



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 280 OF 2011

ANNIVERSARY PRESS (K) LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION.....DEFENDANT/RESPONDENT

J U D G M E N T

1. On 24th November 2017, judgment was delivered in this matter in favour of the plaintiff.
2. On 15th August 2019 Notice to Show Cause why execution should not issue for the decretal sum of Kshs. 9,450,407/= and costs, fees, interest of Kshs. 32,139,235.
3. The Notice to Show Cause was served on the National Water Conservation and Pipeline Corporation (NWPC) but was received with the stamp of National Water Harvesting and Storage Authority (NWHSA).
4. The response was the Notice of Preliminary Objection dated 27th September 2019 to the effect that;
 1. *The defendant's identity has since changed to M/s National Water Harvesting and Storage Authority; hence National Water Conservation & Pipeline Corporation is non-existent entity against whom the managing director of M/S National Water Harvesting & Storage Authority cannot be summoned in execution of the decree herein. The plaintiff cannot legally seek any claims from M/S National Water Harvesting & Storage Authority hence the Notice to Show Cause dated 15/8/2019 is a non-starter illegal, irregular, un-procedural and void ab initio.*
 2. *The plaintiff has illegally and un-procedurally commenced execution proceedings against the defendant contrary to the provisions of Section 21(4) of the Government Proceedings Act Cap 40, Laws of Kenya.*
 3. *The defendant is a state corporation and thereby an instrumentality or agency of Government to which the provisions of the Government Proceedings Act, Cap 40, Laws of Kenya. As such execution against it is governed by the provisions of Section 21(4) of the Government Proceedings Act, Cap 40, Laws of Kenya.*
 4. *The defendant as a Government Agency exclusively derives its funding from the government and/or draws all its funds from the consolidated fund and is thereby bound by the Public Finance Management act no. 18 of 2012.*
5. Parties agreed to proceed by way of written submissions and highlights. However, Covid 19 happened and the date was pushed from 13th May 2020 to 27th May 2020 via zoom.
6. The grounds for the preliminary objection are;
 1. *The Respondent's identity has since changed to M/s National Water Harvesting & Storage Authority, hence National Water Conservation & Pipeline Corporation is a non-existent entity against whom the Chief Executive Officer of M/s National Water Harvesting & Storage Authority cannot be summoned in execution of the decree herein. The Claimant cannot legally seek any claims from M/s National Water Harvesting & Storage Authority hence the Notice to show cause dated 15/8/2019 is a non-starter illegal, irregular, unprocedural and void ab initio;*

2. Without proper substitution of parties, M/s National Water Harvesting & Storage Authority and its Chief Executive Officer are non-suited since M/s National Water Harvesting & Storage Authority against whom the execution herein is sought was not in existence at the time the judgment herein was passed.

3. The claimant has illegally and un-procedurally commenced execution proceedings against the Respondent contrary to the provisions of Section 21(4) of the Government Proceedings Act Cap 40, Laws of Kenya.

4. The Respondent is a state corporation and thereby an instrumentality or agency of Government to which the provisions of the Government Proceedings Act, Cap 40, Laws of Kenya. As such execution against it is governed by the provisions of Section 21(4) of the Government Proceedings Act, Cap 40, Laws of Kenya.

5. The respondent as a Government Agency exclusively derives its funding from the government and/or draws all its funds from the consolidated fund and is thereby bound by the Public Finance Management act no. 18 of 2012.”

7. Counsel for the respondent relied on the submissions and authorities already filed viz;

- Phimark Systems Co. Limited vs Andermore Enterprises [2018] eKLR
- David Umara Baliola vs Tanasco Co. Limited [2018] eKLR
- Section 21(4) of the Government Proceedings, Act Cap 40 Laws of Kenya.
- Association of Retirement Benefit Schemes vs AG & 3 Others [2007] eKLR
- National Union of Water and Sewerage Employees vs Mathira Water and Sanitation Company Limited & Another.

It is the Respondents submissions that the identity of the respondent changed, and the respondent in the suit as filed had ceased to exist, and the only way the applicant could proceed with execution would be first by substituting the respondent with the agency that replaced it. Secondly that the provisions of **Section 21(4)** Of the government proceedings, Act Cap 40 Laws of Kenya prohibit the said execution proceedings which states;

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

11. Relying on the **Retirement Benefits Case**, it was argued that the respondent is a public body or state organ and therefor was covered by the provisions of cap 40.

12. In response to these submissions it was argued for the applicant that change of name did not change the status of the respondent and did not have any bearing on execution. The applicant relied on;

- John Kahiato Bari & 3 Others vs New KCC Limited & Another [2017] eKLR
- Kenya Scientific Research International Technical & Allied Institutions Workers Union vs Flame Tree Brands Limited & 2 Others [2013] eKLR.
- Agility Logistics Limited & 2 Others vs Agility Logistics K Limited [2012] eKLR
- Tom Ojienda & Associates vs National Land Commission [2019] eKLR

13. In totality, that change of name of a government parastatal did not alter its legal obligations.

14. I have carefully considered the submissions by counsel. The issue is whether the preliminary objection has merit, based on whether;

- 1) Change of the defendant/respondent’s name amounted to a change in its legal personality to warrant substitution.
- 2) Whether **Section 21(4) of the Cap 40** is applicable to the defendant/respondent.

15. It is not in dispute that the defendant/respondent’s name changed midstream the proceedings and that when judgment was delivered, it was against NWPC, while now when execution proceedings have commenced it is NWSA.

