



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 639 of 2009

ERAD SUPPLIES & GENERAL CONTRACTORS LIMITED ... PLAINTIFF/RESPONDENT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD DEFENDANT/RESPONDENT

ATTORNEY

GENERAL

(On behalf of

Permanent Secretary

Office of the

President, Ministry of State for

Special Programmes) OBJECTOR/APPLICANT

KEYSIAN AUCTIONEERS INTERESTED PARTY

RULING

1. This ruling is in respect of two applications. The first one is an application by way of a Notice of Motion dated 5th April, 2012. It was filed by the Attorney-General for and on behalf of the Permanent Secretary, Office of the President, Ministry of State for Special Programmes.
2. The second application is dated 4th April, 2012 and is by the respondent seeking extension of time

granted to the respondent to take such appropriate steps in the Court of Appeal by a further period of forty-five (45) days from the date of grant of the order.

3. In the first application, the objector sought the following orders:

“(i)

(ii) There be a stay of execution of the warrant of attachment of movable property dated 13th March, 2012 issued pursuant to and in execution of a decree of the court dated 17th February, 2012 pending the hearing of this application inter partes.

(iii) There be a stay of execution of the proclamation of attachment of movable property dated 14th March, 2012 issued pursuant to a warrant of attachment in execution of a decree of the court dated 17th February, 2012 pending the hearing of this application inter partes.

(iv) The warrant of attachment of movable property dated 13th March, 2012 in execution of a decree of the court dated 17th February, 2012 and all consequential action/order thereto is set aside.

(v) The proclamation of attachment of movable property dated 14th March, 2012 issued pursuant to a warrant of attachment dated 13th March, 2012 in execution of a decree of the court dated 17th February, 2012 and all consequential action/order thereto is set aside. ”

The application was made on the grounds that:

“(i) The objector/applicant herein is the proprietor of the property proclaimed in the schedule of movable property and described as;

(a) 100,000 bags maize

(b) 100,000 bags beans.

(ii) The said property/stocks are part of the national food security and emergency relief stocks consisting of the;

(a) Strategic Grain Reserves of the Government of the Republic of Kenya

(b) Grain storage for the famine relief programme of the Government of the Republic of Kenya.

(iii) The objector/applicant is the custodian of the Strategic Grain Reserves and famine relief stocks of the Government of the Republic of Kenya in trust for the benefit of the public general.

(iv) The inventory management of the Strategic Grain Reserves is controlled in and through the electronic data base of the defendant/respondent hence the objector/applicant has a legal/equitable interest in the property proclaimed in the schedule of movable property as; 20 pieces computers.

(v) The said property/stocks part of the national food security and emergency relief stocks are purchased out of funds voted in the budgetary allocations of the objector/applicant.

(vi) The said property/stocks part of the national food security and emergency relief stocks are purchased by the objector/applicant through the plaintiff/respondent as a purchasing and storage agent.

(vii) The intended proclamation and sale in execution of the said properties is unconcionable in the circumstances set out above.”

4. On 5th April, 2012 a temporary stay of execution of the warrant of attachment of movable property was granted by Kimondo, J. (the duty judge) pending inter partes hearing of the application on 18th April, 2012 before Odunga, J. who was earlier handling the matter. The objector had filed a Notice of Objection to attachment together with the application.

5. Come the 18th of April, 2012 Odunga, J. directed that since he had been moved to the Civil Division the matter be placed before this court for further directions and/or orders.

6. On 20th April, 2012 this court directed the parties to file their respective skeletal submissions and extended the interim orders of stay of execution pending hearing of the application.

7. Parties filed their respective submissions and highlighted the same on 3rd May, 2012. The objector’s application was brought under **Order 22 rules 51 and 52** of the **Civil Procedure Rules** and **Order 29 rule 2** of the **Civil Procedure Rules**.

8. The objector’s application was supported by an affidavit sworn by **Mr. Andrew Mondo**, the Permanent Secretary, Office of the President, Ministry of State for Special Programmes, (hereinafter referred to as “**the Ministry**”), on 5th April, 2012. Mr. Mondo also swore a further affidavit on 24th April, 2012.

