



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL APP. NO.278 OF 2017

GREENSTAR SYSTEMS LIMITED.....APPLICANT

VERSUS

KENYATTA INTERNATIONAL CONVENTION

CENTRE (KICC).....RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST GARNISHEE

KENYA COMMERCIAL BANK LIMITED.....2ND GARNISHEE

R U L I N G

Before this Court is the Notice of Motion dated **7th August 2018**, by which the **KENYATTA INTERNATIONAL CONVENTION CENTRE** (the Applicant/Judgment – Debtor) sought the following Orders:-

“(1) SPENT

(2) SPENT

(3) THAT the execution proceedings commenced by the Respondent/Decree-Holder against the Applicant/ Judgment Debtor be stayed and/or set aside.

(4) THAT costs of the Application be provided for”.

The application which was premised upon **Order 22 Rule 22 of the Civil Procedure Rules (2010), Section 21(4) of the Government Proceedings Act, Cap 40** and all other enabling provisions of the law, was supported by the affidavit of **GRACE MAUREEN CHOGO**, the Legal Manager of KICC sworn on **7th August 2018**.

The Respondent/Decree-Holder **GREENSTAR SYSTEMS LIMITED** opposed the application by way of the Replying Affidavit deponed by **JOHN IBAE**, the Managing Director of the Respondent on **15th August 2015**.

BACKGROUND

The parties herein had been involved in Arbitration and on **14th July 2017** the Respondent filed an application seeking to have the Arbitral Award enforced by the Court. By a Ruling delivered on **19th January 2018**, **Hon Lady Justice Olga Sewe** adopted the Final Award as binding and granted the Applicant leave to enforce the same. A decree was issued on **19th January 2018** for **Kshs.59,929,710/62**.

The Applicant then filed an application dated **20th July 2018** seeking to have the OCS KICC Police Station assist **Kendest Auctioneers** and its agents to execute warrants of attachment of moveable property in execution of the Decree issued on **19th January 2018**. The Respondent later withdrew this application but then filed an Application dated **3rd August 2018** praying that the court make a Garnishee Order Nisi against Co-operative Bank of Kenya Limited, City hall Branch on Account No.**01141093218300** and Kenya Commercial Bank Limited

KICC Branch on Account No.1102294810 and that all monies held in those two accounts be attached to answer the Decree to the extent of Kshs.60,070,427103 being the decretal sum.

The Applicant then filed this present application on **8th August 2018** declaring that it was Government Parastatal and as such any execution against it is governed by the provisions of **Section 24(1) of the Government Proceedings Act, Cap 40 Laws of Kenya**.

The Court directed that the application be disposed of by way of written submissions. The Applicant duly filed its written submissions on **24th August 2018**, whilst the Respondent filed their written submissions on **6th September 2018**. Parties appeared in Court for highlighting of those written submissions on **19th September 2018**. **MS OKOTH** urged the application on behalf of the Applicant whilst **MR KYALO MBOBU** appeared for the Respondent.

For the Applicant it was contended that the Respondent had illegally and unprocedurally commenced execution proceedings against KICC contrary to the provisions of **Section 21(4) of the Government Proceedings Act Cap 40, Laws of Kenya**. The Applicant submitted that it was a Government Agency which draws all its funds from the Treasury and is bound by The **Public Finance Management Act no.18 of 2012**. Consequently any funds to be utilized in settling the decree must be properly appropriated and budgeted for. Finally the Applicant submitted that it stood to suffer substantial loss unless the stay of execution was granted.

On their part the Respondent countered that the Applicant was merely seeking to hide behind the provisions of the **Government Proceedings Act** and the **Public Finance Management Act** in an attempt to defeat the pending Garnishee proceedings. The Respondent argued that the provisions of the **Government Proceedings Act** applied only to the Government of Kenya, its various departments and ministries as well as to County Governments. The Act it was submitted **did not** apply to independent State Corporations which is what the Applicant was.

The Respondent submitted that **Section 40 of the Tourism Act no.28 of 2011** under which the Applicant is established describes **Kenyatta International Convention Centre** as an independent corporation with perpetual succession, and with the power to sue and be sued in its own name. The Respondent's view was if that if the Applicant was a state agency, then all proceedings against it would have to be instituted against the Hon. Attorney General in line with the Government Proceedings Act. Finally the Respondent urged for the dismissal of this present application terming it as misleading.

ANALYSIS AND DETERMINATION

I have carefully considered this application, the affidavit in support, the Replying Affidavit, the submissions of both parties and the relevant statute and case law. The only issue for determination is whether the Applicant is a state corporation and hence a Government Agency to which the provisions of the **Government Proceedings Act** would apply.

Sections 2 of the State Corporations Act, Cap 446 defines a state corporation in the following terms:-

“State corporation” means-

(a) a State Corporation established under Section 3.

(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament of other written law”.

The Applicant was established under **Section 40 of the Tourism Act 2011** as a body corporate with perpetual succession, capable of suing and being sued in its corporate name.

The Applicant invoked **Section 21(4) of the Government Proceedings Act** which provides

“(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 persons 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.” [emphasis supplied]

Section 21(4) makes reference to **“the Government”, any Government department”** or **“any officer of the Government”**. No specific reference is made at all to State Corporations. Blacks Law Dictionary, 8th Edition defines the term **“government”** as being

“(1) The structure of principles and rules determining how a state or organization is regulated.

