Endebess Development Company Limited v Coast Development Authority; National Bank of Kenya (Garnishee) (Civil Case 11 of 2017) [2024] KEHC 2945 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 11 OF 2017

DKN MAGARE, J

MARCH 14, 2024

BETWEEN

ENDEBESS DEVELOPMENT COMPANY LIMITED ..... PLAINTIFF

AND

COAST DEVELOPMENT AUTHORITY ..... DEFENDANT

AND

NATIONAL BANK OF KENYA ..... GARNISHEE

RULING

1. The Plaintiff filed the Application dated 28th July 2023 which sought the following orders.
    1. Spent
    2. Spent
    3. Spent
    4. Spent
    5. Spent
    6. Spent
    7. That the Honourable Court be pleased to grant a Garnishee Order nisi against the Garnishee being Account No. 01004007563400 ordering that all monies lying and/or held in Deposit by the Garnishee to the credit of the Defendant/Respondent be attached to amount to the cumulative sum of Kshs. 62,000,000/- in favor of the Plaintiff/Applicant herein and further towards the costs of these Garnishee proceedings.

8. That the Honourable Court be pleased to grant a Garnishee Order nisi against the Garnishee ordering that all monies lying and/or held in Deposit by the Garnishee on all the Defendant's Bank Accounts to the credit of the Defendant/Respondent be attached to amount to the cumulative sum of Kshs. 62,000,000 in favor of the Plaintiff herein and further towards the costs of these Garnishee proceedings.

9. That this Honourable Court be pleased to Order that the Garnishee produced before this Court at the hearing of this Application all the various documents including:

    i. The Defendant's Bank Statements of all the Accounts held on behalf of the Defendant and all other bank accounts held by the Defendants.

    ii. The Defendant's Current Bank Accounts as held by the Garnishee.

2. In the alternative to the prayers for a Garnishee Order nisi against the Garnishee, this Honourable Court be pleaded to order the Garnishee to release to the Plaintiff's Advocates the guaranteed sum of Kshs. 62,000,000/= as contained in the Bank Guarantee dated 15th February 2022.

3. Costs of the Application be provided for and to the extent applicable be retained out of the money recovered under the Garnishee Order.

4. The Application was supported on the Grounds on the face of it and an Affidavit of Davies Mulani advocate for the Applicant.

5. It is the Applicant's case that this Court awarded the Plaintiff Kshs. 62,000,000/= vide the Judgement dated 9th June 2020. The said judgment is yet to be settled. From the history of the case, it emerges that the defendant had applied and was granted stay of execution pending appeal on the condition that the Defendant shall issue the Plaintiff with a Bank Guarantee for Kshs. 62,000,000/= within 60 days of 27th January 2021. The same was issued but the Defendant declined to extend the same.

6. Even the Bank Guarantee provided the Defendant on 1st March 2022 was provided late. The Bank Guarantee expired on 15th February 2023. The Defendant declined to renew it during the pendency of the Appeal. The Appeal was dismissed by the court of Appeal. It is this guarantee that the Applicant seeks to enforce.

7. The Defendant filed a Replying Affidavit though Dr Mohamed Keinan Hassan dated 2/10/2023. They opposed the said application. It eas their case that the decree was premature and thus not capable of execution. Secondly, they stated that they are funded by the ex chequer. Their case was that they wrote a letter dated 18th April 2023 requesting for funds from the permanent ministry. Further, they awaited for issuance of the decree and certificate of costs.

8. It is also stated that the Plaintiff has not followed the procedure under Section 21 of the *Government Proceedings Act*. This was informed by lack of the certificate of Order against the Government.

9. The Application also started that the Applicant made an application more than 1 year after judgement and no prior Notice to Show Cause was issued.

10. The Plaintiff also filed a further affidavit primarily stating that the court had jurisdiction within Section 94 of the *Civil Procedure Act*. They stated that Order 22 Rue 18 of the Civil Procedure Rules did not apply to this Application. Further, that the *Government Proceedings Act* did not apply to these proceedings. These are legal issued which this court will consider in its determination.

Submissions

11. The Plaintiff filed submissions dated 9th October 2023. It was submitted that Certificate of Order against the Government under Section 21 of the *Government Proceedings Act* was not applicable to these proceedings. Reliance was placed on the previous ruling on the same issue vide this court ruling dated 27th January 2021 where the applicability of the impugned section of the law was ruled out.

