



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 8 OF 2015

SAMUEL NGARI GITHINJI.....PLAINTIFF/RESPONDENT

VERSUS

THE CONSTITUENCY DEVELOPMENT

FUND BOARD.....1ST DEFENDANT/RESPONDENT

DAGORETTI SOUTH CONSTITUENCY

DEVELOPMENT FUND COMMITTEE

(FORMERLY DAGORETTI CONSTITUENCY

DEVELOPMENT FUND COMMITTEE.....2ND DEFENDANT/APPELLANT

AND

EQUITY BANK LIMITED.....GARNISHEE/RESPONDENT

RULING

On 17th November, 2017, judgment was entered for the plaintiff against the defendants jointly and severally as follows (in part);

1. Kshs. 12,000,000/- with interest at court rates from the date of judgment until payment in full being the market value of the plaintiff's land on which the defendants had illegally constructed a public road.
2. Kshs. 7,000,000/- as general damages for trespass together with interest from the date of judgment until payment in full.
3. Costs of the suit.

A decree was extracted from the said judgment on 23rd January, 2018. On 14th February, 2019, the plaintiff and the 1st defendant entered into a consent staying execution the of the said judgment as against the 1st defendant. On 3rd September, 2019, the plaintiff's bill of costs was taxed by the Deputy Registrar at Kshs. 1, 129,552/. Through an application dated 1st December, 2020, the plaintiff sought an order nisi to be issued against the Garnishee, Equity Bank Limited for the attachment of all the monies held at Equity Bank, Kawangware Branch, Account No. 063xxxxxxxxxx in the name of the 2nd defendant/judgment debtor in satisfaction of the said judgment. The plaintiff also sought a hearing date to be set for the order nisi to be made absolute and for the Garnishee to ordered to release to the plaintiff forthwith from the said account of the 2nd defendant a sum of Kshs. 20,129,552.00 together with interest from 17th November, 2017.

On 26th January, 2021, the Deputy Registrar, Hon. I.N.Barasa (hereinafter referred to only as "the Deputy Registrar") issued an order nisi against the Garnishee attaching forthwith all the funds held at Equity Bank, Kawangware Branch, Account No. 063xxxxxxxxxx in the name of the 2nd defendant/judgment debtor to satisfy the judgement debt in the sum of Kshs. 20,129, 552.00 together with interest accruing thereon at court rates from 17th November, 2017 until the date of payment in full to the plaintiff/judgment creditor.

The plaintiff's said application dated 1st December, 2020 for attachment of the monies held in the 2nd defendant/judgment debtor's bank account with the Garnishee at its Kawangware Branch was served together with the order nisi aforesaid upon the 2nd defendant/judgment debtor and the Garnishee for inter partes hearing. In response to the said application, the 2nd defendant/judgment debtor filed an application

by way of Notice of Motion dated 8th February, 2021 seeking to set aside the said ex parte order *nisi*. The plaintiff's application dated 1st December, 2020 and the 2nd defendant's application dated 8th February, 2021 were heard together by the Deputy Registrar. In a ruling delivered on 16th February, 2021, the Deputy Registrar dismissed the 2nd defendant's application with costs. The Deputy Registrar allowed the plaintiff's application, confirmed the order *nisi* and ordered the Garnishee to pay to the plaintiff Kshs. 10,649,487.73 from the funds held by the Garnishee in the 2nd defendant's Account No. 063xxxxxxxxx at Kawangware Branch.

The gist of the 2nd defendant/judgment debtor's argument before the Deputy Registrar was that it was a government body and as such was protected against execution under the Government Proceedings Act, Chapter 40 Laws of Kenya (hereinafter referred to only as "the GP Act"). The 2nd defendant argued that execution proceedings under Order 23 of the Civil Procedure Rules for the attachment of debts (Garnishee proceedings) did not apply to it. On his part, the plaintiff argued that the 2nd defendant was a body corporate capable of suing and being sued and that a suit against the 2nd defendant was not a suit against the government. The plaintiff contended that the execution that was levied against the 2nd defendant through attachment of the monies held in its account with the Garnishee was lawful and proper.

The Deputy Registrar after considering the rival submissions by the parties held that the 2nd defendant was not a government within the meaning of the GP Act and as such the 2nd defendant was not shielded from execution under that Act. The Deputy Registrar agreed with the plaintiff that the 2nd defendant was a body corporate and that it was not exempted from the execution process set out in the Civil Procedure Rules. The Deputy Registrar found the Garnishee proceedings against the 2nd defendant's bank account lawful and proper.

