



**CORETEC SOLUTIONS AFRICA LIMITED (Formerly Coretec Systems & Solutions Limited ) (Formerly Coretec Systems & Solutions Limited) v Export Processing Zones Authority; Kenya Commercial Bank Limited & another (Garnishee) (Civil Suit E005 of 2023) [2024] KEHC 16127 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16127 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL SUIT E005 OF 2023  
MW MUIGAI, J  
DECEMBER 17, 2024**

**BETWEEN**

**CORETEC SOLUTIONS AFRICA LIMITED (FORMERLY CORETEC SYSTEMS & SOLUTIONS LIMITED ) ..... PLAINTIFF  
FORMERLY CORETEC SYSTEMS & SOLUTIONS LIMITED**

**AND**

**EXPORT PROCESSING ZONES AUTHORITY ..... DEFENDANT**

**AND**

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

**RULING**

**Introduction**

1. This Court in its Judgment delivered 24<sup>th</sup> September, 2024 in its disposition observed as follows:

- a. The Respondent failed to provide any proof of any or some of the grounds for setting aside the Final Arbitral Consent Award as provided by Section 35 or Section 37 for Refusal of Recognition or Enforcement of Arbitral award of Arbitration Act. The objection is hereby dismissed.



- b. The Chamber Summons of 23/5/2024 seeking recognition and enforcement of the Final Arbitral Consent Award of 14/5/2024 under Section 36 of the Arbitration Act is granted.
  - c. Each Party to bear own Costs.
2. A decree in favour of the Plaintiff was issued on 2<sup>nd</sup> October, 2024.
3. On 25/10/2024, this court was moved with a Garnishee application after the decree was drawn on 2/10/2024.
4. The 1<sup>st</sup> Garnishee Kenya Commercial Bank (KCB) filed Replying Affidavit to the chamber summons filed on 3/10/2023.
5. The decree holder is opposed to the hearing of the application for stay of execution and filed preliminary objection that this court lacks jurisdiction. That the matter is res judicata and the issues were dealt with in the Ruling of 24/09/2024.

#### **Replying Affidavit Sworn On 19/11/2024**

6. The Plaintiff filed their Replying affidavit sworn on 19/11/2024 stating as follows;
  - a) THAT the Plaintiff have been shown the Defendant/Applicant's Notice of Motion Application dated 7<sup>th</sup> November, 2024 read and understood it and wish to respond as follows,
  - b) That the Defendant/Applicant sought an order that the court discharges/sets aside, reviews and/or vacate the Garnishee Order Nisi issued on 5<sup>th</sup> November, 2024 against the Defendant/Applicant's Bank Accounts No. 1102736953, 1102737380 and 1101641797 held with KCB Bank (K) Limited.
  - c) That from a simple look at the instant Application, the Garnishee Nisi orders that the Applicant seeks to set aside are in respect of the Plaintiff's Garnishee Application dated 3<sup>rd</sup> October, 2024 which by their very nature, the Judgment Debtor has no role and/or locus standi to oppose or apply or seek dismissal.
  - d) That the Garnishee proceedings are taken strictly between the Decree Holder and the Garnishee.
  - e) THAT from the foregoing, there is no dispute that the Decree herein remains unsatisfied the Decree Holders, made claims that the Garnishees are indebted to the Judgment Debtor to an extent that is sufficient to satisfy the Decree.
  - f) THAT once those claims in form of Garnishee proceedings are made, the burden shifted to the Garnishee to prove otherwise and to discharge that burden, and it became incumbent upon the Garnishee to present controverting evidence.
  - g) That the Respondent cannot purport to challenge orders resulting from proceedings where their participation is not warranted as they involve other very distinct parties.
  - h) That in any case, it is instructive that the 1<sup>st</sup> Garnishee response to the Garnishee Application was not in its opposition contrary to the Applicant's argument.
  - i) That the 1<sup>st</sup> Garnishee in its Replying Affidavit dated 24<sup>th</sup> October, 2024, it indicated the amounts it had in its accounts and at paragraph 10 indicated that they are willing to abide by



any order and/or directions that the Court will give in regard to the said sums of money held in the said accounts.

