



Republic v National Land Commission; Mohammed (Suing on Behalf of Bilal Primary School Narok) (Exparte Applicant) (Environment & Land Case 250 of 2018) [2024] KEELC 6711 (KLR) (14 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 250 OF 2018
MAO ODENY, J
OCTOBER 14, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

FATUMA MOHAMMED (SUING ON BEHALF OF BILAL PRIMARY SCHOOL NAROK) EXPARTE APPLICANT

RULING

1. This ruling is in respect of a Notice of Motion dated November 24, 2023 by the Respondent seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to set aside the warrants of attachment issued on the 27th of September 2023 and quash the proclamation notice issued thereto dated the 17th October 2023.
 - d. That this Honourable Court be pleased to grant such other and further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of this case.
 - e. That the costs of this Application be in the cause.
2. The application was supported by the annexed affidavit of Brian Ikol, the Director Legal Affairs and Dispute Resolution Department of the Respondent where he deponed that the Applicant is the



Respondent and the Judgment Debtor in this suit That the costs were taxed at Kshs. 694, 132/= to which the Ex-parte Applicant commenced execution proceedings. He further deponed that this Honourable Court issued warrants of attachment on 27th September, 2023 as well as a notice to Ms. Mbusera Auctioneers authorizing execution of the decree to realize the sum of Kshs. 698, 132/=.

3. He deponed that pursuant to the Warrant of Attachment, Ms. Mbusera Auctioneers have served the Applicant's with a proclamation of attachable movable property which are tools of trade/work of the Applicant and who is a government entity. That the items include office computers, office chairs, desks, printing and photocopy machines as well as telephone heads among other items.
4. He also deponed that the warrants of attachment of movable property and the notice of proclamation are irregular as they are contrary to Section 21 of the [Government Proceedings Act](#). It was the Applicants case that unless the warrants of attachment are set aside, the Applicant stands to suffer immense loss as its operations may be paralyzed and the auction may proceed contrary to the provisions of the [Government Proceedings Act](#).
5. In response, Fatuma Mohammed filed a replying affidavit sworn on 13th December, 2023 and deponed that she is the manager of Bilal Primary school and a decree holder. She deponed that the applicant is a body corporate established by [the Constitution](#) and Statute and therefore independent from the government.
6. She further deponed that under Article 248 of [the Constitution](#), the applicant is an independent constitutional commission that operates independently from the government and that any decree against it, is not against the government but against it as an independent juridical body.
7. The Applicant relied on Article 253 of [the Constitution](#) and stated that the applicant is a body corporate with perpetual succession and a seal with capacity to sue and be sued therefore independent and separate from the government bearing its own liabilities thus not covered by the [Government Proceedings Act](#).
8. It was her case that none of the proclaimed items are exempt from execution under [the Constitution](#) or under the law hence the Applicant cannot hide itself behind the [Government Proceedings Act](#) for any wrongs committed by it and or judgment passed against it.

Respondent Applicant's Submissions

9. Counsel filed submissions dated 7th May, 2024 and identified the following issues for determination:
 - a. Whether the warrants of attachment should be set aside and the proclamation notice be quashed.
 - b. Who should pay costs.
10. On the first issue, counsel submitted that the Applicant herein is an independent commission established under Article 67 of [the Constitution](#) and operationalized by the [National Land Commission Act](#). Counsel further submitted that it thus falls under the bracket of a government entity or state organ and thus execution of a judgment or decree against it must adhere to the provisions of the [Government Proceedings Act](#).
11. Ms. Njuguna relied on Article 260 of [the Constitution](#) which defines "state organ" to mean a commission, office, agency or other body established under [the Constitution](#). Counsel cited the case of Okiya Omtatah Okoiti & Another vs Attorney General & 7 others [2013] eKLR and submitted that it is clear that the National Land Commission is a government entity and attachment against the government is regulated under Section 21 of the [Government Proceedings Act](#) No. 35 of 2015.



