Milly Glass Works Limited v Kenya Railways Corporation & another (Environment & Land Case 135 of 2012) [2022] KEELC 15044 (KLR) (1 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15044 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 135 OF 2012

M SILA, J

NOVEMBER 1, 2022

BETWEEN

MILLY GLASS WORKS LIMITED ..... PLAINTIFF

AND

KENYA RAILWAYS CORPORATION & ANOTHER ..... DEFENDANT

RULING

(Application by the successful plaintiff seeking to garnishee an account of the Kenya Railways Corporation in order to have his decree satisfied; Corporation and the garnishee raising objection based on Section 88 of the *Kenya Railways Corporation Act*, that there can be no attachment and/or execution against the Corporation and thus the garnishee application is misplaced; respondents arguing that the only remedy of the applicant is to file suit for mandamus; court not persuaded that the path to take is to file suit for mandamus; no law providing that a suit for mandamus needs to be filed in order to enforce the decree; public policy would not tilt towards asking a successful party to file another suit in order to execute the decree; Section 34 of the *Civil Procedure Act*, in fact, being explicit that a second suit ought not to be filed for purposes of executing the decree; the *Kenya Railways Corporation Act* providing that the Managing Director is supposed to pay the decree out of the revenue account of the Corporation without delay; no payment having been made; in the new Constitutional dispensation public duty must be undertaken and if not undertaken the court must provide for an effective remedy so that what a public officer needs to do is done; garnishee proceedings well placed as what the applicant is intending to do is that which the Managing Director was supposed to do; application allowed)

1. This suit was commenced through a plaint filed on 12 July 2012. In issue was a lease agreement between the plaintiff and the 1st defendant (Kenya Railways Corporation) over the property Mombasa/Block XLVIII/134 (the suit property) where the plaintiff contested increments of rent by the 1st defendant. The 2nd defendant is an auctioneer who had been instructed by the 1st defendant to collect rent and the

issues really did not involve her. She indeed entered no appearance to the suit and did not participate in the suit. The subject lease was first entered into by the predecessor of the plaintiff, on 16 January 1980, at an annual rent of Kshs. 22,000/=. It had a clause for revision of rent on expiry of each period of 30 years and rent was to be raised to an equivalent of 1/20th part of the unimproved value of the land at the date of the revision. On 1 January 1994, the 1st defendant raised rent to Kshs. 146,000/=. On 30 September 2011, the 1st defendant informed the plaintiff that she has revised rent from Kshs. 146,000/= to Kshs. 10,200,000/= which the plaintiff contested as being against the lease agreement.

2. I heard the case and delivered judgment on 4 November 2021. I held as follows :-

   (i) That there was a right to increase rent on expiry of every thirty years.

   (ii) That if rent was increased before the end of thirty years, and there was no objection by the lessee, then it would be deemed that the lessee has waived his right to contest the new rent despite it having been increased before expiry of thirty years.

   (iii) That time for the next revision of new rent would start running from the last increment of rent so that rent will be subject to increase after thirty years of the new rent.

   (iv) That in the case at hand, there was an increment of rent on 1 January 1994, and therefore, the next increment of rent would be thirty years thereafter which would be January 2024.

   (v) That it was therefore illegal and against the lease agreement for the 1st defendant to increase rent in the year 2012 before expiry of 30 years of the last increment which was 1 January 1994.

3. The above would have been the end of the matter, but it emerged that the 1st defendant, while the suit was subsisting, coerced the plaintiff into paying the new rent that it had illegally increased in the year 2012. This was despite an order entered into by consent of the parties on 14 March 2013, where the parties agreed, that pending the hearing and determination of the suit, the plaintiff would pay the undisputed contractual rent, that is Kshs. 146,000/=, and that the 1st defendant was barred from recovering the disputed annual rent. In my judgment, I ordered the 1st defendant to refund to the plaintiff the sums of money paid which exceeded the annual rent of Kshs. 146,000/= per year from the time the same were paid, with interest at court rates until settlement in full.

4. Through a motion dated 6 September 2022, the plaintiff applied to attach, through garnishee proceedings, the account No. 110XXXX917 held by the 1st defendant in Kenya Commercial Bank (the garnishee). That attachment is opposed by both the 1st defendant and the garnishee, and it is that application which forms the subject of this ruling.

5. In the application, the plaintiff avers that the amount of overpaid rent has been ascertained at Kshs. 127,464,047.67/= and in addition the plaintiff's party and party bill of costs has been taxed at Kshs. 2,576,046.67/=. On 8 July 2022 the 1st defendant was served with the demand for payment of these monies but there was no response. That is why she moved to attach the money held by the 1st defendant in the garnishee bank.

6. The 1st defendant has opposed the application through a preliminary objection vide which the 1st defendant has contended that execution against Kenya Railways Corporation (1st defendant or the Corporation) by way of garnishee proceedings offends Section 88 (a) and 88 (b) of the *Kenya Railways Corporation Act*, Chapter 397, Laws of Kenya. There is also a replying affidavit sworn by Christine Macharia, the Senior Legal Officer of the Corporation, which more or less raises the same legal issue in the preliminary objection, and adds that the judgment did not quantify any monies to be paid by the 1st defendant to the plaintiff that can be executed. She states that the 1st defendant disputes the amount

of Kshs. 127,464,047.67/= claimed by the plaintiff because it is grossly exaggerated. She contends that the law prohibits determination of quantum to the parties or their advocates other than the judge.

