



**Mbaraka & 8 others v Kenya Electricity Transmission Co Ltd & 2 others;
Governor, County Government of Tana River & another (Interested Parties);
Kcb Bank Kenya Limited & 3 others (Garnishee) (Environment & Land
Petition 9 of 2021) [2025] KEELC 3234 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 9 OF 2021**

FM NJOROGE, J

APRIL 8, 2025

BETWEEN

SAID BUYA MBARAKA & 8 OTHERS PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO LTD 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

COUNTY GOVERNMENT OF TANA RIVER 3RD RESPONDENT

AND

**THE GOVERNOR, COUNTY GOVERNMENT OF TANA
RIVER INTERESTED PARTY**

ABDI MOGO INTERESTED PARTY

AND

KCB BANK KENYA LIMITED GARNISHEE

NCBA BANK KENYA GARNISHEE

CO-OPERATIVE BANK OF KENYA GARNISHEE

STANDARD CHARTERED BANK KENYA LIMITED GARNISHEE

RULING

1. The application for consideration is the 3rd Respondent's and 1st Interested Party's Notice of Motion application dated 22/4/2024 brought under section 38 (c) of the Civil Procedure Act; Order 9 rule 9



and 10, Order 23 Rules 1, 2, 3, 4 and 10 and Order 51 rule 1 of the Civil Procedure Rules. The 1st Interested Party seeks the following orders: -

1. Spent.
 2. Spent.
 3. That pending hearing and determination of this application, this Honourable Court do issue a garnishee nisi order against the 1st, 2nd, 3rd, and 4th Garnishees ordering that all sums due to and held in favour of the judgment debtor in the accounts listed below, sufficient to satisfy the Applicant's decretal sum of Kshs. 68,557, 865.71 be attached to answer the decretal sum together with interest accrued from 15th March 2023 to date: (spent)
 - i. KCB Bank Kenya Limited Account Number 120XXXX752, 111XXXX622 and 122XXXX435;
 - ii. NCBA Bank Kenya, Account Numbers 100XXXX443, 100XXXX554, 7612XXXX17, 761XXXX025 and 761XXXX038;
 - iii. Co-operative Bank of Kenya, Account Numbers 1136XXXX14102, 1136XXXX14100 and 1136XXXX4101; and
 - iv. Standard Chartered Bank Kenya Limited, Account Numbers 1040XXXX6600, 9304XXXX600, 870XXXX6600, and 1040XXXX6601.
 4. That the 1st, 2nd, 3rd and 4th Garnishees do appear before this Honourable Court on an appointed date and time to show cause why it should not pay to the Applicant the sum of Kshs. 68, 557, 865.71 together with interest at court rates accrued from 15th March 2023 till payment in full, from the monies held by them in favour of the judgment debtor.
 5. That this honourable court be pleased to issue a garnishee absolute order herein that all and/or any sums due to and held by the 1st, 2nd, 3rd and 4th Garnishees in favour of the judgment debtor in the accounts listed under paragraph 3 above, as shall be sufficient to satisfy the Applicant's decretal sum of Kshs. 68, 557, 865.71 be attached to answer the decretal sum together with interest at court rates accrued from 15th March 2023 till payment in full.
 6. That the costs of this application be provided for.
2. The application is premised on the grounds listed on the face of the Motion and supported by an affidavit sworn by Major (RTD) Dr. Dhadho Gaddae Godhana, the 1st Interested Party herein, who deposed that on 14/3/2023, the court directed that the balance due from the 1st Respondent, being Kshs. 68,557, 865.71, be paid to a special interest earning account opened by the 3rd Respondent, the decree holder. That the 1st Respondent is yet to pay the said amount and has declined to do so until the 2nd Respondent is included as a signatory to the special interest earning account. The Governor asserted that despite the 1st Respondent's claim that they did not have enough funds to settle the decretal sum, he had reasons to believe that the mentioned accounts are adequately funded to satisfy the decree.
 3. In a replying affidavit sworn by Gordon on 21/5/2024, on behalf of the 1st Garnishee, it was confirmed that as at the time the garnishee order nisi was served upon the bank, the outstanding balance held by the bank for the 1st Respondent in account number 120XXXX752 was sufficient to settle the decretal amount. The deponent sought costs of the garnishee proceedings and that the same be paid out of the judgment-debtor's account.



