



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 102 OF 2012**

**MARGGIE MBOGO MACNIVEN T/A GARDEN OF EDEN RESTAURANT...PLAINTIFF**

**VERSUS**

**NORTH LAKE LIMITED.....1<sup>ST</sup> DEFENDANT**

**TRANSALLIED LIMITED.....2<sup>ND</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....3<sup>RD</sup> RESPONDENT**

**RULING**

On 30<sup>th</sup> October, 2019, judgment was entered for the plaintiff against the 3<sup>rd</sup> defendant on the following terms;

1. Kshs. 6,777,432.46 as special damages together with interest from the date of filing suit until payment in full.
2. Kshs. 1,000,000.00 as general damages together with interest from the date of judgment until payment in full.
3. Kshs. 5,000,000.00 as exemplary damages together with interest from the date of judgment until payment in full.
4. Costs of the suit.

A decree was extracted from the said judgment on 4<sup>th</sup> November, 2019. On 18<sup>th</sup> November, 2019, the plaintiff's bill of costs was taxed by the Deputy Registrar at Kshs. 741,789.21 and a certificate of costs for that amount was issued on 9<sup>th</sup> June, 2020. What is now before me is the plaintiff's application brought by way of Notice of Motion dated 7<sup>th</sup> July, 2020 under various provisions of the Constitution, the Government Proceedings Act, Chapter 40 Laws of Kenya, the Public Finance Management Act, 2012 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That the County Executive Committee Member for Finance and the Chief Officer for Finance of Nairobi City County Government be summoned to personally appear in court and present a workable and verifiable plan of settling the decree issued herein within 14 days of delivery of the ruling.
2. That if no cause is shown within the prescribed time, an order be issued for the attachment of the following accounts held by the 3<sup>rd</sup> defendant/judgment debtor in satisfaction of the said decree;
  - i. National Bank of Kenya Account Number [...].
  - ii. Co-operative Bank Account Number [...].
3. That the costs of the application be borne by the 3<sup>rd</sup> defendant/judgment debtor.

The application was brought on the grounds set out on the face thereof and on the affidavit of the plaintiff sworn on 7<sup>th</sup> July, 2020. In summary, the application was brought on the following grounds. On 30<sup>th</sup> October, 2019, judgment was entered for the plaintiff against the 3<sup>rd</sup> defendant together with costs the particulars of which I have highlighted earlier in the ruling. The plaintiff's costs were subsequently taxed and certified by the Deputy Registrar. Copies of the decree embodying the orders that were made by the court and a certificate of costs

were extracted and served upon the 3<sup>rd</sup> defendant/judgment debtor on 7<sup>th</sup> November, 2019 and 11<sup>th</sup> June, 2020 respectively. Despite service of the said decree and certificate of costs upon the 3<sup>rd</sup> defendant, the 3<sup>rd</sup> defendant had failed and/or refused to settle the same. The County Executive Committee Member for finance and the Chief Officer of the County were in charge of the County Treasury and were responsible for among other things, the management of the county government debt and payment of all monies authorised to be paid by the county government for public purpose from the County Exchequer Account without undue delay. The 3<sup>rd</sup> defendant had not only refused and/or neglected to settle the decretal amount but had also refused to give any proposal on how to settle the said amount. The plaintiff urged the court to allow the application in the interest of justice.

The 3<sup>rd</sup> defendant was served with the application but did not respond to the same. When the application came up for hearing on 12<sup>th</sup> October, 2020, Mr. Wawire advocate who appeared for the plaintiff/applicant urged the court to allow the application as prayed since it was not opposed. He cited two authorities namely; Japheth Nzila Muangi v Minister of Lands & Environment of the County Government of Mombasa & Another [2019] eKLR and African Commuter Services Ltd. v Kenya Civil Aviation Authority & 2 Others [2014] eKLR.

I have considered the application together with the affidavit filed in support thereof. I have also read the two cases that the plaintiff's advocate relied on in support of the application. Following the amendment of the Government Proceedings Act, Chapter 40 Laws of Kenya in 2015, Section 21 of the Government Proceedings Act relating to the satisfaction of orders against the government now applies to County Governments. Section 21 of the Government Proceedings Act provides as follows:

**1. Where in any civil proceedings by or against the government or any 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 21 days from the date of the order or, in case the order provides for the payment of costs and the costs are required to be taxed, at any time after the costs have been taxed, whichever is the latter, issue to that person a certificate in the prescribed form containing the 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.**

**2. A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney General.**

**3. If the order provides for the payment of any money by way of damages or otherwise, or any costs, the certificate are to state the amount payable and the accounting officer for the government department concerned shall, subject as hereinafter provided pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:**

**Provided that the court by which any such orders are as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.**

**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 modification, apply to any civil proceeding by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”**

