



Lantech Africa Limited v Geothermal Development Company; Co-operative Bank of Kenya Limited & 2 others (Garnishee); Attorney General (Interested Party) (Commercial Miscellaneous Application E776 of 2020) [2023] KEHC 1225 (KLR) (Commercial and Tax) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E776 OF 2020
DO CHEPKWONY, J
FEBRUARY 10, 2023**

BETWEEN

LANTECH AFRICA LIMITED APPLICANT

AND

GEOHERMAL DEVELOPMENT COMPANY RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED GARNISHEE

KCB BANK OF KENYA LIMITED GARNISHEE

NCBA BANK KENYA PLC GARNISHEE

AND

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. Pending for determination in this matter are three applications and a Notice of Preliminary Objection. Chronologically arranged, the three applications are; the Applicant’s (“Lantech’s Afria Ltd”) Notice of Motion application dated 23rd June, 2022 seeking to garnish various Respondent’s accounts in execution of a decree issued in its favour and against Geothermal Development Company. The second application is the Respondent’s (“Geothermal Development Company’s”) Notice of Motion application dated 28th June, 2022 seeking to set aside the Garnishee Order Nisi issued on 24th June, 2022 in favour of the Applicant. The third application is the Proposed Interested Party’s Notice of Motion application dated 26th July, 2022 wherein the Attorney General seeks to be enjoined as a party



to the proceedings herein. The Notice of Preliminary Objection dated 17th November, 2022 was filed in opposition of the third application filed by the Attorney General.

2. Directions were issued that the three applications be canvassed by way of written submissions and thereafter a composite ruling with respect thereof be delivered. However, taking into account the spectrum of prayers sought in the three applications, I consider it appropriate to first deal with the 3rd application for joinder alongside the Notice of Preliminary Objection and thereafter the other two applications.
3. The joinder application as earlier indicated was filed by the Attorney General seeking for the following orders: -
 - a. Spent;
 - b. That the Honourable Court grants leave to the attorney general to be joined as an Interested Party in Misc. Application No.E776 of 2020.
 - c. That upon leave being granted as sought in prayer No.(b)herein, the Attorney general be at liberty to file any necessary and or documents to the proceedings.
 - d. That the court do make such further order(s) and or direction(s) as it may deem necessary in the circumstances.
 - e. That the costs of this application be provided for.
4. The application is premised on among other grounds that upon a favourable arbitral award, the Applicant obtained a Judgment and subsequent decree against the Respondent which it now seeks to execute through garnishment. According to the Attorney General, although not party to the primary proceedings, the Attorney General is under a constitutional duty under Article 156(6) of *the Constitution* to promote, protect and uphold the rule of law and also defend public interest. And under Sections 6(2) and 7 of the Office of the Attorney General Act, 2012, the Attorney General is authorized with leave of court to appear in any Civil proceedings. It is stated that having perused the pleadings and proceedings culminating to the instant garnishment proceedings, the Attorney General is of the opinion that, the Honorable Court misinterpreted the provisions of Section 35(3) of the *Arbitration Act* by confusing the timelines for which an application for setting aside the arbitral award, the proceedings herein pose a threat of violation of principles of public finance as is envisaged in *the Constitution* and the Public Finance and Management Act.
5. It is further averred that the Attorney General is an important party to the proceedings herein for purposes of safeguarding and upholding the rule of law as well as defending the public interest as espoused herein. It argues that the Respondent is a public entity and the Decree Nisi, if made Absolute would burden public funds and it is in the mandate of the Attorney General to Defend such funds. Finally, it is the Proposed Interested Party's case that there are private interests by the Applicant competing with public interests, and to safe guard public funds and seeks the later to prevail.
6. The Applicant opposed the application vide a Notice of Preliminary Objection dated 17th November, 2022 and an affidavit sworn by Aquinas Wasike, the Applicant's Chief Executive Officer on 28th October, 2022. The grounds in the Notice of Preliminary Objection are as follows: -
 - a. The Application is supported by an incurably defective affidavit of one WAIGI KAMAU, Chief State Counsel and which affidavit has been drawn and sworn in transgression of the mandatory provisions of the *Oaths And Statutory Declarations Act*, Chapter 15 Laws of Kenya.