7. In his submissions, Mr. Karina, learned counsel for the Corporation, submitted that the money held in the bank is property belonging to the Corporation. He submitted that Sections 88 (a) and (b) of the *Kenya Railways Corporation Act*, bar attachment of the properties of the Corporation. He relied on various cases, where it was held that one cannot attach property of the Corporation, to support his submissions. He submitted that the rationale for the restriction on attachment is to avoid a situation where the operations of a public body will be halted. He submitted that the remedy is for the plaintiff to file suit for mandamus against the Managing Director of the Corporation, and in default of compliance with the order, to file contempt proceedings, on the basis that payment of money by the Managing Director is a public duty, and that public duties are enforced through mandamus. Counsel submitted that whether money held in a bank by a Corporation can be garnisheed was held to be unlawful in the cases of *Telkom v Kenya Railways and Hezron Ossorey Jura v Kenya Railways Corporation & Another* [2013] eKLR. He also referred me to the case of *Wachira Nderitu Ngugi & Company Advocates v City Council of Nairobi* [2012] eKLR. Counsel submitted that there is all inclusive protection of Corporation property including money held in the bank.

8. Mr. Karina's submissions were echoed by Ms. Osewe, learned counsel for the garnishee. She also relied on the same authorities referred to by Mr. Karina. She pointed out that Section 88 of the *Kenya Railways Corporation Act* is equivalent to similar provisions in statutes creating other corporations, and she cited as an example, the *Kenya Ports Authority Act*, the Kenya Posts and Telecommunications Act, and the *Kenya Roads Act*. She submitted that the similar language in these statutes is so as to restrict execution against a parastatal. She submitted that in the case of *Total Limited v Kenya Railways Corporation* , Ochieng' J (as he then was) identified the procedure to be followed. She submitted that the procedure is for one to extract a Certificate of Order against the Government and to file suit for mandamus against the Managing Director. If there will be disobedience, then contempt proceedings will follow. She nevertheless submitted that if her client is ordered to release the money held in the account, she will do so, subject to payment of her client's costs of Kshs. 50,000/=.

9. Mr. Gikandi, learned counsel for the plaintiff, submitted that the decree calling for settlement of the amount has been served, and once the decree is served, there is no need for another order of mandamus. On whether or not a Corporation can be subjected to attachment, he submitted that there are decisions for or against attachment and he referred me to authorities affirming attachment. He particularly singled out the case of *Joseph Nyamamba v Kenya Railways Corporation* [2015]eKLR, where the Court of Appeal was dealing with interpretation of Section 87 of the *Kenya Railways Corporation Act*. He submitted that this is the entry point of a suit. He submitted that in this instance, the Court of Appeal held that Section 87 violates the right to access justice under Article 48 of the *Constitution*. He submitted that just as you have an entry point, there is an exit point, and the exit point is Section 88. By parity of reasoning, he submitted that if the Court of Appeal held that the entry point is unconstitutional, then the exit point, that is Section 88, is also a violation of Article 48 of the *Constitution*, as special treatment is now being given to a litigant. He submitted that even then, what Section 88 bars is attachment of immovable properties, trains, vehicles and the other items listed therein, which would be things related to operations of the Corporation. He submitted that money in the bank is not among the items listed, and that if the law maker had intended for money in the bank not to be the subject of attachment, it would have been listed. He submitted that the rule of interpretation is that, that which is excluded cannot be inferred as included. He relied on the case of *Oduor & 3 others v Magistrates and Judges Vetting Board* [2021] KECA 92 [KLR], and the American case of *Conn National Bank v Germain*, 503 US 249. He submitted that Kenyans fought hard, and lives were lost, when they struggled to have a new *Constitution*. He submitted that what

drove Kenyans so hard was the need to ensure that the era of impunity is gone by. He thought that it is an impunity for the Corporation to participate in a case, then when judgment is rendered, seeks protection under Section 88 of the *Act*. He submitted that Section 88 cannot answer Article 48 of the *Constitution* on Access to Justice, Article 25 on the right to fair trial, and Article 50 on the right to a fair hearing. He submitted that once a court issues judgment, that judgment is like property, and Article 40 of the *Constitution* (protecting the right to property) comes into play. He submitted that a statute cannot override provisions of the *Constitution*. He pointed out that the money in issue was taken by the Corporation when there was a court order and it would be an act of impunity for the Corporation to now quote Section 88 for protection. He submitted that there was a contravention of Article 10 of the *Constitution* on good governance. He submitted that the garnishee order should be allowed so that Corporations know that the hour of accountability is here with us.

10. Mr. Karina's rejoinder was that the authorities relied upon by Mr. Gikandi did not deal with interpretation of Section 88 of the *Kenya Railways Corporation Act* and they were therefore distinguishable. He submitted that Article 24 of the *Constitution* has limitation of some rights and such limitation is applicable in our case. Ms. Osewe, for the garnishee, added that execution cannot be restricted to the items specifically mentioned in the Act, on the argument that these are the items the Corporation needs to operate, as money held in the bank is also used in the operations of the Corporation.

11. I have considered all the above. I must say that I am immensely indebted to the industry that counsel put in arguing their positions. They have truly enriched this court.

12. What is before me is a garnishee application based on the provisions of Order 23 Rule 2 of the *Civil Procedure Rules*, 2010, made under the *Civil Procedure Act*, Cap 21, Laws of Kenya, which provides as follows :-

> 2. A credit in a deposit account with a bank or other financial institution shall for the purposes of this Order be a sum due or accruing and shall be attachable accordingly notwithstanding that any of the following requirements is applicable to the account and has not been complied with—
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> (a) that notice is required before any money is withdrawn;
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> (b) that a personal application must be made before any money is withdrawn;
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> (c) that a deposit book must be produced before any money is withdrawn; or
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> (d) that a receipt for money deposited in the account must be produced before any money is withdrawn.

