



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL SUIT NO. 63 OF 2017

KENNEDY WAINAINA NGENGA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....GARNISHEE

RULING

PRELIMINARY OBJECTIONS

Before this court are two applications for determination:

The Garnishee's **Preliminary Objection** dated 13th June 2018 and the Plaintiff's **Notice of Preliminary Objection** dated 26th June 2018.

The Garnishee herein, **Co-operative Bank of Kenya Limited**, raised a Preliminary Objection dated 13th June 2018 against the Application dated 19th April 2018 on the following grounds:

- 1. The Application for execution of the decree is contrary to provisions of Order 29 Rule 2 of the Civil Procedure Rules which prohibits the issuance of execution orders against the government except in accordance with the provisions of the Government Proceedings Act;**
- 2. The institution of garnishee proceedings against the Defendant, a government within the provision of Article 6 (2) of the Constitution, offends the provisions of Order 29 Rule 4 of the Civil Procedure Rules which expressly prohibits the grant of garnishee orders against the government;**
- 3. Contrary to the provisions of Section 21 of the Government Proceedings Act, the Plaintiff instituted execution proceedings against the Defendant;**
- 4. The Plaintiff has sought garnishee orders against the Defendant's Revenue Accounts contrary to Article 207 (2) & 3 of the Constitution which provide the manner in which revenue accounts of the County Government operate; and**
- 5. Section 109 of the Public Finance Management Act prohibits the operation of the county revenue accounts except in accordance with the Constitution and an approval from the Controller of Budget.**

The Garnishee sought orders that the Application dated 19th April 2018 be struck out with costs.

The Plaintiff herein, **Kennedy Wainaina Ngenga**, raised a Preliminary Objection dated 26th June 2018 against the Garnishee's Notice of Preliminary Objection on the grounds that:

- 1. The Garnishee has no *locus standi* to comment on the legal verity of the execution of the Decree Order Nisi as such would be a collateral attack on the Order of the High Court which has not been set aside;**
- 2. Under Order 23 Rule 4 of the Civil Procedure Rules, the locus of a garnishee is limited to confirming whether the funds attached are the judgment debtor's or not and the garnishee confirmed this by a letter dated 8th May 2018; and**

3. The Garnishee's Preliminary Objection and Replying Affidavit are causing unnecessary delays which are leading to growth of the interest on the decree, sums of which are payable from public finance.

GARNISHEE'S SUBMISSIONS

Arguments in support of the Garnishee's Preliminary Objection dated 12th June 2018

The Garnishee filed their Submissions dated 3rd August 2018 on 7th August 2018. The Garnishee submitted that these garnishee proceedings involve a unique judgment debtor who is one of the 47 county governments. They relied on **section 21(1) and 21 (4) of the Government Proceedings Act as read with Order 29 Rule 2 (2) (b) of the Civil Procedure Rules** which prohibit the attachment of debts as against the government.

The Garnishee submitted that in light and on the face value of the previously mentioned provisions of the law, the Plaintiff's Notice of Motion dated 19th April 2018 is in breach of those statutory provisions. The Garnishee relied on **Article 6 (2) of the Constitution**, which provides that the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations based on consultation and cooperation. This is to say that the Defendant is a government and as such no order can be made against it for execution of decrees and orders. The Garnishee also brought **Section 21 (5) of the Government Proceedings Act** to the court's attention which states:

"This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party."

It was thus in the foregoing legal provisions that the Garnishee filed its Preliminary Objection dated 12th June 2018. The Garnishee relied on the case of ***R v County Secretary, Nairobi City County & another Ex parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR***, which held that:

"This Court must therefore protect devolution and promote its principles. It must not condone actions which are likely to promote onslaught on the County Government and grind its operations to a halt and paralyze it from realising and fulfilling its Constitutional mandate. It is therefore my view and I hold that the extent of the immunity granted to the National Government under section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya must necessarily extend to the County Governments."

They also placed reliance on the case of ***Kilimanjaro Safari Club Limited v Governor- Kajiado County (in place of County of Ol Kejuado) [2014]eKLR*** where the Court dismissed a garnishee application against a county government:

"The draftsman in coming up with the Government Proceedings Act had in mind the interests of the Government as a whole. The County Government is not an exception. I think I have said enough to show that the County Government is 'Government' as per the Government Proceedings Act. Therefore, the provisions of the said Act apply in proceedings brought against County Governments. Having made the foregoing observations, it therefore follows that the Garnishee proceedings as instituted by the Applicant are not sustainable."

Based on the constitutional and statutory provisions together with judicial precedent laid out by the Garnishee, it was thus their submission that the Application dated 19th April 2018 ought to be struck out for lack of conformity with the **Government Proceedings Act and Order 29 of the Civil Procedure Rules**.

Arguments opposing the Plaintiff's Preliminary Objection dated 26th June 2018

Through its Notice of Preliminary Objection dated 26th June 2018, the Plaintiff challenged the involvement of the Garnishee in these proceedings, he contended that the Garnishee lacks locus to comment on the legality of the execution of the Decree necessitating these proceedings.