- j) THAT in any case and in furtherance to the Orders issued on the Garnishee Nisi, the 1<sup>st</sup> Garnishee has in fact confirmed that it has proceeded to execute the terms of the Garnishee Order Nisi, and locked an equivalent of the Decretal sum as held in the said account.
- k) THAT consequently, it is misleading for the Applicant to imply that the 1<sup>st</sup> Garnishee opposed the Garnishee Application as they purport at paragraph 12 of their Supporting Affidavit.
- l) THAT further, the instant Garnishee Order Nisi was regularly issued with the parties having filed their responses and submissions to both the Application and the Notice of Preliminary Objection raised by the Applicant herein.
- m) THAT notwithstanding, this Court had the benefit of interrogating every argument and evidence adduced by all the parties at the time of issuing the Garnishee Order Nisi as Responses and submissions to the Application and Notice of Preliminary objection had been filed.
- o) THAT any operational paralysis experienced by the Applicant is a result of their own doing as they are aware of the obligations arising out of the Decree dated 2<sup>nd</sup> October, 2024, and being clear orders of the court, the same ought to have been settled promptly to avoid this litigious exercise and the resultant ramifications such as the effects of the instant Garnishee Order Nisi.
- q) THAT in an attempt to delay the realization of the fruits of the said Decree, the Applicant has continuously filed unmerited Applications before this Court and to the extent of dragging unnecessary parties to these proceedings in a desperate attempt to defeat the course of justice.
- s) THAT the Applicants and Respondents undertook a mutually agreeable Arbitration proceeding, executed a mutually agreed consent, obtained an arbitral consent award and consequently a Decree from the said proceedings but now the Applicant is clutching at every straw at their disposal to avoid meeting the Decretal obligations.

## **Written Submissions**

### **Defendant/judgment Debtor Submissions Dated 28/11/2024**

7. The Defendants in their Submission stated that the Decree as extracted is erroneous and does not reflect the terms of the Award at all. Order 21 Rule 7 (1) of the Civil Procedure Rules provides that:

“ the decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, granted or other determination of the suit.”
8. That not only does the Decree fail to specify clearly the relief granted, but it also fails to even mention the amount due for payment yet it is supposed to be a money decree. Without stating the actual amounts due for payment, there remains the all too real possibility of the Plaintiff seeking to recover more than what is actually due, if at all.
9. Reliance is made in the case of Masinde Muliro University of Science and Technology v Alfatech Contractors Limited; Kenya Commercial Bank Limited & another (Garnishee) [2021] where the respondent omitted from the calculation the sum of Kshs. 585, 573.50, in a draft Decree which ended up being left out in the final decree.



10. Similarly, the Court of Appeal in the case of Highway Furniture Mart Limited v Permanent Secretary Office of The President & another [20061 eKLR reiterated the need for the Decree to agree with the Judgment (in this case the Award) prior to execution thus:

“By Order XX Rule 6 (1) the decree should agree with the judgment and by Order XX Rule 7, in case of dispute the decree is settled by a judge before it is issued by the court. A decree which is not in conformity with the judgment is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the court. The court would, however, be functus officio if the decree conforms with the judgment, which is not the case here.

The decree in this case was, in our view, a nullity as it included a very large claim (over Shs.30 million) which was not awarded in the judgment of the court.”

11. It is therefore submitted that it is paramount that the Honourable Court considers the contents of the Decree herein vis a vis the Award. Should the Court be inclined to agree with the foregoing submissions, it would be most appropriate that the said Decree be revoked and a fresh one be issued in terms of the Award.
12. On the issue of whether, in terms of the consent arbitral award, the entire sum of Kshs. 34,224,727.60 has become due the answer on this issue is that, no, the said amount has not yet fallen due. As indicated, we submit that even though the Defendant is yet to pay the sums due under Clause 1 of the Award, the amount claimed by the Plaintiff is not due for payment because: -
1. The 2nd and 3rd instalments were only to be paid upon the Plaintiff performing its obligations under the Award;
  2. The twelve months' period (under Clause (f) of the Award dated 14/05/2024 has not even lapsed; and,
  3. Schedule C of the Contract dated 23rd September, 2015, which is the basis for the payment terms in the first place, stipulates performance of some obligations by the Plaintiff (which are yet to be done) before payments are made.
13. The Plaintiffs claim for Kshs. 34,224,727.60 is not supported by its performance of its obligations under the Award and such payment would be unconscionable and akin to unjust enrichment on the Plaintiff's part.
14. Section 34 of the *Civil Procedure Act*, Cap 21 enjoins the Court executing a decree to determine all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree. It is only by so doing that a just process of execution will obtain to ultimately protect public funds from being paid to the Plaintiff who has not offered the commensurate services for such payment.
15. Even though the jurisdiction of the Court is limited under the *Arbitration Act*, the Court is nevertheless not deprived of its inherent jurisdiction where an injustice is likely to occur as in the present case.
16. In case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [20211 eKLR:-

“Section 10 leaves no doubt that it permits two possibilities where the court can intervene in arbitration. First, is where the Act expressly provides for or permits the intervention of the court. Second, in public interest where substantial injustice is likely to be occasioned



even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially.

