



Habo Agencies Limited v National Land Commission & 3 others; National Bank of Kenya Limited (Garnishee) (Petition 44 of 2018) [2024] KEHC 2148 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 44 OF 2018
OA SEWE, J
MARCH 5, 2024**

BETWEEN

HABO AGENCIES LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF TRANSPORT & INFRASTRUCTURE
DEVELOPMENT 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

THIRD CHINA ENGINEERING CO. LTD 4TH RESPONDENT

AND

NATIONAL BANK OF KENYA LIMITED GARNISHEE

RULING

1. This ruling is in respect of the 1st respondent's Notice of Motion dated 12th 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 that, pending the filing of an appeal, the Court be pleased to grant stay of execution of the orders of the Court issued herein on 6th 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 6th July 2023, the Court delivered a ruling in respect of an application dated 25th February 2023 whereby it made the Garnishee Order Nisi issued herein against the National Bank of Kenya Limited absolute. An order was consequently 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. xxxx.



3. The 1st respondent was aggrieved by that order and has expressed its intention to appeal the decision. Accordingly, it 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 1st 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 the appeal. The application was supported by the affidavit of the 1st respondent's Director of Legal Services and Enforcement, Mr. Brian Ikol, sworn on 12th 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 26th February 2024. He averred that, although the application dated 12th 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 6th July 2023 which, the 1st respondent seeks to have stayed, was fully complied with by the Garnishee on 11th 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 14th July 2023, the Court gave directions as to the disposal of the application; including the mention date on 25th July 2023. There was no appearance for the 1st respondent, not only on 25th July 2023, but also on various dates thereafter. No submissions were filed by the 1st respondent as directed. 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 28th February 2024.
6. 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 12th 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 LR No.36/1/871, Eastleigh Nairobi. It is registered in the name of the 1st respondent as the proprietor or the legal owner. The transfer of the property to the 1st 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 1st respondent and it is not now possible in the circumstances of this case to restrain the 1st 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 14th July 2023 having been filed after the funds were paid out is not justiciable. The same is hereby dismissed with costs.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MARCH
2024

OLGA SEWE

JUDGE