9. Mr. Mondo is the Accounting Officer for the said Ministry and is charged with responsibility over the accounts and funds voted in the budgetary allocations of the Ministry.

10. He stated that the Ministry has the general and specific mandate of *inter alia*, maintaining the determined Strategic Grain Reserves of the Government to assure food security for the benefit of the citizenry of the Republic of Kenya. The role mandate of the ministry includes maintaining the strategic reserve stocks, stabilization policy and famine relief programme.

11. Mr. Mondo further stated that as part of the execution of that mandate the Ministry has progressively received funds assigned from the Consolidated Fund and expended towards the procurement and sustenance of the required threshold of grain reserves. The Ministry has over time entered into Agency Agreements with the defendant for purposes of provision of technical managerial services including the sourcing of strategic reserve stocks. Copies of several Agency Agreements were annexed to Mr. Mondo’s affidavit. The Ministry transmits its allocated funds to finance the Agency Agreements with the defendant as its agents.

12. He further stated that the food stocks so purchased form part of the national food security and emergency relief stocks.

13. Further, the procured grains are stored, preserved and managed by the defendant as a procuring agent on behalf of the Ministry but the property in the grains remains in the Ministry, Mr. Mondo added.

14. The Ministry claims the legal/equitable proprietorship of the property proclaimed in the schedule of movable property as the stocks now in the stores of the defendant are alleged to belong to the Ministry.

15. It is not only food stocks that were attached. The schedule of movable property as recorded by Keysian Auctioneers **includes** the following:

	“Description of Property	Estimated Value
1.	100,000 bags maize	Kshs.300,000,000/=

2.	100,000 bags beans	Kshs.250,000,000/=
3.	20 pieces of computers	Kshs.5,000,000/=
4.	10 pieces computer printers	Kshs.5,000,000/=
5.	100 pieces of office chairs	Kshs.2,000,000/=
6.	40 pieces of office tables	Kshs.1,000,000/=
7.	5 pieces of photo copiers	Kshs.10,000,000/=
8.	Motor Vehicle Reg. No. KAV 564E Prado	Kshs.5,000,000/=
9.	Motor Vehicle Reg. No. KBG 185G	Kshs.1,500,000/=
10.	Motor Vehicle Reg. No. KAE 299F	Kshs.1,000,000/=
11.	Motor Vehicle Reg. No. KAD 056S	Kshs.1,000,000/= and
12.	4 Forklifts	Kshs.6,000,000/=
13.	KBN 963E	Kshs.300,000/=
14.	Motorcycle Reg. No. KAV 702E	Kshs.50,000/=
15.	Motor Vehicle Reg. No. KAN 638U	Kshs.200,000/=
16.	Motor Vehicle Reg. No. KAE 846F	Kshs.150,000/=
17.	Motor Vehicle Reg. No. KAN 637U	Kshs.200,000/=
18.	1 water dispenser	Kshs.1,500/=
19.	1 sofa set	Kshs.8,000/=
20.	100 plastic chairs	Kshs.10,000/=
21.	Carpet cleaner	Kshs.3,000/=
22.	Cleaning/whoofer machine	Kshs.2,000/=
23.	150,000 bags of fertilizer	Kshs.75,000,000/=”

16. In paragraph 13 of his affidavit, Mr. Mondo stated that:

“..... It is unconcionablefor the property of the Ministry to be attached in satisfaction of a decree arising out of a contractual dispute to which it was not privy.”

17. He added that should the proclamation subsist and attachment ensue the Government will be faced with an acute grain deficit which may result in disequilibrium in its food supply protection without immediate recourse measures to recoup the loss.

18. The defendant supported the objection proceedings and **Mr. Patrick M. Karanja**, the Acting board Secretary of the defendant filed a affidavit in support thereof.

19. He stated, *inter alia*, that the defendant is a creature of statute, fully owned by the Government of the Republic of Kenya and accordingly fully financed by the Exchequer. He added that the defendant's assets are Government assets held for and on behalf of the people of Kenya.

20. He further stated that other than the maize and other cereals that were proclaimed by Keysian Auctioneers, the rest of the items are key components and tools of trade used to execute or aid the respondent's statutory mandate and are property of the Government.

