



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 252 OF 2015

EQUILAB TECHNOLOGIES LIMITED.....PETITIONER

=VERSUS=

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

MINISTRY OF STATE INTERIOR &

CO-ORDINATION OF NATIONAL GOVERNMENT....3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE CHIEF LAND REGISTRAR.....5TH RESPONDENT

CO-OPERATIVE BANK (K) LIMITED.....GARNISHEE

RULING

1. The application giving rise to this ruling stems from the Judgment rendered in this suit by Hon Lady Justice Gacheru on 26/2/2016. Through the Judgment, the court awarded the petitioner, Equilab Technologies Limited, Kshs.5,000,000 as exemplary damages. The court also awarded them costs of this suit. A decree was issued and the awarded costs were assessed on 27/7/2017 at Kshs 1,064,392. No appeal was preferred against the Judgment.
2. Subsequent to that, Equilab Technologies Limited (**the decree holder**), filed Nairobi ELC **Judicial Review Application No. 45 of 2017; Equilab Technologies Limited v The County Secretary of Nairobi City County Government & 2 others** in which they obtained orders of mandamus, directing the County Secretary of the Nairobi City County Government to satisfy the decree together with costs.
3. Nairobi City County Government (**the judgment debtor**) did not satisfy the award despite the orders of mandamus and pleas by the decree holder. Consequently, the decree holder brought a notice of motion dated 23/11/2020, seeking to attach monies held by the judgment debtor in **Bank Account Number 01141709410000** held at the City Hall Branch of the Co-operative Bank of Kenya, to satisfy the award of the court. The said application is the subject of this ruling.
4. Counsel for the applicant canvassed the application alongside an application he said was dated **6/3/2019**, in which the decree holder sought contempt orders against officers of the judgment debtor. I have perused both the physical file and the e-portal relating to this cause but I have not found any application dated **6/3/2019**. It is probable that the application dated 6/3/2019 was filed in **Nairobi ELC JR Application No. 45 of 2017**. I will therefore not make any pronouncement on the application dated 6/3/2019 because it appears it was not brought in this cause and cannot, in the circumstances, be disposed on the platform of this cause. The applicant in the said application dated 6/3/2019 shall have the liberty to canvass it afresh in the cause in which it was filed.
5. The decree holder's application dated 23/11/2020 was supported by an affidavit sworn on even date by **Manoj Keshavlal Shah**. It was canvassed through written submissions dated 2/12/2020, filed by the firm of **Wamae & Allen Advocates** and oral highlights of the submissions were made in the virtual court. The decree holder's case was that officers of the judgment debtor had in flagrant disregard of the provisions of Article 10 of the Constitution, ignored the orders made by the court, requiring them to satisfy the award, including the orders of mandamus, despite them being summoned by the court. Consequently, the unchallenged judgment rendered in 2016 remained unsatisfied.
6. Mr Allen Gichuhi, counsel for the decree holder, submitted that the key issue falling for determination in the application was whether this court should issue an order for attachment of the sum of Kshs 9,423,968 in the above account to satisfy the decree. Counsel made reference to various sections of the **Public Finance Management Act, No. 18 of 2012**, including Section 104 which vests in the County Treasury the

duty to manage the County Government's public debt and Section 109 which obligates the County Treasury to ensure that all money authorized to be paid by the County Government is paid without undue delay. Counsel argued that the Act required every public body to factor every debt in the annual budget and there was no explanation why the decretal sum in this suit had not been factored in the judgment debtor's annual budgets in the preceding five years. Counsel added that there was an obligation on every public body to ensure settlement of court decrees. Counsel relied on the decisions in: (i) **Republic V Permanent Secretaries, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoh Egunza [2012]eKLR** ; (ii) **Japheth Nzila Muangi V Minister for Land & Environment of the County Government of Mombasa & another [2019] Eklr**; (iii) **African Commuter Services Ltd V Kenya Civil Aviation authority & 2 others [2014] eKLR** ; and (iv) **Republic V Town Clerk of Webuye County council & another [2014] eKLR**.

7. On the role of the garnishee, counsel submitted that the duty of the garnishee was to come to court and disclose the amount of money held in the account, not to obstruct the realization of the court award.

