



**Okeno & Sons Building Contractors v Bukura Agricultural College & another;
Co-operative Bank, Kakamega Branch & another (Garnishee) (Miscellaneous Civil
Application E014 of 2022) [2024] KEHC 2196 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E014 OF 2022**

PJO OTIENO, J

MARCH 4, 2024

BETWEEN

OKENO & SONS BUILDING CONTRACTORS APPLICANT

AND

BUKURA AGRICULTURAL COLLEGE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

CO-OPERATIVE BANK, KAKAMEGA BRANCH GARNISHEE

KENYA COMMERCIAL BANK (KCB), KAKAMEGA BRANCH GARNISHEE

RULING

1. The Notice of Motion dated 14.2.2024 raises two questions on which the law should be settled but keeps coming up. The two questions are:
 - a) When the Court may interfere with a consent order?
 - b) Whether a public entity incorporated under a statute and given the character of a body corporate is subject to the rigors and constraints of the *Government Proceedings Act*?
2. These questions arise by virtue of the Replying Affidavit sworn by Mr. Paul K. Njogu which acknowledges that indeed parties entered into a consent order for the payment of the decretal sum herein. That agreement is disclosed to have had the blessings of the Board of Management of the Judgment debtor following a meeting held on the 1.12.2023.



3. Having read the Application for Garnishee, and the Replying Affidavit, the sole dispute emerges to be the meaning and purport of Clause 2 of the Consent Order issued on 14.12.2023. It reads:

“That the 2nd instalment of Kshs. 2,500,000 to be paid on or before 31st January, 2024 with further equal instalments payable at the beginning of each quarter years till payment in full. In default, execution to issue for the entire outstanding sum.”

4. On the face of that order negotiated and settled by the parties, the judgment debtor contends that the second instalment was only due for payment upon the Management briefing the Board but the Board scheduled its meeting on 9.2.2024 when it resolved that the 2nd instalment be paid to the Decree holder.

5. When, in the view of the Decree holder, the 2nd instalment was not paid, by the Judgment debtor by the 31.01.2024 it sought to rely on the default clause and seek full recovery by seeking Garnishee order against the Co-operative Bank of Kenya Limited and Kenya Commercial Bank Limited. It appears that before applying for the garnishee orders, it had taken out Warrants of Attachment and Sale and Ms. Eshikhoni Agencies had in fact purchased goods it valued at Kshs. 33,200,000/=.

6. To this Court, a consent between parties is a contract which may only be set aside or altered by a written consent or by the Court on satisfactory proof of a ground that would vitiate a contract. See *Flora Wasike v Destino Wakoko* [1988] eKLR.

7. A reading of the consent order is explicit that if by the 31/01/2024, the second instalment of Kshs. 2.5 million would not have been paid, the Decree holder would be entitled to take out execution proceedings from the entire sum then outstanding. The Court finds that there was a default to pay the 2nd instalment and the Decree holder was wholly entitled to seek the recovery of the entire sum then outstanding.

8. It cannot be a justification that the Board had to meet and authorize that particular payment. I could not have been a justification because by the Board Resolutions passed in the meeting of 5.12.2023, full approval was given to the Management to authorize named advocates to record a consent for implementation. Once the consent was recorded the only thing that remained was implementation by the Management. When there was failure to pay the 2nd instalment on the date contracted in the Consent order the entire sum then outstanding became due and payable and the Decree holder cannot be faulted in seeking to execute.

9. On the second issue for determination, the Judgment debtor contends at paragraph 15 of the Replying Affidavit that it is owned, operated, governed, managed and also financed by national government and is thus a public entity and or corporation and not subject to garnishee proceedings and or attachment of its assets in the execution of a decree.

10. It is indubitable that the Judgment debtor is a creature of *Bukura Agricultural College Act*, Cap 348, Law of Kenya. By section 3 (2) of the Act, the body corporate Parliament intended to create is: -

“(2) The College shall be a body corporate with perpetual succession and a common seal, and shall in its corporate name be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
- (c) borrowing or lending money;



(d) doing or performing all such other things or acts for the furtherance of the provisions of this Act which may lawfully be done by a body corporate.”

11. While it may remain an agency of government of Kenya and a public institution, it is not an appendage of the government but an entity with legal corporate personality separate and distinct from the government. It is not different from say Consolidated Bank of Kenya, Kenya Revenue Authority or Nzoia Sugar Company Limited.
12. The application of Government Proceedings Act on corporates established under statutes ought to be settled now from the pronouncement by the Superior Courts in Kenya. One only needs to cite, Doshi Iron Mongers Ltd v Kenya Revenue Authority and another [2020] eKLR: -

“In *Bob Thompson Dickens Ngobi v Kenya Ports Authority* [2017] eKLR this court had the chance to consider the provision and similar ones in other statutes and the court did hold while citing the decision of the Court of Appeal in *Kenya Revenue Authority v Habimana Said Hemed* [2015] eKLR:-

“I must say, as various superior courts in this country have said more than once, that a statutory provision that seeks to hinder any person’s access to justice, seeks to impose hurdles on the way of citizens from seeking accountability, openness and efficiency in service delivery by government or government agencies must be seen to violate Article 48 and must be held to be unconstitutional for being antibusiness, oppressive, and I dare add, suppress the need to interrogate the constitutional values of accountability, transparency and efficiency expected of state agencies. The Court in *Kenya Revenue Authority v Habimana sued Hemed & another* [1]decided on 31/7/2015 made the position clear beyond doubt that the 3rd defendant ought to be the institution parliament sought to create under the statute and not to continue considering self as an abandage or extension of the government. The court said:-

“.....it is not necessary that a party who finds itself on the wrong side of the appellant would be greatly prejudiced if they are shaded from accessing justice for a minimum of 30 days as happens many times”.