21. The Board Secretary further deposed that if the respondent were to pay the decretal sum, which is about **US\$5,844,727**, it is the Treasury that would be required to pay because the contract that gave rise to the suit in which the decree was issued was sponsored by the Government. Consequently, the decree holder should direct any execution against the Government.

22. The claimant opposed the objector's application vide a replying affidavit that was sworn by **Grace Sarapay Wakhungu**, the Managing Director. She stated that the objector's application is an abuse of the court process because:

(a) the objector, Ministry of State for Special Programmes, is not a legal person which can institute legal proceedings and therefore has no locus standi to institute these proceedings.

(b) the objector has not exhibited any document showing ownership of the goods that it has objected to the attachment. For example, there is no bill of lading or other such shipping documents to show that it imported the goods, there is no agreement for sale/purchase to show that it was the purchaser or that it procured the goods and there are no purchase orders, invoices or receipts showing that the objector is the one that paid for the goods.

23. The respondent asserted that the goods that had been proclaimed belong to the respondent and not the objector and urged the court to dismiss the objection proceedings.

24. **Muganda Wasulwa T/A Keysian Auctioneers**, the Interested Party, filed a replying affidavit and stated that on 14th March, 2012 he proceeded to the defendant's premises in Industrial Area and proclaimed various items as shown in the proclamation notice. He also notified the respondent of his intention to collect the proclaimed goods upon expiry of seven days.

25. Because of the resistance that he experienced during the proclamation he applied for police protection and supervision during the execution of the warrants. An order to that effect was granted on 3rd April, 2012 by this court's Senior Deputy Registrar.

26. The Interested Party further stated that the motor vehicles that were proclaimed are registered in the name of the respondent and not in the objector's name. Copies of records of the motor vehicle obtained from the Registrar of Motor Vehicles were annexed to the affidavit of Mr. Wasulwa and they clearly reveal that the motor vehicles in question are all registered in the name of the National Cereals and Produce Board. The auctioneer denied that the attached goods had not been proclaimed. He further alleged that the attachment and collection of the defendant's goods was undertaken before any court order to the contrary was served upon him.

27. In the further affidavit sworn by Mr. Andrew Mondo in response to replying affidavit of Grace Wakhungu, he stated that his Ministry was assigned the general and specific mandate of *inter alia*, maintaining the determining strategic grain reserves of the Government of Kenya through Presidential Circular No. 1 of 2008. He added that the Ministry also administers the fund established by the **Exchequer and Audit (Strategic Grain Reserve Trust Fund) Regulations, 2002**. The object and purpose of the Fund is to provide a strategic grain reserve in physical stock and cash equivalent and the initial target of the fund was to maintain three million 90 kg bags grain in physical stock and cash equivalent.

28. To achieve that objective and purpose, the trustees, being the Permanent Secretary in charge of provincial administration and internal security in the Office of the President, the Permanent Secretary in the Ministry of Finance and Planning and the Permanent Secretary in the Ministry of Agriculture and Rural Development, were tasked with the responsibility of arranging for procurement, storage and sale of grain. The initial capital of the Fund was Kshs.1 Billion appropriated by Parliament in the 2001/2002 financial year and additional contributions to the capital of the fund were to be made in the subsequent financial years' budget.

29. The Regulations further provide that all procurement of goods and services for the Fund shall be made in accordance with the Public Procurement Regulations for the time being in force. Mr. Mondo reiterated that the plaintiff had purported to attach non-food items and other grain reserves that had been purchased out of monies transmitted from the Fund.

30. Turning to the second application filed by the respondent on 4th April, 2012, the same seeks extension of time granted by Odunga, J. on 28th March, 2012. Upon delivery of a ruling on that date where the judge dismissed the defendant's application seeking stay of execution of the decree herein, the court ordered that the status quo be maintained for a period of seven (7) days to allow the defendant consider its options, particularly regarding an intended appeal.

31. The respondent filed a Notice of Appeal but the appeal has not yet been filed. **Mr. Katwa** for the respondent stated that the respondent requires a further period of 60 days.