It will thus be observed from the foregoing that one may apply to attach money in a bank in order to satisfy a decree.

13. There are two issues raised in opposing the application. The first is of course the argument in the preliminary objection, that there can be no attachment of the property of the Corporation, given the provisions of Section 88 of the *Kenya Railways Corporation Act*. The second is that raised in the replying affidavit of Ms. Macharia, that the amount due to the plaintiff is yet to be ascertained. She also seemed to attack the judgment of the court that the money sought to be refunded, was not quantified. I will start with the preliminary objection before addressing this second issue.

14. The objection on attachment is based on Section 88 of the *Kenya Railways Corporation Act*, which provides as follows :-

88. Restriction on execution against property of Corporation Notwithstanding anything to the contrary in any law—

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

(b) no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Managing Director.

15. I have considered the cases provided by Mr. Karina, learned counsel for the Corporation. In the case of *Wachira Nderitu, Ngugi & Company Advocates v City Council of Nairobi* [2012] eKLR, there was an attempt to garnishee an account held by the City Council of Nairobi to satisfy a decree. There was also a clause in Section 263A of the *Local Government Act*, (repealed) similar to Section 88 of the *Kenya Railways Corporation Act*, only that now it was barring attachment against a local Government. The Court (Odunga J, as he then was) held that there can be no execution, even by garnishee proceedings, and that the only recourse was to file a judicial review motion for mandamus. Ms. Osewe, learned counsel for the garnishee, in her submissions, made reference to the case of *Total Kenya Limited v Kenya Railways* but she did not attach that decision. It is always good practice for counsel to attach the decisions that they refer to so that the court can be able to refer to them. I can see however that the case of *Total Kenya Limited v Kenya Railways* was referred to in the case of *Wachira Nderitu, Ngugi & Company Advocates v City Council of Nairobi* (*supra*) and in the case of *Hezron Ossorey Jura v Kenya Railways Corporation & Another* [2013] eKLR. In this latter decision, there was move to garnishee an account of Kenya Railways Corporation and a preliminary objection was raised. The court (Muchelule J, as he then was) upheld the preliminary objection, and agreed with what was held in the case of *Total Kenya Limited v Kenya Railways*, that money held in the Corporation's account was its property which could not be attached. Another decision referred to me was that of *Ernest Moraa Mokua v Kenya Railways Corporation* [2022]eKLR, where the court nullified warrants of attachment against the Corporation.

16. I have also considered the authorities provided by Mr. Gikandi, learned counsel for the plaintiff. In the case of *Anne Kinyua v Nyayo Tea Zone Development Corporation & 3 others* 2012] eKLR, one of the issues discussed in the judgment of Aboudha J, was Section 13A (1) of the *Government Proceedings Act*, Cap 40, Laws of Kenya, which provides that, "No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings." The Judge was of opinion that this section is no longer tenable in the context of the 2010 *Constitution* as it "runs against the principle of access to justice enshrined in the *Constitution*." The Judge also referred to Article 159 (2) (d) of the *Constitution* which enjoins the court, when exercising judicial authority, to do so without undue regard to procedural technicalities. A similar position was taken by Majanja J in the case of Kenya Bus Service

Limited & others v Minister for Transport & 2 others [2013] eKLR, where, with regard to Section 13A of the *Government Proceedings Act*, the Honourable Judge, stated as follows :-

> " 47. Viewed against the prism of the *Constitution*, it also becomes evident that Section 13A of the GPA provides on (sic) impediment to access to justice. Where the state is at the front, left and centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the courts... It is my finding therefore that Section 13A of the *Government Proceedings Act* as a mandatory requirement violates the provisions of Article 48."

17. Mr. Gikandi also referred to the decision in the case of *Joseph Nyamamba & 4 Others v Kenya Railways Corporation* (2015) eKLR. That was a case where some persons sued the Corporation for placing "X" marks on their properties, which was a signal that they intended to demolish them. A preliminary objection was raised that there had been no compliance with Section 87 of the *Kenya Railways Corporation Act*, which inter alia provides that "the action or legal proceeding shall not commence against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent." The Judge of the High Court found that it was mandatory for the appellants to issue this one month notice prior to commencing the suit failure of which the suit was invalidated. On appeal, it was submitted that Section 87 of the *Act* was an impediment to access to justice and a violation of Article 48 of the *Constitution*, which provides that "the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice." The Court of Appeal was not persuaded of the argument and found that there was nothing impairing access to justice and held further "that it is for the parties and their advocate to know the law and its consequences." The appeal was dismissed. Despite dismissing the appeal, the Court of Appeal, in principle, endorsed the holding of Majanja J made in the case of *Kenya Bus Services Limited and Another v Minister of Transport & 2 others* (*supra*) and only departed from his reasoning on the basis that the matters in the *Joseph Nyamamba case* occurred before the 2010 *Constitution*. The Court of Appeal held that "the retired *Constitution* did not provide for access to justice rights in the robust and clear way that the current *Constitution* has done or at all."

18. In the case of *African Commuter Services Limited v Kenya Civil Aviation Authority & National Bank of Kenya Limited* and *CFC Stanbic Bank Limited (Garnishees)* [2014]eKLR, the successful decree holder moved to attach the accounts of the judgment creditor, Kenya Civil Aviation Authority, a parastatal. Objection was raised on the basis of Section 43 (1) (a) of the *Kenya Civil Aviation Authority Act*, which provides as follows :-

> "Where any judgment or order has been obtained against the authority, no execution or attachment or process in the nature thereof, shall be issued against the immovable property of the Authority or any of its vehicles, vessels, aircrafts or its other operational equipment, machinery, fixtures or fittings, but the Director-General shall cause to be paid out of the revenue of the Authority such amount as may, by the judgment or order or decree, be awarded against the Authority to the person entitled thereto.

