



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
Civil Case 421 of 2012

**WACHIRA NDERITU, NGUGI & CO. ADVOCATES**

**AND**

- 1. IN THE MATTER OF THE HIGH COURT MISC CIVIL APPLICATION NO. 632 OF 2009**
- 2. IN THE MATTER OF THE HIGH COURT MISC CASE NO. 538 OF 2009**
- 3. IN THE MATTER OF THE HIGH COURT MISC CIVIL APPLICATION NO. 360 OF 2011**
- 4. IN THE MATTER OF THE HIGH COURT MISC CIVIL APPLICATION NO. 361 OF 2011**

**BETWEEN**

**WACHIRA NDERITU, NGUGI & CO. ADVOCATES.....DECREEE  
HOLDER**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....JUDGEMENT  
DEBTOR**

**AND**

**IN THE MATTER OF.....A GARNISHEE  
APPLICATION**

**BETWEEN**

**WACHIRA NDERITU, NGUGI & CO. ADVOCATES.....  
APPLICANT**

**AGAINST**

EQUITY BANK

LTD.....1<sup>ST</sup> GARNISHEE

CO-OPERATIVE BANK OF KENYA LTD.....2<sup>ND</sup>  
GARNISHEE

RULING

By a Notice of Motion dated 25<sup>th</sup> July 2012 expressed to be brought under the provisions of Order 51 Rules 1 and 2 of the Civil Procedure Rules, the applicants herein seek the following orders:

1. That this Honourable court do be pleased to certify this application as urgent.
2. That a Garnishee Order Nisi do issue against the Garnishees attaching all the deposit that they hold in favour of the judgement debtor herein in the judgement debtor's accounts No. 0810297194838 with the first Garnishee and account No. 01136005723605 with the second garnishee at its city Hall Branch respectively in satisfaction of the sum of Kshs. 21,843,526.31 due to the applicant by way of decretal sum for costs awarded to the applicant in H.C. Misc. Civil application No. 632 of 2009. H.C. Misc. Civil case no. 538 of 2009, H.C. Misc civil application No. 360 of 2011 and H. C. MISC Civil application No. 361 of 2011.
2. That the cost of this application be provided for.

The application is supported by an affidavit sworn by Wachira Nderitu on 25<sup>th</sup> July 2012 and in summary it is the applicant's contention that the judgement debtor/respondent owes the applicant a sum of Kshs. 21,843,526.31 in respect of legal services rendered by the applicant to the respondent which sum has been duly taxed and various decrees drawn in respect thereof. According to the applicant the respondent has or is likely to have credit in its account nos. 0810297194838 and 01136005723605 which accounts the applicant now seeks to attach.

The only issue before this Court is whether the respondent being a Local Authority established under the Local Government Act is amenable to the garnishee proceedings in respect of monies held in its credit.

Section 263A of the *Local Government Act, Cap 265, Laws of Kenya* provides as follows:

*Notwithstanding anything to the contrary in any law—*

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

*(b) no immovable property of the local authority or any of its vehicles or its other operating equipment, machinery, fixture or fittings shall be seized or taken by any person having by law power to attach or dis train property without the previous written permission of the clerk of the local authority.*

In my view the foregoing provision was meant to protect local authorities and public bodies for that matter from execution in circumstances that could lead to the operations of the public body grinding to a halt, taking into account the central role played by the body. However, it is unfortunate and regrettable that that section has been subject of abuse in several cases by local authorities. However, the law as it stands presently is that no execution whether through garnishee proceedings or otherwise can be levied against the property of a local authority in settlement of a decree in a civil case. The only recourse

available to a decree holder is to apply for *mandamus* against the Chief Officer of the Local Authority, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of *mandamus* is not complied with. I refer to the case of **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants**[2007] 2 EA 441 where Nyamu, J (as he then was) dealing with orders of orders of judicial review and citing the cases of **Susan A. Akoth and Others vs. Municipal Council of Kisumu and Co-Operative Bank of Kenya Limited Kisumu HCCC No. 46 of 2005; Compware Limited Vs. Municipal Council of Kisumu HCCC No. 287 Of 2000(UR); National Housing Corporation vs. Nairobi City Council & Kenya Commercial Bank HCCC No. 5004 of 1998 (UR); W G Wambugu & Company vs. Kenya Railways Corporation HCCC No. 804 of 2001 (UR); Total (Kenya) Limited vs. Kenya Railways Co-Operation** stated as follows:

**“The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/ and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.**

I agree therefore with the Judge that the applicant should pursue the remedies available to it under the judicial review process to their rightful conclusion.

By parity of reasoning I also wish to refer to the case of **Total Kenya Limited vs. Kenya Railways corporation** [2004] 1 EA at 339, in which Ochieng’ AJ (as he then was) set aside an earlier order made by Nyamu, J (as he then was) on the ground that section 110 of the then Kenya Post and Telecommunications Act restricted attachment or execution against the corporation or against any property with the corporation. The Honourable Judge expressed himself thus:

**“It is my view that the phrase “any property with the corporation” definitely extends to and includes money in the account of the corporation or any third party who holds such money for the said corporation. It is a cardinal rule of interpretation that when a provision enumerates specific matters, the said provision is ordinarily deemed to exclude any matters not incorporated therein. I therefore ask myself whether or not section 88 of the Kenya Railways Corporation is wide enough to include a restriction against the process of execution by way of garnishee proceedings. It would appear that, that section could have been perhaps better worded (as in the case of Kenya Post and Telecommunication Act Chapter 411) so that it would have been clear that all execution and attachment was not lodged against the corporation’s property. But having searched my soul and hard I find that the first part of the section may be deemed to provide all the inclusive protection to the corporation’s property”.**

In **Municipal Council of Kisumu vs. Neela Bhanubhai Patel T/A Chemhard Agencies. Civil Application No. Nai. 29 of 2001** the Court of Appeal did express its doubts on whether attachment of the a Local Authority’s moneys in a bank is a mode of execution and therefore barred by section 263A of the Local Government Act and found that that issue was an arguable point for the purposes of stay of execution pending an appeal.

In the foregoing premises, I will follow the beaten path and hold that garnishee proceedings being

execution proceedings are barred by section 263A aforesaid unless the exceptions enumerated therein are satisfied.

In passing, I entertain some doubt, without deciding whether garnishee proceedings can be brought in separate proceedings from the ones in which the original decree was made.

Accordingly, the application dated 25<sup>th</sup> July 2012 is struck out but with no orders as to costs.

**Ruling read and delivered in court this 30<sup>th</sup> day of July 2012**

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

In the presence of Mr. Nderitu for the applicant