32. In his response, **Mr. Ahmednasir** for the defendant stated that the period of seven days that was granted for maintenance of the status quo expired on 5th April, 2012 and thereafter execution of the decree proceeded. There is therefore no subsisting order that can be extended, counsel added.

33. Turning to the first application by the objector, **Mr. Muiruri**, Principal Litigation Counsel, sought to rely on the case of **AKIBA BANK LIMITED VS. JEDA & SONS LIMITED [2005] eKLR**, where the principles of law in objection proceedings were considered. In that case, an objector filed objection proceedings in respect of two motor vehicles that had been proclaimed by Keysian Auctioneers in execution of a decree. Waweru, J. held that for an objector to succeed in his objection he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree. The standard of proof required in such proceedings is that of balance of probabilities. See **TRANS-AFRICA ASSURANCE COMPANY vs. NATIONAL SOCIAL SECURITY FUND [1999] 1 E.A. 352**.

34. Mr. Muiruri further submitted that all the property that had been proclaimed belongs to the Government of the Republic of Kenya and under **Order 29** of the **Civil Procedure Rules** there can be no attachment against the property of the Government of Kenya. He referred to the provisions of **Section 2** of the **Public Audit Act, 2003**, which defines "**Government**" to include "**the Central Government, the Courts, the National Assembly, commissions established under the Constitution and any other institution connected with the Government or bodies set up under an Act of Parliament**". The Ministry of state for Special Programmes is a Department of Government and is included in the definition of Government, counsel submitted. It therefore means that the attached maize and beans in particular, which were imported by the Ministry of State for Special Programmes, cannot be attached, and so are all the other proclaimed goods, he added.

35. Responding to Mr. Muiruri's submissions, **Mr. Ahmednasir** submitted that a proper reading of **Order 22 rules 51 and 52** of the **Civil Procedure Rules** shows that the court cannot entertain an objection proceeding once 14 days have lapsed. In his view the objector's application is time barred since it was filed more than fourteen (14) days from the date of its hearing. The order of stay was first granted by the court on 5th April, 2012. The court therefore lacks jurisdiction to entertain the objection proceedings, counsel submitted.

36. Counsel further submitted that the Ministry of State for Special Programmes lacks legal personality to qualify as an objector under **Order 22 rule 51 (1)** of the **Civil Procedure Rules**. The Ministry is not a

legal person and cannot own or hold any property, he stated. In support of that submission counsel cited the case of **HOUSING FINANCE COMPANY KENYA LIMITED vs. EMBAKASI YOUTH DEVELOPMENT PROJECT** where the court cited with approval the words of Bankes, L.J. in **BANQUE INTERNATIONALE DE COMMERCE DE PETROGRAND VS. GOUKASSAW [1923] 2KB 682 at page 688** where the court held:

“The party seeking to maintain the action is in the eye of our law not party at all but a mere name only, with no legal existence.”

The court further stated:

“A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining their action, it cannot allow the action to proceed.”

37. Counsel further contended that the Attorney-General is not the owner of the proclaimed goods and neither is the Government of Kenya, in view of the averments by Mr. Andrew Mondo in paragraph 1 of his affidavit where he categorically stated that the Ministry is the objector.

38. He further submitted that the goods that had been proclaimed belong to the defendant/judgment debtor since the National Cereals and Produce Board is a statutory body under **Chapter 338 of the Laws of Kenya.**

39. Regarding the various Agency Agreements that were relied upon by the objector to prove ownership of the attached goods, counsel submitted that none of them suffices. In the second Agency Agreement for May 2001 to May 2004, the objector is not a party to the agreement. The same applies to the 3rd and 4th Agency Agreements. The 5th one for the period 1st July, 2010 to 30th June, 2013 is unsigned. The Agency Agreements are between the Government of Kenya and the defendant. In any event, counsel added, there was no evidence that the attached goods relate to any of the Agency Agreements.

40. **Mr. Oyatta** for the Interested Party supported the submissions made by Mr. Ahmednasir. Counsel further contended that it is not normal for a judgment debtor to support an objector in objection proceedings and that to him was clear evidence that there is collusion between the two parties. He urged the court to dismiss the objector’s application.