“.....it is nonetheless an autonomous, cooperate, statutory body specifically with powers to sue and be sued. The appellant cannot hide behind the clock of the Attorney General when it is accused of breaking the law or otherwise violating people’s rights purely in Order to take advantage of the 30 days statutory notice”.

Even though the decision was strictly rendered with regard to the provisions of the Kenya Revenue Authority, I consider the 1st and the 3rd defendants to be created in the like manner, by acts of parliament and both have been given legal personally in that they are capable of suing and being sued independent of the office of the Attorney General. Infact the two statutes creating the two defendants are explicit that the two run as distinct corporates not as government department. I take notice that both recruit their personnel including the legal personnel independent of the office of the Attorney General whose involvement is limited to representation in the board of directors. No repetition is needed



for the position that any statutory provision that seeks to hinder a citizen for accessing court merely because a notice has to be served upon the two defendants is undesirable for being illogical and unconstitutional.

For that reason, I am bound by the Court of Appeal [2] to add my voice to those of my brothers, Mbogoli Msagha[3], David Majanja[4], J.B. Ojwang[5] and Osieno JJ[6] and hold that a statutory corporation, unless the creating statute says otherwise, is not an appendage or department of the Government as contemplated under the Government Proceedings Act. One need not invite the application of the Government Proceedings Act when parliament in its own wisdom has expended time and public resources to enact a statute to regulate the body so desired to be created”.

13. As said by the Court of Appeal in *KRA v Habimana* cited in the foregoing decision, it would be ridiculous to imagine that a statutory body would be shielded from legal processes. The Court said: -

“...We hold the view that the Kenya Revenue Authority is not an organ of the Government as contemplated under the Government Proceedings Act.

There are three arms of Government, and they are clearly defined and recognized universally over the ages. We do not need to redefine them here. Kenya Revenue Authority collects taxes for the Government, and they do a good job of it. It is nonetheless an autonomous, corporate, statutory body specifically with power to sue and be sued. The appellant cannot hide behind the cloak of the Attorney General when it is accused of breaching the law or otherwise violating people’s rights purely in order to take advantage of the 30 days statutory notice!”

14. The Court now take the position that all statutory bodies created by Parliament and given the character of corporate entities with own personality, to sue and be sued, have and must retain that identity given by Parliament and away from the shadows of government. When they contract as the Respondent/ Judgment debtor did herein, with legal counsel of an advocate, they have no business to run away from such legal obligations under the guise of *Government Proceedings Act*.
15. Reading the Affidavit of Paul K. Njogu gives the impression that the deponent was not being given a candid advice. He proceeds from the notion that the Consent order left it open that second instalment would be made at an indefinite date in February, 2024 and the third one in September, 2024. That is erroneous and mistaken because the consent order says payment is before 31st January and the next at the beginning of the second quarter. I discern the next quarter to begin in April, 2024. Maybe the situation would have been avoided had the Counsel told the client what his office negotiated and recorded in Court.
16. It thus follows that the legal hurdle indicated by the Respondent to the Garnishee application do not have merit at all and cannot be the basis to decline the orders sought.
17. It would be sufficient at this juncture to allow the application but there are two issues I need to comment upon before I pen off.
18. The first issue is that when an application for garnishee is presented to Court, on the hearing, it is for the Garnishee to take the simple position whether it owes the Judgment debtor or if it does not. Strictly speaking, the date for hearing on a garnishee application, is the day of the Garnishee not the Judgment debtor. Where the Garnishee choses to say nothing, like in this case, Order 23 Rule 4 mandates that the order is made absolute and the Court is entitled to order execution against the Garnishee.



19. The second point that must be pointed out is the Decree holder's over-kill- like manouvers by which it not only sought execution by way of Garnishee but also by way of Warrants of Attachment and Sale. That to court is unacceptable and must be discouraged by the Decree holder being called upon to choose one and abandon the other. In the cause of reading this ruling, Counsel chose to abandon garnishee proceedings and opted to go by the warrants. For that reason, even though I was destined to have allowed the application, now it is marked as abandoned.
20. With the confirmation by the Decree holder that he collected Kshs. 2,500,000/= as second instalment, the sum now outstanding is Kshs. 5,500,000/=. This observation is made for the sake of avoiding further litigation in the matter.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 4TH DAY OF MARCH, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Mose for Mandala for the Applicant

Mr. Juma for the Respondents

No appearance for the Garnishees

Court Assistant: Polycap Mukabwa

