



**Rotich v Kenya National Highways Authority & 7 others (Constitutional
Petition 14 of 2016) [2024] KEHC 5820 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION 14 OF 2016**

JK SERGON, J

MAY 23, 2024

**IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21 , 22 (1), 23 (1) & (3), 25, 27 (1)
& (2), 28,29 (A), (B),(D) AND (F), 31 (B), 40 (1), (2) & (3), 47, 48, 159 (1), (2), (A),
(B) AND (E) & 165 (3), (A) (B) OF THE CONSTITUTION OF KENYA, 2010 .**

AND

**IN THE MATTER: OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 20,21,22(1), 23(1) (3), 25, 27 (1) AND (2), 28, 29 (A), (B),
(D) AND (F), 31 (B), 39 (1), 40 (1) (2) & (3), 47, 48 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

**IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY, DIGNITY
AND PROTECTION OF FREEDOM AND SECURITY OF THE PERSON**

AND

**IN THE MATTER OF MOTOR VEHICLE
REGISTRATION NUMBER KAX 304C ISUZU TRUCK**

BETWEEN

MOSES KIPKOECH ROTICH PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT



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| HEAD OF TRAFFIC POLICE DEPARTMENT | 3 RD RESPONDENT |
| OCS, KERICHO POLICE STATION | 4 TH RESPONDENT |
| CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT | 5 TH RESPONDENT |
| CABINET SECRETARY, MINISTRY OF TRANSPORT AND INFRASTRUCTURE | 6 TH RESPONDENT |
| DIRECTOR OF PUBLIC PROSECUTION | 7 TH RESPONDENT |
| ATTORNEY GENERAL | 8 TH RESPONDENT |

RULING

1. The petitioner herein has moved to court by way of a notice of motion dated 12th April, 2020 seeking the following orders;
 - (i) That the 1st Respondent’s Director General does cause payment of the decretal sum and costs due to the Petitioner/Applicant pursuant to the judgement and decree of this honourable court dated 19th June, 2019 within thirty days.
 - (ii) That in default, an order does issue directing the 1st Respondent’s Director General to appear in person before this honourable court and show cause why he should not give written permission for the attachment of the 1st Respondent’s properties.
 - (iii) That in default of payment and/or appearance by the Director General, this honourable court does grant the Petitioner/Applicant leave to execute the decree herein by way of attachment of the 1st Respondent ‘s moveable properties.
 - (iv) That the costs of this Application be borne by the 1st Respondent.
 - (v) That any other necessary directions do issue.
2. The notice of motion is supported by grounds on the face of it and the supporting affidavit of Moses Kipkoech Rotich the petitioner/applicant.
3. The petitioner/applicant avers that judgement was entered in his favour against the 1st Respondent on 1st November, 2018, inter alia for payment of the sum of Kshs. 3,000,000/= as damages for unlawful deprivation of his motor vehicle for a period of ten months. The petitioner/applicant further avers that the costs of the suit were assessed at Kshs. 415, 390/= on 19th February, 2020, which costs and decretal sum the 1st Respondent neglected and/or refused to settle, to date.
4. The petitioner/applicant avers that he was aware that the 1st Respondent had preferred an appeal against the determination of this Court vide a Notice of Appeal dated 7th November, 2018 and filed an application for stay of execution before the Court of Appeal which application was dismissed vide a ruling dated 19th March, 2021.
5. The petitioner/applicant avers that he was advised by his advocates on record that section 68 of the [Kenya Roads Act](#) places a restriction on attachment of the 1st Respondent’s property in execution of the decrees entered against it and that the 1st Respondent’s Director General is obligated to ensure that judgments and/or decrees against it are settled without delay.