- b. The Supplementary Affidavit of the said WAIGI KAMAU sworn on the 14th November, 2022 on-behalf of the proposed Interested Party is bad in law and is made in breach of the rules of evidence as the same is based on “evidence within evidence” thus incurably defective.
 - c. The Application is otherwise an abuse of the Court process, against the principle of finality and is plainly non-sustainable.
7. In his Replying Affidavit, Mr. Aquinas has averred that the Interested Party had never shown interest in the matter since the beginning of the arbitration proceedings in the year, 2017, to December, 2020 when the arbitral award was adopted as Judgment of the court. That now the Interested Party seeks to come on board to raise issues which the court is functus officio on having already pronounced itself in the Judgment. He thinks that the Interested Party is in cahoots with the Respondent and does not explain the delay in seeking to be enjoined in these proceedings. Further, that the Interested Party has no identifiable stake in the matter and its joinder in the matter will not assist the court to effectually and completely adjudicate upon and settle all questions involved in the suit. According to the deponent, the Interested Party’s only interest is the colossal nature of the award which is approximately USD25,717.905.00 and that cannot be a ground of enjoining a party to any suit. Lastly the deponent states that the application is entirely defective for being supported by undated affidavit and it is unlikely that the Interested Party will bring anything new on the table than the Respondent has.
8. In its Supplementary Affidavit sworn by Waigi Kamau, the Interested Party has averred that the failure to sign the affidavit is an inadvertent mistake made while uploading the affidavit and the same can be excused. He added that the Interested Party was requested to intervene by the Ministry of Energy and the rationale for preferring the joinder is on the mode of execution elected by the Applicant being the garnishee application dated 23rd June, 2022. That since the application for joinder was made on 26th July, 2022, it cannot be said that there was delay as from the date of filing the garnishee application.
9. It is further averred that garnishing the sum of USD25,717,905.00 would be a real threat to violation of the Public Finance and Management Act as well as the principles articulated under Chapter Twelve of *the Constitution* and burden public funds in the result. He added that the Respondent is a Government entity under Sections 2 and 4 of the *Public Finance Management Act*, 2012 and was duly gazzetted as a National Government Entity vide Legal Notice No.33.
10. The joinder application as well as the Notice of Preliminary Objection were canvassed by way of written submissions filed by respective parties as directed by the court. I have read and considered the Interested Party’s two sets of submission dated 16th November, 2022 and 13th December, 2022, the Applicant’s submissions dated 8th November, 2022 and the Respondent’s submissions dated 22nd November, 2022. I have also considered the judicial authorities that have been relied on by the parties.

Analysis and Determination of the Joinder Application dated 26th July 2022 and the Preliminary Objection.

11. Having laid out each of the parties’ perspective on the joinder application as well as the Notice of Preliminary Objection, the issues which came out for determination are as follows: -
 - a. Whether the Preliminary objection is merited.
 - b. Whether the Attorney General is a proper and necessary party to enjoined to this suit as necessary party.



a. Whether the Preliminary Objection is merited

12. A Preliminary Objection is usually on a point of law. It usually implies that the facts as pleaded are correct but save for the legal barrier to the sustenance of the suit. A Preliminary Objection on point of law should be apparent on the face of the pleadings. It should not be gleaned from the pleadings. It further does not require extensive analysis of facts and circumstances. The locus classicus case on the same is the celebrated case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696, where the court expressed itself on what constitutes a ‘Preliminary Objection’ in the following words: -