41. The judgment that gave rise to these objection proceedings was by way of an arbitral award delivered by **Evans Thiga Gaturu** way back on 7th July, 2009. Thereafter an application was made to set it aside but the same was dismissed by **Njagi, J.** vide his considered ruling delivered on 28th June, 2011. Subsequently, the respondent filed an application seeking stay of further proceedings pending hearing and determination of the intended appeal. The application came up for hearing before **Odunga, J.** who dismissed the same by a ruling delivered on 8th February, 2012. Thereafter the defendant sought leave to appeal and same was granted. The learned judge further ordered that the prevailing status quo be maintained for a period of seven days. Upon expiry of the said period of time the plaintiff/decree holder proceeded to execute the decree.

42. The validity of the judgment cannot therefore be questioned before this court in any way. The court is only called upon to determine the issue of ownership of the attached goods, that is, whether they belong to the defendant or to the objector and whether they can be attached in execution of the decree. The court has already set out a list of the attached goods. It is contended by the objector and the defendant that all those goods do not belong to the defendant since the objector has legal and equitable rights over the same.

43. Before I determine the issue of ownership of the attached property, the issue of this court’s jurisdiction to consider an application of this nature after expiry of fourteen days from the date stay of execution was first granted must first be settled. **Order 22 rule 52** of the Civil **Procedure Rules** states as follows:

“Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

Rule 54 provides that if the attaching creditor proposes to proceed with the attachment the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.

44. My understanding of these provisions is that the discretionary stay of execution that is initially granted to an objector who has filed a valid notice of objection and an application is limited to a period of fourteen days. But once the attaching creditor intimates to the court that he wishes to proceed with the attachment and has filed a replying affidavit the court can extend the order of stay of execution for a reasonable period of time before it can hear the application, provided the application is heard and determined expeditiously. I do not therefore agree with the plaintiff that after lapse of fourteen days from the date when the order of stay was initially granted the court lacks jurisdiction to order any further stay. If it were so it would have been expressly stated that the application must be heard and determined within fourteen days from the date of grant of the order of stay of execution.

45. I will now proceed to deal with the issue of ownership of the attached properties.

46. In determining that issue, the starting point should be to consider the legal status of the National Cereals and Produce Board. **Section 3** of the **National Cereals and Produce Board Act, Cap 338**, establishes the Board and **Section 5 (1)** sets out the powers of the Board. **Section 5 (1)** states that:

“The Board shall be a body corporate with perpetual succession and a common seal.”

Section 5 further provides that:

“The Board shall have power –

- (a) to enter into contracts and arrangements which may, in the opinion of the Board, be necessary or expedient for the better carrying out of the objects of this Act;**
- (b) to establish and operate in the name of the Board any bank accounts it may deem necessary or convenient;**
- (c) to invest and deal with any moneys of the Board not immediately required by the Board, in and upon such investments and securities as are allowed by law for the investment of trust funds or such other securities or investments as may be approved by the Treasury for the purposes of this paragraph;**
- (d) to draw, make, accept, endorse, discount, execute and issue bills of exchange, promissory notes, bills of lading and other negotiable or transferable instruments or securities;**
- (e) to set up reserve or equalization funds in respect of maize, wheat or scheduled agricultural produce as may, for any year, have generated excess profits which in the opinion of the Board may be used to support subsequent falls in market prices;**
- (f) to raise or borrow, with the approval of the Minister, such sums of money as it may require for the provision of working capital, the establishment or acquisition of property or undertakings required by the Board or any other expenditure properly incurred by the Board for the purposes of this Act.”**

47. What is a **“body corporate”**? **Black’s Law Dictionary**, 9th Edition page 391 defines it as:

“An entity having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.”

That is the same definition as that of a corporation or a company.

48. That in essence means that even though the Board consists of persons who are either public servants and/or appointed by the President as spelt out under **Section 3** of the **Act**, the Board is a corporate entity with capacity to sue and be sued in its own name. The Board has capacity to enter into contracts and hold property in its name, irrespective of whether the funds used to acquire that property may have been wholly provided by the Government of Kenya. That was the intention of the Legislature in constituting the Board as a body corporate.