It is not in dispute that the plaintiff obtained judgment against the City Council of Nairobi on 30<sup>th</sup> October, 2019 for a total sum of Kshs. 12,777,432.46 plus interest accruing on part of the judgment amount from the date of filing suit and on the other part from the date of judgment. The plaintiff was also awarded the costs of the suit that was taxed at Kshs. 741,789.21 on 18<sup>th</sup> November, 2019. I am in agreement with the plaintiff that under the Public Finance Management Act 2012, the County Executive Committee Member for Finance of a County Government and his Chief Officer are the accounting officers of the County Government. Section 21(3) of the Government Proceedings Act, Chapter 40 Laws of Kenya that I have reproduced herein earlier places an obligation on the accounting officer of the County Government to pay or settle any judgment made against the County Government. It follows therefore that the County Executive Committee Member for Finance of the Nairobi City County Government and his Chief Officer as the accounting officers of the said government had a duty and an obligation to settle the said sum of Kshs. 12,777,432.46 plus interest and costs that were awarded to the plaintiff. However, I am of the view that the said accounting officers were only under a duty to settle the said amount after the applicant had complied with the provisions of section 21(1) of the Government Proceedings Act aforesaid.

I have noted that the plaintiff has failed to comply with section 21 (1) of the Government Proceedings Act. There is no evidence that the applicant has applied to this court to be issued with a certificate in the prescribed form containing the particulars of the order that was made in her favour. Under section 21 (3) of the Government Proceedings Act, the accounting officer of the government is only supposed to make payment of the amount which has been certified to be due by the court. I am of the view that in the absence of a certificate, the accounting officer is not under any duty to make payment to a judgment debtor. What the plaintiff served upon the 3<sup>rd</sup> defendant were copies of the decree and certificate of costs. The judgment of the court included the principal amount, interest and costs. The certificate of order against the government under section 21(1) of the Government Proceedings Act must reflect these three elements of the judgment. The decree of the court and the certificate of taxation served upon the 3<sup>rd</sup> defendant which in any event were not in the prescribed form did not meet this

threshold.

The other limb of the plaintiff's application was seeking an order that in the event that the County Executive Committee Member for Finance of the Nairobi City County Government and his Chief Officer fail to appear in court and present an acceptable plan for payment of the decretal amount, an order should be made for the attachment of the Nairobi City County Government accounts held at Kenya Commercial Bank and Cooperative Bank of Kenya. Even if I was to forgive the plaintiff's failure to serve the 3<sup>rd</sup> defendant with a certificate of order against the government in a prescribed form, I do not think that this court would issue an order for the attachment of the 3<sup>rd</sup> defendant's accounts in execution of the judgment entered herein. First, section 21(4) of the Government Proceedings Act expressly forbids attachment against the government in execution of a decree or order of the court. An order for the attachment of the accounts of the Nairobi City County Government would in the circumstances be illegal. As I mentioned earlier, I have perused the two decisions that were cited by the plaintiff in support of her contention that an order of attachment can be issued against a County Government. The said decisions are not binding on this court. I am not in agreement with the decision in Japheth Nzila Muangi v Minister of Lands & Environment of the County Government of Mombasa & another(supra). With regard to the decision in Africa Commuter Services Ltd. v Kenya Civil Aviation Authority & 2 others(supra), the same is distinguishable. The decision in that case turned on the interpretation of section 43(1) of the Civil Aviation Act, 2013 which is not similar to section 21(4) of the Government Proceedings Act. Whereas section 21(4) of the Government Proceedings Act bars all forms of execution, section 43(1) of the Civil Aviation Act, 2013 bars execution only in respect of particular items. I am supported in the position I have taken herein by several decisions of this court such as Republic v Attorney General & another ex-parte Stephen Wanyee Roki (2016) KLR, Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic v The Attorney General & Another ex parte James Alfred Koroso[2013]eKLR, Miscellaneous Civil Application No. 350 of 2015, Republic v County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR and Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR.

The other hurdle which the plaintiff's application for attachment of the 3<sup>rd</sup> defendant's bank accounts faces is that there is a prescribed procedure in Order 23 of the Civil Procedure Rules for applications for attachment of bank accounts. The application before the court is not in accord with that procedure that would have required that Kenya Commercial Bank Limited and Cooperative Bank Limited be summoned to appear in court to show cause why the monies held in the two accounts sought to be attached should not be paid to the plaintiff before the attachment order is issued.

The upshot of the foregoing is that I find no merit in the Notice of Motion application dated 7<sup>th</sup> July, 2020. The application is dismissed with costs to be in the cause.

**Delivered and Dated at Nairobi this 4<sup>th</sup> day of February, 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Wawire for the Plaintiff

N/A for the 3<sup>rd</sup> Defendant

Ms. C. Nyokabi-Court Assistant