It will be noted that the above section is pari materia to Section 88 (a) of the *Kenya Railways Corporation Act*, only that the Managing Director is substituted for the Director General. It was urged that to allow such attachment would be going against public interest, as the parastatal is a regulator of a very crucial , vital and sensitive industry, and that if the monies are attached, it will disrupt the operations of the Authority. Mabeya J, was not moved by this section, nor this argument, and allowed the garnishee proceedings. *Inter alia*, the Honourable Judge stated as follows :-

40. In this regard, I am persuaded to hold that whilst it is in the public interest to safeguard the operations of the Respondent, it is likewise in the public interest that there be law and order in this country. That the rule of law be maintained as decreed in the *Constitution*. That all litigants be treated equally without exception. That once the courts interpret the law and declare rights of disputants, those rights are forthwith enforced and bestowed upon those entitled without delay. The so called vital and sensitive aviation industry which the Respondent regulates cannot operate or exist in a state of anarchy. It can only exist and operate in a state where there is smooth administration of justice and application of the rule of law.

41. ... To my mind, it will be the saddest moment in the history of this country, and more so for the principle of the rule of law and constitutionalism, when a court of law will permit a litigant to comply with court orders at the litigant's own pace, time and pleasure.

42. ... In this regard, I hold the greater public interest requires that the Applicant be allowed to enforce its rights and thereby maintain and sustain the Constitutional value and principle of governance of the rule of law than to uphold narrow interests of allowing a state and public corporation to prevaricate or suspend the rule of law by refusing to obey a court's decision more so that of the Court of Appeal on the pretext of public interest !"

44. ... In this regard, I reject the contention that public interest requires suspension of execution of the Court decree against the Respondent to allegedly enable the Respondent operate... The submission to suspend the orders is rejected. There can be no special category of citizens or corporations in this country who would operate outside the law. No litigant should be allowed the luxury of complying with the law or court order at his or its own terms, time and pleasure."

19. In *Shamz Enterprises Limited v Isiolo County Government & Another* [2018]eKLR, there was judgment for the plaintiff against the County Government of Isiolo. The plaintiff moved to garnishee an account held by the County Government. An objection was raised that the County Government falls under the protection of Section 21 (4) of the *Government Proceedings Act* which restricts attachment of Government propery in execution of a decree. The Court (Ong'injo J) dismissed this argument and allowed the garnishee proceedings. She expressed herself as follows :-

> " The defendant is a County Government and as submitted in the Preliminary objection falls under the Protection of Section 21(4) of *Government Proceedings Act*. However the defendant has not taken any steps to discharge the liability as in the consent recorded by the court on 28th November 2016, despite letters of demand being send to them.
>
> The defendant does not deny owing the plaintiff. The defendant does not give any proposal of how they intend to pay the decretal sums.
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> In this matter the Respondent has identified monies held on behalf of the defendants by the Garnishee and I don't think that it would be fair and just to cause them to use another procedure to realise a decree that was entered into by the consent of the parties. In light of Article 159(2)(d) and Article 48 of the *Constitution* of Kenya 2010 I'm of the view that both Judicial Reviewed Garnishee proceedings (sic) are procedures in execution of a decree. In the decision of the Court of Appeal in *Joseph Nyanamba & 4 others v Kenya Railways Corporation* [2015] it was held that S.21 of *Government Proceedings Act* impedes the provisions of access to justice as provided by Article 48 of the *Constitution*.

The decision of Hon Mabeya J in *African Commuter Services Ltd v The Kenya Civil Aviation Authority & 2 others* [2014] eKLR also fortifies the position in The Court of Appeal decision in *Joseph Nanyamba* (supra) where he held:

> "That all litigants be treated equally without exception .....the greater public interest requires that the applicant be allowed to enforce its and thereby maintain and sustain the constitutional value and prince of governance by the rule of law than uphold narrow interests of allowing a state and public corporations to prevaricate or suspend the sale of land by refusing to obey a court decision."

This court therefore finds that the preliminary objection cannot be sustained for reasons that it breaches the provisions of the Constitution and also that it will not bring this matter to an end. The Preliminary objection is overruled and the garnishee order nisi is made absolute."

20. A similar conclusion, as that reached in the above case of *Shamz Enterpises Limited v Isiolo County Government*, was arrived at in the case of *Blue Shield Insurance Company Limited v County Government of Mombasa & another (garnishee)* [2019]eKLR. Blue Shield Insurance Company Limited had a money decree against the County Government of Mombasa and through an application dated 17 January 2018, it applied to garnishee the County Government's accounts in National Bank of Kenya and Kenya Commercial Bank. A preliminary objection was raised that this violates Section 21 (4) of the *Government Proceedings Act*. The Court (Chepkwony J) dismissed this argument, heavily basing her decision on the reasoning of Ong'ijo J in the Shamz Enterprises Limited case.