The 2nd defendant was dissatisfied with the said decision by the Deputy Registrar made on 16th February, 2021 and preferred an appeal against the same to this court pursuant to Order 49 rule (7)(2) of the Civil Procedure Rules. The appeal was filed on 17th February, 2021 through Memorandum of Appeal dated 16th February, 2021. Together with the Memorandum of Appeal, the 2nd defendant filed an application dated 17th February, 2021 for stay of the Deputy Registrar's orders aforesaid pending the hearing of its appeal by this court. The application for stay was opposed by the plaintiff. On 22nd February, 2021, the court granted a temporary order of stay of execution pending the hearing of the application for stay inter-partes. The parties thereafter agreed that the stay application be heard by way of written submissions and both filed submissions in respect of the said application.

Upon further engagement between the parties and the court on 29th June, 2021, the parties agreed that instead of the court rendering a ruling on the stay application, the court should deliver its ruling on the appeal against the decision of the Deputy Registrar on the basis of the material that the parties had placed before the court. This understanding was reached upon realization that the stay application and the appeal raised similar issues of law and fact. The parties also agreed that pending the delivery of a ruling on the appeal, the interim order of stay of execution that was granted on 22nd February, 2021 would remain in force.

Arising from the foregoing, what is now before me is the 2nd defendant/judgment debtor's appeal against the decision of the Deputy Registrar made on 16th February, 2021. As I have mentioned earlier, the 2nd defendant filed Memorandum of Appeal dated 16th February, 2021. In its memorandum of appeal, the 2nd defendant challenged the decision of the Deputy Registrar on the following main grounds;

1. The Deputy Registrar erred in law and fact by allowing execution and attachment against the 2nd defendant which is a government agency contrary to section 21 of the Government Proceedings Act, Chapter 40 Laws of Kenya (GP Act) as read with Order 29 of the Civil Procedure Rules which bars execution and attachment against the Government.
2. The Deputy Registrar erred in law and fact in failing to take into account the evidence and submissions that were placed before her to the effect that execution that had been commenced against the 2nd defendant was unlawful.
3. The Deputy Registrar erred in dismissing the 2nd defendant's application dated 8th February, 2021 that sought the setting aside of the order *nisi* and allowing the plaintiff's application dated 1st December, 2020 by making the order *nisi* absolute.

The 2nd defendant urged the court to allow the appeal with costs, set aside the Deputy Registrar's orders made on 16th February, 2021 and substitute in place thereof an order lifting the order *nisi* that was given by the Deputy Registrar on 26th January, 2021.

The parties had agreed that the court does consider the affidavits, grounds of opposition and the submissions that they had filed in support of and in opposition of the application for stay of execution in determining the present appeal. The 2nd defendant (hereinafter referred to only as "the appellant") filed submissions and further submissions. In its submissions, the appellant submitted that the appellant was established under section 43 of the National Government Constituencies Development Fund Act, 2015 ("NGCDF Act"). The appellant submitted that it was responsible for the implementation of development projects within Dagoretti South Constituency under the supervision and oversight of the 1st defendant which was established under section 14 of the same Act. The appellant submitted that all the funds used by the appellant are disbursed by the 1st defendant pursuant to sections 5 and 6 of the NGCDF Act. The appellant submitted that it had no funds of its own and that all funds disbursed to it were public funds drawn from the consolidated fund pursuant to section 4 of the NGCDF Act. The appellant submitted that it was not aware of the existence of this suit until the order *nisi* for the attachment of its bank account with the Garnishee was made by the Deputy Registrar on 26th January, 2021.

The appellant submitted that it was a Government agency and as such it was protected from execution under section 21(4) of the GP Act and Order 29 Rule 2 of the Civil Procedure Rules. The appellant submitted that the Garnishee proceedings that were instituted against it were contrary to the said provisions of the law. The appellant submitted that the plaintiff was under an obligation to pursue the recovery of the decretal amount/ judgment debt through the procedure set out in the GP Act. The appellant submitted that the plaintiff did not obtain certificate of order against the Government as provided for in section 21(1) of the GP Act. In its further submissions, the appellant submitted that the 1st defendant supervised its budget and that it had no ultimate control over disbursement of funds for its projects.