6. The petitioner/applicant avers that the 1st Respondent has reneged and/or neglected to settle the decree in effect thereby denying him the fruits of judgement delivered on 1st November, 2018 for a period of four years.
7. The petitioner/applicant avers that he therefore was constrained to file the instant application in order to compel the 1st Respondent to honour its obligations to settle the judgement and decree of this Court.
8. In response to the application, the 1st respondent stated that he filed grounds of opposition dated 6th February, 2024 opposing the application based on the following grounds;
 - (i) That the 1st Respondent is a state agency as contemplated in the *State Corporations Act* and therefore inline with the *Government Proceedings Act*, execution against it is restricted by law and the only mode of execution contemplated is judicial review proceedings by way of mandamus and therefore the notice of motion filed is an abuse of court process and ought to be dismissed with costs.
9. The parties were directed to file written submissions. At the time of writing this ruling both the respondents and the petitioner/applicant had complied.
10. The petitioner/applicant filed his submission in which he contended that his averments were never controverted by the 1st Respondent and that in any event it is not contested that there exists a binding and valid decree against the 1st Respondent which has not been stayed or set aside.
11. The petitioner/applicant conceded in as much as the provisions of section 68 of the *Kenya Roads Act* place a restriction on attachment of the 1st Respondent's property in execution of decrees entered against it, the 1st Respondent's Director General is obligated to ensure that judgments or orders against it are settled without delay.
12. The petitioner/applicant maintains that guided by the foregoing provisions of the law, this Court is vested with the jurisdiction to issue further orders in enforcement of its judgments and decrees. The petitioner/ applicant cited findings of the court in *Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 Ors* [2015] eKLR whereby in a similar application the court held as follows;

“... In conclusion, I hold the view that the application by the judgement creditor is merited. The director general ought to attend before the court and explain to the court and to the judgement creditor the reason why the court judgement is yet to be honoured and what steps are being taken if any to ensure that the same is honoured...”
13. The 1st respondent complied with court orders and filed written submissions.
14. The 1st respondent submitted that the application is misconceived and constitutes an abuse of court process in view of the mandatory provisions of section 68 (a) and (b) of the *Kenya Roads Act*, 2007 which prohibit any form of execution by way of attachment of any of the properties of the Kenya National Highways Authority unless with the written permission of the Director General. Furthermore, the correct procedure of execution should be done by way of judicial review, by way of mandamus to compel the Director General a public officer holding office as the accounting officer of the judgement debtor to satisfy the decree, as is the case with any judgement entered against the government of Kenya.



15. The 1st Respondent cited the Court of Appeal Case of *Five Star Agencies Ltd v National Land Commission & National Bank of Kenya LTD* Civil Appeal No. 20 of 2023 whereby the Learned Judges were categorical that the National Land Commission is a state organ... and any such organ, department, commission, state corporation is firmly part of the Government of Kenya and therefore all its properties are insulated from any form of execution, unless by way of mandamus in a judicial review application.
16. The 1st Respondent reiterated that the Kenya National Highways Authority by its character is a state corporation, a state organ, a state agency, a state department within the meaning of section 21 of the *Government Proceedings Act* and the *State Corporation Act*.
17. I have considered the pleadings and submissions by the parties. I find that the sole issue for determination is whether this Court can grant the reliefs sought in the notice of motion dated 12th April, 2020 which is crafted as a constitution petition. The answer is in the negative. The petitioner/ applicant is yet to exhaust all legal options available to him including that of judicial review.
18. It is not disputed that the Kenya National Highways Authority is judgement debtor in view of the judgement entered against it on 1st November, 2018 in favour of the judgement creditor herein. There is a binding and valid decree against the Kenya National Highways Authority, the 1st Respondent herein which has not been stayed or set aside. However, the Kenya National Highways Authority is a state organ and execution against it is restricted by law specifically section 68 (a) and (b) of the *Kenya Roads Act* and therefore the only mode of execution contemplated is judicial review proceedings by way of mandamus to compel the Director General a public officer holding office as the accounting officer of the judgement debtor to satisfy the decree/order of this Court.
19. In *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo, J. (as he then was) had this to say about the doctrine of constitutional avoidance:

“In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause.”
20. It can be discerned from the foregoing that where another legal course is available, through which a matter can be properly decided and which can give an applicant the relief he seeks, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter. In the circumstances, the notice of motion crafted as a constitutional petition is untenable and therefore constitutes an abuse of the process of the Court.
21. Therefore the notice of motion dated 12th April, 2020 is hereby ordered struck out with no order as to costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 23RD DAY OF MAY, 2024.

J.K. SERGON

JUDGE

In the Presence of:-



C/Assistant – Sang for the Petitioner

No Appearance for the Respondent