21. It will thus be seen that there are contrasting authorities and decisions regarding whether or not garnishee proceedings should be resorted to where statute restricts attachment. The cases of *Wachira Nderitu, Ngugi & Company Advocates v City Council of Nairobi*, *Hezron Ossorey Jura v Kenya Railways Corporation & Another*, and *Ernest Moraa Mokua v Kenya Railways Corporation* reason that there can be no attachment or execution, including attachment by garnishee proceedings, and that the only recourse a party has is to file judicial review proceedings for mandamus. On the other hand are the decisions in *Africa Commuter Services Limited v Kenya Civil Aviation Authority*, *Shamz Enterprises Limited v Isiolo County Government*, and *Blue Shield Insurance v County Government of Mombasa*, which permitted attachment in the form of garnishee proceedings. All these are decisions of courts of equal status and are not binding on this court, thus purely of persuasive value. I am therefore at liberty to either agree or disagree with them and/or chart my own path on the issue.

22. I will start by saying that it is apparent that strictures in statute, limiting rights of persons to access justice, have come under heavy attack in the post-2010 Constitutional dispensation, as can be seen by the declaration of unconstitutionality of Section 13A of the *Government Proceedings Act* in the case of *Kenya Bus Services Limited and Another v Minister of Transport & 2 others* (*supra*) and the subsequent endorsement by the Court of Appeal as demonstrated in the case of *Joseph Nyamamba v Kenya Railways Corporation case* (*supra*). This is because the 2010 *Constitution*, does contain a robust Bill of Rights, including the right to a fair trial and the right to access justice. All laws are subject to the *Constitution* as provided for in Article 2 of the *Constitution*, which is drawn as follows :-

> 2. Supremacy of this *Constitution*
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> (1) This *Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this *Constitution*.

(3) The validity or legality of this *Constitution* is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this *Constitution* is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this *Constitution* (emphasis mine).

23. One of the rights contained in the Bill of Rights is the right to access justice which is contained at Article 48 of the *Constitution*, which provides as follows :-

48. Access to justice

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

24. The manner in which the Bill of rights is to be construed is contained in Article 20 of the *Constitution*, which states :-

20. Application of Bill of Rights

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to

prevailing circumstances, including the vulnerability of particular groups or individuals; and

(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion (emphasis mine).

25. First, it will be observed that the Bill of Rights binds all persons. Secondly, it will be noted that the court is enjoined to develop the law "to the extent that it does not give effect to a right or fundamental freedom." It is therefore the onus of the court to develop the law and "adopt the interpretation that most favours the enforcement of a right or fundamental freedom." In addition to the above, Article 159 of the *Constitution* provides that :-

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this *Constitution* shall be protected and promoted (emphasis mine).

26. We have already seen that the *Constitution* has a bill of rights, and that the court needs to interpret the law in a manner that promotes the realization of these rights. From Article 159 (2) (e) above, the purpose and principles of the *Constitution* need to be protected and promoted. The intention is to ensure that citizens get justice and that they receive what rightfully belongs to them. When it comes to a judgment, any provision in the law which attempts to deny the successful litigant the fruits of his/her judgment, must be considered to be going against Article 48 of the *Constitution*, unless such impediment is justifiable, under Article 24 of the *Constitution* which provides as follows :-

24. Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

27. Mr. Karina, in his submissions, did submit that Section 88 of the *Kenya Railways Act* is justifiable so as to avoid a situation where the operations of a public body will be halted. I have no problem with the spirit contained in Section 88 of the *Act*. The Corporation is a public entity undertaking a public function and its operations, as much as possible, ought not to be interfered with, for in doing so, the public may be adversely affected. Nevertheless, we must also remember that individuals have rights, and these rights also need to be given effect. That is why at Section 88 (a), where there is contained the restriction to attachment, there is an obligation upon the Managing Director, to promptly pay the judgment sum. To use the exact words in the statute, the Managing Director "shall, without delay, cause to be paid out of the revenue of the Corporation" the judgment sum to the person who is entitled thereto. As far as I can see, it's a quid pro quo. The Corporation is protected from attachment, on the promise that the Managing Director shall, without delay pay the judgment sum. This is a win-win for both parties. The Corporation does not suffer the embarrassment of attachment and the judgment debtor is guaranteed that he/she will be paid without delay. So in the contemplation of the law, once there is judgment, and the Managing Director is aware of it, he/she ought to proceed to forthwith pay the judgment sum. The same Section that restricts attachment also promises that the money shall be paid without delay by the Managing Director. The law is explicit on where the Managing Director is supposed to get the money. It directs the Managing Director to pay the money from "the revenue of the Corporation." Under Section 88 (b) the Managing Director also has power to permit seizure of some of the property of the Corporation in order to satisfy the decree. I would assume that this may happen where the Managing Director is of opinion that the revenue of the Corporation is not adequate to satisfy the decree, so he could, say, allow attachment of one of the Corporation's idle assets in order to satisfy the decree. Thus, so as to make good the decree, the Managing Director is supposed to pay the money from the revenue of the Corporation or allow for some of the assets of the Corporation to be attached. It follows therefore that it is not the case that property of the Corporation can never be attached; it can, but with the permission of the Managing Director.

28. Now, the scenario we have here is that the Managing Director has not paid the decree as he is supposed to do, that is, without delay, pay it out of the revenue of the Corporation. Neither has the Managing Director allowed for the attachment of any of the properties of the Corporation to satisfy the decree in accordance with Section 88 (b). The Managing Director is pointing at the restriction on attachment but is forgetting that the same is premised on the promise to pay the judgment sum without delay. The lacunae in the statute is that it does not provide for the consequences that should follow if the Managing Director does not act as contemplated. I can draw parallels of the situation at hand with the unfortunate scenario where the President of the Republic declined to appoint Judges of the Court despite the Judicial Service Commission recommending their appointment. Under Article 166 of the *Constitution*, "The President shall appoint—

    (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

    (b) all other judges, in accordance with the recommendation of the Judicial Service Commission."