In his submissions dated 8th April, 2021, the plaintiff submitted that the appellant's appeal lacked merit. The plaintiff submitted that the appellant's contention that it was a Government agency was erroneous. The plaintiff submitted that section 21 of the GP Act and Order 29 of the Civil Procedure Rules did not apply to the appellant. The plaintiff submitted that the appellant was a body corporate capable of suing and being sued in its own name. In support of this submission, the plaintiff relied on several decisions including, Green Star Systems Ltd. v Kenyatta International Convention Centre (KICC) & 2 others [2018] eKLR (by the High Court), and Maina Mwangi v John Kagucia & Mukurwe-ini Constituency Development Fund Committee [2017] eKLR and Amin Mohamed Ali v Fund Manager Laikipia East Constituency Development Fund & 3 others [2014] eKLR (by the Employment and Labour Relations Court). The plaintiff submitted that the claim that the appellant was a Government agency was an attempt by the appellant to scuttle the execution proceedings against it.

I have considered the decision by the Deputy Registrar, the grounds of appeal put forward by the appellant against the same and the submissions by the advocates for the parties. The appellant's entire appeal turns on only one point namely; whether or not the appellant is a Government or a government agency and as such is protected from execution under the GP Act and Order 29 of the Civil Procedure Rules. Government is not defined either in the GP Act or the Civil Procedure Act, Chapter 21 Laws of Kenya and the rules made thereunder. A reading of sections 2, 12, 19 and 21 of the GP Act as to what constitutes "civil proceedings by and against the Government", and "order against the Government" which is reproduced in Order 29 Rule 1(1) of the Civil Procedure Rules leaves no doubt that "the Government" includes Government departments, Government organs, agencies of the Government and officers of the Government.

In Black's Law Dictionary, 10th Edition, "government" is defined as:

"1. The structure of principles and rules determining how a state or organization is regulated. 2. The sovereign power in a country or state. 3. An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed...In this sense, the term refers collectively to the political organs of a country regardless of their function or level, and regardless of the subject matter they deal with."

A government agency I believe is the same as a public agency. In Black's Law Dictionary, 8th Edition at page 67 "Public agency" is defined as:

"A government body with the authority to implement and administer particular legislation – Also termed government agency; administrative agency; public agency; regulatory agency."

What I need to determine is whether the appellant falls under any of the foregoing description of Government so as to benefit from the protection accorded under the GP Act. In determining this issue, it is necessary to look at a bit of history of the Constituency Development Fund(CDF) and the legal framework under which the 2nd defendant was established. This suit was filed on 8th January, 2015 initially against the 1st defendant only. The plaint was amended on 9th March, 2015 to add the 2nd defendant to the suit. As at the time this suit was filed, the law regulating Constituency Development Fund(CDF) was Constituencies Development Fund Act, 2013 (CDF Act 2013). The CDF Act 2013 established Constituencies Development Fund Board(CDFB) which was a body corporate with perpetual succession and a common seal which is the 1st defendant in this suit. The CDFB was administered by a Board of Directors. The CDF Act, 2013 also established Constituency Development Fund Committee (CDFC) for every constituency. The membership of the CDFC comprised of; the national government official at the constituency designated by the Cabinet Secretary or an alternate; three men nominated by the ward development committees and one of whom was a youth at the date of appointment; three women nominated by the ward development committees and one of whom was a youth at the date of appointment; one person with disability nominated by the ward development committees; one person nominated from among the active Non-Governmental Organisations in the constituency; an officer of the Board seconded to the Constituency Development Fund Committee by the Board who was ex officio. The Member of Parliament (who was ex-officio member of the committee) appointed these members save for the national government official and the officer of the board (in consultation with the officer of the Board and the sub county administrator for the constituency) from a list submitted from various wards in the constituency.

The constitutionality of the CDF Act 2013 was challenged in the High Court in Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR. In the suit, the petitioners argued that the CDF Act 2013 was unconstitutional because of among other things, that the National Assembly had set its own structures to receive the CDF money and implement projects without the involvement of the counties since there was no representation of county governments in the CDFB and CDFC. The petitioners argued that the structures set up by the CDF Act 2013 created a third party to share in the equitable allocation of revenue that was constitutionally reserved for the two levels of government. They maintained that projects undertaken through CDF were local and were county projects and not projects of the national government. The petitioners contended that CDFB being a national organ had unconstitutionally encroached on the functions of the County governments. The High Court declared the whole CDF Act 2013 unconstitutional. The court found that the Act established CDF as a mechanism that ran parallel to the constitutionally recognised governance structures and that by charging it with local projects under section 22 of the CDF Act 2013, CDF threatened to upset the division of functions between the national and county levels of government and interfered with the county government autonomy.

The High Court decision was challenged in the Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR. The Court of Appeal found contrary to the finding of the High Court that the CDF Act 2013 did not violate the principles of public finance, division of revenue and the principle of division of powers and functions. It however found that Sections 24(3)(c), 24 (3)(f) and Section 37 (1) (a) of the CDF Act 2013 violated the principle of separation of powers. The appeal was allowed, the declaration that the CDF Act 2013 was unconstitutional was set aside and substituted with a declaration that sections 24(3)(c), 24(3)(f) and 37(1)(a) of the CDF Act 2013 were unconstitutional and invalid for violating the principle of separation of powers. These provisions of the CDF Act 2013 that were struck down by the Court of Appeal gave roles to Members of Parliament and Senators in the administration of CDF. This decision of the Court of Appeal was appealed to the Supreme Court in Petition No. 1 of 2018. There is no information whether that appeal has been determined.

In the intervening period, Parliament passed the National Government Constituencies Development Fund Act 2015 (NGCDF Act 2015). This Act was assented to on 15th December, 2015 and came into operation on 19th February, 2016 save for section 57 thereof that came into

operation upon publication of the Act. The Act was amended extensively in 2016. NGCDF Act 2015 established National Government Constituencies Development Fund Board (NGCDFB) as a body corporate with perpetual succession and a common seal. The Act also established National Government Constituency Development Fund Committee (NGCDFC) for every constituency. The membership of NGCDFC is comprised of: the national government official responsible for co-ordination of national government functions; two men, one of whom shall be a youth at the date of appointment; two women one of whom shall be a youth at the date of appointment; one person with disability nominated by a registered group representing persons with disabilities in the constituency; two persons nominated by the constituency office established under Regulations made pursuant to the Parliamentary Service Act; the officer of the Board seconded to the NGCDFC by the Board who shall be an ex officio member without a vote and one member co-opted by the Board in accordance with Regulations made by the Board. A part from those seconded by the Board and the national government official these members are appointed by a selection panel comprised of one person nominated by the national government official in charge of the sub-county or a designated representative, who is the chairperson of the selection panel; the Officer of the Board seconded to the Constituency who is the secretary to the selection panel; and two persons, one of either gender, nominated by the Constituency office.

The constitutionality of the NGCDF Act 2015 was challenged in Wanjiru Gikonyo & another v National Assembly of Kenya & 8 others [2016] eKLR. There is no information as to whether this case that was referred to the Chief Justice to constitute a bench of uneven number of judges to hear has ever been heard and determined. For reasons which are not clear, although NGCDF Act 2015 established new structures and organs to administer CDF that succeeded those that were established under CDF Act, 2013 thereby rendering the 2013 Act obsolete, NGCDF Act 2015 did not repeal CDF Act, 2013. For all practical purposes, it is the NGCDF Act 2015 that is currently regulating the administration of the CDF.

Section 3 of the CDF Act 2013 sets out the object and purpose of the said Act as follows:

“The provisions of this Act shall apply, as more specifically provided for in the Act, and shall ensure that a specific portion of the national annual budget is devoted to the constituencies for the purposes of infrastructural development, wealth creation and in the fight against poverty at the constituency level.”

As at the time judgment was entered herein against the defendants on 17th November, 2017, the CDFC that was in place was NGCDFC established under section 43 of the NGCDF Act 2015 whose membership I have set out above. Section 2 of the NGCDF Act 2015 sets out some of the objects of the Act as follows;

“To recognize the constituency as a platform for identification, performance and implementation of national government functions;

To facilitate the performance of and implementation of national government functions in all parts of the Republic pursuant to Article 6 (3) of the Constitution.”

From the history of the CDF that I have set out above and the foregoing objects of the CDF Act 2013 and NGCDF Act 2015, I am of the view that the CDF was set up as a vehicle to facilitate the implementation of national government functions at the constituency level. For that reason, I am persuaded that CDFC/NGCDFC is part of national government structure for the implementation of the said functions. Although both the CDF Act 2013 and NGCDF Act 2015 are silent on the function of the CDFC/NGCDFC, in National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR the Court of Appeal while referring to the CDF Act 2013 defined the functions of the CDFC as follows:

“The functions of the CDFC include receiving a list of priority projects from the wards, approval of the projects, submitting a list of projects to the CDFB for approval, withdrawal and disbursements of the funds, implementation of projects and the monitoring of the implementation of the projects.”

I am convinced from the objects of the Acts establishing the CDFC/NGCDFC, the functions of the CDFC/NGCDFC, the composition of CDFC/NGCDFC, the extent of government control of the CDFC/NGCDFC through the CDFB/NGCDFB and the source of its funds that CDFC/NGCDFC is a government agency for the implementation of national government functions at the constituency. I am not persuaded by the authorities that were cited before me to the contrary by the plaintiff. I find the same distinguishable. Having reached the conclusion that CDFC/ NGCDFC is a government agency, it follows that the same is protected from execution by the provisions of the GP Act and Order 29 of the Civil Procedure Rules. In the circumstances, the plaintiff could only recover the judgment debt owed by the 2nd defendant in accordance with the provisions of the GP Act and not otherwise.

Section 21 of the GP Act provides as follows:

1. Where in any civil proceedings by or against the government or any proceedings in connection with any arbitration in which the government is a party, any order (including an order for costs) is made by any court in favour of any person against the government or against a government department, or against an officer of the government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of 21 days from the date of the order or, in case the order provides for the payment of costs and the costs are required to be taxed, at any time after the costs have been taxed, whichever is the latter, issue to that person a certificate in the prescribed form containing the particulars of the order:

Provided that if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

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

the Attorney General.

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

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

4. Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the government, or any government department, or any officer of the government as such, of any money or costs.

5. This section shall, with necessary modification, apply to any civil proceeding by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

It is not in dispute that the plaintiff obtained judgment against the defendants jointly and severally on 17th November, 2017 for a total sum of Kshs. 19,000,000/- plus interest. The plaintiff was also awarded the costs of the suit that was taxed at Kshs. 1,124,547/- on 3rd September, 2019. As I have stated earlier, as at the time judgement was entered against the defendants, the CDFC that was in place was the NGCDFC established under the NGCDF Act 2015. The NGCDF falls under the Ministry of Devolution and Planning. It is this Ministry that ensures NGCDF budgetary provisions and offers policy direction to NGCDFB that administers NGCDF through the NGCDFCs. I am of the view that the judgment debt owed by the NGCDFC should be settled by the accounting officer of the NGCDFB or the accounting officer at the Ministry of Devolution and Planning. Section 21(3) of the GP Act, that I have reproduced above places an obligation on the said accounting officers to pay or settle any judgment made against NGCDFC from the budgetary allocation to NGCDFC. This is how the judgment debt owed to the plaintiff by the 2nd defendant should have been settled. The said accounting officers could only settle the said judgment debt after the plaintiff had complied with the provisions of section 21(1) of the GP Act aforesaid. There is no evidence that the plaintiff applied to this court to be issued with a certificate in the prescribed form containing the particulars of the order that was made in his favour. Under section 21 (3) of the Government Proceedings Act, the accounting officer of the government is only supposed to make payment of the amount which has been certified to be due by the court.

Section 21(4) of the GP Act expressly forbids attachment against the Government in execution of a decree or order of the court. The order that was issued by the Deputy Registrar for the attachment of the monies held in the 2nd defendant's bank account with the Garnishee was illegal in the circumstances. I am in agreement with the appellant that the Deputy Registrar erred in dismissing its application to set aside the ex-parte order *nisi* and in allowing the plaintiff's application for the said order to be made absolute.

In the final analysis and for the foregoing reasons, the 2nd defendant's appeal succeeds on all grounds. Consequently, the appeal is allowed. The orders made by Hon. I.N.Barasa, Deputy Registrar on 16th February, 2021 are set aside and in place thereof, there shall be an order dismissing the plaintiff's application dated 1st December, 2020. For the avoidance of doubt, the orders for the attachment of the 2nd defendant's bank account with the Garnishee that were made by the Deputy Registrar on 26th January, 2021 and 16th February, 2021 are discharged. Each party shall bear its own costs of the two applications that were before the Deputy Registrar and of this appeal.

DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF JULY 2021

S. OKONG'O

JUDGE

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

Mr. Ochieng for the Plaintiff

N/A for the 1st Defendant

Ms. Miringu h/b for Ms. Khasindi for the 2nd Defendant

Ms. Rweya for the Garnishee

Ms. C. Nyokabi-Court Assistant