



**Kay Construction Company Limited v Kenya Rural Roads Authority  
(Miscellaneous Application 171 & E156 of 2019 (Consolidated))  
[2024] KEHC 2267 (KLR) (Commercial and Tax) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2267 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION 171 & E156 OF 2019 (CONSOLIDATED)  
PM MULWA, J  
MARCH 7, 2024**

**BETWEEN  
KAY CONSTRUCTION COMPANY LIMITED ..... DECREE HOLDER  
AND  
KENYA RURAL ROADS AUTHORITY ..... JUDGMENT DEBTOR**

**RULING**

1. Before the Court is the decree holder's Notice of Motion application dated 10<sup>th</sup> June 2021 filed pursuant to Section 68 of the [Kenya Roads Act](#), Section 5 of the [Judicature Act](#), Rule 81.4 of the Civil Procedure (Amendment No.2) Rules 2012 of the Supreme Court of England, Section 1A and 1B of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules.
2. The decree holder sought the following orders:
  1. Spent
  2. That the Honourable Court be pleased to order that the Director General of the Kenya Rural Roads Authority (the Judgement Debtor herein); Mr. Philemon Kandie causes to be paid to the Decree Holder/Applicant the entire decretal sum together with all accrued interest and costs within 14 days as enumerated herein below:
    - a. The sum of Kshs. 215,028,512 being settlement amount and pre-award interest as stipulated in order (2) and (3) of the decree issued on 8th April 2021 together with interests thereon at the rate of 17% per annum calculated from the date of the award until payment in full.



- b. All reasonable costs incurred by the Decree Holder during the Arbitration exercise as stipulated in order (5) of the Decree.
  - c. Kshs. 2,855,746.65 being the total Arbitrator's recoverable fees and expenses together with interests thereon at 14% per annum calculated from the date of the award and compounded monthly until payment in full as per order (6) of the decree dated 8th April 2021.
  - d. Kshs.361,707 being the costs taxed by the Deputy Registrar on 8th February 2021 and interests thereon at court rate until payment in full.
3. That in default of prayer (2) above, the Honourable Court be pleased to cite Director General of the Kenya Rural Roads Authority (the Judgement Debtor herein); Mr. Philemon Kandie for contempt of court and further punish him by imprisonment for six (6) months or such a term the court may deems fit or subject him to such fines (to be borne by him personally) as commensurate to his contempt or as the court deems just.
  4. That cost of and incidental to this motion be provided for.
3. The grounds of the application are that despite this court having issued a ruling for enforcement of an arbitration award on 4<sup>th</sup> March 2020 and subsequently having issued a decree against the respondent on 8<sup>th</sup> April 2021, the respondent, through its Director-General Mr. Philemon Kandie has refused/neglected and/or declined to pay or make to be paid the decretal sum. And that is despite numerous reminders and extensions of time to do so.
  4. That the decretal sum totals to approximately Kshs. 218,245,966.34 plus other costs and interest whereas one of the respondent's accounts holds the sum of Kshs. 2,682,366,074.40 as at 7th June 2021 a clear indication that the respondent is deliberately violating court orders.
  5. It was the decree holder's contention that if the court does not intervene it would be denied the realisation of the fruits of the decision in its favour and the respondent would be allowed to perpetuate the violation of court orders.
  6. The judgement debtor filed a replying affidavit sworn on 23/6/2021 by Eng. Philemon Kandie, the Director General (DG). He deposed that he is yet to be served with a Certificate of Order pursuant to section 21(2) and (3) of the *Government Proceedings Act*, and application is therefore premature. That upon receiving the Certificate of Order against the Authority it is expected that he would forward any awards in respect of adjudications, arbitrations and court awards to the Pending Bills Committee of Government for approval after which budget allocation and a requisition are done before payment is made.
  7. It was averred that the DG had already carried out the aforementioned process despite the fact that he had not received the Certificate of Order and that the delay in payment to the decree holder is not intentional. That the same would eventually be dealt with by the Pending Bills Committee.
  8. It was further contended for the respondent that the money held in the in the judgement debtor's KCB account is money held in trust to be paid to specific contractors and specific works in respect for specific requests which were made to the National Treasury and therefore it would be unlawful to divert the money to other uses. That the instant application the jurisdiction of this court has not been properly invoked as the government can only be compelled to do any act through prerogative writs, in this case a writ of mandamus.



