



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.16 OF 2018

BETWEEN

THE COUNTY SECRETARY

COUNTY GOVERNMENT OF BUSIA.....APPELLANT/APPLICANT

AND

MANWARI & COMPANY ADVOCATES.....RESPONDENT

RULING

1. The respondent herein obtained a judgment against the appellant /applicant and a decree dated 22nd June 2017 issued, sought to execute the said decree. A warrant of arrest against Nicodemus Mulaku the Busia County Secretary was applied for and issued. It has given rise to the present application.
2. It was argued for the applicant that the proper procedure ought to have been that of applying for mandamus.
3. The respondent contended that the Secretary had been notified before the warrant of arrest was issued.

It would appear on the face of the warrant that execution by way of a warrant arrest was erroneous. It is improper to execute against an individual for liabilities of a Government. This can only be done in exceptional circumstances for instance where it shown that the government has funds to pay but the accounting officer is deliberately refusing to pay. In **Braeburn Limited vs. Gachoka and Another** [2007] 2 EA 67 where the Court stated as follows:

To determine whether the right to liberty is limited by the law prescribed, and that the person whose liberty is circumscribed has been subjected to due process under that law an independent and impartial court established by the law as per section 77(1) and 77(7), this Court must examine the concerned law in the light of section 84(1) of the Constitution to establish that both the substantive and procedural law under which a person may be deprived of his liberty, itself meets with the constitutional safeguards under those provisions of the Constitution and in a manner justifiable in a democratic society..... Rules 18 and 32 of Order 21 of the Civil Procedure Rules do meet and in a very special way in relation to a debtor surpass the standard laid down in the Constitution for the deprivation of a person's liberty. This is so because the deprivation of a person's liberty whether for contempt of court (under section 72(1)(b) of the Constitution), or for default to pay a money decree, is in the nature of criminal proceedings and for a person to suffer the loss of liberty, it must be in the words of that hackneyed phrase, be proved beyond reasonable doubt, that he has the means to pay but that he has refused and/or neglected to pay.....To Conform with that high standard proof, the discretion conferred upon the court to either issue a warrant of arrest and instead issue a notice calling upon the judgement to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison, must be construed, strictly, that is to say mandatorily, that upon an application by a decree holder for execution of a money decree by way of arrest and committal to prison the court to which an application is made for issue of a warrant of arrest shall in the instance first issue a notice to the judgement debtor to appear in court and show cause why he should not firstly be arrested, and secondly, committed to prison. That is the first step towards the execution of a

decree for payment of money...

4. The procedure for satisfaction of orders against the Government is provided for under section 21 of the Government Proceedings Act. Subsection 4 states:

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. In addition to the Statutory procedure provided for under section 21 of the Government Proceedings Act, the best procedure before execution against the Government was to apply for an order of mandamus. This was held by the court of appeal in the case of **Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74**

Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject 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 has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for 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 principle 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 unauthorised payment may be recovered. *SEE HALSBURY'S LAWS OF ENGLAND 4TH EDN VOL. 11 PARA 970, 971 AND 1370*. As a result of the foregoing, 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 the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. *SEE AUCKLAND HARBOUR BOARD vs. R (1924) AC 318, 326*. The second situation, which arises from the above, is that once a decree or judgement 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 and considering the nature of the 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 judgements and will be inundated (sic) with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, 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 paralysed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and 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.

6. From the foregoing, I find that the application is merited. The order for warrant of arrest against the applicant is set aside. Costs to the applicant.

DELIVERED and SIGNED at BUSIA this 25th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE