



Njeru Nyaga & Co Advocates LLP v Registered Trustees of Ruiru Sports Club; National Land Commission (Garnishee) (Miscellaneous Application E083 of 2023) [2023] KEELC 21420 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E083 OF 2023
JO MBOYA, J
NOVEMBER 2, 2023**

BETWEEN

NJERU NYAGA & CO ADVOCATES LLP ADVOCATE

AND

REGISTERED TRUSTEES OF RUIRU SPORTS CLUB CLIENT

AND

NATIONAL LAND COMMISSION GARNISHEE

RULING

1. The Ruling herein relates to and/or concerns two A (2) Applications; one filed by the Advocate and in respect of which same seeks for orders against the Garnishee; and the 2nd Application which has been filed by the Respondent/Client; and which essentially, seeks for orders of Stay of Execution/ Proceeding; pending the hearing and determination of an Application for stay of execution before the Court of Appeal.
2. Given the diverse reliefs sought at the foot of the named Application(s), it is expedient to reproduce the reliefs sought thereunder for purposes of brevity and ease of reference. Consequently, the reliefs sought are reproduced as hereunder
3. Vide the Application dated the 9th August 2023; the Advocate/Applicant has sought for the following reliefs;
 - i.Spent.
 - ii. That all the Monies held by the Garnishee be attached to answer and/or satisfy the Ruling given by the Honorable Court on the 31st May 2023; and the balance thereof be paid to the Respondent/Client.



- iii. Costs of this Application and further costs occasioned by the Respondent be paid out of the account held by the Garnishee.
 - iv. Such Further and/ or other reliefs as the Court may deem fit and expedient.
4. The instant Application is premised and/or anchored on the various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of one, Martine Njeru Nyaga; sworn on even date and in respect of which the Deponent has annexed a copy of the Decree issued by the Honourable court on the 31st May 2023.
 5. Upon being served with the instant Application, the Respondent filed an elaborate Replying affidavit sworn by one, namely, Gabriel Muthwale. For clarity, the Replying affidavit is sworn on the 16th September 2023.
 6. On the other hand, the Garnishee filed a Replying affidavit sworn by one Brian Ikol; and which is sworn on the 3rd October 2023. Suffice it to point out that the Garnishee herein does not dispute holding the sum of Kes.349, 779, 975/= only, but contends that there exists a dispute pertaining to the ownership of the property in question and thus the determination of the ownership will impact on the monies which are currently held by the Garnishee.
 7. The second Application is the one dated the 16th September 2023; and in respect of which the Respondent/Client has sought for the following reliefs;
 - i.Spent.
 - ii.Spent.
 - iii. The Honorable Court be pleased to issue an order of Stay of proceedings, pending the Hearing and determination of the Notice of Motion Application dated the 3rd July 2023; in Civil Appeal No. E463 of 2023; the Registered Trustees of Ruiru sports club vs Njeru Nyaga & Co Advocates.
 - iv. This Honorable Court be pleased to issue an order of Status Quo ante prior to the issuance of the Garnishee Order Nisi and subsequent orders dated the 10th August 2023, issued pursuant to the Garnishee Application dated the 9th August 2023; pending the hearing and determination of the Notice of Motion Application dated the 3rd July 2023; in Civil Appeal No. E463 of 2023; The Registered Trustees of Ruiru sports club vs Njeru Nyaga & Co Advocates.
 - v. That this Honorable Court be pleased to issue any other order it deems fit to meet the Jnds of justice.
 - vi. The costs of this Application be provided for.
 8. Suffice it to point out that the instant Application is premised on various grounds which have been alluded to at the foot thereof. Further and in addition, the Application is supported by the affidavit of one, namely, Gabriel Muthwale sworn on even date.
 9. It is imperative to underscore that the matter herein came up on the 5th October 2023; whereupon the Parties agreed to canvass and dispose of the two (2) Applications simultaneously. Consequently and in this respect, the court thereafter proceeded to and indeed issued directions, inter-alia, the filing and exchange of written submissions within set timelines.



10. Pursuant to and in line with the directions by the Honourable court, the Parties herein duly filed and exchanged their respective submissions. For coherence, the submissions formed part of the record of the court.

