



**Cyber Access Limited v National Land Commission & 3 others; National Bank Of Kenya Limited (Garnishee) (Petition 43 of 2022) [2023] KEHC 19633 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19633 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION 43 OF 2022**

**OA SEWE, J  
JULY 6, 2023**

**BETWEEN**

**CYBER ACCESS LIMITED ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF TRANSPORT & INFRASTRUCTURE  
DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THIRD CHINA ENGINEERING CO. LTD ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... GARNISHEE**

**RULING**

1. The Notice of Motion dated 25<sup>th</sup> February 2023 was filed by the petitioner under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya Order 23 of the Civil Procedure Rules. The petitioner thereby seeks orders that:
  - (a) Spent
  - (b) A Garnishee Order Nisi be issued against National Bank of Kenya, Harambee Avenue Branch and National Land Commission in respect of Bank Account No. 01001032980000 ordering that all monies deposited therein, lying and being held by the Garnishee to the credit of National Land Commission be attached to answer the decree for costs herein in the sum of Kshs. 1,700,086.67 in favour of the petitioner.



- (c) That the Garnishee be ordered to pay over to the petitioner the said sum of Kshs. 1,700,086.67 out of the funds belonging to National Land Commission and held by the Garnishee at its said Account No. 01001032980000.
- (d) That costs of the application be paid by National Land Commission.
2. The application is premised on the grounds that a decree for payment of costs was issued herein against the respondents, including National Land Commission (the 1<sup>st</sup> respondent) requiring the payment of Kshs. 1,700,086.67; and that a Warrant of Attachment of Movable Assets of the National Land Commission was subsequently issued on 14<sup>th</sup> December 2022 in execution of the said decree for costs. The petitioner further averred that thereafter, a proclamation of attachment was made over the movable assets of the 1<sup>st</sup> respondent, but that attachment was resisted by the use of the Police.
3. The petitioner further stated that the Garnishee is the 1<sup>st</sup> respondent's banker and is believed to be holding on behalf of the 1<sup>st</sup> respondent an amount in excess of the decretal sum in the 1<sup>st</sup> respondent's bank Account No. 01001032980000 at the Garnishee's Harambee Avenue Branch in Nairobi. Consequently, the Garnishee should be ordered to pay the petitioner the decretal sum from the funds held by it to the credit of the 1<sup>st</sup> respondent.
4. The application was supported by the affidavit of Mr. Paul Amuga, Advocate, sworn on 25<sup>th</sup> February 2023, to which he annexed copies of the Warrants and the Auctioneer's letter of return. He added that the costs remain unpaid even after the 1<sup>st</sup> respondent was served with notice to pay.
5. In response to the application, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objection on 4<sup>th</sup> April 2023, contending that:
- (a) the application is contrary to and offends the provisions of Articles 40, 67, 249 and 260 of *the Constitution* of Kenya;
- (b) The entire application offends the provisions of Section 21(4) of the *Government Proceedings Act*, Chapter 40 of the Laws of Kenya;
- (c) The application contravenes the provisions of Order 22 Rule 18 of the Civil Procedure Rules on the procedure for execution against the Government;
- (d) The application in its entirety offends all known mechanisms of executing against a state organ such as the 1<sup>st</sup> respondent;
- (e) The costs to be borne by each respondent herein have not been ascertained or apportioned as between the respondents as per the judgment of the Court and the decree is therefore not capable of satisfaction by the 1<sup>st</sup> respondent alone;
- (f) The entire application is not anchored under any provisions of *the Constitution* or *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and hence the jurisdiction of the Court has not been properly invoked;
- (g) That the application is premature and misconceived and it ought to be dismissed with costs.
6. On behalf of the Garnishee, a Replying Affidavit was filed herein on 6<sup>th</sup> April 2023 sworn by the Garnishee's Relationship Manager, Ms. Christine Makone. She conceded that the Garnishee holds Account No. 01001...8000 in the name of the 1<sup>st</sup> respondent at its Hill Branch; and that the same is sufficiently funded. She however contended that she was aware that owing to the special nature of the account, the funds are held in trust for various designated recipients of compensation and therefore



not available for the satisfaction of any decree. The Garnishee also prayed for costs in the sum of Kshs. 100,000/= incurred in connection with the Garnishee proceedings.