12. They relied on the interpretation under *the Constitution* and Section 21 of the *Government Proceedings Act* to define what government means and that it only meant National and County Governments. It was stated that Section 3 of the Coastal Development Authority Act provided for the Defendant as a body corporate capable of suing and being sued.

13. It was also submitted that parliament did not intend to safeguard the Defendant from execution as if it did, it would have specifically stated in the *Coast Development Authority Act*. They relied on the case of Paul Gichuke Kibathi v National Irrigation Board (2002) eKLR to buttress this submission. In the said persuasive authority, the Court stated in detail as follows:

> "I have perused the *Irrigation Act* Cap. 347 Laws of Kenya. It is not in dispute that the Government has a large stake in the Board just like it has in the Kenya Ports Authority, Kenya Railways and other bodies. It was the intention of the Legislature to safeguard the Board against attachments it would have incorporated such safeguards as it did in the Acts incorporating the Kenya Ports Authority and the Kenya Railways. There are no such safeguards in the *Irrigation Act*.
>
> Section 3(1) of the Act clearly states that the Board is a corporate body capable of suing and being sued. In the instant case the Respondent was an employee of the Board and was injured in the course of his employment with the Board. Had the Respondent been in breach of his duty with the Board, the Board would have been in order to sue him by virtue of section 3(1) of the Act. Similarly the Respondent was entitled to sue and he sued the Board. The Board instructed a firm of advocates to represent it. It did not instruct the Attorney General. As a government department it did not plead the defence of the Attorney General not being given the statutory notice prior to the filing of the suit. But when it came to execution it now remembered that it was a government department.
>
> I am not persuaded despite being referred to the Webster's Third New International Dictionary that the Board is a government department. Once is body is establishment as a body corporate, it becomes a separate legal entity. It becomes responsible for all its activities unless clearly stated otherwise in the Act establishing such a body. It is immaterial where such a body gets its funding. A poor man does not lose his legal entity simply because he is kept alive by his brother."

14. The Applicant relied on the cases of Ikon Prints Media v Kenya National Highways Authority (2015) eKLR and Tom Ojienda & Associates v National Land Commission & Another (2019) eKLR to buttress their position.

15. On the issue of leave to execute before taxation, it was submitted that the same was not applicable based on Section 94 of the *Civil Procedure Act* that governed this Application.

16. I was urged to allow the Application.

17. On the part of the Defendant, it was submitted that the Defendant was a public body and this court had earlier determined this issue which was now funtus offio.

18. It was further submitted that the Defendant was not subject to execution by dint of section 21 of the *Government Proceedings Act*. Consequently, it was the submission of counsel that a certificate of order against government ought to have been obtained before execution.

19. Further, that Application was made more than 1 year after judgement and no prior Notice to Show Cause was issued as required under Order 22 Rule 18 of the Civil Procedure Rules.

20. To buttress their arguments, they on the decisions of Telcom Kenya Limited v John Ochanda (2014) eKLR, Kisya Investment v A.G (20050e KLR, R v Permanent Secretary in the Ministry if Internal Security (2014)e KLR and R v Permanent Secretary Ministry of State for Provincial Administration (2012)eKLR. Unfortunately, the cases do not typically address the issues in this Application

21. A part from failing to incorporate the principles on garnishee proceedings where public bodies are involved, the decisions largely involve the Honourabe Attorney General and Ministries as parties which justifies the Application of *Government Proceedings Act*. They are thus of little use to this Court.

Analysis

22. This Court has considered the Application, responses thereto and the submissions and authorities filed in support and opposition by the respective parties.

23. The law that governs Applications for a garnishee order is premised under Order 23 Rule 1 of the Civil Procedure Rules which provides as follows:-

> " 1. court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree- holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

24. It is not in vain that the Application for a Garnishee Order is separately regulated under Order 23 of the Civil Procedure Rules as opposed to being impeded into Order 22 of the Civil Procedure Rules that generally govern executions.

25. The common denominator in garnishee proceedings which constitute attachment of debts and the ordinary execution proceedings under Order 22 of the Civil Procedure Rules is that both procedures emanate from a Decree of Court that is due and owing.