The Parties' Submissions:

a. Applicant's Submissions:

11. The Applicant herein filed written submissions dated the 11th October 2023; and in respect of which same has raised, highlighted and canvassed one [1] issue for consideration by the Honourable court.
12. For good measure, Learned counsel for the Applicant has submitted that the court herein entered Judgment in favor of the Applicant in terms of the Certificate of Taxation and thereby decreed that the Applicant is entitled to payment of the sum of Kes.41, 289, 401.80/- only, together with interests at court rates.
13. Nevertheless, Learned counsel for the Applicant has further submitted that despite the Judgment and consequential decree of the Honourable court, the Respondent/Client has failed and/or neglected to liquidate the decretal sum, which amount is stated to be owing and payable.
14. Be that as it may, Learned counsel for the Applicant has submitted that the Garnishee herein holds sufficient amount of money on account of the Respondent/Client, which monies can be attached and applied towards liquidation of the decretal sum.
15. Based on the foregoing submissions, Learned counsel for the Applicant has thus invited the Honourable court to find and hold that the monies held by the Garnishee, albeit on account of the Respondent herein, falls within the purview of Order 23 of the Civil Procedure Rules, 2010; and thus merits attachment.
16. In a nutshell, the Applicant has therefore contended that the Application beforehand has been proved to the requisite standard/ threshold and hence same ought to be allowed.
17. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on, inter-alia, the decision in the case of Nicolas Stephen Okaka & Another versus Alfred Wanga Wesonga (2022)eKLR; Isaac Gichingi Leaky versus Alfred Wanga Njogu & Another (2021)eKLR; and Kenya Women Microfinance Ltd vs Martha Wangari Kamau (2020)eKLR.

b. Respondent's Submissions:

18. The Respondent has filed two (2) sets of submissions, dated the 4th August 2023; and 13th August 2023; respectively, but which submissions (sic) predates both Applications which are the subject of deliberations before the Honourable court.
19. Nevertheless, the Respondent herein has raised and highlighted two (2) pertinent issues for consideration by the Honourable court.
20. In respect of the Application seeking for an order of Garnishee, Learned counsel for the Respondent has submitted that the Garnishee proceedings which have been commenced by and on behalf of the Applicant are not only illegal but a nullity, for all intents and purposes.
21. Furthermore, Learned counsel for the Respondent has submitted that the Garnishee herein is an Independent and Constitutional Commission pursuant to the Provisions of Article 67(2) of the Constitution, 2010; and by virtue of her nature, same falls within the purview of the Government



- Proceedings Act*, which prohibits any attachment of debts as against the Government or Government Departments.
22. Instructively, Learned counsel for the Respondent has invited the Honourable court to take cognizance of the provisions of Section 21(4) of the *Government Proceedings Act*, Chapter 40 Laws of Kenya; as well as the provisions of Order 29 Rule (2) of the Civil Procedure Rules, 2010.
 23. Other than the foregoing provisions of the law, Learned counsel for the Respondent has also cited and relied on inter-alia, the decisions in the case of Takaful Insurance of Africa Ltd versus The County Government of Garisa & 2 Others; Governor Central Bank of Kenya (Garnishee) (2021)Eklr; Kennedy Wainaina Njenga versus County Government of Nairobi and Cooperative Bank of Kenya (Garnishee) (2019)eKLR;
 24. Additionally, Learned Counsel for the Respondent herein has also cited the holding in the case of In-club Ltd vs The County Governor Kajiado County Government and Kenya Commercial Bank; Misc. Application No. 442 of 2021 (UR), respectively.
 25. Secondly, Learned counsel for the Respondent has submitted that even though the Respondent has since filed an Application for stay of proceedings and execution of the decree before the Court of Appeal; this court is still vested with the requisite Jurisdiction to entertain and to adjudicate upon the Application seeking for stay of proceedings, pending the hearing of the Application before the Court of Appeal.
 26. Furthermore, Learned counsel for the Respondent has submitted that the Jurisdiction of this Honourable court is unfettered and same ought to be exercised in such a manner to ensure the ends of Justice are duly served.
 27. On the other hand, Learned counsel for the Respondent has further contended that the appeal which has been filed before the Court of Appeal raises arguable grounds and thus this Court ought to afford the Respondent the requisite opportunity to canvass and/or prosecute her appeal, prior to and before commencement of any execution.
 28. To buttress the foregoing submissions, Learned counsel for the Respondent has cited and relied on various decision on inter-alia, Erinford Properties Ltd versus Chesire County Council (1974) 2ALL ER 448; Madhupapaper International Ltd vs Kerr (1995)eKLR; Venture Capital & Credit Ltd vs Consolidated Bank of Kenya Ltd (2004) 1EA 357; and Patricia Njeri & 3 Others versus National Museum of Kenya (2004)eKLR.
 29. Based on the foregoing, Learned counsel for the Respondent have thus implored the court to find and hold that the Application dated the 16th September 2023; is meritorious and thus ought to be granted.

c. Garnishee's Submissions:

30. The Garnishee herein filed written submissions dated the 12th October 2023; and in respect of which same has raised and canvassed one [1] issue for consideration by the court.
31. For coherence, Learned counsel for the Garnishee has submitted that prior to and or before a Garnishee Order absolute is issued, the Applicant must establish and demonstrate that the Garnishee is holding monies belonging to and/or due on account of the Judgment debtor.
32. Nevertheless, in respect of the instant matter, Learned counsel for the Garnishee contends that the Applicant before the court has failed to demonstrate and/or prove that the Garnishee holds monies on account of the Judgment debtor, capable of being attached to satisfy the decretal sum.



33. Furthermore, Learned counsel for the Garnishee has submitted that to the extent that the Applicant has failed to demonstrate that the Garnishee holds monies on account of the Judgment Debtor, the Garnishee Order absolute, ought not to issue.
34. In support of the foregoing submissions, Learned counsel for the Garnishee has cited and relied on inter-alia the case of James G.K Njoroge T/a Baraka Tools & Hardware versus APA Insurance Company Ltd (2018)eKLR; Choice Investment Ltd versus Jeromnomine (Midland Bank Ltd, Garnishee) (1981) ALL ER 225, respectively.
35. Flowing from the foregoing submissions, Learned counsel for the Respondent has thus invited the court to find and hold that the Applicant has failed to prove the requisite ingredients underpinning an Application for Garnishee Orders; and in this regard, the subject Application ought to be dismissed.

Issues for Determination:

36. Having reviewed the two (2) Applications; as well as the Responses thereto and upon taking into consideration the submissions filed by and on behalf of the respective Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether the Honorable court is seized of the requisite Jurisdiction to grant the orders of stay of proceedings and execution in the manner sought by and on behalf of the Respondent and more particularly, when there is a similar Application pending before the Court of Appeal.
 - ii. Whether the Applicant herein has established and demonstrated the requisite ingredients to warrant the grant of an order of Garnishee Absolute or otherwise.

Analysis and Determination

Issue Number 1

Whether the Honorable Court is seized of the requisite Jurisdiction to grant the orders of stay of proceedings and Execution in the manner sought by and on behalf of the Respondent and more particularly, when there is a similar Application pending before the Court of Appeal.

37. Before venturing to interrogate and address the issue herein before mentioned, it is appropriate to underscore that the Respondent herein has since filed an Appeal before the Court of Appeal and in respect of which same seeks to challenge the Ruling of the court issued on the 31st May 2023.
38. Furthermore, it is also important to recall that other than filing the said Appeal, the Respondent herein also proceeded to and filed an Application dated the 3rd July 2023, and in respect of which same has sought for various reliefs inter-alia stay of proceedings as well as stay of execution of the decree arising from the Ruling of this court.
39. Suffice it to point out that the Respondent herein is actively pursuing the Application dated the 3rd July 2023; before the Honorable Court of Appeal. Be that as it may and despite the pendency of the said Application before the Court of Appeal, the Respondent has since filed yet another Application before this Honorable court; and in respect of which same is seeking near similar orders/reliefs, as the ones being sought before the Court of Appeal.
40. To my mind, even though this Honorable court is vested with the Jurisdiction to entertain and adjudicate upon an Application for stay of proceedings and/or stay of execution of a decree, pending the hearing and determination of an Appeal to the Court of Appeal, it suffices to observe that such



Jurisdiction only exists prior to and before the Applicant invokes the Jurisdiction of the Court of Appeal for purposes of similar Orders/ Reliefs.