7. From the foregoing, it is manifest that the factual basis of the application dated 25<sup>th</sup> February 2023 is uncontroverted, granted that the 1<sup>st</sup> respondent opted to rely on a Notice of Preliminary Objection as opposed to a Replying Affidavit. Accordingly, there is no dispute that a decree for payment of costs was issued herein against the respondents jointly and severally, including National Land Commission (the 1<sup>st</sup> respondent) requiring the payment of Kshs. 1,700,086.67 to the petitioner. There is further no dispute that a Warrant of Attachment of Movable Assets of the National Land Commission was issued on 14<sup>th</sup> December 2022 with a view of executing the decree; and that thereafter, a Proclamation of Attachment was made over the movable assets of the 1<sup>st</sup> respondent by Bemac Auctioneers. Copies of the said documents were annexed to the Supporting Affidavit and marked Annexure "PA1".
8. The contention by the petitioner, at paragraph 4 of its Supporting Affidavit, is also uncontroverted; namely, that the attempts by Bemac Auctioneers to physically attach the 1<sup>st</sup> respondent's property was resisted with the aid of police officers. A letter to that effect by Bemac Auctioneers was likewise annexed to the Supporting Affidavit to further show that the decretal sum remains unpaid to date.
9. Further to the foregoing, the Garnishee herein confirmed that it is the 1<sup>st</sup> respondent's banker and that it is holding on behalf of the 1<sup>st</sup> respondent an amount in excess of the decretal sum in the 1<sup>st</sup> respondent's bank Account No. 01001032980000 at the Garnishee's Harambee Avenue Branch in Nairobi. It however asserted that the funds are held in trust for purposes of compensation of third parties. Consequently, the issues to consider are:
  - (a) Whether the Court has jurisdiction to entertain the Garnishee application; and if so,
  - (b) Whether the petitioner has shown justifiable cause for the issuance of the orders sought in the Notice of Motion dated 25<sup>th</sup> February 2023.

#### **A. On Jurisdiction:**

[10] In the Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11. Needless to say that a preliminary objection on jurisdiction ought to be such a point that is capable of disposing of the entire suit or application (see Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd [1969] EA 696). Hence, the overarching question for determination, in respect of the Preliminary Objection is whether the 1<sup>st</sup> respondent is protected from execution by dint of Section 21(4) of the [Government Proceedings Act](#) as read with Order 29 Rule 2(2)(c) of the Civil Procedure Rules.
12. Section 21(4) of the [Government Proceedings Act](#) provides that:

"...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.

13. Order 29 Rule 2(2) of the Civil Procedure Rules, on the other hand, provides that:

“No order against the Government may be made under—

- a. Order 14, rule 4 (Impounding of documents);
- b. Order 22 (Execution of decrees and orders);
- c. Order 23 (Attachment of debts);
- d. Order 40 (Injunctions); and
- e. Order 41 (Appointment of receiver).

(14) Thus, the question to pose is whether the Respondent, the National Land Commission is “the Government” for purposes of the *Government Proceedings Act*. As has been pointed out herein above, the applicant’s contention is that it is an independent commission and therefore a distinct and separate juridical entity with a corporate seal and perpetual succession; capable of suing and being sued. Accordingly, the applicant’s submission was that execution by way of attachment of debts pursuant to Order 23 of the Civil Procedure Rules is permissible.

(15) There is no dispute that the Respondent is an independent commission and therefore a state organ for purposes of Chapter 15 of *the Constitution*. Accordingly, in respect of it and in respect of similar commissions, Article 253 of *the Constitution* stipulates as follows:

Each commission and each independent office—

- a. is a body corporate with perpetual succession and a seal; and
- b. is capable of suing and being sued in its corporate name.

(16) Moreover, *the Constitution* provides, in Article 249(2) and (3), that:

(2) The commissions and holders of independent offices—

- a. are subject only to this Constitution and the law; and
- b. are independent and not subject to direction or control by any person or authority.

(3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

(17) Having given consideration to the submissions and the authorities cited by learned counsel herein, I take the view that, inasmuch as the 1<sup>st</sup> respondent is independent and clothed with requisite constitutional powers to sue and be sued in its own corporate name, it is not “the Government” or a “Government Department” for purposes of the *Government Proceedings Act*. Consequently, my considered view is that the 1<sup>st</sup> respondent is subject to the usual legal consequences flowing from court proceedings, including execution of ensuing decrees. This is because there is no such protection afforded by the *National Land Commission Act*, to shield the Respondent from the execution process.

