



**REUBEN NYANGINJA NDOLO.....PETITIONER/RESPONDENT**

**VERSUS**

**DICKSON WATHIKA MWANGI.....1<sup>ST</sup> DEFENDANT**

**JERUSA CHEPSAP.....2<sup>ND</sup> RESPONDENT**

**ELECTION COMMISSION  
OF KENYA..... 3<sup>RD</sup> RESPONDENT/APPLICANT**

**RULING**

The applicant herein, the **Independent Electoral and Boundaries Commission**, (hereinafter referred to as the Commission), the successor to the 3<sup>rd</sup> respondent herein has come before court by way of a Notice of Motion dated 25<sup>th</sup> January 2012 seeking the following orders:

- “1. This Application be certified as being urgent and service of the same be dispensed with in the first place.**
- 2. The prayer number 3 hereof be granted exparte in the first instance.**
- 3. There be a stay of execution of the warrants of attachment issued herein in favour of the Petitioner and dated the 11<sup>th</sup> day of January 2012 pending the hearing and determination of this Application.**
- 4. There be a declaration that the purported execution by the Petitioner against the 3<sup>rd</sup> Respondent is irregular, unlawful, bad in law and therefore null and void.**
- 5. The costs of this Application be awarded to the 3<sup>rd</sup> Respondent”.**

The application is supported by an affidavit sworn by **Mahamud Jabane**, the applicant’s Manager Legal and Public Affairs, and filed in this court on 27<sup>th</sup> January 2012. According to the deponent the 1<sup>st</sup> respondent on 23<sup>rd</sup> January 2012, was served with a proclamation by Auctioneers purportedly in execution of costs in the sum of Kshs. 1,294,428.15 together with Auctioneers costs of Kshs. 247,389.00. It is however deposed that the warrants of attachment leading to the said proclamation was issued in concealment of/non-disclosure of material facts to Court. The said concealed material according to the deponent were the fact that the Commission is specifically precluded by **section 13(2)** of the *Independent Election and Boundaries Commission Act 9 of 2011* (hereinafter referred to as the Act) as read together with the provisions of the *Government Proceedings Act*, from execution; that the decree being executed being more than one year old required that a notice to show cause be given before execution; that all the

taxed costs have been fully paid; the costs the petitioner is purportedly executing for were taxes deducted and remitted to the tax authorities; and that the matter had been dealt with under correspondence exchanged between the parties.

In opposition to the application, the petitioner filed grounds of opposition dated 19<sup>th</sup> March 2012 in which he states as follows:

- “1. The application is a misapprehension of the principles governing party and party costs.**
- 2. The application purports to subject party and party costs to income and VAT taxes as if the same was consultancy fees.**
- 3. the application defeats the overriding objective principle spelt out in the Civil Procedure Rules.**
- 4. The application if granted will defeat the principles of justice spelt out in Article 159 of the Constitution of Kenya.**
- 5. The application is designed to rob the petitioner of part of the fruit of his judgment.**
- 6. The application is in any event lacking in merit”.**

At the hearing of the application **Mr. Mutubwa**, learned counsel for the applicant submitted that the purported attachment against the 3<sup>rd</sup> defendant is unlawful and offends **section 13** of the Act as read which **section 25(1)** and **(2)** of the Government Proceedings Act, which precludes the Commission’s assets from being attached in execution. The petitioner’s action of attaching the Commission’s assets is accordingly unlawful. Secondly, it is submitted that the Petitioner’s action contravenes the provisions of **Order 22 Rule 17(1)** of the *Civil Procedure Rules* due to the fact that the decree being executed was passed on 30<sup>th</sup> April 2010 and by the time of the issuance of the execution, the decree was over one year old and it was necessary that the petitioner applies for a Notice to Show Cause before execution could issue. Thirdly it is submitted that the entire decretal sum has been paid. There is no dispute, it is contended, that costs were ordered and taxed. The Commission then deducted the amount payable in tax being 16% VAT and 5% being Withholding Tax which it remitted to Kenya Revenue Authority and the balance was paid over together with statutory certificate to the petitioner’s advocates. Accordingly, the applicant has fully discharged its obligations and has been told by the treasury that the action it took is the correct legal position. The position was duly explained to the petitioner who was informed to ask for the refund from Kenya Revenue Authority. The Commission, it is submitted, is a public body and to require it to pay the sum which it had remitted to Kenya Revenue Authority would constitute a misuse of public funds. Accordingly, it was submitted that the Commission is not indebted at all to the petitioner and cannot make further payments from public coffers. Counsel further submits that he is not aware of any provision that supports the contention that party and party costs should not attract VAT. Party and party costs, counsel contends, are payable to the advocate and it is clear that payment to an advocate attracts VAT. *Article 159(2)(d)* deals with undue regard to technicalities and that there is no attempt to rob the petitioner of the fruits of the judgement. Accordingly, it is prayed that prayers 3, 4 and 5 be allowed.