4. The 1st Respondent opposed the application. It filed a notice of Preliminary Objection dated 13/5/2024 and a replying affidavit sworn by Tom Imbo on the even date. The ground of preliminary objection was that the garnishee application seeks to execute a decree against the 1st Respondent, KETRACO, in a manner that contravenes Section 21(1), (4) and (5) of the [Government Proceedings Act](#) and Order 29 (2) and (4) of the Civil Procedure Rules.
5. In the replying affidavit, Tom Imbo is said to be the 1st Respondent's General Manager-Finance. He asserted that the garnishee application as well as the garnishee order nisi dated 26/4/2024 are void ab initio and erroneous for seeking to execute a decree against a government body. He deposed that the 1st Respondent does not have enough funds to comply with the court's orders of 14/3/2023. He added that the 1st Respondent is taking appropriate steps to seek additional funding so as to settle the decretal sum. He explained that the garnished accounts are donor funded accounts relating to different projects currently executed by the 1st Respondent; and that the monies held in those accounts are meant for payment of contractors undertaking different projects and compensation to land owners affected in those projects.
6. The deponent asserted that it would cause hardship to the 1st Respondent in so far as planned implementation of other projects is concerned, if the accounts are garnished, and in turn cause a myriad of suits against the 1st Respondent. In addition, the deponent stated that the consent order dated 27/4/2021 and ruling dated 14/3/2023 did not provide for payment of interest on compensation.
7. On 30/5/2024, the court discharged the garnishee order nisi made on 26/4/2024, against the accounts held at the 2nd, 3rd and 4th Garnishee banks. The court instead ordered that the sum of Kshs. 68, 557, 865. 71 held at KCB Bank Limited be frozen to satisfy the garnishee order nisi.
8. The application was canvassed by way of written submissions.

3rd Respondent and 1st Interested Party's Submissions

9. Miss Kowido, counsel on record for the 3rd Respondent and 1st Interested Party, identified three issues for determination. Firstly, whether the 1st Respondent is a government entity thus immune from execution by dint of the [Government Proceedings Act](#). Counsel argued that the issue of immunity from execution is laced with malice, is an afterthought, an abuse of the court process and a blatant disregard of the law. Citing the Court of Appeal in Mombasa Appeal No. E028 of 2021 Kenya Electricity Transmission Company Limited v Spedag Interfreight Kenya Limited & 4 Others, counsel submitted that by virtue of Section 3 of the [State Corporations Act](#), the 1st Respondent was vested with a corporate character that makes it a separate and distinct entity from the government. Counsel explained that there is a distinction between state organs and state corporation and that such distinction can be deciphered under Article 232 (2) and 260 of [the Constitution](#). She also relied on the Supreme Court's decision in Council of Governors v AG & 7 Others [2019] eKLR. To her, the 1st Respondent is a state corporation and not a state organ. To further buttress her argument on whether the 1st Respondent enjoys the immunity provided in the [Government Proceedings Act](#), counsel relied on the cases of Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR; Kimoi Ruto & another v Samuel Kipkosgei Keitany & another [2014] eKLR and Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 Others [2015] eKLR.
10. Secondly, whether the 1st Respondent is indebted to the 3rd Respondent and therefore liable to meet the decree by way of attachment of the debt. Counsel submitted that all the ingredients provided for under Order 23 of the Civil Procedure Rules have been met, and that there is no issue whatsoever as the indebtedness and the garnishee had admitted that it is able to satisfy the decretal sum. To support



this, she was guided by the previously cited case of the Court of Appeal, Mombasa Appeal No. E028 of 2021 Kenya Electricity Transmission Company Limited v Spedag Interfreight Kenya Limited & 4 Others; and KETRACO v Ecobank Kenya Limited & 2 Others (Civil Appeal E445 OF 2021) [2024] KEHC 2048 (KLR).

11. Counsel's third and final issue was whether the 3rd Respondent and the 1st Interested Party are entitled to interests and costs. It was counsel's argument that since the 1st Respondent has consistently metamorphosed reasons and engaged in endless unnecessary litigation so as to not settle the decretal amount, its should be condemned to interest and costs. To support this argument, counsel urged the court to be guided by Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, Section 27 (1) of the [Civil Procedure Act](#), Order 23 Rule 10 of the Civil Procedure Rules, and the case of Beta Metals KE Limited v CS, Mining, Blue Economy and Marine Affairs & Another; Okoth (Intended Defendant) [2024] KEELC 13681 (KLR).