41. For coherence, it is imperative to underscore that the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules, 2010; grants to and in favor of an Applicant a right of an election of whether to start by filing the Application for stay before the court whose decision is appealed from or to approach the Court appealed to, in this case, the Court of Appeal.
42. Nevertheless, once the Applicant chooses to approach and invoke the Jurisdiction of the Court appealed to, namely, the Court of Appeal, such an Applicant cannot make an about turn and revert to the court whose decision is being appealed from or at all.
43. In my humble, albeit considered view, the moment the Respondent herein ventured forward and approached the Court of Appeal for purposes of procuring and obtaining an order of stay of proceedings and/or an order of stay of execution, the Respondent ceases to have the right to revert back to the Environment and Land court.
44. Premised on the foregoing exposition of the law, it is my humble albeit considered view that the invocation of the Jurisdiction of the Court of Appeal for purposes of granting an order of stay, automatically divests the Superior Court, whose decision is being appealed from, of the Jurisdiction to entertain a similar Application, like the one pending before the Court of Appeal.
45. Secondly, it is also important to point out that where a Party has approached and invoked the Jurisdiction of a particular court, in this case the Court of Appeal, it behooves that particular litigant to exhaust the Jurisdiction of that particular court before commencing further proceedings of a like manner, elsewhere, subject of course to whether such a cause is legally permissible.
46. To this extent, it is my finding and holding that the filing of the current Application albeit during the pendency of the Application dated the 3rd July 2023, before the Court of Appeal; constitutes and amounts to an abuse of the Due process of the court.
47. To buttress the foregoing holding, it suffices to adopt and reiterate the ratio decidendi in the case of Satya Bharna Gandhi versus Director of Public Prosecutions & 3 others [2018] eKLR, where the court held thus;

“22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]

23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.



- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

25. Justice Niki Tobi JSC observed:-[16]

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

- 48. In view of the foregoing, my answer to issue Number one [1] is to the effect that this Honourable Court is divested of the Jurisdiction and thus incapable of granting the orders of stay of proceedings either in the manner sought or at all.
- 49. Other than the foregoing, there is also the attendant and auxiliary issue which touches on abuse of the Due process of the court by invoking the Jurisdiction of two courts simultaneously, over and in respect of the same and/or near similar reliefs, which ipso facto, is inimical to the Rule of Law.



Issue Number 2

Whether the Applicant herein has established and demonstrated the requisite ingredients to warrant the grant of an order of Garnishee Absolute or otherwise.

50. It is not in dispute that the Applicant herein procured and obtained a lawful Decree from this Honorable court, whereby same was awarded Judgment in the sum of Kes. 41, 289, 409.80/- only, as against the Judgment Debtor/Respondent.
51. On the other hand, there is also no dispute that the Judgment sum, which was awarded to and in favor of the Applicant herein has neither been paid, liquidated nor settled.
52. Nevertheless, the contention that has been raised by the Garnishee is to the effect that the Applicant herein has failed to establish and demonstrate that the Garnishee holds monies on account of the Judgment debtor, which ought to be attached towards and in settlement of the Debt.
53. Despite the contention by and on behalf of the Garnishee, namely, that the Applicant has not demonstrated that the Garnishee holds sufficient amount of monies on account of the Judgment debtor, it is not lost on this court that acquiring Entity, namely, Kenya National Highways Authority [KENHA] issued a Letter dated the 1st October 2021; and in respect of which same transferred the sum of Kes.349, 779, 975/- only, to the Garnishee on account of the Respondent herein, whose property had been compulsorily acquired.
54. Furthermore, the contents of the Letter in question, which has been annexed by both the Applicant and Garnishee, are explicit, as pertains to the beneficiary of the Funds which were remitted by Kenya National Highways Authority.
55. To my mind, there is no doubt that the monies which were released and transmitted to the Garnishee herein were on account of the Judgment Debtor/Respondent herein and hence same are attachable towards and in satisfaction of the Judgment debt, unless the Garnishee avails cogent and plausible reasons to the contrary, which, unfortunately has not been supplied or availed.
56. In this respect, it suffices to adopt and reiterate the holding in the case of *Otieno Ragot & Co Advocates versus City Council of Nairobi* [2015] eKLR, where the court held thus;

“Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the Garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.”
57. Arising from the foregoing, I am unable to understand the contention by and on behalf of the Garnishee to the effect that the Applicant herein has not been able to prove and/or demonstrate that the Garnishee holds sufficient amounts of monies on account of the Judgment debtor.
58. Conversely, having perused the Contents of the Letter from Kenya National Highways Authority, which has been annexed by both the Applicant and the Garnishee, respectively, I am duly persuaded, nay, convinced that the Applicant herein has discharged the Burden placed on same towards demonstrating that the monies in question are indeed being held on account of the Judgment Debtor.