(2) The sovereign power in a Nation or State

(3) an organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.”

The Applicant does not fit within the confines of this definition. The Applicant is a tourism agency established under the **Tourism Act**. It is not a Government department. The fact that the Applicant is a State Corporation cannot lead to the inference that it is a government department as envisaged by the **Government Proceedings Act**.

The High Court in the case of **ASSOCIATION OF RETIREMENT BENEFITS SCHEME –VS – ATTORNEY GENERAL & 3 OTHERS [2017] eKLR** cited with approval the Indian Supreme Court case of **INTERNATIONAL AIRPORT AUTHORITY OF INDIA & OTHERS (1979) SC.R 1042** in which the test for determining whether an entity was a Government body or not, was stated as follows:-

“(a) Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government.

(b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;

(c) It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State.

(d) Whether the body has deep and pervasive State control,

(e) Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and

(f) If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.”

Having considered the above test as set out by the court I do not find that the Applicant is a government agency. Indeed **Section 41** of the **Tourism Act** gives the objects and purposes of the Applicant as being to promote business of meetings, conferences and exhibitions. **Section 42** of the same Act sets out the functions of the Applicant as follows:-

“The functions of the Convention Centre shall be to:-

(a) Organize and host meetings and provide incentives for conferences and exhibitions at the Convention Centre.

(b) Develop and implement the national meetings, incentives for conferences and exhibitions strategy, in collaboration with the Tourism Board upon consultation with the relevant stakeholders.

(c) Market the Convention Centre, in collaboration with the Tourism Board and

(d) Perform any other functions that are ancillary to the object and purpose for which the Convention Centre is established.”

These functions cannot strictly be said to be of public importance or as being closely related to Government functions. Similarly the Applicant does not derive its funding exclusively from the Government. This was the view held by **Hon. Justice Munyao** in **KIMOIRUTO & ANOTHER –VS – SAMUEL KIPKOSGEI KEITANY & ANOTHER 2014 eKLR**, where he held:-

“..It will be seen from the above that State Corporations may be established by the President (Under S.3) or through an Act of Parliament. They are ordinarily body corporate with capacity to sue and to be sued and with capacity to hold property. I find it difficult to hold that they should be considered as “government” because if they were, then litigation would be governed by the Government Proceedings Act (CAP 40) and I am more prepared to hold that they are not strictly “Government”, unless the context otherwise prescribes, but rather, that they are independent agents of Government, formed by government in order to undertake and perform certain functions on behalf of government, which functions cannot adequately or efficiently be performed within the structure of Government Ministries.”

On several occasions the courts have acknowledged state corporations as bodies corporate capable of suing and being sued independently. It has been noted that it is not necessary to involve the Hon Attorney General to represent Government interests.

In **NG’OK –VS- ATTORNEY GENERAL & ANOTHER [2005] eKLR**, **JUSTICE J.B OJWANG** (as he then was) cited with approval the holding by **Justice Aaron Ringera** (as he then was) in **ATTORNEY GENERAL –VS – KENYA COMMERCIAL BANK HCCC NO.329 of 2001**, in which the Hon. Attorney General had filed a suit for and on behalf of the National Irrigation Board a body corporate with power to sue and be sued in its own name. Ringera J held as follows:-

“All in all, I think the Attorney General’s institution of a suit for and on behalf of the National Irrigation Board which is a body Corporate with power to sue and be sued in its own name is a legal misadventure. It is an action without juridical basis...”

Finally on this point I will refer to the decision of **Hon Justice J. Onguto (now deceased)** in the case of **IKON PRINTS MEDIA COMPANY LIMITED –VS- KENYA NATIONAL HIGHWAYS AUTHORITY & 2 OTHERS [2015] eKLR** in which he held:-

“Foremost though, it is important to point out that it would not be tenable to invoke the Government Proceedings Act (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on government funding but it is not government

or servant of or agent of Government for the purposes of the Government Proceedings Act. The 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body.”

The above authority which is of persuasive value upholds the view that a state corporation or parastatal is **not** automatically subject to the **Government Proceedings Act**. Where proceedings are instituted under this Act the Hon Attorney General will be a party. The Hon Attorney General is not a party in the present proceedings.

As a parting shot, it is pertinent to note that this matter commenced before an **Arbitral Tribunal** in 2016. It was determined in the year 2017. It is at this point that the High Court became seized of the matter when the Arbitral Award was adopted as a decree of the Court.

From 2015 when the Arbitration commenced to the point of execution the Applicant has always participated and held itself out as a body corporate and **not** as a Government department or agency. It is too late in the day for the Applicant to now seek to don a different coat. Its invocation of the **Government Proceedings Act** is but a last ditch attempt to scuttle the execution proceedings against it. Based on its previous engagement in this matter the Applicant is estopped from relying on the provisions of the **Government Proceedings Act** as a challenge to execution against it.

Based on the foregoing, I find no merit in this application. I hereby dismiss the Notice of Motion dated **7th August 2013** in its entirety and award costs to the Respondent/Decree – Holder.

Dated in Nairobi this 18th day of October, 2018.

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Justice Maureen A. Odero

Ruling delivered at the Nairobi High Court this 19th day of October, 2018