1st Respondent's Written Submissions

12. Similarly, counsel had three issues for determination, similar to those addressed by the 3rd Respondent's counsel. The first being whether KETRACO is a public entity analogous to the government, and the procedure for enforcement of court orders against the government. Counsel highlighted the definition of a state corporation under the [State Corporations Act](#), and a public entity as was defined in the case of Association of Retirement Benefits Schemes v AG [2022] eKLR and Section 3 (1) (d) of the Interpretations and General Provisions Act. To counsel, the 1st Respondent is a public entity established to perform duties of a public nature under Sessional Paper No. 4 of 2004 on Energy, and is fully dependent on the government for provision of compensation funds for wayleave acquisition; it is therefore a public body as opposed to a state organ as argued by the 3rd Respondent's counsel. Counsel relied on the case of Kimoi Ruto & Another v Samwel Kipsogei Keitany & Agricultural Finance Corporation [2014] eKLR.
13. Counsel submitted that the Court of Appeal in Five Star Agencies Limited v NLC and National Bank of Kenya, Civil Appeal No. E290 of 2023 settled the issue of execution against state organs and bodies. That it has to be by way of judicial review and that this is in line with Section 21 (1), (3), (4) and (5) of the [Government Proceedings Act](#) and Order 29 (2) and (4) of the Civil Procedure Rules.
14. Counsel further opposed the award of interest on the decretal sum from 15/3/2023. He argued that the wayleave acquisition is funded by the government of Kenya and no funds for that purpose have been availed by the government for the financial year 2023/2024. That for this reason, the 1st Respondent has been unable to comply with the orders of the court.

Analysis and Determination

15. The issue herein revolves around garnishee proceedings. Order 23 rule 1 of the Civil Procedure Rule Provides that: -

"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.”

16. The 1st Respondent’s contention was that the present garnishee proceedings contravene Section 21(1), (4) and (5) of the [Government Proceedings Act](#) and Order 29 (2) and (4) of the Civil Procedure Rules. It is pertinent to reproduce these provisions hereunder.

21. “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.

- (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.”

The relevant parts of Order 29 (2) of the Civil Procedure Rules further provide as follows: -

“Rules to apply to proceedings by or against the Government [Order 29, rule 2]

- (1) Except as provided by the [Government Proceedings Act](#) (Cap. 40) or by these Rules—
- (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);

17. The relevant parts of Order 29 (4) of the Civil Procedure Rules further provide as follows: -

"Attachment of debts or appointment of a receiver [Order 29, 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."

18. The question that follows therefore is whether KETRACO, the 1st Respondent enjoys immunity from execution under the *Government Proceedings Act* (GPA).

19. Section 3 of the *State Corporations Act*, vests to the 1st Respondent with a corporate character. As it is, there is no express provision in the *State Corporations Act* that provides that state corporations, in this case, the 1st Respondent is granted the immunity referred under Section 21 of the GPA. Does the foregoing exempt the 1st respondent from the application of the Section 21 of the GPA? I think the answer lies in an examination of the *State Corporations Act* in general. The definition of a state corporation in that act is as follows:

"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 or other written law but not—

(i) the Principal Secretary to the National Treasury incorporated under the Cabinet Secretary to the Treasury (Incorporation) Act (Cap. 101);

SUBPARA (ii) spent;

(iii) a co-operative society established under the *Co-operative Societies Act* (Cap. 490);

(iv) a building society established in accordance with the *Building Societies Act* (Cap. 489);

(v) a company incorporated under the *Companies Act* (Cap. 486) which is not wholly owned or controlled by the Government or by a state corporation;

(vi) the Central Bank of Kenya established under the *Central Bank of Kenya Act* (Cap. 491);



- (vii) deleted by [Act No. 2 of 2002](#), Sch.;
- (viii) the Financial Reporting Centre established under the [Proceeds of Crime and Anti-Money Laundering Act](#) (Cap. 59A).
- (c) a bank or a financial institution licensed under the [Banking Act](#) or other company incorporated under the [Companies Act](#) (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;
- (d) a subsidiary of a state corporation.”

