

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLAENOUS APPLICATION NO.223 OF 2010

HEZRON OSSOREY JURAAPPLICANT

VERSUS

KENYA RAILWAYS CORPORATIONRESPONDENT

KENYA COMMERCIAL BANKGARNISHEE

R U L I N G

In CMCC No.464 of 2003 at Kisumu the applicant sued the respondent and obtained a decree in the sum of Kshs.4,620,777/85. When the respondent did not pay the applicant filed the present judicial review proceedings and obtained an order of Mandamus to compel the Managing Director to pay the amount. The order was issued on 15/4/09 and since then there has been no payment. On 12/10/12 the applicant filed the present garnishee proceedings seeking that all sums due and accruing and held at the credit of the respondent at the named accounts of the Kenya Commercial Bank Moi Avenue be attached to answer the decree and the costs of the garnishee proceedings. The court was asked to direct the in-charge of the garnishee bank to appear in court to show cause why he should not pay the decretal sum due to the applicant. The respondent and the garnishee raised each a preliminary objection to the hearing and determination of the application. The ground of the objection was that under section 88 of the Kenya Railway Corporation Act (Cap.397) there is a restriction on execution against the property of the respondent. MR. OKERO for the respondent and M/S ODERA for the garnishee took the position that the section provides in mandatory terms that no execution can issue against the property of the respondent, and therefore the applicant cannot access or attach the respondent's money held by the garnishee.

MR. MWAMU for the application opposed the objection. He took the position that, first, what was being raised was not a pure point of law and, secondly, that a look at the history of the dispute shows the many years that the applicant has suffered to execute against a party who has failed to keep his word.

It is not in dispute that the respondent has failed to pay the decree passed against it in favour of the applicant. If the respondent and the garnishee are pointing to section 88 to say that it prohibits the sought execution then theirs is a pure point of law and therefore the objection has been properly raised **(MUKISA MANUFACTURING CO., LTD .V. WEST END DISTRIBUTORS [1969] E.A. 696).**

Section 88 of the Act is headed:

“Restriction on execution against property of Corporation.”

It provides as follows:

“Notwithstanding anything to the contrary in any law -

(a) where any judgment or order has been obtained against the Corporation; no execution or attachment, or process in the nature thereof, shall be issued against the Corporation or against any immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings; but the managing director shall, without delay, cause to be paid out of the revenue of the Corporation such amounts as may, by the judgment or order, be awarded against the Corporation to the person entitled thereto;

(b) no immovable property of the Corporation or any of its trains, vehicles or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the managing director.”

It is clear the section restricts execution against the Corporation, or against property of the Corporation. In the case of **TOTAL (KENYA) LIMITED .V. KENYA RAILWAYS CORPORATION [2004] E.A. 339**, the court considered the section in an application where the plaintiff sought to garnish the bank balance of the Kenya Railways Corporation. The question was whether execution by attachment of a debt in the nature of the balance at the Kenya Commercial Bank was proper. It was held the Corporation's money held in the account at the bank was its “property” which could not be proceeded against by way of execution. The court followed the decision in **WAMBUGU AND CO., ADVOCATES .V. MANAGING DIRECTOR KENYA RAILWAYS CORPORATION [2001] LLR 4491 (HCK)** and observed that if the managing director has failed to pay the decretal sum the applicant should proceed against him by way of Mandamus to compel him to pay the sum claimed from the amounts of the Corporation.

In the instant case, the managing director has failed to pay and the applicant has successfully filed judicial review proceedings in the nature of Mandamus and has an order which is being disobeyed. Instead of filing garnishee proceedings the applicant should apply, which he has done, to have the managing director committed to civil jail for contempt of court. Otherwise this court lacks jurisdiction, in view of section 88, to order execution against the respondent's funds held by the garnishee. The objection is sustained. This means that the applicant's application dated 12/10/12 is incompetent and is struck. However, in view of the conduct of the respondent there shall be no order as to costs.

Dated, signed and delivered this 22nd day of July 2013

A. O. MUCHELULE

J U D G E