“----A Preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

13. In this particular case, it is averred that the Application for joinder is fatally defective for being supported with undated affidavit contrary to the provisions of the [Oaths and Statutory Declarations Act](#). For that reason, the Applicant submits that the court lacks jurisdiction to proceed on an incompetent pleading. Given that the Preliminary Objection by the Applicant is to the effect that the court lacks jurisdiction, I find the same sustainable. I now turn to the question on whether it is merited.
14. In our Jurisdiction, the making of affidavits is governed by the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya. Section 5 of the Act provides, thus: -
- “Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
15. Hence, an affidavit must clearly state the place and date when it was made. The Applicant argues that the affidavit in support of the Interested Party’s application is undated and therefore contravenes Section 5 of the [Oaths and Statutory Declarations Act](#) above. On the other hand, the Proposed Interested Party has submitted that the failure to date the affidavit was an inadvertent clerical error and went on to argue that the same is excusable or curable under Article 159 of [the Constitution](#) which calls upon the court to do substantive justice for the parties as opposed to technicalities. The proposed Interested Party went on to attach a dated affidavit in support of the argument that the undated affidavit was inadvertently filed.
16. The fact that the affidavit initially filed in support of the application was not signed is not contested and as such forms the court record. In my view, the court record should be taken as it is and in that case, as agreed by all parties, the official record indicates the Supporting Affidavit is undated. However,



notwithstanding the authorities put across by the Applicant which emphasizes the need to strictly comply with Section 5 above, this court in adjudication of disputes, is moved by a more progressive approach while taking into consideration the overriding objective as incorporated in Section 1A Civil Procedure Act which is “to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes” and Article 159(2)(d) of the Constitution that provides that “justice shall be administered without undue regard to procedural technicalities”.

17. In my view, the failure to date the Supporting Affidavit does not affect the substratum of the application or go to its roots since on its face, it is not only stated to be premised on the grounds thereof, but also on the affidavit of Kamau Waigi which happens to be undated. And even if the Supporting Affidavit was to be struck out for failing to comply with Section 5 of the Oaths and Statutory Declarations, the application would still proceed on basis of the grounds on its face. Based on the foregoing, this court is reluctant, thus declines to dismiss the joinder application even though the affidavit sworn in its support is undated. Consequently, the Notice of Preliminary Objection is disallowed.

b. Whether the Attorney General is a proper and necessary party to enjoined to this suit as necessary party.

18. The Black’s Law Dictionary, 9th Edition at page 1232 defines an ‘Interested Party’ as a party who has a recognizable stake (and thereafter standing) in the matter. Similarly, the ‘Mutunga Rules’, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Legal Notice No. 117 of 2013, defines an Interested Party as: -

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.”

19. Order 1 Rule 10(2) of the Civil Procedure Rules provides on joinder of parties and particularly states as follows: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”

20. Parties herein have also relied on the case Francis Kariuki Muruatetu & Another –vs- Republic & 5 Others, Petition No.15 as consolidated with No.16 of 2013 [2016]Eklr, which I also associate myself with. In that case, the Supreme Court of Kenya laid down some of the guiding principles in an application for joinder of Interested Parties and specifically stated that the Applicant must show:-

- a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- b. (b)The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also



demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

21. Further, the Supreme Court in the case of *Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 Others* [2015]eKLR reiterated the same principles by stating thus: -

“the applicant has to have a stake in the subject matter before the Court, he has to show that he will be affected by the decision of the Court, and that his interests will not be articulated well in his absence from the proceedings”

22. Justice Munyao of the Environment and Land Court expressed the jurisprudence on joinder of Interested Parties while addressing the case of *Skov Estate Limited & 5 Others –vs- Agricultural Development Corporation & Another* [2015] eKLR, as follows: -

“The Applicant in an application of this nature must demonstrate that it is necessary that he/she be enjoined in the suit. That becomes important if he has to show that the issues before the Court cannot be effectively adjudicated upon in his absence. Being affected by the order of the Court is not enough. The Applicant must show that in addition to being affected the reliefs which will be granted will not be fully decided upon because an important element of fact, which he has, shall miss if he is not added to the proceedings.”

