



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT GARISSA

CIVIL CASE NO.8 OF 2020

TAKAFUL INSURANCE OF AFRICA LTD (KENYA).....DECREE HOLDER

VERSUS

THE COUNTY GOVERNMENT OF GARISSA.....1ST JUDGEMENT DEBTOR

THE COUNTY SECRETARY GARRISSA

COUNTY GOVERNMENT OF GARISSA.....2ND JUDGEMENT DEBTOR

CHIEF OFFICER FINANCE & ECONOMIC PLANNING

GARISSA COUNTY.....3RD JUDGMENT DEBTOR

THE GOVERNOR CENTRAL BANK OF KENYA.....GARNISHEE

RULING

1. The decree holder is a limited liability company incorporated in the Republic of Kenya and provides insurance services. It instituted this suit on the 16th of September 2019 claiming to have rendered various services to the first Judgement debtor including motor vehicle insurance amounting to Kshs 119, 799,426; Employers liability cover amounting to Kshs 77,991,818; medical insurance cover amounting to Kshs 23,574,399 all totalling to Kshs 221, 365,643 which amounts remain unpaid.
2. The 1st Judgement debtor is a County Government and was sued as such, the 2nd Judgement debtor is the accounting officer of the 1st, whereas the Garnishee is the Central Bank of Kenya.
3. For lack of filing a defence a default judgement was entered in favour of the Decree holder. In a draft defence attached to an application for setting aside the default judgement, the judgement debtor alleged that the contracts entered into by the decree holder and its predecessor were not properly procured; further the said insurance covers were prematurely terminated by the decree holder and that premiums were paid for services rendered.
4. The application subject of this ruling dated the 20th of November 2020 relates to the Garnishee proceedings. Prayers 1 & 2 thereof are now spent. The remaining prayers seek setting aside of the Garnishee orders issued on the 29th of October 2020 and costs of the application.
5. The application is predicated on grounds that the default judgement was entered against the applicant for the sum of Kshs 221,365,643 together with costs though no hearing notice was served upon the judgement debtor; since there was no order for stay the decree holder filed garnishee proceedings on the 19th of October 2020; did not serve the garnishee or the applicant; obtained final orders and as a result the 1st judgement debtor's bank account has been frozen; the said garnishee proceedings and orders were a nullity *abinito* and contrary to the Government Proceedings Act, Cap 40 of the laws of Kenya; the court in issuing the garnishee orders was erroneous, and execution may issue unless the orders are set aside.
6. The decree holder filed grounds of opposition and a replying affidavit both dated the 4th of December 2020. In its opposition it argues that this court is functus officio having delivered its ruling on the subject on 28th of April 2020; the garnishee proceedings are *ex parte* in nature as participation of the judgement debtor is not envisaged; further the decree herein is final as no appeal has been preferred; further the judgement debtor having sought for setting aside failed to comply with the conditions set by this court when setting aside its default

judgment; lastly the Government Proceedings Act does not cover to the County Governments.

7. This court in its ruling of the 12th of February 2020 set aside the default judgement conditionally. Being aggrieved by the said order the judgement debtor sought for stay pending appeal against the said ruling which was declined; the judgement debtor then moved the Court of Appeal and its application is yet to be determined.

8. The matter pending in the court of appeal has to be distinguished from the application subject of this ruling. The Decree Holder moved this court for Garnishee proceedings and obtained an *ex parte* order in its favour on the 29th of October 2020.

9. The issues for determination in the current application are;

I. whether this court is functus officio,

II. whether the court's *ex parte* order of 9th November 2020 ought to be set aside, and

III. whether the Government Proceedings Act apply to County Governments

10. Indeed, the provisions of Order 23 of the Civil Procedure rules envisage that post the *ex-parte* application where the order Nisi is issued the court will be engaged further by either the Garnishee and the judgement debtor.

Order 23 provides as follows;

(1) A court may, upon the *ex parte* application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

(2) 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.

(3) Effect of garnishee order Service of an order that debts due to a judgment-debtor liable under a decree shall be attached, or notice thereof to the garnishee in such manner, as the court may direct, shall bind such debts in his hands.

Execution against garnishee

(4) If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.

11. In *Cecilio Murango Mwenda T/A Murango Mwenda & Company Advocates versus Isiolo County Government & Consolidated Bank of Kenya Ltd (Garnishee)* 2017 eKLR. Mabeja J had this to say of the Garnishee proceedings

"10. It is clear from the fore going that the judgement debtor must be served with the order *nisi* unless the court has ordered otherwise. From the record, it is clear that the court did not order otherwise. It therefore follows that it is a legal requirement that the Judgement debtor must be notified of the Garnishee proceedings.