In his submission in opposing the application, **Mr. Ongoya**, learned counsel for the petitioner submitted that the issue here is whether a person who is under an obligation to pay another and erroneously or deliberately pays a third party can be said to have settled the obligation to the party owed. The Commission’s action, it is submitted is founded on misapprehension that party and party costs is an income to the advocate which is not correct. Those costs, it is counsel’s case, are a reimbursement to the successful party and by its very nature reimbursement should not be subjected to tax. It is not in doubt that the costs were payable to the petitioner. However, the withholding tax certificate indicates the payee as **Rachier & Amollo** Advocates who were not the beneficiaries of the costs. Save for the fact that **Mr. Otiende Amollo** was the lead counsel, his firm was not even on record. The duty is upon the applicant to recover the money from Kenya Revenue Authority. With respect to the age of the decree, it is submitted that the correct position is that what is being executed is the certificate of taxation dated 9<sup>th</sup> February

2011 and therefore by the time of attachment one year had not lapsed. A reading of **section 13** of the Act together with **section 21(4)** of the *Government Proceedings Act* does not expressly immunise the Commission from attachment but expressly immunises the officers from personal liability. The intention, counsel submits, cannot have been to leave a successful litigant with no option and hence the application should be dismissed.

In a rejoinder, **Mr. Mutubwa** submitted that the question is whether the Petitioner was entitled to costs under the Advocates Act. In this case, the costs were taxed as the advocates costs. Whereas the firm on record was **Asiema & Co. Advocates**, that firm expressly requested that payment of the costs be paid to **Rachier & Amollo**. On the costs being a reimbursement, it is submitted that the costs herein were simply advocates costs payable to an advocate hired by a client. A certificate of costs, it is submitted, is not capable of execution since only decrees and orders can be executed. The decree of costs was hence more than one year old, it is submitted. The petitioner does not lack the remedy since there are other modes of execution other than the sale of the Commission's assets. The drafters did not contemplate a situation where the Commission's vehicles and Ballot Boxes would be attached and therefore **section 21(4)** aforesaid applies and the whole section should be read and not just the first part.

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions made by counsel. In my view the determination of the application depends broadly on three issues:

- 1. Whether a certificate of costs issued subsequent to a decree constitutes a different order from the decree for the purposes of Order 22 rule 18 of the Civil Procedure Rules.**
- 2. Whether the Commission's assets are immuned from attachment in execution of a decree or order.**
- 3. Whether party and party costs are subject of taxation.**

**Order 22 rule 18** of the *Civil Procedure Rules* provides as follows:

**(1) Where an application for execution is made—**

**(a) more than one year after the date of the decree;**

**(b) against the legal representative of a party to the decree; or**

**(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:**

**Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:**

**Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.**

**(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.**

**(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.**

An order relating to costs, in my view is part of the decree, hence the term decretal sum constitute the Principal Sum together with costs where such awards are made. They are in fact contained in one document. A certificate of costs on the other hand is an expression of the quantum of the said costs but does not constitute a separate decree or order. One can readily imagine a scenario where the court makes an award together with the costs but the decree holder waits several years later to assess or tax his costs. Can the decree holder be permitted to execute for the costs separately while he issues notice to show cause in respect of the award? I, respectfully, do not think so. The requirement for Notice to Show Cause serves two purposes in my view: First, it serves to give a notice to the judgement debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice. This is a recognition that invariably a delay in execution of decrees leads to escalation of interests and the due process of the law in civil litigation should not be used as an avenue to extract penal consequences. Since it is undisputed that the decree herein was more than on year old, I find that it was necessary that a Notice to Show Cause be taken out.

