



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. 27 OF 2018**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPLICANT**

**VERSUS**

**AHMEDNASSIR MAALIM ABDULLAHI .....RESPONDENT**

**RULING – NO. 2**

1. This ruling disposes two applications by the appellant/application dated 16<sup>th</sup> October, 2020 and 23<sup>rd</sup> October, 2020.
2. In the application dated 16<sup>th</sup> October, 2020, the applicant sought an order to set aside or discharge warrants of attachment of its moveable property issued on 7<sup>th</sup> October, 2020. The motion was supported by the grounds on its face and the affidavit of **Fredrick Oyunga Onyango**, an assistant Director, Corridor, in the applicant. The applicant argued that the respondent, acting through auctioneers, had proclaimed its moveable properties using warrants of attachment irregularly and unlawfully procured contrary to section 68(a) of the Kenya Roads Act.
3. The applicant stated that it is a public body and if the execution was allowed, it would proceed unlawfully and contrary to law. It contended that there was no basis in law to allow execution of the warrant of attachment to proceed.
4. The respondent took out a notice of preliminary objection dated 21<sup>st</sup> October, 2020 and filed on 22<sup>nd</sup> October, 2020. He argued that the motion offended the provisions of section 68 of the Act; that the motion was incompetent, misconceived and bad in law, an abuse of the court process; that it was without merit and did not correctly invoke this court's jurisdiction.
5. The respondent argued that the application was frivolous and a sham; raised no legal points sufficient to warrant intervention and that the applicant was trying to bypass the set principles of law for challenging a decision of the court. He further argued that the court was **functus officio** and lacked jurisdiction to entertain the motion. He contended that the motion did not raise with any degree of clarity, specificity and particularity, any rights infringed or violated by the ruling of the court. He argued that the applicant sought the prayers with ulterior motive.
6. The second motion, dated 23<sup>rd</sup> October, 2020, sought an order to review and vary this court's ruling delivered on 25<sup>th</sup> September, 2020, and substitute it with an order granting stay of execution and allowing the applicant to deposit into court, the decretal sum, pending the hearing and determination of this appeal.
7. The applicant argued that on 25<sup>th</sup> September, 2020, this court dismissed its application for stay of execution, thus allowed the respondent to proceed with execution. He obtained warrants of attachment and proceeded to proclaim against its movable assets. It argued that the action had caused it great hardship since it relied on the assets attached to carry out its functions.
8. According to the applicant, it receives funding from the Exchequer and because the budget for the year 2020/21 was read in June, 2020 prior to the judgment, the decretal amount was not factored in its finances. It argued that the respondent is a mortal being and were circumstances to change, it would not be able to recover public funds.
9. The respondent again filed a notice of preliminary objection dated 10<sup>th</sup> December, 2020. He argued that the application was **res judicata** following this court's ruling of 25<sup>th</sup> September, 2020 and that the court was now **functus officio** and lacked jurisdiction to entertain the present application. He also argued that the application was incompetent bad, in law and was an abuse of the court process.
10. The court directed that the two applications be heard together and parties submitted orally.
11. Mr. Agwala, learned counsel for the applicant, moved the two applications together. With regard to the first application, he argued that under section 68(a) of the Kenya Roads Act, (No, 2 of 2007), no warrants of attachment or execution can issue against the applicant. He submitted that the section provides the mode and execution, in that it is the Director General who is supposed to pay. Counsel argued that if there was to be attachment, leave of court would have to be sought and obtained first which the respondent did not do.

12. He relied on *Ikon Prints Media Co. Ltd v. Kenya National Highways Authority & 2 Others* [2015] eKLR para. 9, 14, 15-16; *Kenya National Highways Authority v Zennith Timber Fabrication Ltd* [2017] eKLR para. 6 and *Republic v Director General, Kenya National Highways Authority exparte Talewa Road Contractors Ltd* [2020] eKLR (Par. 36 – 38) and argued that the applicant was seeking to stop an illegal attachment.

13. Regarding the second application, Mr. Agwala submitted that the application sought the court's discretion to review its ruling of 25<sup>th</sup> September, 2020 and allow the applicant to deposit the decretal sum into court. He submitted that even if the decretal sum was to be paid to the respondent, who is capable of refunding it, he would be holding it in trust for the applicant.