23. I do not wish to reinvent the wheel but instead reiterate the principles as outlined in the authorities cited above. It is against that backdrop that I proceed to consider whether or not the Attorney General has established a stake in the present suit, whether he will be affected by the decision of the Court, and lastly, whether his interests will not be articulated well in his absence from the proceedings.

24. On the first question as to whether the Attorney General has a direct interest or stake in the proceedings in the instant case, it has been submitted on behalf of the Attorney General that the said office is bestowed with the duty to protect and promote public interest as well as the rule of law. More specifically in this matter, to safeguard a public entity, (the Respondent herein), from unlawful execution through garnishment contrary to the *Government Proceedings Act*. However, in this courts' view the core to the pending dispute is on liability between the Applicant and Respondent. The Attorney General has not shown that the liability and how it would extend to it. The dispute can therefore be conclusively determined without the participation of the Attorney General. Further to the foregoing, public interest does not necessarily arise simply because an entity is being funded by the Exchequer. It must be shown that the legal rights or liability of the public at large is at stake. To that extend, I am not persuaded that the Attorney General has clearly established an identifiable interest proximate enough to the dispute at hand. Similarly, he has not shown the prejudice likely to suffered, if the application for joinder is denied.

25. Lastly, the Attorney General submitted that the rationale for preferring the joinder application is on the mode of execution elected which garnished the Respondent's accounts in contravention of Order 23 and Order 29 Rule 2 and 4, both of the Civil Procedure Rules as well as Section 17 of the *Government Proceedings Act*. It is submitted that the said provisions preclude execution or attachment of any Government Entity including the Respondent herein. However, as relevant as those submissions might be, they are merely a replica of what of the Respondent has submitted herein and can well be articulated in the absence of the Attorney General.

26. In the premise, I am of the view that the proposed Interested Party's application dated 26th July, 2022 has not met the threshold for joinder as discussed above and proceed to dismiss the same but with no orders as to costs.



27. I now proceed to the determination of the other two applications. The Applicant's application dated 23rd June, 2022 seeks the following orders: -

- a. Spent;
- b. That the debts owing from the Garnishees to the Judgment-Debtor in respect of the following accounts be and are hereby attached in answer to the decree of this Honourable Court given on the 16th December, 2020 and duly issued on the 28th January, 2021 for inter-alia the sum of USD379,317 together with a simple interest at the rate of 14% p.a with effect from 1st July, 2013 till payment in full (being USD856,240.00 calculated to date) and the further sum of USD18,206,548.72 together with a simple interest at the rate of 14% p.a with effect from the 12th November, 2019 till payment in full being (USD24,861,665 calculated to date) (being in aggregate the sum of USD25,717,905.00) plus costs including the costs of these Garnishee proceedings.
 - i. Co-operative Bank of Kenya Limited, Upper Hill Nairobi Current Accounts Nos.0113XXXXXX7600, 0113XXXXXX57603, 0212XXXXXX7600, 0212XXXXXX7600, 0113XXXXXX4400, 01136XXXXXX9200;
 - ii. Kenya Commercial Bank Limited, Upper Hill Nairobi Call Deposit Account No.021501608576;
 - iii. Co-operative Bank of Kenya Limited, Kipande House, Nairobi Current Account Nos.1119XXXXX08 and 116XXXXX671;
 - iv. NCBA Bank, Upper Hill, Mara Road, Nairobi Account No.476XXXXX015.
- c. That the Garnishees herein do appear before this Honourable Court to Show Cause why they should not pay the Decree-Holder the debts due from them to the Judgment-Debtor being monies held in the stated accounts numbers.
 - i. Co-operative Bank of Kenya Limited, Upper Hill Nairobi Current Accounts Nos.0113XXXXXX7600, 0113XXXXXX7603, 0212XXXXXX57600, 0212XXXXXX600, 0113XXXXXX4400, 0113XXXXXX9200;
 - ii. Kenya Commercial Bank Limited, Upper Hill Nairobi Call Deposit Account No.0215XXXXXX576;
 - iii. Co-operative Bank of Kenya Limited, Kipande House, Nairobi Current Account Nos.111XXXXX208 and 1166XXXXXX71;
 - iv. NCBA Bank, Upper Hill, Mara Road, Nairobi Account No.4761XXX015.or so much thereof as may be sufficient to satisfy the decree herein together with interests thereon making an aggregate of USD25,717,905 together with further interest at the rate of 14% per annum till payment in full plus costs of these garnishee proceedings.

d. That the costs of this application be provided for.

28. The application is premised on amongst other grounds an averment that the Respondent is indebted to Applicant to an aggregate sum of USD25,717,905.00 to which the Respondent is well aware of in the decree thereof but has refused to make good the amount due. Thus without any other available known attachable assets, it is necessary the debts due from the garnishee to Judgment Debtor be attached to satisfy the decree. Those grounds are reiterated in the affidavit of Aquinas Wasike, the Applicant's



Chief Executive Officer with an addition that the application is brought bona fides and in the interest of justice to enable the Applicant enjoy the fruits of its Judgment.

29. The application was opposed by the Respondent vide its Grounds of Opposition dated 29th June, 2021 wherein the following grounds were listed down: -
 - a. The application dated 23rd June, 2022 is fatally defective and incompetent because it contravenes the provisions of Order 29, Rule 2(c) of the Civil Procedure Rules, 2010 which exclude the Applicant from the provisions of Order 23 (attachment of debts) of the Civil Procedure Rules, 2010.
 - b. The Application dated 23rd June, 2022 offends the provisions of Section 21(4) of the [Government Proceedings Act](#) that preclude the Respondent, a Government Entity, from attachment proceedings for purposes of enforcing payment.
 - c. The application is fatally defective and incompetent because costs have not been taxed and no application for execution has been made in accordance with Section 94 of the [Civil Procedure Act](#), 2010.
30. The 1st 2nd and 3rd garnishees filed affidavits dated 29th June, 2022, 29th June, 2022 and 30th June, 2022 respectively furnishing the current statements of account and balances on the Respondents above listed Accounts held with them.
31. On 24th June, 2022, the court issued Garnishee Order Nisi attaching the Respondents accounts as listed above. Aggrieved by the said orders, the Respondent filed the application dated 28th June, 2022 seeking to set aside the orders issued on 24th June, 2022. The application is premised on nine (9) grounds on its face and further supported by the affidavit of its then Acting General Manager, Legal Services, Miss Agnes Muthengi.
32. The Respondent's case is that the Garnishee Order Nisi was issued without disclosing that the Respondent is a fully owned Government entity and it draws public funds from the Exchequer. Therefore, under Order 23 of the Civil Procedure Rules by virtue of Section 21 of the [Government Proceedings Act](#), the Respondent is exempted from execution. It is also the Respondent's statement that the garnishment contravenes Order 29 Rule 2 (c) of the Civil Procedure Rules and has also paralyzed the Respondent's operation since it is unable to meet its day to day operational costs. It is further argued that the Respondent is now unable to pay the employees' salaries and or meet its utility expenses owing to the garnishee order nisi on its bank accounts.
33. It is the Respondent's case that it is pursuing an appeal before the Court of Appeal on the court's decision herein, the same notwithstanding, that the Applicant is yet to pursue determination of costs awarded through taxation nor has it filed an application under Section 94 of the Civil Procedure Rules.
34. The Applicant opposed the Respondent's application vide the affidavit of its C.E.O Aquinas Wasike sworn on 2nd July, 2022. He avers that the attempt to rely on the Section 94 of the [Civil Procedure Act](#) is fallacious since the award was not issued by this court. All issues were determined by the Arbitral Tribunal and the adoption of the said award conclusively determined the matter thus putting a closure to the same. He added that the [Government Proceedings Act](#) has no application to the present application taking into consideration that the Respondent is a Limited Liability entity established under the [Companies Act](#). Further, that the mere fact that the Respondent may perhaps be a state corporation does not subject it to the [Government Proceedings Act](#).
35. The Respondent further filed two supplementary affidavits sworn by Stephen Busieney and Adrian Topoti on 4th July, 2022 and 22nd July, 2022 respectively. In the former affidavit, it is sought that