    There are two significant cases which ensued out of this stalemate. The first is the case of *Adrian Kamotho Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)*, High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Petition No. 369 of 2019, (2020) eKLR. The petitioner sued seeking orders inter alia for a declaration that the President's failure to appoint the Judges was a violation of the *Constitution*. In its judgment, the Court did hold that the President had a duty to appoint the Judges without any unreasonable delay, and issued a declaration that the failure by the President to appoint the judges was a violation of the *Constitution*. Despite this order, the President did not make the appointments. This led to the filing of

a second case, *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)*, High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Petition No. 206 of 2020, [2020] eKLR.In this case, the Court had to grapple with the fact that the *Constitution* does not provide for any consequences that ought to follow if the President does not make the appointment. The Court had this to say :-

> " The critical concern here, of course, is what should happen after or where the bearer of a constitutional duty fails to act as required of him by the Constitution and the law. The Kenyan Constitution, as drafted does not appear, on the face of it, to contemplate such a scenario, that a responsible authority would not act, at the time when it is required to, for if that had been envisaged, then a provision would have been inserted in the Constitution to remedy that. Such is, for example, where an appointment is not made within the timelines, then something should follow, either the same could be deemed, or would lapse or something of that character. In absence of such a provision, then recourse can only be to court by way of a constitutional petition or judicial review, like has been done in this case. All this would have, perhaps, been avoided, had there been a clear follow up provision in the Constitution or legislation."
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> In such circumstances the court held that :-
>
> > "the court could quite properly, in the interests of justice, advancement of the rule of law and access to justice, and to forestall further violation of the Constitution and sustenance of an unconstitutional state of affairs, proceed to deem the six nominees as duly appointed as Judges to the respective Superior Courts, subject to gazettement and swearing in."
>
> Eventually, the Court made the following orders (paraphrased) :-
>
> (a) an order of mandamus directing the President to appoint the judges within 14 days.
>
> (b) That upon the lapse of the fourteen days, without the President having made the appointments, it shall be presumed that his power to make them has expired and his office become functus, so far as the appointments are concerned, and the six nominees shall be deemed duly appointed, effective from the date of default, as Judges of the Superior Courts for which they were recommended.
>
> c) That subsequent to their being deemed appointed, as above, the Chief Justice in conjunction with the Judicial Service Commission, was to take all necessary steps to swear the Judges.

29. What the Court did in the above case was to give life to the requirement of the law that the President must appoint Judges after receiving the recommendation of the Judicial Service Commission. The President could not use the fact that there are no consequences provided in the Constitution to avoid his responsibility to appoint. If he failed to act, then orders could be made to give effect to the Constitution.

30. A more or less similar scenario had earlier played out in the case of *Law Society of Kenya v Attorney General & others*, High Court at Nairobi, Constitutional & Human Rights Division, Petition No. 307 of 2018, [2019]eKLR. The 1st interested party (Hon. Justice Mohamed Warsame) had been elected to represent the Court of Appeal in the Judicial Service Commission. The procedure was that upon

being notified of the election, the President was to formally make the appointment to the Commission within three days. The President failed to act leading to the petition. In the petition, the court (Mwita J), issued a declaration that the Honourable Judge was duly appointed and directed the Chief Justice and the Judicial Service Commission to take all steps to enable him assume office. In essence, it was vain to wait for the President to take action, and the court directed that whatever action the President was to take, to formally appoint the Honourable Judge, be given effect. While grappling with the question of the what remedies were appropriate, the Court was of opinion that it needs to provide an effective remedy given the circumstances. The Judge stated as follows :-

> " In my view, the most effective remedy should not be to direct the 1st respondent (Attorney General) to do that which he has failed to advice the President to do. Rather, the court should grant a remedy that will bring the constitutional process to a conclusion, do away with any further or potential stalemate and enable an independent constitutional commission function at its optimal in the discharge its constitutional mandate."

31. It is no different from the situation in our case. Despite the law dictating to the Managing Director, to , without delay, cause to be paid out of the revenue of the Corporation, the judgment sum, the Managing Director has not done so, and I had earlier pointed out that neither has he allowed for the attachment of any of the property of the Corporation in order to satisfy the decree. His failure to act should not leave the plaintiff without a remedy, in the same manner that the failure by the President to appoint Judges, could not leave Kenyans without a remedy. There ought not to be granted a right without a remedy. I would say that the Court has discretion to make orders that are reasonable, and effective, given the circumstances of the case, to see to it that what the Managing Director is supposed to do is actually done.

32. I reiterate that the law directs the Managing Director to pay the money from the revenue account of the Corporation. In doing so, the Managing Director will be undertaking a public and statutory duty. If he does not pay within a reasonable time, the aggrieved party has a right to come to court, to see to it that the public duty that the Managing Director is supposed to do, is done. I see no bar to any party coming to court to be allowed to seize money in any of the revenue accounts of the Corporation, so that what the Managing Director was supposed to do, which is to pay out of the revenue account of the Corporation, is done. I also see no provision in the law, which will bar a successful litigant from approaching court for leave to attach any of the properties of the Corporation that the Managing Director is empowered to allow to be attached pursuant to Section 88 (b) of the *Kenya Railways Corporation Act*. Upon such application being made, it is for the court to determine it, upon taking into account all surrounding circumstances. What is important is that the law must be read so that what the Managing Director is supposed to do is effectively done. That is what the *Constitution* enjoins the Court to do pursuant to Article 20 (3) , that is, to develop the law so that it gives effect to the rights of the people, and also adopt an interpretation that most favours the enforcement of a right and fundamental freedom. You see, we cannot have a scenario where statute has directed a public officer to made payment without delay, and when payment is not forthcoming, we say that the decree holder has no remedy, and is at the mercy of the said public officer or the institution that he works for. The right to be paid, which has been ordered by the court, is not a vain right; it must be given effect. If we say that it cannot be given effect by strictures in statute, then we are saying that there is a category of persons in this country who are above the law and can operate with impunity. That cannot be allowed in the current Constitutional dispensation. We cannot argue that there is a right to access justice, under Article 48 of the *Constitution*, and yet say that a person holding a decree against a public body has no remedy if the public body refuses to pay him. What sort of access to justice would there be when a person holding a decree against a public institution cannot have it satisfied because the public officer who is supposed