14. Counsel relied on *Fredrick Otieno Outa v Jared Odoyo Okeyo* [2017] eKLR (para. 90 – 92); *Pankras T. Swai v Kenya Breweries Ltd* [2014] eKLR para. 29 and *Michael Mungai v Independent Electoral and Boundaries Commission* [2014] eKLR para. 5. He urged the court to allow the two applications.

15. Mr. Ahmed Nasir Abdullahi, the respondent, opposed the two applications. On the application dated 16<sup>th</sup> October, 2020, he argued that section 68 makes a mandatory direction to the Director General to pay but there was no explanation why he had not paid.

16. According to the respondent, if the applicant's argument was to be allowed, the section would place the applicant above a successful litigant.

17. He argued that in the decision of *Republic v Director General, Kenya National Highways Authority exparte Talewa Road Contractors Ltd* (supra), the court rejected the notion that a party had to apply for leave to attach. In his view, there is no requirement a successful litigant to seek leave of court to attach.

18. The respondent contended that section 68 places an obligation to the Director General to explain why he cannot pay or has not paid. In his view, the Director General having disobeyed the law, cannot rely on the same legal provisions he had disobeyed. He urged the court to dismiss the applications with costs.

19. Regarding the application for review, dated 23<sup>rd</sup> October 2020, he submitted that the court's jurisdiction flows from Order 42 and not the Civil Procedure Act, and therefore, the court cannot entertain the application for review. He urged the court to dismiss both applications.

20. I have considered the twin applications, the responses and submissions by parties. I have also considered the decisions relied on. Since the applications raise different issues, I will deal with them separately. I will start with the application dated 23<sup>rd</sup> October, 2020.

21. In the application dated 23<sup>rd</sup> October 2020, the applicant asked this court to review its ruling delivered on 25<sup>th</sup> September 2020. In that ruling, the applicant had sought stay of execution pending appeal. After considering the arguments by parties, the court dismissed that application. That is the ruling the applicant sought to review.

22. The reasons advanced as far as they can be gleaned from the supporting affidavit, grounds on the face of the motion and submissions by counsel, are that the applicant would prefer to deposit the decretal sum in court pending the hearing and determination of the appeal rather than paying it to the respondent. The applicant also argued that since the 2020/2021 budget was read in June 2020 prior to the judgement the subject of the appeal, the decretal amount was not factored in its finances. The respondent dismissed the applicant's arguments, contending that this court having rendered its decision on the application for stay, it was **functus officio** and could not entertain the application.

23. The applicant invoked various provisions of the law, including the Constitution, Civil Procedure Act and rules made thereunder. It is important to state here, that the jurisdiction of the court for review, is provided for under section 80 of the Civil Procedure Act while the grounds on which such an application may be made are provided for in Order 45 rule 1 of the Civil Procedure Rules.

24. Section 80 provides:

***“Any person who considers himself aggrieved-***

***(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred: or***

***(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

25. Order 45 augments this section and provides for grounds for review. The court may allow an application for review where an applicant shows that there is a mistake or error apparent on the face of the record; discovery of new and important matter that was not in the applicant's knowledge, or any other sufficient reason. The jurisdiction for review involves exercise of the court's jurisdiction which must be exercised judicially.

26. The applicant relied on the decision in *Pankras T. Swai v Kenya Breweries Ltd* (supra) in support of the application. In that decision, the Court of Appeal stated that a party cannot seek review on grounds of law since those are grounds of appeal and not review. The court then stated with regard to review:

***“The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient***

reason.” *The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order...*”

27. In *Benjoh Amalgamated Ltd & another v Kenya Commercial Bank Ltd* [2014] eKLR, the Court of Appeal again stated:

*“[26] The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice.*

*[27] In the High Court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.”*

28. And in *National Bank of Kenya Ltd v Ndungu Njau* [1977] eKLR, the Court of Appeal rendered itself thus:

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”*

29. The decisions are clear that an applicant must base his application for review on the three limbs in Order 45 rule or any other sufficient reason. The applicant did not state which of the limbs it was relying on. That is; it did not show that there was an error or mistake apparent on the face of the record, or discovery of new and important matter, or still, any other sufficient reason.

