



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. CIV. APPLICATION NO. 47 OF 2016

CECILIO MURANGO MWENDA T/A

MURANGO MWENDA & CO. ADVOCATES..... APPLICANT/DECREE HOLDER

VERSUS

ISIOLO COUNTY GOVERNMENT..... RESPONDENT/JUDGMENT- DEBTOR

CONSOLIDATED BANK OF KENYA LTD GARNISHEE

RULING

1. This is a ruling on the Applicant's Notice of Motion dated 13th April, 2017. The Motion was brought under Order 23 Rules 1, 2, & 4 of the Civil Procedure Rules seeking an order of garnishee to attach monies held in Account Nos. 10111203000081 and 10111203000061 by the Garnishee bank at Isiolo Branch in satisfaction of the decree made on 24th March, 2017.

2. The Motion was based on the grounds set out in the body thereof as well as the Supporting Affidavit of Cecilio Murango Mwenda sworn on 13th April, 2017. These were; that the Applicant acted on behalf of the Respondent in *Meru HC. Petition No. 15 of 2014* but the Respondent refused to pay legal fees therefor; that a bill of costs was thereby taxed and a certificate of costs issued; that the Applicant applied for judgment thereon which was entered and a decree issued which remains unsatisfied. The Applicant then concluded that he knew that the Respondent had funds in Account Nos. 10111203000061 and 10111203000081 at the Garnishee's Isiolo Branch which was capable of settling the decree.

3. The application was opposed by the Judgment-debtor vide Grounds of Opposition filed on 13th May, 2017. The Respondent *contended* that; the application offended *section 21(4) of the Government Proceedings Act*; that the application contravenes *Order 29 Rule 2(2)(c) and 4(1) of the Civil Procedure Rules* and that in the circumstances, the application was bad in law, incompetent and misconceived.

4. The application was argued on the basis of written dated 23rd May, 2017 and 7th June, 2017 respectively. In his submissions, the Applicant reiterated his averments in the supporting affidavit; he submitted that garnishee proceedings are special in nature which pit a decree holder against the garnishee; that the judgment-debtor has no role in such proceedings; that since there was already a decree *nisi* which had been issued, the same could only be set aside by a substantive application by the judgment-debtor. He cited the case of *Otieno Ragot & Co. Advocates v. City Council of Nairobi HC Misc. Application. No. 148 of 2013* in support of his submission that the judgment-debtor had no right of audience in garnishee proceedings.

5. Mr. Murango Mwenda submitted that the Judgment-Debtor could not plead the protection of *section*

21 of the Government Proceedings Act as it was in contempt of the order of the court requiring it to satisfy the decree; that the said defence was in breach of Article 48 of the Constitution; he cited the decisions in **Dry Associates v. Capital Markets Authority & Another NRB HC Petition No. 328 of 2012** and **Kenya Bus Service v. Bustrack Ltd & 2 Others (2012) eKLR** in support of those suppositions. Counsel further cited the case of **African Commuter Services Ltd v. Kenya Civil Aviation Authority and National Bank of Kenya & CFC Stanbic Bank (as garnishees) Nrb HCCCNo. 1208 of 2013** in support of the proposition that there can be no special category of litigants who are beyond court process. Counsel therefore urged that the objections of the judgment-debtor be rejected and the application be allowed.

6. On behalf of the judgment-debtor, it was submitted that the application offends the provisions of the **Government Proceedings Act** as the judgment-debtor is a government of the County of Isiolo; the cases of **Republic v. Attorney General & Another Ex-parte Stephen Wanyee Roki (2016)** and **Republic v. County Secretary, Nairobi City County & Another Ex-Parte Wachira Nderitu & Co. Advocates** were cited in support of that submission.

7. It was further submitted for the judgment-debtor that **Order 29 Rule 2 (2) of the Civil Procedure Rules** ousts the jurisdiction of this Court from entertaining the application; that the Applicant has a remedy through judicial review in terms of the decision in **Kilimanjaro Safari Club Ltd v. County Council of Olkejuado & 3 Others (2016) eKLR**. The Court was therefore urged to dismiss the application.

8. I have considered the affidavit and the submissions on record. I have also carefully considered all the authorities relied on. The first issue is whether the judgment-debtor has any right of audience in a garnishee proceeding like the one at hand. According to the Applicant, a garnishee proceeding is as between the decree-holder and the garnishee. The judgment-debtor has no role. The judgment-debtor did not address this issue in its submissions.