to pay it has refused to do so ? A decree is similar to property; we cannot point at Article 40 of the *Constitution* and boast that Kenya protects the right to property, yet create insurmountable hurdles in effectuating that right.

33. It was of course urged that the only remedy that a decree holder has against the Kenya Railways Corporation is to file another suit for mandamus. That narrative also extends to persons holding decrees against other State Corporations and against the National and County Governments, because of the strictures in statute on attachment of their property. There is certainly a good number of authorities which support this opinion. Indeed, as I have mentioned earlier, I was referred to the case of *Wambugu Njoroge, Ngugi & Company Advocates v City Council of Nairobi*, and *Hezron Osserey v Kenya Railways*, where the approach of the Court was that since execution/attachment is barred by statute, the only remedy of the decree holder is a suit for mandamus. I will also mention the three judge bench decision in the case of *Nahashon Omwoha Osiako & 66 others v The Attorney General & others*, High Court at Kisumu, Petition No. 29 of 2010 (2015)eKLR. This was a petition seeking to declare Section 21 (4) of the *Government Proceedings Act*, unconstitutional. The reasoning in the above decisions is that since the law restricts attachment, then one has to file a suit for mandamus, in order to enforce the duty to pay, which is said to be a public duty. The argument goes further to say that if the order of mandamus is not complied with, then one needs to file an application for contempt.

34. I have difficulty agreeing with this proposition. First, to be specific on the matter at hand, that is execution against Kenya Railways Corporation, there is no provision under the *Kenya Railways Corporation Act*, or indeed any other law that has been shown to me, which says that the only mode of executing against the Corporation is to file a suit for mandamus, then if the order is not complied with, one should file an application for contempt. I have looked, and looked again, at the *Kenya Railways Corporation Act* and nowhere have I seen this procedure being mentioned anywhere. In fact, I recall that at the hearing of the application, I asked both Mr. Karina and Ms. Osewe, whether there is such procedure in the *Kenya Railways Corporation Act*, and they conceded that there is none. The other statutes restricting execution against Corporations or the Government also do not provide for the path of mandamus to enforce the decrees. I am therefore at a loss as to how the concept, that one needs to file a suit for mandamus, arose, since there is no provision in the law for such as a method of executing a decree against a Corporation or the National or County Government. If there was such provision, then I would have had no difficulty in making an order for the successful litigant to follow it, but there being no such provision, I do not see any basis for asking a successful litigant, who has a decree issued by a competent court within a particular suit, to require him to file a second suit for execution of the decree. This in fact goes against Section 34 (1) of the *Civil Procedure Act*, which dictates as follows :-

> 34
>
> (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

35. The above Section speaks for itself. Questions relating to execution or satisfaction of a decree, are to be determined by the court executing the decree and not by a separate suit. Thus, to demand that a successful litigant needs to file a separate suit solely for purposes of execution flies in the face of the above provision. I do not see the rationale, nor the public policy, nor the mischief to be cured, by asking a successful litigant to proceed and file another suit for mandamus, solely for the purpose of executing the decree. There is no percentage to gain by asking the decree holder to now file another case in order to have the judgment creditor satisfy the decree. Firstly, you will be burdening an already successful party with additional costs by asking him to file another suit. Secondly, you will be putting the successful litigant through the rigours and risks of another trial. As we well know, a trial can go

either way. What if the suit for mandamus is dismissed ? Does that mean that that is the end of the road for the successful litigant so that the judgment will never be satisfied ? Thirdly, you will only be delaying further an already concluded matter. A new trial can take years to be concluded, yet the issues have already been tried and settled, and all that remains is satisfaction of the decree. Fourthly, you will be negating the principle, and public policy, that parties are bound to satisfy court orders when and as passed. Asking that another suit be filed is the equivalent of saying that the earlier judgment does not matter. In any event what you will get at the end of the mandamus hearing is an order demanding satisfaction of the decree. But that is exactly what a judgment is; an order to the judgment creditor to satisfy the decree, which will already have been issued in the first judgment. If you already have one order compelling satisfaction of the decree, why would you need a second order in a separate suit ? The suit for There is the suggestion that if the mandamus order is disobeyed, then the avenue is to file a contempt application, to compel its satisfaction. If that is the end game, why not have the contempt application filed in the first judgment, against the very person in the institution who is supposed to ensure satisfaction of the decree, and still have it as the end game ?

36. Whichever way you want to look at it, there is absolutely no purpose to be served by asking a successful litigant, who has either sued the National Government, County Government, or a statutory corporation, to file a second suit for mandamus in order to have his decree satisfied. Whatever mode of execution that will be employed if the order of mandamus is not complied with, can as well be employed if the judgment of the court has not been complied with. A second suit for mandamus is not only antithetical the right to access justice under Article 48 of the Constitution, but also a mockery of the principle in Article 159 (2) (b) of the *Constitution*, which prescribes that "justice shall not be delayed." That may be one very simple statement but it is an extremely weighty principle that courts need to ensure adherence.