## Analysis and determination

9. Both parties canvassed their respective arguments through written submissions which I have analysed and having considered the same alongside the affidavits in support and in opposition, the issue for determination is whether the court should order the respondent's director general to cause to be paid to the decree holder the entire decretal sum together with accrued interests and costs.
10. On 8<sup>th</sup> April 202, the court issued the decree holder with a signed and sealed decree enforcing the arbitral award issued by Engineer Lukas A.N. Ochieng on 27<sup>th</sup> November 2018. The decree ordered the judgement debtor to pay various amounts as enumerated in prayer 2 of the present application.
11. The record indicates that the decree was promptly served upon the judgement debtor's advocates to effect payment but no payment has been made to date hence the instant application.
12. Section 68 of the *Kenya Roads Act* is titled Restriction on execution against property of Authority and states:

“Notwithstanding anything to the contrary in any law—

- (a) where any judgement or order has been obtained against an Authority, no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property, but the Director-General shall, without delay, cause to be paid out of the revenue of the Authority such amounts as may, by the judgement or order, be awarded against the Authority;
- (b) no property of an Authority shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Director-General.

13. In *Kenya National Highways Authority v Ahmednassir Maalim Abdullahi* [2021] eKLR Mwita, J. held:

“My reading of 68(a) is that the section only places a restriction against attachment as the headnote clearly suggests. It does not make attachment illegal per se. The import of the section is that instead of attaching its assets, the applicant's Director General is commanded by the section to pay the decretal amount promptly from amounts in its revenue. This view is informed by the fact that the section uses the word “but” and goes on to state that “the Director-General shall, without delay, cause to be paid out of the revenue of the Authority the amounts awarded against the Authority.

The section states in mandatory terms that payment must be made without undue delay. In other words, where payment is to be made without delay, ordinarily there would be no reason to attach against the applicant. The section does not therefore contemplate a successful litigant moving the process towards attachment. That is why the law demands in mandatory terms that the Director General should promptly pay.”

14. It is therefore not in doubt that the law contemplates that where judgement has been obtained against the judgement debtor, the Director General of the Authority is obligated to act with haste to pay the decretal amount out of the revenue of the Authority. True, the decree holder may not execute against any of the assets of the decree holder but may pursue the Director general to ensure such payment is made.



15. In this case, the Director General of the judgement debtor has failed and/or neglected to make sure the decretal amount is paid despite the fact that the amount has been due and owing from 4<sup>th</sup> March 2020 when the court issued a ruling enforcing the arbitral award. The annexure marked “HP 8” in the supporting affidavit indicates that the judgement debtor held substantive amounts in its KCB account a clear indication that it is indeed possible for the Director General to ensure that the decretal amount is paid from the revenue of the judgement debtor.
16. The wording of section 68 is couched in mandatory terms; the Director General is commanded by the section to pay the decretal amount promptly from amounts in its revenue. It is not enough for the Director General to casually state that the decree holder ought to be patient for the payments to be processed, yet the decree was issued way back on 8<sup>th</sup> April 2021.
17. In the interest of justice, it is my finding that there is merit in the application dated 10<sup>th</sup> June 2021. The same is allowed in the following terms:
  - A). The Director General of the Kenya Rural Roads Authority(the Judgement Debtor herein); Mr. Philemon Kandiebe and is hereby ordered to cause to be paid to the Decree Holder/ Applicant the entire decretal sum together with all accrued interest and costs within 14 days as enumerated herein below:
    - i. The sum of Kshs. 215,028,512 being settlement amount and pre-award interest as stipulated in order (2) and (3) of the decree issued on 8th April 2021 together with interests thereon at the rate of 17% per annum calculated from the date of the award until payment in full.
    - ii. All reasonable costs incurred by the Decree Holder during the Arbitration exercise as stipulated in order (5) of the Decree.
    - iii. Kshs. 2,855,746.65 being the total Arbitrator’s recoverable fees and expenses together with interests thereon at 14% per annum calculated from the date of the award and compounded monthly until payment in full as per order (6) of the decree dated 8th April 2021.
    - iv. Kshs.361,707 being the costs taxed by the Deputy Registrar on 8th February 2021 and interests thereon at court rates until payment in full.
  - B). That in default of order (A) above, the Director General of the Kenya Rural Roads Authority (the Judgement Debtor herein); Mr. Philemon Kandie shall be held to be in contempt of court and will show cause why he should not be imprisoned for six (6) months.
  - C). Costs of the application awarded to the decree holder.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

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**P. MULWA**

**JUDGE**

**In the presence of:**

**Mr. Nyamwaro for the Decree Holder/Applicant**

**Ms. Gachugu h/b for Mr. Ambani for the JD/Respondent**



**Court Assistant: Carlos**