With respect to the Commission's said immunity **section 12** of the Act provides:

***(1) The Commission shall be a body corporate with perpetual succession and a common seal and shall be capable, in its own name, of—***

***(a) acquiring, holding and disposing of real and personal property;***

***(b) suing and being sued; and***

***(c) doing or performing all such acts and things as a body corporate may by law do or perform.***

***(2) Any legal proceedings for execution of judgments against the Commission shall be subject to the Government Proceedings Act.***

**Section 21(4)** of the *Government Proceedings Act Cap 40 Laws of Kenya* provides as follows:

***“Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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”.***

It is clear from the foregoing provision that the Government cannot be subjected to the process of execution or attachment for the purposes of enforcement by the Government of any money or costs. Since this provision seems to have been imported into the Act by virtue of section 12 of the Act, it similarly follows that the Commission cannot likewise be subjected to the process of execution or attachment or process in the nature thereof for enforcing payment by the Commission of any money or costs. The reason for the insulation of the Commission from attachment is based on the practicalities of such action. The Commission is solely entrusted with the onerous task of guiding the process of the democratic process with respect to *inter alia* election of the leaders of the country. That is a task that requires that at all times, whether during electioneering times or otherwise, its activities should not be disrupted by being exposed to the vagaries of execution or attachment. Such action may have dire consequences not only to the Commission but to the whole country as it may expose the democratisation of a country to disruptive activities associated with the execution process.

The petitioner contends, and not without some merits, that that provision amounts to a clog on the petitioner's right to enjoyment of his fruits of judgement. Whereas, the provision, in my view, may have the effect of delaying a party from having a quick access to the results of a judgement, it does not purport

to completely curtail or oust a party's right to have a judgement in its favour satisfied. Any provision that purports to completely shut out a litigant from having a lawful order of the court implemented would, in my view, be unconstitutional as is it would be an impediment to justice contrary to the provisions of Article 48 of the Constitution. Access to justice not only encompasses the right to present one's case before a legally constituted tribunal but also the ability to realise the fruits of the due process of law. In my view, the petitioner in this matter has a right to compel the payment of the sum due by the Chief Officers of the Commission under a threat of a penalty of committal in event of disobedience. Although Mr. Ongoya contends that the grant of judicial review order would itself not be capable of execution under the foregoing provisions I, with respect, is of a view that orders issued in judicial review proceedings, which are proceedings between the Republic on the one hand and its servants or one of them on the other hand be it an institution or an individual, cannot be covered by the immunity since their disobedience is an act of insubordination by the servant of the principal and therefore transcend the realm of attachment or execution as contemplated by the foregoing provisions. I associate myself with the decision of Mwera, J in National Housing Corporation vs. Nairobi City Council & Another Nairobi (Milimani) HCCC No. 404 of 1998 [2002] 1 KLR 767 where the learned Judge stated as follows:

**“The law prohibits all attachment of a local authority's property in whatever form unless the Town Clerk has given his written permission first (Section 263A(b)). If the permission is not given what is open to the decree holder to do is to move by process of law (mandamus) to get the defendant's Town Clerk without delay to cause to be paid out of the revenue the amount owed here”.**

The last issue was with respect to taxation of party and party costs. Even if it was to be assumed that party and party costs is subject of taxation, one would have to determine what amount, in the said costs, constitute fees and what constitute disbursements. I did not understand the **Mr. Mutubwa** to contend that the amount remitted to Kenya Revenue Authority was only the percentage of the fees and that the disbursements were not touched in the deduction. Without distinguishing the two, the Commission cannot be justified in contending that it has settled the amount in full. However, in strict legal sense party and party costs belong to the party as opposed to the advocate client costs. Where a client has settled the advocate's fees in full the costs purely belong to the client and not to the advocate. For one party to a litigation to determine what portion of party and party costs is payable in form of tax would amount to gate-crashing into an arena not within its mandate and uninvited. Where, however, from the amount payable it is clear that the whole sum or an identifiable portion thereof is due to the advocate in form of fees it is undoubtedly subject to the laws relating to taxation. Where a party is not sure of the exact amount to retain and the amount to be paid it is advisable that the party pays the money into court under **Order 22 rule 1(1)(a)** of the Civil Procedure Rules.

Accordingly, whereas I am satisfied that the manner of the execution carried out by the petition was unprocedural and in clear breach of the law, I am unable, based on the evidence on record, to find that the Commission has fully settled the sum due. To that limited extent the application dated 25<sup>th</sup> January 2012 succeeds with costs to the Commission.

**Ruling read, signed and delivered in Court this 24<sup>th</sup> day of May 2012.**

**G.V. ODUNGA**  
**JUDGE**

**In the presence of:**

Ms. Onyango for Mr. Mutubwa for the applicant

No appearance for the respondent