37. It is for the above reasons that I am not persuaded that there is any legal provision, nor any public policy principle, that provides that a party needs to file a second suit for mandamus in order to enforce a decree against a Corporation, or against the National or a County Government. Execution, either by attachment, or arrest of the person who is supposed to satisfy the decree, can be done within the very suit that brought forth the decree. As I have pointed out, that is indeed the law as provided for in Section 34 (1) of the *Civil Procedure Act*. The law abhors a second suit solely aimed at execution and demands that all matters related to execution be addressed within the suit where the decree was passed.

38. I will reiterate my earlier view, that where a person is obligated to act, and fails to act, the aggrieved party is at liberty to move the court for orders that will give effect to the action that the obligated party has refused to perform. The plaintiff has moved to garnishee the account of the Corporation. I see no problem with this. What is sought to be attached has not been claimed not to be a revenue account of the Corporation. In fact, the garnishee has elaborately described it as a "collection account" which means that it is a revenue account of the Corporation. It will be recalled that the Managing Director is supposed to pay the judgment sum out of the revenue account of the Corporation. He has failed to do so. To give effect to the judgment, and so that what the Managing Director was to do is done, I see no problem with a party approaching the court for leave to attach a revenue account of the Corporation, because the Managing Director has refused to release money from it despite the order in the law. The garnishee application is therefore well within the jurisdiction of this court and faced with it, the court needs to make orders that give effect to the judgment.

39. I have not forgotten the second ground upon which the application is opposed, which is contained in the replying affidavit of Ms. Macharia. She deposed that the amount due to the plaintiff is yet to be ascertained. She stated that the amount of Kshs. 127, 464,047.67/= is disputed and grossly exaggerated. She seemed to argue that quantum must be specified in a judgment. The latter submission, is with

respect, not my view of the law. For example, Order 21 rule 13 which provide for decrees for possession and mesne profits permits the court to issue a decree for rent accrued, or the court may direct an inquiry which can be done after judgment. It is drawn as follows :-

13. Decree for possession and mesne profits [Order 21, rule 13.]

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of such suit until—

(i) the delivery of possession to the decree-holder;

(ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under subrule (1)(b) or (1)(c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

The above is one instance where an amount may not be fixed in the judgment, but provision is made for its payment. There are more or less similar provisions in Order 21 Rule 15 and Order 21 Rule 17 for taking accounts where the amount is disputed. In our case, what the Court ordered to be refunded to the plaintiff was the amount paid in excess of the annual rent of Kshs. 146,000/=. This is not any quantification of damages. This is a refund of money actually paid. We should not forget that this is money that the Corporation ought never to have demanded in the first place, for it went against a very explicit consent order. It was contemptuous of the order of court for the Corporation to demand and pocket the money. I find it completely unjust, that despite violating a court order, the Corporation is now again seeking the protection of the Court so that it does not pay the money. I am afraid that this Court is unable to allow the Corporation to run away from its obligations. It was claimed that the money is not ascertained. Calculating it is very simple; you take the money paid into the Corporation less Kshs. 146,000/= annually, then add interest at Court rates from the time that it was paid. That is all. The amount paid in excess of this sum is certainly known to the Corporation, and if the Corporation feels that what the plaintiff has stated as being the overpayment is exaggerated, nothing has stopped the Corporation from filing an application for accounts to be taken. None has been filed and neither has the Corporation offered to say what the correct amount is. In light of that, I have no reason to doubt that the money claimed by the plaintiff in the garnishee application is not the money due and owing.

40. I had mentioned that I am not persuaded that the avenue of a successful litigant in a suit against a Corporation, or the National or County Government is to file a suit for mandamus. I have demonstrated that in so far as the Corporation is concerned, the Managing Director is supposed to pay the judgment sum, without delay, out of the revenue account of the Corporation. I have held, that where the Managing Director fails to act, the Court is mandated to issue such orders as the nature of the case deserves, to see to it that what the Managing Director is supposed to do is actually done. I have

held that in doing so, the Court has wide discretion. In the case before me, I am of opinion that the following orders will suit the circumstances of this case, and I order as follows :-

(i) That within 30 days from the date hereof the Managing Director of Kenya Railways Corporation to ensure that he has refunded to the plaintiff the money paid in excess of Kshs. 146,000/= as rent, together with interest at court rates from the time the same was paid, and within the same time also ensure that the plaintiff is paid the taxed costs.

(ii) That in default, the garnishee, Kenya Commercial Bank Limited, to release and transfer into the account that counsel for the plaintiff will provide, all the monies currently contained in the account No. 1108981917, but not to exceed the amount claimed in the garnishee application.

(iii) That pending either (i) or (ii) above, there be no withdrawals from the said account.

41. The only issue left is costs. In her submissions, Ms. Osewe, learned counsel for the garnishee, asked for Kshs. 50,000/= as costs of the garnishee to be retained from the account in the event that I make this order. I regret my inability to assess the costs at Kshs. 50,000/= nor order the said sum to be deducted from the account. The garnishee fought this application as if her life depended on it yet this was not her money. She aimed at frustrating the plaintiff from being paid what is rightfully hers. She will pay her own costs. The Corporation will however pay the costs of this garnishee application to the plaintiff.

42. Orders accordingly.

DATED AND DELIVERED THIS 1ST DAY OF NOVEMBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

In presence of:-

Mr. Gikandi for plaintiff/applicant.

Mr. Karina for 1st defendant/respondent.

Ms. Osewe for the garnishee.

Court Assistant – Wilson Rabong'o.