17. It is finally submitted that the Garnishee Application dated 3<sup>rd</sup> October, 2024 be dismissed as the same is without merit and consequently that the Order Nisi issued on 5th November, 2024 be set aside.

### **Decree Holder/Respondent’ Skeletal Submissions**

18. The Decree holder raised 2 issues for determination;
- a. Whether the issues raised by the defendant/judgment debtor are Res-judicata
  - b. Whether the court has jurisdiction to hear the application and grant orders as sought on stay of execution and set aside orders, joinder of KRA and order to compel the plaintiff/decree holder to issue a performance guarantee.
19. On the issue of whether the issues raised are Res-judicata it is submitted that for a case to be res-judicata three conditions must be shown;
1. that there is a former suit or proceeding in which the same parties in the subsequent suit litigated.
  2. The matter in issue is directly or substantially in issue in the subsequent suit.
  3. That a court of competent jurisdiction had heard the matter and finally decided the matter in controversy.
20. In the instant case this Court ought to find the judgment debtors instant application to be offending the rules of Res-judicata.
21. Therefore, the joinder of KRA to the suit for the sake of determining the issues already determined by this Court is a nullity and this court should not entertain.
22. Reliance is made in the cases of Anne Hinga vs- Gathara & 5 others (Civil Appeal 374 of 2018)[2014] KECA 974 KLR and owners and masters of the Motor Vessel “Joey” -vs- Owners of the Motor Tugs “Barbara” and “Steve” [2008] EA 367.
23. It is submitted that the Arbitral process is a consensus, voluntary procedure through which parties choose to resolve their dispute. This Court can only intervene in that process as set out under section 10 of the Arbitration Act which provides that “Except as provided in this Act, no court shall intervene in matters governed by this Act.
24. This Court already found in its Ruling herein delivered on 24<sup>th</sup> September, 2024 that the failure by the Judgment Debtor to bring an application under Section 35 to set aside Award, this Court did not have any way to proof the grounds laid down under Section 35 of the Arbitration Act.
25. It is finally submitted that all the attempts by the Applicant herein are all but a futile exercise by the Judgment Debtor to employ judicial craftsmanship in a bid to attempt to circumvent to provision of the Arbitration Act that would grant this Court inherent jurisdiction to hear this application.

### **Determination**

26. Order 23 – Attachment Of Debts CPR 2010 provides;
1. Order for the attachment of debts [Order 23, rule 1.]



- (1) A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.
- (2) At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.
- (3) Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or place of business or in such manner as the court may direct.

4. An order nisi shall be in Form No. 16 of Appendix A

26. Order 23 CPR 2010 allows for ex parte application for Garnishee order and/or the judgment debtor may be examined. So proceedings of 5/10/2024 were regular, the Court was not aware that the Defendant was not informed or aware of the Garnishee proceedings.
27. On 25/10/2024, a Preliminary Objection was raised by the Defendant that this Court lacks jurisdiction to execute the Arbitral Consent Award that was recognized and enforcement by this Court on 24/9/2024. The Court sought skeletal submissions on the P.O. On perusal of the Court file the Court found that a Garnishee Application was filed on 3/10/2024 and served and 1<sup>st</sup> garnishee Kenya Commercial bank filed Replying Affidavit confirming sufficient funds to satisfy the decretal sum.
28. The Decree holder objected to the Court hearing Garnishee proceedings as matters herein are res-judicata already dealt with in the Ruling of 24/9/2024.
29. As to the Preliminary Objection this Court invokes jurisdiction from Article 165 3(a) COK2010 & Order 22 CPR 2010.
30. With regard to matters being reopened after determination by this Court earlier, it will depend on the actual item/issue or subject as shall be alluded by the parties.
31. With regard to joining an interested party KRA, I am reluctant as though the Court ought to meet ends of justice, the Court cannot act in vain, the matter was subject to arbitration and culminated to Arbitral Consent Award which the Court recognized and enforced. To bring in an interested party is to institute a new //fresh matter for hearing and determination other than what the Court’s limited mandate is recognize and enforce the award.