8. The judgment debtor opposed the application through a replying affidavit sworn on 20/5/2021 by **Halkano D Waqo**. He deposed that the application by the decree holder was premature and violated the mandatory requirements of **Section 21** of the **Government Proceedings Act** and **Order 29** of the **Civil Procedure Rules**.

9. Mr Mboya who submitted on behalf of the judgment debtor argued that the County Government would pay the award only when they are served with a certificate under Section 21 of the Government Proceedings Act, duly signed by the Deputy Registrar of this court, directing them to pay. Counsel relied on the provisions of Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules.

10. The garnishee, Co-operative Bank (K) Limited, opposed the application through a replying affidavit sworn on 25/5/2021 by **Linda Mango**. She deposed that Section 21 of the Government Proceedings Act set out a clear and elaborate manner of enforcement of decrees against the Government, a procedure which the decree holder had ignored. She added that under Order 29 of the Civil Procedure Rules, execution of a decree by way of a garnishee order against the Government was untenable.

11. Submitting on behalf of the garnishee, Mr Muiruri argued that application of rules of equity in our Constitution was subject to the law and the rules of equity did not supplant the law. Counsel argued that rules of equity apply only in so far as it is legal. Counsel added that there existed a jurisdictional injunction against issuance of execution orders against the Government under Section 23 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules. He added that the garnishee was **properly before court to explain why the garnishee order should not issue**.

12. Making reference to the decision in **African Commuter Services v Civil Aviation Authority**, counsel argued that the decision was distinguishable because the Kenya Civil Aviation Act which created the authority did not expressly prohibit execution against the Authority. In conclusion, counsel submitted that there were good reasons why the Government was exempted from execution by attachment.

13. I have considered the application dated 23/11/2020, the responses thereto, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key questions falling for determination in this application. Two key questions fall for determination. The first question is whether the decree issued in this suit can be enforced against the Nairobi City County Government in the absence of a certificate issued by the Deputy Registrar under Section 21 of the Government Proceedings Act. The second question is whether a garnishee order in terms of the prayers sought in the present application can issue against the Nairobi City County Government. I will make brief sequential analysis of and pronouncements on the two questions in the above order.

14. The first question is whether the decree issued in this suit can be enforced against the Nairobi City County Government in the absence of a certificate under Section 21 of the Government Proceedings Act. There is no contestation about the fact that the Nairobi City County Government is a government as contemplated under the Constitution of Kenya 2010. Secondly, there is nothing on record to suggest that the decree holder in this suit has procured and served a certificate issued by the Deputy Registrar under Section 21 of the Government Proceedings Act. The said Section provides thus:-

“21. Satisfaction of orders against the Government

(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(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 person 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.”

15. Justifying the omission to serve a certificate under Section 21 of the Government Proceedings Act, Mr Allen Gichuhi, counsel for the decree holder, argued that once an order of mandamus is issued, the requirement for a certificate under Section 21 of the Government Proceedings Act does not apply. I do not agree with counsel on that. I say so because, execution against the Government or against any judgment debtor is carried out on the platform of a particular cause. In the present application, the decree holder elected to enforce the decree on the platform of **Nairobi (Milimani) ELC 252 of 2015**. They had the option of enforcing the order of mandamus in **Nairobi (Milimani) JR No. 45 of 2017**. Having elected to enforce the award on the platform of this cause, the decree holder is obligated under Section 21 of the Government Proceedings Act to obtain and serve a certificate under Section 21 of the Government Proceedings Act, issued in this cause. It is therefore my finding that the decree issued in this suit cannot be enforced against the Nairobi City County Government on the platform of this suit in the absence of a certificate under Section 21 of the Government Proceedings Act.

16. Given that the decree in this cause has not been challenged in the Court of Appeal, to avoid the present scenario where the court is invited to expend valuable time on a cause that has been fully adjudicated and determined, I will in my disposal orders direct the Deputy Registrar to prepare and make available to the parties a certificate under Section 21 of the Government Proceedings Act, for collection by the decree holder, upon payment of the requisite court fees, if necessary. I now turn to the second question.

17. The second question is whether a garnishee order in terms of the prayers sought in the present application can issue against the Nairobi City County Government. The garnishee objected to the present application on the basis of the provisions in Order 29(4) (1) of the Civil Procedure Rules. The said legal framework provides as follows:-

“29(4)(1) No order for the attachment of debts under Order 23 or for the appointment of a receiver under Order 41 shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the Government.”