the orders in place be discharged to enable the Respondent meet its utility and wage obligations which range close to Kshs708,700,000/= per month, a loan with Co-operative Bank amounting to USD1,200,000/= among other expenses. In the former affidavit, it is averred that the Respondent is fully owned by the Government of Kenya through the office of the Attorney General as witnessed in its Articles and Memorandum of Associations. That the initial subscribers of the Company were the permanent secretary to the Treasury holding 19,990 shares and the Permanent Secretary to the Ministry of Energy. That both hold the shares not to their individual capacity but as public officers exercising public functions.

36. The two applications were canvassed by way of written submissions, with the Applicants submissions dated 28th October, 2022 and the Respondent's submissions dated 22nd July, 2022, together with the cited authorities. I have read through the said submissions in consideration of the prayers being sought in either of them.

Analysis and Determination of the Applications dated 23rd June 2022 and 28th June 2022.

37. The raging debate in the two applications is whether the Respondent is a Government Department in the meaning of the *Government Proceedings Act* so as to be accorded the protection under the said Act including the exemption from execution proceeding such as the one at hand.
38. The summary above replicate the stand taken by each party. Whereas the Respondents emphasis is that it is a Government Company incorporated to manage Geothermal Resources in Kenya and funded by the Exchequer with respect to its budgets, the Applicant on the other hand submits that the Respondent is merely a State Corporation enjoying no benefits under the *Government Proceedings Act*. There were also submissions that the Respondent was recognized as a Government entity pursuant to Legal Notice No.33 date 20th March, 2015. It then behoves this court to consider whether provisions of the *Government Proceedings Act* apply to the Respondent.
39. The *Government Proceedings Act* states the law relating to the civil liabilities and rights of the Government. Section 21(4) of the Act which the Applicant herein vehemently relies on states as follows: -

“(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no persons shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such of any money or costs.”

40. The Black's Law Dictionary, 10th Edition at page 810 defines a “Government” as being:-
1. The structure of principles and rules determining how a State or Organization is regulated.
 2. The sovereign power in a Nation or State.
 3. An Organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.”
41. Ideally therefore, a Government Department as reference in Section 21(4) above would properly be described as body exercising a governmental function and exercising the same authority and monopoly as the Government would. Further, I am guided by the decision in the case of Association of Retirement Benefits Schemes –vs- Attorney General & 3 Others [2017]eKLR, where the court cited with approval Indian Supreme Court in the case of International Airport Authority(R.D Shetty) –



vs- The International Airport Authority of Indian & Others. In that case, the Court set the test for determining whether an entity is a Government body or not, as follows:-