49. The functions of the Board are set out under **Section 4** of the **Act**. The functions include purchase, sale, importation and exportation of maize and other cereals as specified under the Act. However, **Section 4 (3)** states that:

“Nothing in this Act shall prevent or prejudice the appointment of the Board as an agent under section 14 of the Agriculture Act.”

Section 14 of the **Agriculture Act** grants the Minister for Agriculture power to appoint by notice in the gazette, an agent or agents for the purchase, collection, storage and marketing of any scheduled crop or animal product. In entering into an Agency Agreement the Minister for Agriculture may consult with the Minister for Finance for purposes of facilitating the agreement.

50. The objector and the defendant alleged that all the attached property in this matter belong to the Government of Kenya but that was denied by the plaintiff. Regarding the bags of maize and beans, Mr. Mondo deponed that the Government of the Republic of Kenya entered into several Agency Agreements with the defendant for purchase and storage of the said cereals as part of the strategic food reserves maintained by the Government. He annexed several letters addressed to the Board by the Permanent Secretary, Ministry of Agriculture and Permanent Secretary, Office of the President Ministry of State for Special Programmes. It is important to highlight the contents of some of those letters.

51. On 29th July, 2011 Mr. Mondo wrote to the Managing Director of the National Cereals and Produce Board as follows:

“REF: PURCHASE OF STRATEGIC GRAIN RESERVE AT MARKET PRICE

You are aware that the Cabinet directed this Ministry to re-stock the SGR Stock by buying maize from local farmers at the prevailing market price. You are in this regard directed to commence the purchase at the earliest as the harvest is going on in the South Rift. The Ministry will transfer Kshs.500 Million for this exercise.”

52. On 9th November, 2011 Mr. Mondo wrote to the defendant’s Managing Director as hereunder:

“REF: PAYMENT OF AGENCY FEES FOR SGR

This is to inform you that we have transferred to your account Kshs.200 Million (Two Hundred Million Only) being part payment of agency fees for management of Strategic Grain Reserve. Please confirm the receipt of the funds.”

53. More recently, on 16th January, 2012 Mr. Mondo wrote to the defendant’s Managing Director as follows:

“REF: RELEASE OF FUNDS FOR PURCHASE OF SGR AND RELIEF MAIZE

This is to inform you that we have transferred to your account Kshs.550 Million (Five hundred and fifty Million). Out of this amount Kshs.450 Million is for purchase of SGR maize while Kshs.100 Million is for purchase of relief maize at Kshs.1,800 per 90 Kg bag.”

54. The defendant ordinarily purchases and stores maize and is also engaged in marketing and distribution of the same, apart from serving as an agent for the Government at specific times as indicated in the Agency Agreements aforesaid. It cannot therefore be assumed that any maize or beans stored at the premises of the defendant form part of Strategic Grain Reserves or relief food. That must be established by way of evidence.

55. In **KENYA OIL COMPANY LIMITED vs. FUAD MAHMOUD MOHAMMED & OTHERS [2002] LLR 3113 (CCK)**, Ringera, J. (as he then was), held that the burden of proof is on the objector to establish a legal or equitable interest in the property subject matter of the execution objected to, which burden is to be discharged on balance of probability. It is not for the decree holder to prove that the goods belong to the defendant.

56. In **TRANS-AFRICA ASSURANCE COMPANY vs. NATIONAL SOCIAL SECURITY FUND (Supra)**, the Supreme Court of Uganda held that in objection proceedings the objector was not required to definitely and conclusively prove ownership of the disputed property, all that was required to be done was to establish possession and account or adduce satisfactory evidence of ownership.

57. Although the objector did not exhibit documents like bills of lading, letters of credit or such other evidence of importation or local purchase of the cereals that were attached by the auctioneer in execution of the decree from the documents annexed to the affidavit of Mr. Mondo there can be no denial that the defendant has been acting as an agent of the Government of Kenya for purchase and storage of Strategic Grain Reserves and relief food.