12. Counsel further submitted that the applicant is an independent Constitutional Commission established under Article 67 of *the Constitution* tasked with inter alia the management of public land on behalf of the National and County Governments and falls under Chapter 15 of *the Constitution*, which commissions are fully funded by the exchequer.
13. Counsel relied on the case of Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR on the test for determining whether an entity is a Government body or not.
14. Counsel further relied on the cases Kisyia Investments Ltd vs Attorney General & Another [2005] 1 KLR 74, Five Star Agencies v National Land Commission & Others (ELC Civil Case Number 445 of 2014) and Permanent Secretary Office of the President, Ministry of Internal Security & Another ex parte Nassir Mwandishi [2014] eKLR and submitted that the rationale or objective of the law that prohibits execution against attachment of government assets and property
15. Ms. Njuguna also stated that the Ex-parte Applicant has not shown this honorable court that it followed the laid down procedure for applying for a writ of mandamus or obtaining a certificate of order of costs against the applicant and relied on the cases of Jamleck Waweru Karanja v County Government of Nakuru [2020] eKLR, Speaker of the National Assembly v James Njenga Karume [1992] eKLR and Samson Chembe Vuko vs Nelson Kilumo & 2 others [2016] eKLR.
16. On the second issue, counsel relied on the case of Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No 6 of 2004 and urged the court to find that the Applicant herein is entitled to costs.

Ex-parte Applicant's Submissions

17. Counsel filed submissions dated 24th May, 2024 and identified the issue for determination as to whether the respondent/applicant is covered by the *Government Proceedings Act* and therefore exempt from execution under the *Civil Procedure Act*.
18. Counsel submitted that the Applicant is an independent Constitutional Commission established under Article 67 of *the Constitution* and Section 2 of the *National Land Commission Act*. Counsel submitted that the Applicant is neither covered by the *Government Proceedings Act* nor immune from execution under the *Civil Procedure Act*.
19. Counsel relied on Articles 248, 249 (2) b (c), and 253 of *the Constitution* of Kenya, Sections 2 and 24 of the *National Land Commission Act* and the cases of Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 others [2018] eKLR and Paul. T. Gichuhi t/a Sapamo Consulting Engineers v Kenya Pipeline Company Limited [2021] eKLR.

Analysis And Determination

20. The issues for determination are whether the *Government Proceedings Act* governs the Applicant, National Land Commission, whether it is immune from execution under the *Civil Procedure Act* and whether the court should set aside the warrants of attachment and proclamation notice.
21. In the case of *Five Star Agencies Limited & another v National Land Commission & 2 others (Civil Appeal E290 & 328 of 2023)* (Consolidated)) [2024] KECA 439 (KLR) (12 April 2024) (Judgment), the Court of Appeal established that the NLC (the Respondent herein) is a State organ and therefore,



for all purposes is part of government. The court sought to answer what mode of execution should be adopted against it and in answering the question, the court stated as follows at paragraphs 88 and 91:

“Having stated the foregoing, and since decrees will from time to time be issued against the Government, what then is the option available to a party who holds a decree against the Government? The only remedy available to such a person is to institute judicial review proceedings and seek an order of mandamus to compel the Government to settle the decree in question....”

It is clear beyond any peradventure that the procedure to be followed in execution against the government is to seek an order of mandamus to compel the relevant person in the Government to settle the decree in question....”

22. Similarly, in the case *Vivo Energy Limited (Formerly known as Kenya Shell Limited) v National Land Commission* [2020] eKLR the court stated as follows:

“... Execution proceedings against a government or public authority can thus only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a Judgment made by the court against that body. This was also the holding in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* [2012] where J. Githua held as follows:-

‘In ordinary circumstances, once a Judgment has been entered in a Civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a Civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a Judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regard to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property / goods under section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a Certificate of Costs obtained by the successful litigant from the Court issuing the decree which should be served on the Hon. Attorney General. The Certificate of Order against the Government should be issued by the Court after expiration of 21 days after entry of Judgment. Once the Certificate of Order against the Government is served on the Hon. Attorney General. Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.’”

23. In the instant case, the Ex-Parte Applicant did not file a Judicial review seeking an order of mandamus to compel the respondent to settle the decree in question. Instead, the Ex-parte Applicant went ahead to request for issuance of warrants of attachment a proclamation notice to attach the Respondent’s properties.



24. Black's Law Dictionary defines Mandamus as:

“A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act.”

25. I have considered the application, the submissions on record and relevant authorities and find that the application has merit and is therefore allowed as prayed with the following specific orders:

- a. The warrants of attachment issued on September 27, 2023 are hereby set aside.
- b. The proclamation notice issued and dated October 17, 2023 is hereby quashed.
- c. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