(18) Moreover, it is significant that whereas the *Government Proceedings Act* was amended in 2015 to include County Governments, Parliament, in its wisdom, did not consider it apposite to extend the same



protection to independent commissions such as the 1<sup>st</sup> respondent. I would accordingly take the path taken in Petition No. 513 of 2013: Ikon Prints Media Company Limited vs. Kenya National Highways Authority & 2 Others [2015] eKLR that:

“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 1<sup>st</sup> 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 1<sup>st</sup> Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1<sup>st</sup> Respondent are not judgments against the government but against an independent juridical body...”

- (19) The same position was taken in Miscellaneous Civil Application No. 278 of 2017: Greenstar Systems Limited vs. Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR thus:

“From 2015 when the Arbitration commenced to the point of execution the Applicant has always participated and held itself out as a body corporate and not as a Government department or agency. It is too late in the day for the Applicant to now seek to don a different coat. Its invocation of the Government Proceedings Act is but a last-ditch attempt to scuttle the execution proceedings against it. Based on its previous engagement in this matter the Applicant is estopped from relying on the provisions of the Government Proceedings Act as a challenge to execution against it.”

- [20] The foregoing being my view of the matter, it follows that the Preliminary Objection is wholly untenable and is hereby dismissed.

#### **B. On the merits of the Notice of Motion dated 25<sup>th</sup> February 2023:**

- (21) Having found that the 1<sup>st</sup> respondent’s Preliminary Objection has no merit, the next issue to consider is the merit or otherwise of the Notice of Motion dated 25<sup>th</sup> February 2023. I note that the 1<sup>st</sup> respondent did not respond to the averments of fact made by the petitioner. Nevertheless, a Replying Affidavit was filed by its bankers, the Garnishee, to the effect that the funds held by the Garnishee on behalf of the 1<sup>st</sup> respondent are held in trust for various designated recipients of compensation, and therefore not available for attachment. It is noteworthy however that not a single document was annexed to the Garnishee’s affidavit in proof of that assertion. Accordingly, I am far from convinced that the subject account in fact is a special account as alleged; or that the funds therein are funds held in trust as compensation funds for third parties.
- (22) In the premises, I am persuaded by the position taken in Africa Commuter Services Limited v Kenya Civil Aviation Authority & 2 Others [2014] eKLR that:

“...the Respondent was not candid with the court. It only alleged that the monies in the subject bank accounts are operating capital...if the Respondent was candid enough, it should have disclosed all the bank accounts that it operates apart from the two garnisheed and the respective balances thereon or if not, state to the court whether the two accounts are the only accounts it holds. The Respondent should also have disclosed the balances in those accounts for the court to gauge the veracity of the submissions or contentions that the sums therein are operating capital of the Respondent and that if the Court of Appeal order of



07/2/2014 is enforced by their attachment, the day to day operations of the Respondent would be affected. In the absence of such disclosures and explanation, I find it difficult to side with the Respondent...” (also see Milimo Muthomi & Co. Advocates v Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme; Co-operative Bank of Kenya Limited & Another (Garnishee) [2021] eKLR)

- (23) In the result, I find merit in the application dated 25<sup>th</sup> February 2023. The same is hereby allowed and orders granted as hereunder:
- (a) The Garnishee Order Nisi issued herein on 29<sup>th</sup> March 2023 against National Bank of Kenya Limited, Harambee Avenue Branch and National Land Commission in respect of Bank Account No. 01001032980000 ordering that all monies deposited therein, lying and being held by the Garnishee to the credit of National Land Commission be attached to answer the decree for costs herein in the sum of Kshs. 1,700,086.67 in favour of the petitioner be and is hereby made absolute.
  - (b) That the Garnishee be and is hereby ordered to pay over to the petitioner the said sum of Kshs. 1,700,086.67 out of the funds belonging to National Land Commission and held by the Garnishee at its said Account No. 01001032980000.
  - (c) That costs of the application, including the costs of the Garnishee be paid by National Land Commission, the 1<sup>st</sup> respondent.

24 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6<sup>TH</sup> DAY OF JULY 2023**

**OLGA SEWE**

**JUDGE**