20. Section 3 of the Act provides as follows:

3. Establishment of state corporations by the President

- (1) The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.
- (2) A state corporation established under this section shall—
 - (a) have perpetual succession;
 - (b) in its corporate name be capable of suing and being sued;
 - (c) subject to this Act, be capable of holding and alienating movable and immovable property.”

21. Section 4 provides as follows:

4. Ministerial responsibility for state corporations

“The President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice-President and the several Cabinet Secretary as the President may by directions in writing determine.”

22. Section 5 of the Act provides as follows:

5. Powers generally of state corporations

- (1) Subject to this Act, every state corporation shall have all the powers necessary or expedient for the performance of its functions.
- (2) After the commencement of this Act and notwithstanding subsection (1), the power of a state corporation to borrow money in Kenya or elsewhere shall be exercised only with the consent of the Cabinet Secretary and subject to such limitations and conditions as may be imposed by the Treasury with respect to state corporations generally or specifically with respect to a particular state corporation.
- (3) A state corporation may engage and employ such number of staff, including the chief executive on such terms and conditions of service as the Cabinet Secretary may, in consultation with the Committee, approve.
- (4) A state corporation may, with the approval of the Cabinet Secretary in consultation with the Treasury and the Committee, establish pension,



gratuity, superannuation, provident or other funds for the state corporation's employees and their dependants.”

22. Sections 6 and 7 of the Act provide as follows:

6. Composition of Boards

- (1) Unless the written law by or under which a state corporation is established or the articles of association of a state corporation otherwise require, a Board shall, subject to subsection (4), consist of—
 - (a) a Chairperson appointed by the President who shall be non-executive unless the President otherwise directs;
 - (b) the chief executive;
 - (c) the Principal Secretary of the parent Ministry;
 - (d) the Principal Secretary to the National Treasury;
 - (da) the Attorney-General or his representative;
 - (e) not more than eleven other members not being employees of the state corporation, of whom not more than three shall be public officers, appointed by the Cabinet Secretary.
- (2) Every appointment under subsection (1)(a) and (e) shall be by name and by notice in the Gazette and shall be for a renewable period of five years or for such shorter period as may be specified in the notice, but shall cease if the appointee—
 - (a) serves the Cabinet Secretary with written notice of resignation; or
 - (b) is absent, without the permission of the Cabinet Secretary notified to the Board, from three consecutive meetings; or
 - (c) is convicted of an offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding two thousand shillings; or
 - (d) is incapacitated by prolonged physical or mental illness from performing his duties as a member of the Board; or
 - (e) conducts himself in a manner deemed by the Cabinet Secretary, in consultation with the Committee, to be inconsistent with membership of the Board.
- (3) No person whose membership of a Board has ceased in accordance with paragraphs (b), (c) or (e) of subsection (2) shall be eligible for appointment to any Board thereafter.
- (4) Unless the written law under which a state corporation is established or the articles of association of a state corporation otherwise require, the Cabinet Secretary may, in consultation with the Committee, appoint one or more duly qualified persons, not being members of the Board, to be alternate members, and any one alternate member may attend a meeting of a Board in place of a substantive member who is unable to attend; and every alternate member shall, when attending a meeting, be deemed for all purposes to be a member of the Board.

23. 7. Power to issue directions and to remove Board



- (1) The President may give directions of a general or specific nature to a Board with regard to the better exercise and performance of the functions of the state corporation and the Board shall give effect to those directions.
 - (2) Notwithstanding subsection (1), directions under this section may require that the memorandum and articles or any other documents establishing a state corporation, be amended to conform with any requirement of this Act where the same is inconsistent therewith.
 - (3) Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.”
24. Section 10 A of the Act provides as follows:
- 10A. Financial year
- Notwithstanding anything to the contrary in any written law, the financial year of every state corporation shall be from the 1st of July in a year to the 30th of June in the next year.”
25. Section 11 of Part IV of the Act which is titled “CONTROL OF THE FINANCES, ETC. OF STATE CORPORATIONS” provides as follows:
11. Annual estimates
- (1) Every state corporation shall cause to be prepared and shall, not later than the end of February in every year, submit to the Cabinet Secretary and to the Treasury for approval, estimates of the state corporation’s revenue and expenditure for the following financial year accompanied by proposals for funding all projects to be undertaken by the state corporation, or the implementation of which will continue during the financial year to which those estimates relate.
 - (2) No annual estimates and proposals for funding projects shall be implemented until they have been approved by the Cabinet Secretary with the concurrence of the Treasury.”
26. Sections 12 and 13 of the Act provide as follows:
12. Expenditure not included in annual estimates
- No state corporation shall, without the prior approval in writing of the Cabinet Secretary and the Treasury, incur any expenditure for which provision has not been made in an annual estimate prepared and approved in accordance with section 11.
13. Dealing with assets
- (1) The assets of a state corporation may be disposed of—
 - (a) if they are current assets in the normal course of business carried on by that state corporation;



- (b) where the disposal and the utilization of the proceeds have been taken into account in an annual estimate prepared and approved in accordance with section 11;
 - (c) by way of sale or otherwise with the approval of the Cabinet Secretary and the Treasury where such disposal has not been taken into account in the estimates.
- (2) Subject to subsection (1), the Cabinet Secretary for the time being responsible for finance may, in consultation with the Committee, make rules for the acquisition and disposal of assets by state corporations and different rules may be made with respect to different state corporations; and such rules shall be brought to the notice of the state corporations and other persons affected thereby, but it shall not be necessary to publish the rules in the Gazette.
- (3) This section does not apply with respect to procurements or disposals to which the *Public Procurement and Asset Disposal Act* (Cap. 412C) applies.”

26. A state corporation comes into being by virtue of an Act of Parliament or by order of the President. The President may assign ministerial responsibility for any state corporation and matters relating thereto to the deputy President or to a Cabinet Secretary. A state corporation’s power to borrow money in Kenya or elsewhere can be exercised only with the consent of the Cabinet Secretary so assigned and subject to such limitations and conditions as may be imposed by the Treasury with respect to state corporations generally or specifically with respect to a particular state corporation; a state corporation may engage and employ such number of staff, including the chief executive on such terms and conditions of service as the Cabinet Secretary may, in consultation with the State Corporations Advisory Committee established by Section 27, approve; every Board of a state corporation has a Chairperson appointed by the President, a chief executive and must include the Principal Secretary of the parent Ministry, the Principal Secretary to the National Treasury, and the Attorney-General or his representative; State Officers line up the quintessential cadres of its administration. Estimates of the state corporation’s revenue and expenditure for the following financial year accompanied by proposals for funding all projects to be undertaken by the state corporation, or the implementation of which will continue during the financial year to which those estimates relate must be submitted to the cabinet secretary of the ministry under which it is assigned. A state corporation can not incur expenditure as it wishes without a cabinet secretary’s scrutiny, and every such expenditure must be part of those submitted to the cabinet secretary in advance. Without government, a state corporation can not be. It can not form itself. It can not be formed by private persons or entities. From incorporation to dissolution, from its birth to its death, in between, the state corporation can not sneeze from a cold and the government does not get to know of it for it is, from the provisions set out above, the sole power behind it.
27. In view of the provisions examined herein above requires much persuasion to sway this court into believing that a state corporation is not another face or extension of government, clothed with some form of operational independence uncommon of ordinary government departments purely for maximum flexibility and convenience during intervention in sectors that require government intervention or regulation for public good. State corporations are ubiquitous, in the energy, water, trade, agriculture, transport sectors, and so on. This court agrees with the counsel for the 1st respondent when he submits that the 1st respondent is a public entity established to perform duties of a public nature and is fully dependent on the government for provision of funds. It is therefore the case that execution against it equals execution against government.



28. In *Kisya Investments Ltd v Attorney General & another* [2005] KEHC 3226 (KLR) the court stated as follows:

"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, 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 paralyzed and soon the Government will not only be bankrupt, but it's Constitutional and Statutory duties will not be capable of performance. This will lead to a chaos, anarchy and the breakdown of the Rule of Law.

In our view, this is the rationale or the objectives of the Law that prohibits execution against and attachment of the Government's assets and property. We form this view from a general reading of the English Statutes, Halsbury's Laws of England and some case law which do not bring out all these, but one is able to construe the intentions.

This brings us to the proviso in Section 70 (a) of *the Constitution*: -

"... The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest." (emphasis ours).

If the facts and circumstances of this case, could have led us to decide that the Applicant's fundamental rights and freedoms under Sections 70, 72, 75 and 82 have been violated or infringed upon by the operation of Sections 21 (4) of the *Government Proceedings Act* and Order XXVIII Rules 2 and 4, then we would certainly have held that the public interest herein in insulating the Government from execution and attachment overrides the Applicant's enjoyment of his rights and the fruits of judgment through execution and that it was in the public interest that the said laws have been enacted and must continue to be in force unless and until Parliament legislated otherwise.

Before we conclude, we think that it is our duty as a Court to point out that we think the problem and difficulties in this case in not necessarily the law but the office of Attorney General's conduct and performance of its duties in this case. It is our view that satisfaction of the decree herein against the Government was to be obtained by means of the Certificate containing particulars of the decree issued by the Court and served on the Attorney General as required by Section 21 (1), (2) and (3) of the *Government Proceedings Act*. The applicant duly served such a certificate and the Attorney General was obliged to advise the relevant Ministry and Ministry of Finance of the consequences and ensure that payment was made within a reasonable time taking all circumstances into account. Alternatively, it



was upon the Attorney General to appeal against the decision giving rise to this debt.”

29. In *Kisya*, (supra) the mainstream government had been sued and the issue of applicability of the GPA was more or less straightforward. It behoves this court to examine other decisions in which governmental bodies or commissions had been sued and the decisions emanated from those pieces of litigation.
30. In *Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 others* [2015] eKLR a ruling was delivered on 9th day November, 2015. In that ruling, Onguto J held as follows:
31. 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 Proceeding 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.”
32. In *Ikon* (supra) Section 68 of the *Kenya Roads Act* (Cap 409) Laws of Kenya had been relied on by KeNHA. That section restricted execution against the Authority in the following terms:
68. Restriction on execution against property of Authority
- Notwithstanding anything to the contrary in any law—
- (a) where any judgment or order has been obtained against an Authority, no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property, but the Director-General shall, without delay, cause to be paid out of the revenue of the Authority such amounts as may, by the judgment or order, be awarded against the Authority;
- (b) no property of an Authority shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Director-General.”
33. Underlining the exception courts take against statutory provisions acting as stumbling blocks to execution in legal proceedings which exception buttresses the old adage that court orders ought not be made in vain, the court stated as follows:

“Section 68 of the *Kenya Roads Act* which has been reproduced above in paragraph [9] seeks to prohibit any execution proceedings against the 1st Respondent. It is a rare statutory provision. Ordinarily it is never and should never be the intention of any legislation to place parties in a position where the courts judgment is never realized. Courts, as they say, do not and should not act in vain. Consequently, in reviewing or interpreting such statutory provisions, the construction must be liberal and lean towards the Constitutional principle that every person including judicial persons are equal before the eyes of the law and must be subjected to the rule of law.

It is clear to me that Section 68 never intended to have a situation where the Authority, in this case the 1st Respondent runs away from any legal liability. The section did not state so either. Instead the section expressly made provision for the Director General to ensure that



‘without delay’ judgments or orders awarded against the authority are settled. The Director General has a statutory compulsion to ensure that payment is made without undue delay.

The mischief intended to be arrested by the section, in my view, was the embarrassment and prejudice which so often accompanies the ordinary process of attachment and execution. It is noteworthy that subsection (b) of the said section expressly states that any execution or attachment can only be proceeded on with once the director general of the Authority grants written permission. If therefore there is any delay in honouring a court judgment or order, it is for the Director General to explain to the court and to the judgment –creditor the cause or reason for the delay. It is however clear from a reading of Section 68 of the [Kenya Roads Act](#) that the court judgment or order must ultimately be honoured, either involuntarily or voluntarily. I hasten to add that the director general can also not arbitrarily refuse to grant permission for the execution to proceed. Where he does so, the court can intervene.”