In response to this, the Garnishee submitted that **Order 23 Rule 1 (1) of the Civil Procedure Rules** entitles a garnishee to appear in court upon being served and offer an explanation why the decree holder should not be paid from the debts held on behalf of a judgment debtor. It provides:

"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."

PLAINTIFF'S SUBMISSIONS

Arguments opposing Garnishee's Preliminary Objection dated 12th June 2018

It was the Plaintiff's submissions that the deployment of "MAY" in **Order 29 Rule 2 (2) (b) CPR** begets to the court's discretion to determine whether an acceptable set of circumstances exists to warrant issuance of orders of attachment under **Order 22 of the Civil Procedure Rules**. It was thus their submission that an order can be issued against the Government as the law does not read "SHALL".

Based on this, the Plaintiff submitted that in circumstances which warrant exercise of discretion to issue orders of execution against the government, is the presence of a consent between the government and decree holder.

To support this, the Plaintiff relied on the case of ***In Island Uniforms Limited vs Municipal Council of Mombasa [2013] eKLR*** where the Plaintiff/ Decree Holder and the Defendant/ Judgment Debtor by consent agreed for an amount to be paid to the Plaintiff in installments. The Defendant failed to honor the installments thus causing the Plaintiff to file an Application for orders of garnishee against the Garnishees. The Court issued orders of Garnishee Absolute.

The Plaintiff also relied on the case of ***Otieno Ragot & company Advocates vs. City Council of Nairobi [2015] eKLR***; where the court held:

“In the premises, I allow the application. The Garnishee order nisi is hereby made absolute whereby the Garnishee is to pay forthwith to the Applicants Advocates, a sum of Ksh.50,987,985/= to satisfy the Decree herein from monies attached and held in a/c Nos.[particulars withheld], [particulars withheld] and [particulars withheld], respectively. The Garnishee will also pay the costs of the application.”

It was thus the Plaintiff’s submissions that if the court shall interpret **Order 29 (2) of the Civil Procedure Rules**, to defeat execution of a Decree of the High Court, it shall be in violation of Article 48 of the Constitution which provides for access to justice. Accordingly, the Plaintiff urged the Court to dismiss the Preliminary Objection dated 12th June 2018 and grant their Application dated 19th April 2018 with costs.

Arguments in support of the Plaintiff’s Preliminary Objection dated 26th June 2018

In support of their Preliminary Objection dated 26th June 2018, the Plaintiffs submitted that the *locus* to oppose an application for execution by way of Garnishee Orders is exclusively to a Defendant. A Garnishee’s interests are limited to the debt in issue as contemplated in **Order 23 Rule 4 CPR** which provides that:

“If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.”

The Plaintiff further submitted that once the Garnishee confirmed that the funds garnished are the Defendant’s, the Garnishee ceased to have any right of participation in the garnishee proceedings save to pay the sums so garnisheed. It was thus beyond the locus of **Order 23 (1) and (4) of the Civil Procedure Rules** for the Garnishee to go beyond and question the verity of the garnishee proceedings.

It was thus the Plaintiff’s submissions that for each month that the Decree remains unpaid, the Decree earns an interest which is payable from public funds and **Article 201 (d) of the Constitution** provides that courts ought to make orders that facilitate the responsible use of public finance. The Plaintiff therefore urged this court to grant the Application dated 19th April 2018.

DEFENDANT’S SUBMISSIONS

The Defendant filed their Submissions dated 25th September 2018 on the same day. It was their submission that the Garnishee’s Preliminary Objection dated 12th June 2018 ought to be upheld and the Defendant’s Notice of Motion dated 19th May 2018 be allowed with costs to the Defendant.

It was the defendant’s case that both the Plaintiff’s Preliminary Objection dated 26th June 2018 and the Plaintiff’s Notice of Motion dated 19th April 2018 ought to be dismissed with costs to the Defendant.

The Defendant submitted that they support the Garnishee’s submissions on their Preliminary Objection dated 12th June 2018 as they are elaborate and clear, warranting no further exposition. They therefore, only submitted on the Plaintiff’s Preliminary Objection.

Arguments opposing the Plaintiff’s Preliminary Objection dated 26th June 2018

It was their submission that the Plaintiff’s Preliminary Objection to the Garnishee’s Preliminary Objection is unheard of and totally out of procedure and no precedent was cited by the Plaintiff to justify this action.

They further submitted that no garnishee order can lawfully be issued against the Defendant by dint of **Order 29 Rule 2 (2) of the Civil Procedure Rules** as the Defendant is one of the constitutionally recognized governments of Kenya as premised in **Article 6 (2) of the Constitution**. Hence, the Nairobi City County Government is insulated against execution processes pursuant to **Order 23 of the Civil Procedure Rules**.

DETERMINATION

The issues to be determined are:

1. Is County of Nairobi part and parcel of Government?

2. Legally, can execution orders in form of garnishee absolute against the County of Nairobi to be executed by the Garnishee Kenya Cooperative Bank by paying the Plaintiff the Decretal amount due and owing from the County of Nairobi?