30. The applicant wanted the court to review its ruling dismissing the application for stay and allow the applicant to deposit the decretal amount into court. The applicant did not show discovery of new and important matter, mistake or error on the face of the record. The court dismissed the applicant’s application for stay because the applicant did not establish that it would suffer substantial loss.

31. In the present application, even as the applicant sought a review and an order to allow it deposit the money into court, it still did admit that the respondent had the ability to refund the decretal sum, a confirmation that it would not suffer substantial loss. It however, raised a peripheral issue that the respondent was a *“mortal being.”* That was not a ground for seeking exercise of the court’s jurisdiction for review. I must add that a court will not decide a case or application according to the wishes of a party but on sound legal principles and dictates of justice.

32. Turning to the application dated 16<sup>th</sup> October 2020, the applicant argued that section 68(a) of the Act makes execution against its assets illegal. According to the applicant, execution could only issue with leave of court. The applicant further argued that the section provides for a mode of execution in that it is the Director General who is required to pay.

33. The respondent on his part argued that there was no requirement for leave before execution could issue. He was of the view that the Director General has a statutory obligation to pay and having not done so, he could not be a beneficiary of the same law he had disobeyed.

34. I have considered respective parties’ argument on this application. There is no dispute that the respondent has a decree in his favour against the applicant. There is also no dispute that the applicant’s Director General is aware of that decree. The respondent obtained warrants of attachment and instructed an auctioneer who proclaimed against the applicant’s moveable assets prompting this application. The question that calls for this court’s resolution, is whether the attachment was illegal.

35. The applicant is a corporate entity established under statute with a common seal and perpetual succession. It can sue and be sued in its corporate name.

36. Section 68 of the Act provides:

*“Notwithstanding anything to the contrary in any law—*

*(a) where any judgment or order has been obtained against an Authority, no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property, but the Director-General shall, without delay, cause to be paid out of the revenue of the Authority such amounts as may, by the judgment or order, be awarded against the Authority;*

*(b) no property of an Authority shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Director-General.”* (Emphasise)

37. The applicant relied on section 68(a) to argue that the section makes attachment of its assets illegal. In its view, one can only attach with leave of the court. it relied on several decisions to buttress its argument.

38. My reading of 68(a) is that the section only places a restriction against attachment as the headnote clearly suggests. It does not make attachment illegal parse. The import of the section is that instead of attaching its assets, the applicant's Director General is commanded by the section to pay the decretal amount promptly from amounts in its revenue. This view is informed by the fact that the section uses the word "**but**" and goes on to state that "***the Director-General shall, without delay, cause to be paid out of the revenue of the Authority the amounts awarded against the Authority.***"

39. The section states in mandatory terms that payment must be made without undue delay. In other words, where payment is to be made without delay, ordinarily there would be no reason to attach against the applicant. The section does not therefore contemplate a successful litigant moving the process towards attachment. That is why the law demand in mandatory terms, that the Direct General should promptly pay.

40. The applicant relied on several decisions to argue that they supported its position that it is illegal to attach its assets in execution of decrees issued against it. In ***Ikon Prints Media Co. Ltd v. Kenya National Highways Authority & 2 Others*** (supra), the court stated:

***"[14] Section 68 of the Kenya Roads Act which has been reproduced above in paragraph [9] seeks to prohibit any execution proceedings against the 1<sup>st</sup> Respondent. It is a rare statutory provision. Ordinarily it is never and should never be the intention of any legislation to place parties in a position where the courts judgment is never realized. Courts, as they say, do not and should not act in vain. Consequently, in reviewing or interpreting such statutory provisions, the construction must be liberal and lean towards the Constitutional principle that every person including judicial persons are equal before the eyes of the law and must be subjected to the rule of law.***

