exposed Counsel to financial peril, affecting their pecuniary wellbeing, and their legal practice;
 - (iii) That the Respondent is a chapter 15 Commission established under the Constitution of Kenya, 2010, at article 248, sub-article (1) Paragraph (b), and should uphold the Constitution and the rule of law; and
 - (iv) That enforcement of a Judicial decision is vital and critical in dispute resolution, and ought to be effective, because judicial officers do not render Judgments in vain.
3. The National Land Commission named as the Plaintiff/Respondent in the Motion is opposed to the application. In a replying affidavit sworn on its behalf by its Director, Legal Affairs and Dispute Resolution Department Brian Ikol, the respondent avers that it is an independent Commission established under article 67(1) of the Constitution and is operationalised by the National Land Commission Act No. 5 of 2012 and that it has as its fundamental functions, the management of public land on behalf of the National and County Governments.
4. The respondent avers that on 23rd June 2021, this Honourable Court *inter alia* made an order for the release of Kshs.10,000,000/- out of the compensation money herein set aside for advocates costs in the matter, as well as the maintenance of the late Wambugu Mathangani's grave, the Advocates costs being Kshs.8,500,000/- to be shared amongst certain Law Firms.
5. The respondent avers that it was never served with any summons to enter appearance or any application herein and that the matter proceeded *ex-parte* without their knowledge. The Respondent asserts that the previous proceedings herein were between the Commissioner of Lands as then represented by the Honourable the Attorney General on the one side and the Applicants on the other. The Respondent was not in existence when the cause of action arose and hence it never participated in the proceedings.
6. The respondent further avers that despite the applicants being aware of its existence as a successor in title to the office of the Commissioner of Lands, the applicants did not serve them with any documents and no evidence was adduced of any service upon themselves.
7. The respondent avers further that neither the Ministry of Lands and Physical Planning nor the defunct office of the Commissioner of Lands has ever transferred the alleged compensation funds to itself and



- hence the said funds are neither in its custody and/or possession. In the circumstances, the respondent avers that the orders ought to be addressed to the Attorney General who fully participated in the proceedings.
8. The Central Bank of Kenya, named as the 1st Garnishee herein did not enter appearance and/or respond to the application.
 9. The National Bank of Kenya cited as the Second Garnishee is equally opposed to the application. In a replying affidavit sworn on its behalf by its Hill Branch Operations Manager Davis M. Miriti, the 2nd Garnishee avers that it has not denied the National Land Commission access to withdraw any money from accounts allegedly held with themselves for whatever purposes.
 10. The 2nd Garnishee asserts that the applicant has not tendered any sufficient evidence to show why nisi orders should issue against them as no execution pleadings have been annexed to show attempts made to recover the alleged debt from the debtor.
 11. I have carefully perused and considered the application as well as the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
 12. As I have indicated at the beginning of this Ruling, the application before this Court was instituted by the Law Firm Peter M. Muthoni Advocates as the Advocates for “the Applicants”. Those Applicants apparently consist of a group of seven (7) Law Firms which had taken up various roles in these proceedings. There did not however appear to be much consensus amongst the said Applicants as one of them Messrs Wanyiri Kihoro & Company Advocates representing a number of beneficiaries of the Estate of the late Wambugu Mathangani actually filed Grounds of Opposition dated February 8, 2023 objecting to the application.
 13. Be that as it may, by their application before the Court, the Applicants urged the Court to issue a Garnishee Order nisi against both the Central Bank of Kenya and the National Bank of Kenya in respect of some undisclosed accounts said to be at their branches within the City of Nairobi. It was the Applicants’ case that this Court should order the immediate attachment of all the monies deposited, lying or held in those accounts which were to the credit of the National Land Commission to satisfy a claim of Kshs.8,500,000/- said to be due to the Applicants.
 14. The Applicants told the Court that the Respondent Commission had unreasonably declined to comply with orders issued against them by the Court on 17th June, 2021 and that by so doing, they had greatly exposed the Learned Counsels to great financial peril that had affected the Counsel’s pecuniary well-being and their respective legal practices.
 15. The Applicants asserted that as a chapter 15 Commission established under the *Constitution* of Kenya 2010, the Respondent was bound to uphold the *Constitution* and the rule of law and that having so failed to do, this Court ought to compel them to do so by issuing the orders sought herein.
 16. As it were Garnishee proceedings are a special specie of process by which a Judgment creditor may attach (or garnishee) debts due in satisfaction of the Judgment debt. In such an instance the debt owed by the third party to the Judgment debtor, on being attached, shall ultimately be paid by him to the Judgment creditor on the order of the Court.
 17. In that regard, Garnishee proceedings serve to facilitate the process of satisfaction of Judgment debts and execution of decrees to enable the decree-holder to realise the fruits of the decree. A perusal of order 23 of the *Civil Procedure Rules* under which the application is premised reveals that it prescribes a two-steps process in Garnishee proceedings. The first is a garnishee order nisi. Nisi is Norman-French



meaning “unless”. It is thus an order to the Bank communicating that unless there is some sufficient reason why the Bank should not pay the decree, it will be required to pay money held in the Judgment Debtor’s account. If no sufficient reason appears, the Garnishee order is made absolute.