This Court adopts submissions by Garnishee in reliance of **Article 6 (2) of the Constitution** by virtue of **Article 2(1) & (2) of the Constitution**. The import is that the Constitution is supreme law of the land and Article 6 of the Constitution dictates that Government consists of National and County Governments that are distinct and interdependent. Thus County of Nairobi, defendant herein is part of Government and is subject to Government Proceedings Act.

The laid-out procedure in law in executing decrees against the Government is provided under **section 21(1) of the Government:**

“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.”

Section 21 (4) of Government Proceedings Act provides:

“Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.”

Order 29 Rule 4 (1) of the Civil Procedure Rules provides:

“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.”

Order 29 Rule 2 (2) of the Civil Procedure Rules 2010 provides:

“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)*

The above cited legal provisions confirm that the process of execution with regard to Government institutions is prescribed by Government Proceedings Act. **The Civil Procedure Act & Rules 2010** also prescribes the execution process and exempts Government from the said process. This means although execution is a right enforced by a decree holder against judgment debtor execution shall be carried down where it involves Government it shall be within the purview of **Government Proceedings Act**. Therefore, the Garnishee proceedings herein against the Judgment debtor; County of Nairobi are improper in law to the extent of the recovery procedure. However, the judgment debt remains unchallenged and valid order and decree of the Court.

To the Plaintiff's Preliminary objection's main thrust is that the Garnishee had no *locus standi* to oppose the execution but the Defendant's role Garnishee orders. Secondly, the Garnishee's role is only is to confirm sufficient funds held for the client and that is all. Thirdly, that the Garnishee's objection is mainly to delay the realization of a valid decree of the Court in favour of the Plaintiff. These questions have been dealt with before and this Court will not reinvent the wheel but rely on the position detailed in the case of **M & E Consulting Engineering Limited v Lake Basin Development Authority [2008] eKLR** where a similar Preliminary Objection was raised and the court held:

“My view of this issue is as follows. Under Order 22, rule 1 of the Rules, a garnishee is entitled to show cause why he should not pay to the decree-holder the debt due from him to the judgment-debtor. In other words, the garnishee has the right to oppose a garnishee application. In the present case the Garnishee indeed opposed the garnishee application by raising a preliminary objection to the same. I therefore hold that the Garnishee was entitled to challenge the consent order of 13th September, 2006 that purported to compromise the garnishee application, the said consent having been entered without reference to or the consent of the Garnishee. As there is no specific provision in the Rules for such application, the Garnishee has properly approached the court under section 3A of the Act.

Even if there was no right provided in Order 22 of the Rules for a garnishee to resist a garnishee application, I would still have

allowed the Garnishee herein to challenge the consent order of 13th September, 2006 for the following reasons. The Judgment-Debtor is a public body; the decree against it had apparently been compromised and settled as compromised, yet it was now required to pay a very huge additional sum of money upon the same decree; and the Garnishee was in a fiduciary capacity with the Judgment-Debtor and the funds it held to its credit appeared to be public funds designated for another specific purpose. It was therefore proper for the Garnishee's suspicions to be aroused and for it to approach the court."

Therefore, the Garnishee is properly before Court and raised Preliminary objection only with regard to Garnishee process. By virtue of law it is not the proper procedure against County of Nairobi, the Defendant/Judgment debtor herein as it is a Government institution and is subject to the procedure laid down under the Government Proceedings Act. On this issue; the Garnishee's Preliminary Objection is upheld.

On the other hand, the Plaintiff retains a valid decree against the Defendant/Judgment debtor. This is confirmed by the Judgment **ELC 110 of 2011**. The correspondence between legal Counsel for Plaintiff and Defendant, Minutes of Meetings held between the parties/representatives and documents of proof of ownership and valuation have been exchanged. To the extent of the process of realization of decree through Garnishee proceedings, this Court finds that with regard to Government institutions it is not the proper and legal procedure in law. That does not deprive the Plaintiff's right of enforcement of decree within the confines of law. The Plaintiff's Preliminary Objection is not upheld.

The Court notes with concern that the process of filing Preliminary Objection and counter Preliminary Objections is unknown in law. Once a Preliminary Objection is filed the other party(ties) reply points of law and it is heard and determined to its logical conclusion. Then any other party with a Preliminary question of law may then file that Preliminary Objection. Be that as it may each application is/was determined on merit.

DISPOSITION

- 1. The Preliminary Objection by Garnishee filed on 13th June 2018 is upheld.**
- 2. The Preliminary Objection by Plaintiff filed on 26th June 2016 is dismissed with costs.**
- 3. The Plaintiff may pursue execution of the decree against the Defendant /Judgment Debtor in the laid down, proper and legal process.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 7TH JUNE 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. KINYANJUI FOR RESPONDENT

MR. KINYANJUI H/B MR. WANGA FOR INTERESTED PARTY GARNISHEE/CO-OPERATIVE BANK

MR. BWIRE FOR THE PLAINTIFF