34. Kenya Electricity Transmission Company Limited (KETRACO) v Ecobank Kenya Limited & 2 others (Civil Appeal E445 of 2021) [2024] KEHC 2048 (KLR) (Civ) (1 March 2024) (Judgment) relied on by the applicant was an appeal from a decision of a Magistrate’s court. The Appellant challenged the Ruling of the subordinate court issuing a Garnishee Order absolute against it. The issue of whether or not execution by way of garnishee proceedings, or any other type of execution process contrary to the GPA never featured in the application before the Magistrate or in the appeal and the appeal was dismissed as lacking in merit.
35. In Mombasa High Court Civil Case No. 22 of 2018 the court found that, by virtue of Section 3 of the [State Corporations Act](#), the appellant (KETRACO) was vested with a corporate character that makes it separate and distinct from the Government that created it or promoted it; that, when Parliament mandated that state corporations be established under the [State Corporations Act](#) and be vested with corporate identity with power to sue and be sued, it created juristic persons separate and distinct from the Government; that Parliament did not intend to create corporations that take the identity of government department; that, if Parliament intends to give a corporation immunity from execution or any legal process, such immunity must be expressly stated; and that there is no provision in the [State Corporations Act](#) that cushions the appellant against execution. That decision was rendered on 30th November 2020. The appeal against the decision in that case was handled by the Court Of Appeal in Kenya Electricity Transmission Company Limited v Spedag Interfreight Kenya Limited & 4 others (Civil Appeal E028 of 2021) [2024] KECA 542 (KLR) (24 May 2024) (Judgment) In that appeal, the closes that KETRACO came to challenging the HC decision was when it raised the ground that the HC had disregarded the its evidence that the KETRACO, being a public body, was entrusted with public funds intended for specific Governmental Projects, and that the funds the court ordered to be attached were not held to the credit of the 3rd and 4th respondents. Obviously the issue as to whether execution against it is barred save that under the [Government Proceedings Act](#) was not delved into in the appeal.
36. On 28/3/2023 in another case, ELC 445 Of 2014, the ELC held that the NLC is a state organ pursuant to the provisions of Article 253 of [the Constitution](#), that its functions are of public importance and closely related to governmental functions, that although the NLC is independent, it is infused with governmental character. In that ELC case the applicant, Five Star Agencies Ltd had argued that since the [Government Proceedings Act](#) does not expressly provide for the NLC and the NLC Act does not expressly forbid execution in the ordinary manner, NLC’s assets can be attached in execution of a decree The ELC held that argument to be flawed and further held that the funds allocated to the NLC by Parliament for its operations, or funds deposited in its account by acquiring entities for the purposes of compensating PAPs could not be attached by garnishee proceedings or in any manner



not provided for under the Civil Procedure Rules. It held that the procedure of execution against the NLC was as provided for under Section 21 of the *Government Proceedings Act* which included applying for a certificate of order and costs against the government, and enforcing the same by way of an order of mandamus. In Civil Appeal No. E290 of 2023- Five Star Agencies Limited National Land Commission and National Bank of Kenya the Court of Appeal was sitting on appeal in a decision in ELC 445 Of 2014. The Court of Appeal held as follows:

91. It is clear beyond any peradventure that the procedure to be followed in execution against the government is to seek an order of mandamus to compel the relevant person in the Government to settle the decree in question. This finding, in our view, readily answers the question posed by Five Star whether its right to prompt compensation and equality under the relevant provisions of *the Constitution* and the *Land Act* can exist in the absence of a legal remedy.”

The Court of Appeal also observed as follows:

95. We have perused the mandamus application by Five Star and have also applied our minds to the process leading to the issuance of the said orders. We are convinced that in obtaining the said orders, Five Star did not satisfy the procedure set out in section 21 of *Government Proceedings Act*. An application that seeks to compel the Government to satisfy a decree is subjected to a very elaborate procedure. Before the court issues such an order, there must be proof that the provisions of section 21 of the *Government Proceedings Act* have been complied with.”

37. I must go back to the dicta of the ELC in *Five Star Agencies Limited v National Land Commission; Kenya National Highways Authority (Intended Respondent); National Bank of Kenya (Garnishee)* (Civil Case 445 of 2014) [2023] KEELC 16631 (KLR) (28 March 2023) (Ruling) (which I have simply cited as ELC 445 Of 2014) which was as follows:

“The High Court in the case of *Association of Retirement Benefits Scheme v Attorney General & 3 others* [2017] eKLR cited with approval the Indian Supreme Court case of *Shetty v Airport Authority of India & others* (1979) 1 S.C.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.”