- a. Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government;
 - b. where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;
 - c. it may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State;
 - d. whether the body has deep and pervasive State control,
 - e. whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and,
 - f. if a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.
42. It is a common ground that the Respondent herein is a body corporate established under the rules of the Companies Act limited by shares with its initial subscribers being the Permanent Secretary to the Treasury and the Permanent Secretary to the Ministry of Energy.
43. The Respondent's Memorandum of Association sets out forty-one (41) objectives for which it was incorporated and the wide range of the activities the Company was intended to involve in clearly shows that the Respondent was not incorporated solely to perform works of public nature as is intimated. It further indicates the liability of its members as limited connoting that at its inception just like every other corporate entity, the Respondent would incur its own debts not attributable to any other body or individual. On the other hand, the Respondent's Article of Association indicates that the Respondent's affairs would be managed by its Board of Directors and Article 3 thereof went on to list the personnel constituting to the said Board of Directors.
44. In my opinion, having considered the Respondent's constituent documents against the backdrop for qualification of an entity as a Government body as was illustrated in the case of Association of Retirement Benefits Schemes –vs- Attorney General & 3 Others [2017]Eklr, the Respondent herein does not meet the laid threshold.
45. It can also be inferred from the Memorandum of Association that the Respondent is a body corporate with the capacity to sue and be sued as well as the capacity to hold properties with perpetual succession. With due respect as I can, the Respondents is deduced to be an independent agent of the Government formed in order to undertake, and inter alia perform the duties of managing Geothermal Resources within the Republic. Relevant to the foregoing, in the case of Ikon Prints Media Company Limited – vs- Kenya National Highways Authority & 2 Others [2015] eKLR, the court held as follows:-

“Foremost though, it is important to point out that it would not be tenable to invoke the Government Proceedings Act (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on Government funding, but it is not Government or servant of or agent of Government for the purposes of the Government Proceedings Act. The 1st Respondent is an independent judicial person capable of being sued



and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not Judgments against the Government but against an independent juridical body.”

46. In the premises, taking cue from the above citation, the fact that some of the Respondent’s subscribers are Government Officials as well as the fact that on 20th March, 2015, the Respondent was gazetted as a Government entity does not automatically subject it to the Government Proceedings Act. I also agree with the Applicant’s submission that the Respondent having fully participated in the Arbitral proceedings and the applications for the adoption of the award, it would be so late in the day for Respondent to now seek to invoke protection under the Government Proceedings Act. The same is a faded attempt to challenge the execution that is being taken against it.
47. In the Premises, and owing to the discussions above, I find no merit in the Respondent’s application dated 28th June, 2022 and the same is dismissed with costs.
48. That having been said, the only pending issue is whether the Garnishee Order Nisi can be made absolute. The Respondent has argued that it would be immature to grant such an order given that the costs awarded were not calculated through taxation. Thus it would be appropriate to first move the court under Section 94 of the Civil Procedure Act. To that extend, I have perused the decree at hand, the annexed pleadings, and the Judgment of the court. The same was not arrived at in the exercise of this court’s original jurisdiction but in the exercise of the supervisory jurisdiction over the tribunals and other quasi-judicial bodies. Section 32B of the Arbitration Act provides thus:-

32B. Costs and Expenses

1. Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under Section 34(5).
49. I have perused the Arbitral award and established that the issue of cost was well addressed and determined by the Arbitrator. Therefore, there was no need of pursuing taxation as intimated by the Respondent. However, there is no dispute that there is a decree in favour of the decree holder/Applicant that has not been settled. The 1st to 3rd garnishees have confirmed that the Respondent operates the subject bank accounts as listed in the Applicants application. They have also confirmed that the said accounts hold funds on behalf of the award-debtor even though the said funds are insufficient to satisfy the decree. None of the garnishees has laid claim on the funds and I am therefore satisfied that the Applicant has established a proper case for making the Garnishee Order-Nisi Absolute.
50. Consequently, the Garnishee Order Nisi issued herein on 24th June, 2022 is hereby made Absolute. Each of the three (3) garnishees is ordered to pay the current amounts reflected in the respective accounts as mentioned in the Garnishee Order Nisi dated 24th June, 22 to the Applicant forthwith. The Applicant shall have costs of the application dated 23rd June, 2022.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY , 2023.

D. O. CHEPKWONY



JUDGE

In the presence of:

Mr. A. S. Masika counsel for the Applicant/Respondent/Award Creditor

Mr. Biko Angwenyi holding brief for Mr. Guto Mogere counsel for the Respondent (Geothermal Development Company)

M/S Ikonge holding brief for M/S Mathenge Counsel for 2nd Garnishee

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