KRA has other forums, negotiation/mediation with Commissioner of Tax, Tax Appeals Tribunal and finally the High Court.



32. The Defendant vehemently contests the decree as drawn as it does not reflect the Arbitral consent Award; payment of 34 million was not lumpsum but in instalments with works to be completed by the Defendant at different stages. I agree, before execution and/or garnishee proceeds the decree to reflect the terms of Arbitral Consent Award and then the Court may proceed with Garnishee proceedings.
33. In *Greenstar Systems Limited v Kenya International Convention Centre (KICC) & 2 Others* [2018] eKLR, the court held that:
- “The entity had held itself out as a body corporate and not as a government department or agency. It was thus improper for KICC to invoke the *Government Proceedings Act* as such conduct was an attempt to scuttle the execution proceedings against it.”
34. In *Kenya National Highways Authority–Versus- Ahmednassir Maalim Abdullahi* [2021] eKLR wherein it was held:
- “That a successful litigant should not be barred from enjoying the fruits of litigation. Further, the Judge posited that the failure by The Judgement Debtor, in this case a state corporation, would seriously violate the Decree Holder’s right of access to justice thus *Contra constuonem*”
35. The High Court in the case of *Association Of Retirement Benefits Scheme –vs – Attorney General & 3 Others* [2017] eKLR cited with approval the Indian Supreme Court case of *International Airport Authority Of India & Others (1979) SC.R 1042* in which the test for determining whether an entity was a Government body or not, was stated 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.”



36. Hon Justice J. Onguto in the case of Ikon Prints Media Company Limited –vs- Kenya National Highways Authority & 2 Others [2015] eKLR in which he held:-

“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 1<sup>st</sup> Respondent are not judgments against the government but against an independent juridical body.”

38. In Export Trading Company Limited v National Cereals and Produce Board & 2 others; Kenya Commercial Bank Limited & 2 others (Garnishee) (Miscellaneous Application E158 of 2021) [2024] KEHC 12053 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)

“The court while dealing with the issue of whether garnishee proceedings should proceed against the 1st judgment debtor, The 1st judgment debtor stated that it is a state corporation under the auspices of the 2nd judgment debtor. The 2nd judgment debtor is responsible for fulfilling its functions in compliance with any general or special directions given by the cabinet. It was submitted that the 1st judgment debtor being a government entity, execution must conform with the provisions of Section 21 of the [Government Proceedings Act](#).

19. The decree holder submitted that the 1st judgment debtor is a body corporate with perpetual succession and a common seal, vested with powers to enter into contracts and arrangements and operate bank accounts and thus ought to honour and settle the decretal sum.

20. the court concur with the decree-holder that the 1st judgment debtor is a body corporate and thus should not evade its responsibilities. In the circumstances, and held that the garnishee proceedings against the 1st judgment debtor were properly before the court.

39. In Kimoi Ruto & another v Samuel Kipkosgei Keitany & Another 2014 eKLR, Hon. Justice Munyao held as follows:

“..It will be seen from the above that State Corporations may be established by the President (Under S.3) or through an Act of Parliament. They are ordinarily body corporate with capacity to sue and to be sued and with capacity to hold property. I find it difficult to hold that they should be considered as “government” because if they were, then litigation would be governed by the [Government Proceedings Act](#) (CAP 40) and I am more prepared to hold that they are not strictly “Government”, unless the context otherwise prescribes, but rather, that they are independent agents of Government, formed by government in order to undertake and perform certain functions on behalf of government, which functions cannot adequately or efficiently be performed within the structure of Government Ministries.”



40. I have considered the various cases to indicate that execution may proceed even against Government invested partly owned interrelated as long as the necessary legal steps are undertaken.

### **Disposition**

1. This Court has jurisdiction to enforce Arbitral Consent Award
2. The Court may proceed with Garnishee proceedings as provided by Order 23 CPR 2010
3. However, the contested Decree shall be rectified to read as is in the Arbitral Consent Award; not lumpsum of 34 m paid at once but piecemeal/instalments subject to works done.
4. Further mention 3<sup>rd</sup> February 2025.

**RULING DELIVERED SIGNED DATED IN OPEN COURT ON 17/12/2024 IN MACAHKOS  
HIGH COURT (VIRTUAL/  
PHYISCAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