26. Hon Mativo J (as he then was) in Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) [2021] eKLR where the learned Judge stated as follows:

> " 9. A reading of Order 23 of the Civil Procedure rules shows that it comprises of self-contained provisions which are distinct and independent of Order 22. It

prescribes two steps in Garnishee proceedings. The first is a Garnishee Order nisi. Nisi is Norman-French. It means 'unless.' It is an order to the bank communicating that unless there is some sufficient reason why the bank should not pay the decree, it will be required to pay money held in the Judgement Debtor's account. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to the creditor might be unfair by preferring him to other creditors.[10] If no sufficient reason appears, the garnishee order is made absolute, to pay to the Judgment-Creditor, or into court, whichever is more appropriate. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if the Judgment-Debtor directed the bank to pay it.

27. In the case of Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others [2014] eKLR, the supreme court stated as follows: -

> "(18) This Court refused to assume jurisdiction in the Mwashetani case above, for reasons of good order and good governance. What will compel it to do in this matter where there is apparently no iota of jurisdiction? As it stands, the matter is still pending before the Industrial court. The petitioner has come to this Court too early in the day and the Court cannot admit him. The matter is not ripe for the consumption of the Supreme Court. Commenting on the ripeness doctrine, Jeffrey Tobin in his book "The Oath: The Obama White House and The Supreme Court", page 71-72 writes thus:
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> > "There are a (sic) number of procedural doctrines that can be used for this purpose. Other examples include ripeness (is it too early for a court to decide the case?), mootness (is it too late for a court to decide a case?), venue (is this court the right one?), and the "political question" doctrine (is the subject matter appropriate for a court to decide at all?). Everyone agrees that these doctrines are necessary, at some level; the courts cannot be allowed to weigh in on controversies simply because judges feel like deciding the merits."

28. The question as to whether the defendant was a government department was decided by Justice Chepkwony at paragraphs 13-14. I cannot re-address the same issue, even if I think that I could have arrived at a different conclusion. Indeed, this Court determined the issue of whether the Defendant is a public body in its Ruling dated 27th January 2021 and the issue is now moot. In its ruling Justice Chepkwony court stated as follows:-

> " The plaintiff argues that the defendant is vested with capacity to sue and be sued on its own names and is therefore a different and distinct entity from government following principles reiterated in the land mark case of Salomon vs. Salomon & co. Ltd (1897) A. C., I am however of the contrary view, that the fact that an agency of government has capacity to sure or be sued in its own name does not mean that the entity losses is character as an instrumentality or agency of government. In my view the answer to the question is in the affirmative.

29. This question having been decided in this very case, with no appeal, the question is now res judicata. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

30. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:-

> " Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
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> Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
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> Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

31. In the dicta in in re Estate of Riungu Nkuuri (Deceased) [2021] eKLR the court stated as follows:

> " The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
>
> (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

32. In the case of Attorney General & another ET vs (2012) eKLR where it was held that;

> "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".

In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

33. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:

> " ...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

34. Res judicata applies to applications just like suits. In the case of Julia Muthoni Githinji v African Banking Corporation Limited [2020] eKLR the court stated thus:

> " 14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was res judicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

35. In the case of Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

> By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

36. It is thus unnecessary to re- state what has already been ruled upon. I find and hold that execution against the Defendant cannot proceed. The same should be proceeded in the same manner as enforcement of judgment against Government.

37. It therefore follows that the garnishee application is untenable. The funds held at the national bank are government monies protected against execution.

38. On the guarantee, the Application is a non-starter. The Authority of the courts to dispense justice and order in the society by suppressing impunity is usually at test. The parties agree that there is a valid decree of court to be settled. There was a bank guarantee but the Defendant admittedly did not renew it whose consequence was that it lapsed. The Appeal subject of guaranteed security was dismissed.

39. The guarantee was for a limited period. Once a guarantee lapses, the same cannot be enforced.

40. The defendant prayed for execution before. The certificate of taxation and order against government are perquisites for payment. I don't find the frustration suffered by the Defendant reason enough to eschew taxation. Let the Applicant file a bill of costs, even if the amount taxed is zero. This ensures finality of matters.

13. The Application dated 28th July 2023 is thus devoid of merit. The question of costs is next. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

41. The application was not idle. The debt is owed. The defendant has frustrated the Plaintiff all through. I do not find the Defendant deserving of any costs. It follows that each party will bear their own costs.

Determination

42. In the upshot, I make the following orders: -

    a. The Application dated 28th July 2023 is dismissed with no order as to costs.

    b. The garnishee is discharged.

    c. File is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY OF MARCH, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Onyancha for the Plaintiff

No Appearance for the Defendant

No Appearance for the Garnishee

Court Assistant - Brian