9. **Order 23 of the Civil Procedure Rules** provides for a special mode of execution of a decree by attachment of debts of a judgment-debtor. It is clear from **Rule 1(1)** of that **order** that the garnishee proceedings are only meant to establish whether the garnishee (who is not a party to the suit) owes any monies to the judgment-debtor. However, **Order 23 Rule 1(2) and (3)** provides:-

“(2). At least seven days before the day of hearing the order nisi shall be served upon the garnishee, and, unless otherwise ordered, on the judgment-debtor.

(3). Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or in his business as the court may direct”.

10. It is clear from the foregoing that the judgment-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 judgment-debtor must be notified of the garnishee proceedings.

11. In my view, the requirement for such notice is to enable the judgment-debtor to appear and either dispute the alleged amount of the 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 as between the **decree**-holder and the garnishee, there is nothing in **Order 23** that bars the judgment-debtor from being heard. In any event, it is the cardinal principal of the rule of law that unless expressly provided, no adverse orders should be made against a party without such party being heard. The decision in **Otieno Ragot & Co. Advocates vs. City Council of Nairobi (supra)** is not applicable as the issue of the right to audience for the judgment-debtor did not arise for determination in that case.

13. The next issue is whether the judgment debtor is amenable to garnishee proceedings. It was submitted for the judgment-debtor that being the government of the County of Isiolo, the judgment-debtor was a 'government' in terms of the **Government Proceedings Act, Cap 40, Laws of Kenya and Order 29 of the Civil Procedure Rules**. The decree-holder was of a different view, that it never mattered the judgment-debtor was under an obligation in law to settle the decree.

14. It was not disputed that the judgment-debtor is a government of the County of Isiolo. The Constitution of Kenya recognizes and/or creates two levels of governments, the National and County government. **Article 176 of the Constitution** establishes County governments while **Article 189** requires that the constitutional status of the government at both levels be respected. In this regard, the protection accorded to the National government in law extends in the same manner and extent to County governments.

15. **Section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya** 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 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”.

By virtue of the **Government Proceedings Act (Amendment) Act, No. 35 of 2015** this provision was extended to apply to proceedings in which a County government is a party.

16. The aforesaid provision as well as **Order 29(1) of the Civil Procedure Act** expressly bars any levying of execution against the property of the government. The constitutional basis for such a bar was well spelt out in the case of **Republic v. County Secretary, Nairobi City County & Another, Ex-Parte Wachira Nderitu & Co (2015) eKLR**. Government expenditure is budgeted for and must be appropriated by law through Parliament. It is unlikely that the government will readily have funds to settle decrees without affecting the programs that are budgeted for in any given financial cycle. In **Stephen Wanyee Roki v. K-Rep Bank Limited & 2 Others [2016] eKLR** the court held that there was absolute bar under **order 29** from any form of execution against the government.

17. The cases of **Kenya Bus Service Ltd v. Bustrack Ltd & 2 Others (supra)** and **African Commuters Services Ltd v. Kenya Civil Aviation Authority and National Bank of Kenya & CFC (as garnishees) (supra)** are not applicable in this case. In the **KBS Case**, the court was dealing with the unnecessary limitation put by **section 13A of the Government Proceedings Act** in requiring the statutory notice of 30 days before suing the government. In the **African Commuters Services Case**, the issue of the application of **section 23 of the Government Proceedings Act** was not raised. The court only interpreted the provisions of the Act under which the Kenya Civil Aviation Authority was operating vis a vis the Constitution of Kenya and the conduct of that party in those proceedings.

18. In view of the foregoing, I am satisfied that the application was not well taken. The Decree-holder is not left without a remedy. He can still enforce the decree in the normal manner under the judicial review remedy of mandamus. While there is no substantive application to challenge the *decree nisi* that was issued by this court, in light of what **Order 29(1) of the Civil Procedure Rules** and **section 21 of the Government Proceedings Act**, provide, that order was made in error. The court cannot let it to stand.

19. Accordingly, the application is hereby dismissed. The *decree nisi* issued on 24th April, 2017 is hereby set aside. Since the judgment-debtor is the author of all this and has clearly failed to settle a lawful decree and persisted in being in contempt of court, I will order that the costs of this application be borne by the judgment-debtor.

DATED and **DELIVERED** at Meru this 21st day of September, 2017.

A. MABEYA

JUDGE