38. I must examine whether the character of the 1st respondent corresponds to the test in *Shetty v Airport Authority of India & others* (supra). This court has noted that in a replying affidavit filed on 14/6/2021 in response to the Notice Of Motion application dated 24th May 2021 in the petition, the 1st Respondent is described as a state corporation duly incorporated under the *Companies Act* and charged with the mandate to build, operate and maintain high voltage electricity transmission lines and associated sub stations that form the back bone of the national transmission grid, in line with vision 2030 pursuant to Sessional Paper No. 4 Of 2004 on Energy.
39. It is further stated that the respondent is charged with improving the quality and reliability of electricity supply throughout the country, transmission of generated electricity to areas that are currently not connected to the national grid, evacuation of power from planned generation plants providing a link with neighboring countries in order to facilitate power exchange and develop electricity trade in the region, reducing transmission losses that currently costs the country heavily every year and reducing the costs of electricity to the consumer by absorbing the capital cost of constructing electricity transmission lines.
40. I am of the view that not all state corporations may be exempt from execution. Depending on the nature of the functions, especially if it's a core government function like electricity transmission, KETRACO may still be deemed to be acting on behalf of the government in certain contexts, thus triggering the application of the GPA. What this means is that while KETRACO is not a state organ established under Article 260 like the National Land Commission in Civil Case 445 of 2014, there is nothing in the description of its functions that encourages or promotes the idea that execution can issue against it just as it would against a private company, or that the GPA will not apply in its favour. In fact, its creation pursuant to a governmental Sessional Paper only emphasizes on its governmental nature. A sessional paper is a document that outlines a government's policy proposals or actions, presented to Parliament for review and discussion. Legislation may or may not result from a sessional paper. The introduction to Sessional Paper no 4 of 2004 posted on Parliament's portal reads as follows:
- The aspiration of this session of paper is to lay the policy framework upon which caused effective affordable and adequate quality energy services will be made available to the domestic economy on a sustainable basis over the 2004 to 2023. This sessional paper recognizes that the success of social economic and environmental transformation strategies pursued night and government at present and in the future is to a large extent dependent on the performance of the energy sector as an economic infrastructure. This sessional paper therefore articulates the current and future policies to realize this growth strategy.”
41. It is noted that on the policy front to address the challenges in the energy sector in that sessional paper it was proposed that KPLC should be unbundled into two entities, one for transmission which will be 100% state owned and the other for distribution which will be private sector owned. It is clear the KPLC distributes while KETRACO transmits power.
42. In the present case I find that KETRACO's functions are, just as the National Land Commission's addressed in ELC 445 Of 2014, of public importance and closely related to governmental functions, and that although the KETRACO is a body corporate with power of suing and being sued, it is infused with governmental character. Besides its very public oriented mandate as described above, it also has deep and pervasive State control sanctioned by the *State Corporations Act*, deep enough to be within the description in *Shetty v Airport Authority of India & others* (supra).
43. In this regard I must reiterate the view that I expressed before, that the 1st respondent is but another face or extension of government, clothed with some form of operational independence uncommon



of ordinary government departments purely meant for maximum flexibility and convenience during intervention in sectors that require government intervention or regulation for public benefit. Execution should issue against it only as it is required to issue in respect of Government departments under the *Government Proceedings Act*.

44. The abundant caution with which courts deal with restrictions on execution is evident in all the case law cited. Absolute bar to execution would stifle access to justice. However, it is quite evident that in Kenya there is no law absolutely barring execution, and the only restrictions in place are intended as safeguards against the crippling of the ordinary operations of government institutions and organs. In the present case too, it is not that the 1st respondent is absolved from settling decretal sums held against it. This court is only saying that the proper process for execution against government must apply to it yet it has not been followed hence the execution process is flawed and ought not be permitted to proceed.
45. A garnishee order nisi was initially issued against the 1st Garnishee. However, owing to the foregoing analysis, I find no reason to grant the application as the execution proposed is tantamount to execution against the government which is of the type prohibited by the law. Consequently, the Notice of Motion application dated 22/4/2024 lacks merit and the same is dismissed with costs to the respondents and the garnishees. For the avoidance of doubt the Garnishee order nisi dated 26/4/2024 and all consequential orders are hereby discharged.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 8TH DAY OF APRIL 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