16. In highlighting submissions counsel for the application Mr. Akang’o brought to the court’s attention the provisions of **Section 149 of the Water Act**, it states;

“ (1) All property, assets, rights, liabilities, obligations, agreements and other arrangements not linked to water services provision as provided for in section 148, existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the National Water Conservation and Pipeline Corporation established by the National Water Conservation and Pipeline Corporation Order, 1988 shall, upon the commencement of this Act be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Water Harvesting and Storage Authority to the same extent as they were enforceable by or against the National Water Conservation and Pipeline Corporation before the commencement of this Act.

(2) Any legal proceedings pending in any court, the Water Appeal Board or other tribunal by or against the National Water Conservation and Pipeline Corporation in respect of any matter, shall continue by or against the National Water Harvesting and Storage Authority.

(3) A person who immediately before the commencement of this Act was an employee of the National Water Conservation and Pipeline Corporation shall, on the commencement of this Act, be deemed to be an employee of the National Water Harvesting and Storage Authority on terms to be determined by the Salaries and Remuneration Commission.” (emphasis is mine)

17. He argued that based on the above provisions the change of name did not affect any rights or obligations or render defective any legal proceedings that might have been continued commenced against the former name.

18. On whether the execution proceedings were contrary to **Section 21(4) Cap 40 laws of Kenya**, it was argued that that provisions of the law applied to government, government departments and government officers but not to independent or semi- independent state corporations. On this the Applicant relied on **Section 2 of Cap 466 State Corporations Act** which defines a state corporation;

“state corporation” means—

(a) a state corporation established under section 3;

(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not—

(i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury (Incorporation) Act (Cap. 101);

(ii) a local authority established under the Local Government Act (Cap. 265);

(iii) a co-operative society established under the Co-operative Societies Act (Cap. 490);

(iv) a building society established in accordance with the Building Societies Act (Cap. 489);

(v) a company incorporated under the Companies Act (Cap. 486) which is not wholly owned or controlled by the Government or by a state corporation;

(vi) the Central Bank of Kenya established under the Central Bank of Kenya Act (Cap. 491);

(vii) deleted by to Act No. 2 of 2002, Sch

(c) a bank or a financial institution licensed under the Banking Act (Cap. 488) or other company incorporated under the Companies Act (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;

(d) a subsidiary of a state corporation;

19. It was also argued hat there is a distinction between state corporations and government departments, as was stated by the court in **Greenstar Systems Limited vs KICC & 2 Others [2018] eKLR**.

20. **Section 149 (2)** brings to a close any doubt about the effect of the change in name of the respondent, and the status of the proceedings herein. It is as if no change of name happened because everything that existed within the old name was carried over in the new name. There is a clear transfer of any pending legal proceedings against the respondent as it was named when sued, and the respondent as it is named at this point of time when execution proceedings have issued against it. There would there for be no necessity of substitution.

21. To the next issue. Do the provisions of **Section 21(4) of Cap 40** apply? The NWHSA is established by **Section 30 of the Water Act**, which states that it

“.... shall be a body corporate with perpetual succession and a common seal capable of suing and being sued in its own and doing all things that a corporation may lawfully do.”

22. **Section 21(1)** of **Cap 40** speaks about the Government, a Government department, or a Government officer, and **Section 21(2)** about the involvement of the Attorney General, **Section 21(3)** the involvement of the accounting officer of the concerned Government Department, **Section 21(5)** about County Governments. There is no mention of parastatals.

18. Clearly therefore the respondent as a state corporation does not fall within the prohibitions of **Section 21(4)**.

19. Mr. Kamwenda for the respondent qualified his submissions stating that the respondent was not saying it was exempted from execution, but that the manner adopted by the applicant is what the respondent was objecting to. He submitted that the applicant needed to apply the procedure applicable to Government. The procedure applicable to Government is set out under **Section 21 of the Cap 40 Laws of Kenya**,

the **Government Proceedings Act**. From the foregoing it is clear that the said proceedings do not apply to a State Corporation.

20. To that end the **Retirements Benefits Scheme case** is distinguishable, as the issue there was the definition of a public entity which clearly takes in parastatals, it had nothing to do with the **Government Proceedings Act**. In any event the applicable legislation here is the **Water Act** which transferred the assets and liabilities of NWCPC to NWHSA. Similarly, **David Umara Bahola** case is distinguishable and so is **Phimark Systems Company** Case, unlike in these two (2) cases, in this case the legal proceedings were transferred by the statute from the respondent in the previous name to the respondent in the current name in the upshot. I find that the respondent is not the Government or Government Department, Government Officer and **Section 21(4) of Cap 40** is not applicable.

21. The respondent intended this liability through statute as a state corporation as defined by **Section 30 of the Water Act**, and is not exempted by **Section 21 (4)**. The change of name did not take away its obligations.

22. In conclusion I adopt the words of the judge in **Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR** the Court held and cited with approval an earlier decision to this question thus:

“Finally on this point I will refer to the decision of Hon. Justice J. Onguto (now deceased) 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 may 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 agent of Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body.” The above authority which is of persuasive value upholds the view that a state corporation or parastatal is not automatically subject to the Government Proceedings Act.... It is too late in the day for the Applicant to 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...”

23. The objection is without merit and is dismissed with costs.

Dated and Signed and Delivered at Nakuru this 9th Day of July 2020.

Mumbua T. Matheka,

Judge.

In the presence of: VIA ZOOM

Edna Court Assistant

B. O. Akang’o advocates for plaintiff present

N. M. Kamwenda & Co. Advocates for the defendant N/A