18. It is clear from the above framework that the Government is insulated against execution by attachment. Secondly, the above legal framework existed in Order XXVIII of the pre-2010 Civil Procedure Rules. On several occasions, our courts have been invited to pronounce themselves on the constitutionality of the above insulation. The High Court (**Visram J** and **Ibrahim J** – as they were then) outlined the following rationale for the insulation in **Kisya Investments Ltd V Attorney General & another [2005] eKLR**:-

“...Before we conclude this decision, it is our view that it is

essential, if not imperative on the court’s part, to give its observations regarding the history, purpose and usefulness or otherwise of Section 21 (4) of the Government Proceedings Act and Order XXVIII, Rules 2 (1) (a), (2) and 4 (1).

In preparing our judgment, we have carried out some considerable research regarding the history of the protection and immunity of the Government from execution and attachment of its property/goods but could not find any text covering the subject. We could not obtain any case law or precedent directly on the point. However, it would appear that the genesis of the said protection and immunity arose from two situations:-

1. Firstly, there has been a policy in respect of Parliamentary control over revenue. This is threefold and is exercised in respect of:

(i) The raising of revenue – (by taxation or borrowing)

(ii) its expenditure and

(iii) the audit of public accounts.

The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result, this must be justified in law and provided for in the Government’s expenditure. It is for this reason that Section 32 of the Government Proceedings Act provides as follows:-

“32 (1) Any expenditure incurred by or on behalf of the

Government by reason of this Act shall be defrayed out of

moneys provided by Parliament.”

19. Under the post-2010 constitutional order, the High Court [Majanja J and Maina J] in *Nahashon Omwoha Osiako & 66 others v Attorney General; Amicus Curiae Kenya section of International Commission of Jurists (Open Society Justice Initiative) (2017) eKLR* said the following regarding the constitutionality of the above insulation:

“34 The question then is whether the rationale given for the immunity from execution process given in the Kisya case (supra) is an acceptable basis for differentiating between the Government on one hand and the petitioners and other decree holders on the other. We agree with the reasoning and rationale stated in the Kisya case. This recognizes that due to the special role played and the central position held by the Government in the management of the affairs of the country, it is necessary for further proceedings to be undertaken before the judgment can be implemented.

35. Further, the constitution has not changed the manner in which monies are appropriated for specific purposes. Under Article 206 (2) of the Constitution, money may be withdrawn from the Consolidated Fund only in accordance with an Act of Parliament.”

20. I have not been given a proper basis for departing from the above prevailing jurisprudence. Further, I would agree with counsel for the garnishee that the decision in *African Commuter Services v Civil Aviation Authority* is distinguishable because the Civil Aviation Authority was a creature of a specific statute and that statute did not expressly prohibit execution against the Authority under Order 23 of the Civil Procedure Rules. In light of the foregoing, it is my finding that a garnishee order in terms of the prayers sought in the present application would not issue against the Nairobi City County Government.

21. With regard to costs, the present application would not have been necessary if the Nairobi City County Government had dealt with the decree in this suit and settled it in the manner contemplated under the Public Finance Management Act. It is due to the conduct of officers of the judgment debtor that the decree holder is still in court today, pursuing settlement of the award. The judgment debtor will, in the circumstances, bear the garnishee's costs.

Disposal Orders

22. In the end, I make the following orders:-

- a) The decree holder's application dated 23/11/2020 is declined on the ground that the money held in the said account is insulated against attachment under Order 29(4)(1) of the Civil Procedure Rules.*
- b) The decree holder is at liberty to argue the application dated 6/3/2019 in the cause in which the said application was filed.*
- c) The judgment debtor shall bear the garnishee's costs of this application.*
- d) As between the decree holder and the judgment debtor, the two parties shall bear their respective costs of this application.*
- e) The Deputy Registrar shall immediately issue and make available to the parties a certificate under Section 21 of the Government Proceedings Act.*

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF OCTOBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Kithinji holding brief for Mr Allen Gichuhi for the Petitioner

Mr Muiruri for the Interested Party/Garnishee

Mr Mboya for the Judgment Debtor

Court Assistant: Lucy Muthoni

NOTE:

The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE