



**Cyber Access Limited v National Land Commission & 3 others; National Bank of Kenya Limited (Garnishee) (Petition 43 of 2018) [2024] KEHC 2162 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2162 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION 43 OF 2018  
OA SEWE, J  
MARCH 5, 2024**

**BETWEEN**

**CYBER ACCESS LIMITED ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INFRASTRUCTURE DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THIRD CHINA ENGINEERING CO LTD ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... GARNISHEE**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> respondent's Notice of Motion dated 12<sup>th</sup> July 2023. It was expressed to be filed under Article 159 of the *Constitution*, Sections 1A, 1B, 3A and 75 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Order 42 Rule 6 of the *Civil Procedure Rules*. Most of the orders prayed for therein are now spent. The only outstanding prayer is the prayer that, pending the filing of an appeal, the Court be pleased to grant stay of execution of the orders of the Court issued on 6<sup>th</sup> July 2023. The applicant also prayed that costs of the application be provided for.
2. The application is premised on the grounds that, on the 6<sup>th</sup> July 2023, the Court delivered a ruling in respect of an application dated 25<sup>th</sup> February 2023 whereby it made the Garnishee Order Nisi, issued herein against the National Bank of Kenya Limited, absolute. Accordingly, an order was made for the Garnishee to pay over to the petitioner the sum of Kshs. 1,700,086.67 out of the funds belonging to the National Land Commission and held by the Garnishee in Account No. 0100XXXXX80000.



3. The 1<sup>st</sup> respondent was aggrieved by that decision and expressed its intention to appeal the decision. It therefore submitted that unless the Court intervenes and grants a stay of the order in question, there is an imminent risk that the Garnishee will transfer the said funds to the petitioner before the hearing and determination of its intended appeal. The 1<sup>st</sup> respondent was of the view that the intended appeal is arguable and therefore it is in the public interest that payment be withheld pending the hearing and determination of that application. The application was supported by the affidavit of the 1<sup>st</sup> respondent's Director of Legal Services and Enforcement, Mr. Brian Ikol, sworn on 12<sup>th</sup> July 2023 in which the foregoing grounds were expounded on.
4. On behalf of the petitioner, Mr. Paul Amuga, Advocate, relied on his own Replying Affidavit, sworn on 26<sup>th</sup> February 2024. He averred that, although the application dated 12<sup>th</sup> July 2023 has never been served on him, he was able to get a copy thereof from the Court's e-filing portal. In response to the application, he averred that the order dated 6<sup>th</sup> July 2023, which the 1<sup>st</sup> respondent seeks to have stayed, was fully complied with by the Garnishee on 11<sup>th</sup> July 2023 when the Garnishee remitted the decretal sum to the petitioner's Advocates. He therefore posited that the application for stay has been overtaken by events.
5. It is noteworthy, from a perusal of the record, that no action has been taken towards the prosecution of the application since its filing. Upon granting interim orders on 14<sup>th</sup> July 2023, the Court gave directions as to the disposal of the application; including the mention date on 25<sup>th</sup> July 2023. There was no appearance for the 1<sup>st</sup> respondent, not only on 25<sup>th</sup> July 2023, but also on various dates thereafter. Indeed, it was at the instance of either the petitioner or the Garnishee that the application was fixed for hearing thereafter, including the hearing date of 28<sup>th</sup> February 2024. Thus, there is no indication at all as to whether an appeal was filed as intended.
6. Be that as it may, it is manifest from the Replying Affidavit filed on behalf of the petitioner by Mr. Amuga and the submissions of Mr. Ngaine for the Garnishee that the application dated 12<sup>th</sup> July 2023 was filed after the funds in question had already been released by the Garnishee. In an application before the Court of Appeal under Rule 5 of the *Court of Appeal Rules*, this sort of situation was deprecated thus in *Macharia Kagio v Habiba Ahmed Mohammed* [2014] eKLR:

“The application shows that the property that is the subject of the litigation is known as L.R. No.36/1/871, Eastleigh Nairobi. It is registered in the name of the 1<sup>st</sup> respondent as the proprietor or the legal owner. The transfer of the property to the 1<sup>st</sup> respondent was pursuant to a sale following monetary consideration. The applicant subsequently tried without success to rescind the sale. The injunction orders now sought are designed to stop or prevent acts that have already occurred. The title to the property is in the name of the 1<sup>st</sup> respondent and it is not now possible in the circumstances of this case to restrain the 1<sup>st</sup> respondent from dealing with the suit premises nor is it possible to describe the applicant as having legal rights to the property in the absence of proof of his registration as the legal owner or an order of the court to that effect. In effect, the applicant seems to be seeking to close the stable door after the horse has already bolted. The applicant has not established justiciability of his claim, much less the arguability of the appeal.”

7. By parity of reasoning, the application dated 14<sup>th</sup> July 2023 having been filed after the funds were paid out is plainly not justiciable. The same is hereby dismissed with costs.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5<sup>TH</sup> DAY OF MARCH  
2024**

**OLGA SEWE**

**JUDGE**