59. Other than the contention by the Garnishee, which has been addressed in terms of the preceding paragraphs; there is yet another contention that has been raised by the Respondent herein, namely, that the monies held by the Garnishee, are not attachable in satisfaction of the Judgment debt, insofar as the Garnishee herein is insulated by the provisions of the [Government Proceedings Act](#).
60. Ostensibly, what the Respondent herein is contending is to the effect that the Garnishee falls within the description of the Government and thus the Garnishee proceedings cannot issue for purposes of attaching monies held by the Garnishee herein.
61. Despite the contention by and on behalf of the Respondent herein, it is my humble view that the Garnishee herein does not fall within the purview of the Provisions of Section 21(4) of the [Government Proceedings Act](#), Chapter 40 Laws of Kenya; either as alleged or at all.
62. Furthermore, it is imperative to underscore that the Section 21(4) of the [Government Proceedings Act](#), Chapter 40 Laws of Kenya, were amended in the year 2015, but the National assembly and the Senate, respectively, did not deem it fit or appropriate to include Independent and Constitutional Commissions, inter-alia, the Garnishee herein, as part of the bodies insulated from attachment.
63. Other than the foregoing, I am also privy to the decision of the court in the case of Tom Ojienda & Associates versus National Land Commission; National Bank of Kenya & Another (Garnishee) (Misc. Application No. 29B of 2016) (2022) KEHC 11463 (KLR), where the court had occasion to consider whether National Land Commission is shielded from Execution proceedings or otherwise.
64. For coherence, the Honorable court stated and held thus;
- “I take the view that, in as much as the Respondent is independent and clothed with the requisite constitutional power to sue and to be sued in its corporate name, it is not the government or a government department for purposes of [Government Proceedings Act](#). Indeed, it was in recognition of this independent that it engaged the services of the Applicant herein to offer legal representation. Consequently, my considered view is that the Respondent is amenable to the usual legal consequences flowing from such processes, including execution of ensuing decrees. This is because there is no such protection afforded by its organic legislation, namely, the [National Land Commission Act](#), to shield the Respondent from the execution process.
- Moreover, it is telling that whereas the [Government Proceedings Act](#) was amended by the Government Proceedings (Amendment Act), 2015; to include County Governments, Parliament, in its wisdom did not consider it apposite to extend the same shield to independent commission such as the Respondent”
65. From the foregoing position, what becomes evident is that National Land Commission is not Government or the Government Department, to warrant the invocation of the privilege donated vide the provisions of Section 21(4) of the [Government Proceedings Act](#), either as contended by the Respondent or at all.
66. Notwithstanding the foregoing, it is not lost on the court that the monies which are sought to be garnisheed do not in any event, belong to the Garnishee herein. Instructively, the said monies were admittedly remitted to the Garnishee to hold on account of and to disburse same to the Respondent in line with the contents of the Letter dated the 1st October 2021.
67. Consequently and in view of the foregoing, I come to the conclusion that the monies held by the Garnishee herein are attachable for purposes of satisfaction of the decree in favor of the Applicant.



Final Disposition:

68. From the foregoing discussion, what becomes apparent is that the Application by the Applicant and wherein same seeks to have the Garnishee order Nisi to be made absolute, is indeed meritorious.
69. Consequently and arising from the foregoing, I proceed to and Do hereby make the following orders;
- i. The Application dated the 9th August 2023; be and is hereby allowed in terms of prayer 2 thereof.
 - ii. The Application dated the 16th September 2023; be and is hereby dismissed.
 - iii. Costs of the Application dated the 9th August 2023; and 16th September 2023;, respectively be and are hereby awarded to the Applicant.
 - iv. For the avoidance of doubt, the costs attendant to the Applications are hereby assessed and certified in the sum of Kes.30, 000/= each, to be borne by the Respondent.
70. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms. Chepng'etich h/b for Mr. Njeru Nyaga for the Applicant.

Mr. Muhizi h/b for Mr. Prestone Wawire for the Respondent.

N/A for the Garnishee.