11. In my view, the requirement for such notice is to enable the judgement debtor to appear and either dispute the alleged amount of decree or put any defence that it may have in respect of the decree holder's claim. This is so because, there may be a defence to the decree holder's claim, for example that the decree is statute barred or any other defence.

12. Accordingly, my view is that although the Garnishee proceedings are between the decree-holder and the Garnishee, there

is nothing in Order 23 that bars the judgement debtor from being heard. In any event, it is the cardinal principal of the rule of law that unless expressly provided for, no adverse orders should be made without such party being heard.”

12. **Order 51 Rule 15** of the Civil Procedure rules also empowers the court to set aside *ex-parte* orders.

In this instance the decree holder filed for Garnishee proceedings *ex- parte* and ostensibly obtained final orders. The question is whether the entire Garnishee proceedings were proper and whether the court as moved can consider the issues raised?

The court is of the view that since substantial issues of law have been raised by the judgement debtor putting into question the entire garnishee proceeding the court cannot be said to be *functus officio*, logically the judgement debtor cannot be shut out.

13. Upon analysing the facts of the case and the law, this court’s reading of the above quoted provision of the law and being in agreement with the findings of Mabeya J above, is of the considered opinion that the *ex parte* order issued was an *order Nisi* and not a final. It ought to have been served upon the Judgement debtor and the Garnishee to notify them of the proceedings and to allow reactions.

14. The law equally empowers the court to interrogate the both the Garnishee and the Judgement debtor before issuance of a final order. The above steps were not undertaken and therefore the order obtained by the decree holder cannot be treated as the final order of this court, though it appears that the said *ex parte* order *Nisi* was issued as a final order. Notable is that the judgement debtor was not served as envisaged within 7 days. Neither was the Garnishee summoned to court before the final order was issued. The court agrees with the judgement debtor that there was an error in the garnishee proceedings.

16. In the circumstances therefore, this court finds and holds that it has jurisdiction to hear and determine the application before it for the very reasons stated above.

16. The next question is whether a County Government can be subject of Garnishee proceedings? or is it exempted from such proceeding as the National government.

In making a determination on this subject which has been considered severally by the courts one would have to read together the provisions of the Constitution of Kenya 2010, the Government Proceedings Act and the Civil Procedure Rules.

17. The Constitution of Kenya 2010 states as follows in relation to the Government;

Article 6

(1) The territory of Kenya is divided into the counties specified in the First Schedule.

(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

The import of the above provision of the Constitution is that the Government in Kenya is split into two levels. One is the Government at the National level and the second is Government at the County level, both form “governments” that are separate and distinct with different functions as set out in the Constitution.

18. On its part The Government Proceedings Act in **Section 21** provides as follows in regard to orders against the Government;

Satisfaction of orders against the Government

(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 a party.

19. 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

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

- 1. (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, 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).**

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.

20. Aside from the law; the courts have discussed the subject severally.

“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 Judgement Debtor; the County Government of Nairobi are improper in law to the extent of the recovery process. However, the judgement debt remains unchallenged and a valid order and decree of this court.”

In Club Limited Versus the Governor, Kajiado County Government & Kenya Commercial Bank MISC Application No. 442 of 221 Ogola J stated;

“The draftsman, in incoming up with the Government Proceedings Act had in mind the interest of the Government as a whole. The County Government is not an exception.

I think I have said enough to show that the County Government is “Government” as per the Government proceedings Act. Therefore, the provisions of the said Act apply to proceedings brought against County Governments. Having made the foregoing observations, it therefore follows that the Garnishee proceedings instituted by the applicant are not sustainable.”

22. Whether the County Governments are part of Government is now moot. Based on the law as quoted above and authorities cited, much has been said and the matter is now settled. And therefore, touching on the matter before court the 1st Judgement debtor is Government and therefore no Garnishee proceedings ought to have been brought against it. And in this regard the Garnishee order Nisi and any subsequent order made must and are hereby set aside.

23. Having stated the above and for avoidance of doubt it is to be noted that the judgement and the decree of this court for now remain in force unless ordered otherwise. What is affected is the Garnishee proceedings.

24. Costs in the cause.

DATED IN GARISSA THIS 17TH DAY OF DECEMBER 2020

ALI-ARONI

JUDGE