58. The letter of 16th January, 2012 addressed to the defendant’s Managing Director by Mr. Mondo reveals that the Government recently transferred to the defendant a sum of Kshs.550 Million for purchase of Strategic Grain Reserves and relief maize. It is not clear whether as at the date of the proclamation the defendant had done the purchase. However, the maintenance of the Strategic Grain Reserves is a continuous exercise such that at any one particular time the Government of Kenya is holding in the stores of the defendant three million bags of grain in physical stock and cash equivalent. It is for that reason that Parliament allocated an initial capital fund of Kshs.1 Billion in the 2001/2002 financial year and directed that additional contributions to the fund were to be made in subsequent financial years’ budgets.

59. It is thus evident from the annexures to the affidavit of Mr. Mondo that the defendant has been receiving huge sums of money from the Government for purpose of re-stocking the Strategic Grain Reserves.

60. On the basis of the foregoing, I find and hold that the objector has proved, on a balance of probability, that the 100,000 bags of maize and the 100,000 bags of beans are part of the national food security and emergency relief stocks and therefore belong to the Government of the Republic of Kenya. The Attorney-General is the principal legal advisor to the Government and represents the Government in all legal proceedings and in my view the plaintiff’s challenge as to the objector’s capacity to bring these proceedings is unsustainable. The Government has different Ministries which perform different functions and the Office of the President, Ministry of State for Special Programmes, is tasked with the responsibility of ensuring that there is sufficient food stocks in the country and it is the same Ministry that is responsible for distribution of relief food as and when food supplies in various parts of the country are inadequate due to drought or other natural calamities.

61. If the court were to sustain the plaintiff’s objection as regards the capacity of the objector to institute these proceedings, the court would be acting contrary to the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya, 2010** which requires that justice shall be administered without undue regard

to procedural technicalities.

62. Turning to the various motor vehicles that were proclaimed by the Interested Party, neither the objector nor the defendant adduced any evidence that they are indeed not the property of the defendant. To the contrary, the Interested Party produced records of the motor vehicles showing that they are all registered in the name of the defendant.

63. **Section 8** of the **Traffic Act** states that:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

I am satisfied that the motor vehicles in question are owned by the defendant. The objector did not demonstrate that he has any legal or equitable rights over the same. It must be borne in mind that the defendant is a body corporate that is by law permitted to acquire property in its own name. The objector's and the defendant's objection to their attachment is unsustainable.

64. As regards all the other proclaimed items, I equally find that there is no evidence by the objector that they do not belong to the defendant. It is the objector who bears the burden of proof and not the decree holder. The contention by Mr. Patrick Karanja, the defendant's Acting Board Secretary, that since the defendant is a creature of statute fully owned by the Government, all its assets are Government assets that cannot be attached is without any legal basis.

65. Furthermore, the defendant cannot be heard to advance such arguments in objection proceedings since under **Order 22 rule 51** of the **Civil Procedure Rules** the only person who can bring objection to attachment is a third party who claims to be entitled to or to have a legal or equitable interest in the attached property in execution of a decree and not the judgment debtor.

66. I would agree with Mr. Ahmednasir and Mr. Oyatta that there appears to be collusion between the defendant and the objector to defeat the execution of the decree herein.

67. In view of the foregoing, the objection proceedings succeed to the extent of the 100,000 bags of maize and 100,000 bags of beans only. All the other proclaimed items and any other property that belongs to the defendant are available for attachment by the Interested Party in execution of the decree save for Strategic Grain Reserves and relief maize that may be in the possession of defendant.

68. Since the objector has partially succeeded in his application, he shall bear one half of the plaintiff's costs of the application.

69. Turning to the second application by the defendant, Odunga, J. granted a limited period of time, seven days from 28th March 2012, to enable the defendant consider its options in respect of an appeal to the Court of Appeal. The defendant has already filed a Notice of Appeal. The defendant has also filed an application in the Court of Appeal under certificate of urgency seeking stay of the orders made by this court. The defendant has so far not obtained any order of stay of execution from the Court of Appeal. The seven days period for maintenance of the status quo has long lapsed and there is no order that is capable of any extension. I believe the only viable option the defendant has lies in the Court of Appeal.

70. Consequently, I dismiss the defendant's application with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 2012.

D. MUSINGA
JUDGE
In the presence of

Muriithi – Court Clerk
Mr. Ahmednasir for the Plaintiff
Mr. Katwa for the Defendant
Mr. Muiruri for the Objector