



Eghal Construction & Company Limited v Garissa Water & Sewerage Company Ltd; Equity Bank Ltd & 3 others (Garnishee) (Civil Case 1B of 2021) [2024] KEHC 12440 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL CASE 1B OF 2021
JN ONYIEGO, J
OCTOBER 17, 2024**

BETWEEN

EGHAL CONSTRUCTION & COMPANY LIMITED APPLICANT

AND

GARISSA WATER & SEWERAGE COMPANY LTD RESPONDENT

AND

EQUITY BANK LTD GARNISHEE

FIRST COMMUNITY BANK GARNISHEE

KENYA COMMERCIAL BANK GARNISHEE

SAFARICOM PAY BILL GARNISHEE

RULING

1. By a decree dated 11-11-2022, the defendant herein was ordered to pay the plaintiff kes 21,578,940 pursuant to a summary judgment entered against the defendant. The said amount was in respect of a contract involving construction works rendered by the plaintiff in favour of the defendant sometime 2019. Due to non-payment, the amount attracted interest giving rise to a total sum of kes 26,329,306 plus costs of kes 6,605,042.
2. The journey towards payment has seen endless applications being filed and false promises by the defendant to pay being made but in vain. By a consent dated 26-06-2023, the defendant committed itself to honour the outstanding amount then standing at kes 21,578,940 by paying kes 200,000 per month commencing 15th of August 2023 and thereafter 15th of each succeeding month till full payment.



3. On 20-06-2023, a garnishee order was issued against the defendant for attachment of funds in various bank accounts. On 05-07-2023, they entered yet into another consent providing that the defendant was to settle the outstanding amount of kes 21,578,940 by paying kes 200,000 by 15th of every month commencing 15th August 2023 and kes 1,200,000 on 5th of every January until full payment.
4. Again, on 02-08-2024, a garnishee order to attach the defendant's funds in KCB, Equity and 1st Community banks and Safaricom were issued. On 07-08-2024, parties entered into yet another consent to clear a sum of kes 23,829,306. It was agreed that kes 1,100,000 be settled as follows; a cheque of kes 500,000 yet to be collected, a cheque of kes 300,00 on 5th September 2024 and a cheque of kes 300,000 on 5th October 2024. That thereafter, the respondent to resume payment of the remaining decretal sum at kes 200,000 per month commencing 15th November 2024 until full payment and kes 1,200,000 on every January commencing 5th January 2025 till full payment. Further, legal fees to the plaintiff's lawyer at kes 376,839 by 15th August 2024, kes 100,000 by 15th September 2024 and kes 100,000 by 15th October 2024. That in default of any of the terms of this consent, execution shall follow with immediate effect.
5. Once again, the respondent defaulted culminating to an application dated 17-09-2024 seeking garnishee order for attachment of funds held by the defendant in equity bank Garissa branch; KCB and first community bank Garissa and Safaricom till number. Unfortunately, there was no compliance giving rise to an order dated 27-09-2024 directing the cited garnishees to release funds held in the defendants' accounts in their respective banks to the plaintiff (jc) pursuant to the default clause.
6. Aggrieved by the said order, the defendant filed a notice of motion dated 03-10-2024 seeking to stay the said execution by attachment of funds in the affected bank accounts pending interpartes hearing. The application is anchored on the particulars set out on the face of it and further amplified by the content contained in the affidavit in support sworn by Mohamed Dolal the manager in the defendant company.
7. He averred that the attachment of the said funds would have far reaching consequences as the defendant will not be able to supply water to the residents of Garissa; employees of the company will go without salaries; the company being an entity of the county government are immune from execution; contractors and or suppliers to the company will be affected and that they are willing to honour the consent agreement within 60 days. He further averred that the reason for defaulting was as a result of another garnishee order issued by an ELRC Nairobi thus freezing their KCB account.
8. In reply, the respondents/plaintiffs filed a replying affidavit sworn on 7th October 2024 opposing the application on grounds that; there is no consent in place any more the applicant/defendant having defaulted on the same; the applicant/defendant has come to court with dirty hands; the applicant is buying time by delaying payment; the debt has been outstanding for over 5 years hence the full amount should be realized. During the hearing, counsel merely restated what is contained in their respective affidavits.
9. I have considered the application herein, response thereof and oral submissions by both parties. There is no dispute that there is a judgment in place in favour of the respondent/plaintiff which has not been settled. It is not in dispute that the judgment has never been challenged. It is also not in dispute that the applicants are in breach of the consent dated 07-08-24 and others preceding the same. The claim by the applicant that they are immune from attachment is neither here nor there. They are not a national nor a county government. The defendant is a body corporate capable of suing or being sued.
10. The applicants cannot run away from the execution process. Litigation must come to an end. See *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* (2007) e KLR. It is almost 5 years since



execution process began. The plaintiff is entitled to the fruits of its judgment. See Machira T/A Machira & company Advocates vs East African Standard (No.2)(2002) KLR 63.

11. In view of the above holding, it is clear that a court cannot rewrite a consent. It was a term of the consent agreement that in default of any of the terms of the consent, execution shall issue. I have taken into account the sentiments of the applicants and public interest aspect given the applicant's mandate in supplying water to the public. I have also taken into account the predicament experienced by the applicants owing to the garnishee order issued in Nairobi freezing their KCB account.
12. The plaintiff does not know how much money is in equity yet the applicant is saying there is no money. Equity bank lawyer however stated that they are ready to comply if the correct account is given. However, those are not excuses to stop honouring monthly instalment as even the 8m in Safaricom till was sufficient to honour the outstanding instalment.
13. I do agree with Mr. Ashitiba that the defendants have come to court with dirty hands and equity will not rise in their favour. In exercise of my discretion, I will give the defendant a last chance to honour with immediate effect all the outstanding instalments due and owing to the plaintiff as at 5th October 2024 as per the consent of 07-10-2024 and thereafter resume with payment as per the terms of the said consent. For avoidance of doubt, any default as per clause 7 of the said consent shall be interpreted to mean full recovery of the outstanding decretal sum upon defaulting of single payment.
14. Accordingly, parties shall tabulate the actual amount due as at 5th October 2024 and have the same paid to the plaintiff from either Safaricom till account or equity bank account as per the corrected account number. Immediately upon honouring the outstanding amount, the garnishee order in place shall be lifted upon the plaintiff acknowledging receipt of the said amount.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF OCTOBER 2024.

J. N. ONYIEGO

JUDGE