18. In the matter before me, it was difficult to ascribe the terms “Judgment-creditor” and Judgment-debtor” to the Parties before the Court. The Applicants in the strict sense of the word were not the real beneficiaries of these proceedings as the subject of the proceedings who were awarded compensation had appealed on the issue of quantum which matter remained pending for determination as at the time this application was instituted.
19. Secondly, those proceedings had been instituted by the Respondent’s predecessor the Office of the Commissioner of Lands which had sought to compulsorily acquire L.R No. Aguthi/Gatitu/3447 and to compensate the previous owners. While it was settled that the Respondent had taken over the functions of that now defunct office, there was nothing placed before the Court to demonstrate that the Respondent herein had been substituted for the said office and/or that they had been enjoined herein and had thus assumed the debts that may have been owing from the Office of the Commissioner of Lands. It was not even clear if the Respondent had any account known to the Applicants with the two Garnishee Banks as none was specified.
20. Perhaps even more fundamentally, it was not in dispute that the respondent is an independent constitutional commission established under article 67 of the *Constitution* and tasked with the duty of managing public land on behalf of the National and County Governments and that the resulting order was thus an order made against the Government. Such bodies are protected under sections 21(4) of the *Government Proceedings Act* which provides thus:

“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 as such, of any money or costs.”
21. Under order 29 of the *Civil Procedure Rules* which provides for proceedings by or against the Government, the term “order against the Government” is defined to mean.

“... any order (including a Judgment, decree, rule, award, declaration and an order for costs) made in civil proceedings brought by or against the Government, or in connection with any arbitration to which the Government is a Party, in favour of any person against the Government or against a Government department or against a public officer as such.”
22. For the avoidance of any doubt, order 29 rule 2(2) of the *Civil Procedure Rules* provides thus:
 - (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);
 - (c) Order 23 (Attachment of debts);
 - (d) Order 40 (injunctions); and
 - (e) Order 41 (Appointment of receiver).



23. The rationale or the objective for the above provisions in law were well spelt out in *Kisya Investments Limited v Attorney General & another* (2006) 1 KLR 74, wherein the Court observed as follows:

“Order XXVIII, rules 2(1)(a), (2) and (4) of the *Civil Procedure Rules* (now Order 29) subjects themselves to the provisions of the *Government Proceedings Act* which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the Courts are bound to apply the law as it exists.

Many a times, such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the Court, the application of any written law cannot amount to an abuse of the process of the Court however much its effect is harsh or even undesirable... History and rationale of Government’s immunity from execution arises from the following:- Firstly, there had been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i) the raising of the revenue – (by taxation or borrowing); (ii) its expenditure; and (iii) the audit of public account. The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided in the Government’s expenditure. It is for this reason that section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principles that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorized payment may be recovered. (See *Halsbury’s Laws of England* 4th Edition Volume II Paragraph 970, 971 and 1370).

As a result of the aforesaid provision which was borrowed from the *Crown Proceedings Act*, 1947 (Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over expenditure.

This is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgments. While existence of claims and decrees may be known to Ministries and Departments, they have to notify the Ministries of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. In a case from New Zealand – *Auckland Harbour Board v R* (1924) A C 318 the second situation which arises from the above is that once a decree or judgment is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Comptroller and Auditor General etc for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments. Considering the nature of Government structure, procedures, red tape and large number of claims, this could take a long time.

If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and Judgments and it will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached, its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircrafts, ship and boats will be attached.

There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The



Government, and therefore, the State operations will ground to a halt and be paralysed and soon the Government will not only be bankrupt, but its constitutional and statutory duties will not be capable of performance. This will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the law that prohibits execution against and attachment of the Government assets and property.”

24. Arising from the foregoing, it was clear to me that even where the Applicants were to be considered to wield a proper decree for execution against the Respondent, the execution thereof must be done within the purview of the *Government Proceedings Act*.
25. The result is that the garnishee proceedings herein against the national land commission were misconceived, irregular and incompetent. The motion dated January 16, 2023 is dismissed.
26. I make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 28TH DAY OF SEPTEMBER, 2023.**

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J. O. Olola

JUDGE