***[15] It is clear to me that Section 68 never intended to have a situation where the Authority, in this case the 1<sup>st</sup> Respondent runs away from any legal liability. The section did not state so either. Instead the section expressly made provision for the Director General to ensure that 'without delay' judgments or orders awarded against the authority are settled. The Director General has a statutory compulsion to ensure that payment is made without undue delay.***

41. The court then stated:

***[17] Payment towards satisfaction of any decretal amount is to be made out of the revenue of the Authority. It would however be sacrilege to hold that the payment is to be made only when the Director General deems it fit. The statute itself dictates that it be made without delay.*** (Emphasis)

42. In ***Kenya National Highways Authority v Zennith Timber Fabrication Ltd*** [2017] eKLR, the court referred to the decision in ***Republic v Director General, Kenya National Highways Authority exparte Talewa Road Contractors Ltd*** (supra), and stated:

***"[36]. It is evident that section 68 imposes a statutory duty upon the Respondent to pay amounts awarded in a judgment or order made against KeNHA without delay....inordinary circumstances the performance of the Respondent's duty in section 68 as regards the payment of the decretal sums awarded in the judgment would be purely ministerial, as he has no discretion on the amounts awarded.***

43. The court then went to refer to the decision of The House of Lords in ***Julius v Lord Bishop of Oxford*** (188) 5 App.Cas 214, for the holding that:

***"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."***

44. I agree with the decisions that the law places a mandatory obligation on the applicant, through its Director General, to promptly pay any decretal amount awarded against it from its revenue. I add that the reading of section 68 is clear that the Director General does not have to be compelled by a court to discharge his statutory obligation. He is required by law to pay in order to save the applicant's assets. The section appreciates that the judgment or award made against the applicant, is the outcome of a lawful process, and therefore, satisfying the decree is not an option. The Director General has no discretion to exercise, whether or not to pay. Failure to pay is a violation of the law.

45. The respondent argued that the applicant's Director General having disobeyed the law should not benefit from the same law he has disobeyed. He also argued that if the applicant's argument that section 68 illegitimizes execution was to be allowed, the section would place the applicant above a successful litigant.

46. I agree with the holding by ***Onguto.J***, in ***Ikon Prints Media Co. Ltd v Kenya National Highways Authority & 2 Others*** (supra), that section 68 must be given an interpretation that is in accord with the constitutional principle that all persons are equal before the law and must be subjected to the rule of law.

47. As I have already stated, the section only restricts attachment, but does not make it illegal. The applicant's argument that the section must be read as making execution illegal would lead to an absurdity. A lawful process under one statute cannot be illegal under another. In fact, the section gives the applicant time to pay but not to make the process illegitimate.

48. Fundamentally, the law directs the Director General to pay without delay but he has not. While the same law restricts a successful litigant from execution on the premise that there will be prompt payment, the person directed to pay does not pay. That is what prompted the respondent to argue, and correctly so in my view, that such a provision places one of the parties at an advantage over the other despite the clear constitutional stand that every person is equal before the law and has the right to equal protection and equal benefit of the law.

49. Looking at section 68 *vis avis* the Constitution, does it afford all persons equal protection and benefit? Why would a successful litigant fail to enjoy the fruits of his litigation yet the person who is commanded to pay fails discharge his statutory obligations to the detriment of the successful litigant? Does the section violate the right of access to justice and the rule of law?

50. The respondent urged this court to find that the section violates the principle of equality and dismiss the applicant. This court will resist the temptation to answer the respondent's request or any of the questions above. This is because what is before this court is an application which cannot be the proper basis for returning a verdict on those questions.

51. In the end, having considered the twin applications, submissions and the law, it is this court's finding that section 68 of Kenya Roads Act, restricts attachment of the applicant's assets, and therefore, no attachment should have taken place. However, the section mandates the Director General to pay without delay and he knows it.

52. Consequently, the application dated 16<sup>th</sup> October 2020 is partly allowed and the attachment of the applicant's assets lifted. On the other hand, the application dated 23<sup>rd</sup> October 2020 is declined and dismissed. However, the applicant shall pay costs for the two applications to the respondent.

**DATED, SIGNED AND DELIVERED AT KAJIADO THIS 5TH DAY OF MARCH, 2021.**

**E.C. MWITA**

**JUDGE**