



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 29'B' OF 2016**

**IN THE MATTER OF THE ADVOCATES ACT.**

**CHAPTER 16 OF THE LAWS OF KENYA**

**-BETWEEN-**

**PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT**

**AND**

**NATIONAL LAND COMMISSION.....RESPONDENT**

**AND**

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

**RULING**

[1] By its Notice of Motion dated **22 May 2019**, the law firm of **Prof. Tom Ojienda & Associates** moved the Court pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 23** of the **Civil Procedure Rules, 2010** for orders that the Court be pleased to make a Garnishee Order *Nisi* against the **National Bank of Kenya, Hill Plaza Branch** (hereinafter "**the Garnishee**") in respect of **Bank Account No. 0100103298XXXX**, ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of **National Land Commission** be attached to answer the Decree for the sum of **Kshs. 220,735,840.88**, being the amount in respect of which judgment was entered in favour of the Applicants herein.

[2] Pursuant to **Order 23 Rule 1** of the **Civil Procedure Rules**, directions were given, *inter alia*, for the application to be served on the Respondent and the Garnishee for purposes of the oral examination of the Judgment Debtor in connection with the alleged debt. Both the Garnishee and the Judgment Debtor were duly served with the application, and whereas the Garnishee attended Court on **28 May 2019** to confirm the existence of the aforementioned account and that it had sufficient funds to satisfy the Applicant's Decree, there was no appearance by or for the Judgment Debtor/Respondent. Accordingly, a Garnishee Order *Nisi* was issued as prayed and the matter set for further directions on **4 June 2019**.

[3] Thereafter, the Judgment Debtor/Respondent filed the application dated **29 May 2019**, under a Certificate of Urgency, for orders that:

[a] The application be certified as extremely urgent;

[b] The Court be pleased to order interim stay of the orders issued on **28 May 2019** in relation to the Garnishee Proceedings and/or other consequential orders pending the hearing of the application *inter partes*;

[c] The Court be pleased to set aside and/or vary the Order *Nisi* issued on **28 May 2019** and order the Garnishee Proceedings to be heard *de novo* with the participation of the Judgment Debtor/Applicant;

[d] The Court be pleased to order stay of execution of the Decree and Judgment arising from the taxed costs pending hearing and determination of the pending appeal;

[e] The Court be pleased to grant any other order that it may deem fit in the public interest;

[f] The costs of the application be in the cause.

[4] The application was premised on the affidavits sworn by **Callen Masaka, Brian Ikol** and **Dennis Wabwire**. The sum total of the averments in the three affidavits was that the Decree Holder's application dated **22 May 2019** was only served on **27 May 2019**, a day to the hearing, when Counsel who was handling the matter was away on her annual leave; that since this was indicated on the face of the copy of the application, it was expected that the Decree Holder's Counsel would bring the matter to the attention of the Court as a matter of professional courtesy; that nevertheless, Counsel instructed **Mr. Wabwire**, State Counsel, to hold her brief and seek for adjournment on **28 May 2019** when the Decree-Holder's application came up for mention, to afford the Judgment Debtor's Counsel an opportunity to respond to the application; that unfortunately, **Mr. Wabwire** was not in court by the time the matter was called. Thus the Court proceeded to hear the matter in the absence of and without the input of the Judgment Debtor; whereupon the Garnishee Order *Nisi* was granted.

[5] It was further the contention of the Judgment Debtor that the account in question is a special compensation account as contemplated under **Section 115(2)** of the **Land Act, 2012**, used only for purposes of receiving and making payments to persons whose parcels of land have been compulsorily acquired by the Government; and that the monies in the said account are deposited by Government Agencies or Departments for purposes of conveying payments to project affected persons and not for any other purpose. That the said monies therefore are neither for the use, benefit or disposal by the Judgment Debtor, the **National Land Commission**, but are monies meant for compensation arising out of compulsory acquisition of land required for public purposes. Consequently, it was averred that the subsistence of the orders in question have not only stopped payments of compensation to project affected persons but have also halted all ongoing Government projects including the construction of Phase 2A of the Standard Gauge Railway, the LAPSET Corridor, the Thwake Multi-purpose Dam water project, the Eldoret Bypass and other critical and important national infrastructural projects.

[6] The Judgment Debtor's application was urged on **4 June 2019** by **Mr. Wahome**. He highlighted the fact that service was received on behalf of the Judgment Debtor under protest on account of shortness of notice. He also highlighted the averments of both **Ms. Masaka** and **Mr. Wabwire** that arrangements had been made for **Mr. Wabwire** to hold brief for **Ms. Masaka** with a view of seeking the Court's indulgence for more time, to enable the Judgment Debtor file a response. Counsel raised the points that the matter had been listed as a mention and yet substantive orders were given; that the account in question is a special compensation account and that the effect of the Garnishee Order *Nisi* has been to stall critical Government projects in respect of which the funds were maintained. He urged the Court to allow the Judgment Debtor's application dated **29 May 2019** and grant the orders sought, including the setting aside of the Garnishee Order *Nisi*.

[7] **Mr. Cheruiyot**, Learned Counsel for the Garnishee reiterated the Garnishee's position as deposed to in the affidavit of **Timothy Kosgei**, sworn on **28 May 2019**, namely, that the subject account exists and that there are funds therein to satisfy the Decree. He added that the Garnishee shall abide by whatever orders the Court may issue in the matter.

[8] On behalf of the Decree Holder, it was the submission of **Prof. Ojienda** that the Judgment Debtor and its Advocate, **Ms. Callen Masaka**, were duly served as directed by the Court; and therefore the delay by **Mr. Wabwire** in attending court is not sufficient reason to vary the otherwise valid court order made on **28 May 2019**. **Prof. Ojienda** further submitted that although an appeal had been alluded to, the fact of the matter is that two previous applications for stay of execution have been dismissed; and therefore that nothing stops the Decree Holder from levying execution herein. Regarding the averment that the funds are not available for attachment, it was the submission of **Prof. Ojienda** that since the List of Debtors annexed to the affidavit of **Mr. Ikol** accounts for only **Kshs. 300,000,000/=**, no prejudice will be suffered by the Judgment Debtor if the Garnishee Order *Nisi* is made absolute, granted that there are funds in the said account to the tune of **Kshs. 5,512,458,159.60**. He added that it was at the instance of the Judgment Debtor that the Decree Holder had its costs taxed with a view of execution and therefore that no justification has been made as to why the Garnishee Order *Nisi* should not be made absolute; and that the Decree Holder is equally entitled to protection under **Article 40** of the Constitution as its debt ranks in *pari passu* with the other acknowledged debts of the **National Land Commission**.

[9] **Order 23 Rule 1** of the **Civil Procedure Rules** is explicit in terms, and it states that:

(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.

[10] It is instructive that **Rule 1(1)** provides that such an application be disposed of *ex parte*, for obvious reasons. Time is of the essence. However, in this instance, the Court did direct that the application be served and that the Judgment Debtor be given an opportunity to make representations before the Garnishee Order *Nisi* was granted. There is no dispute that both the Judgment Debtor and Garnishee were duly served before the Garnishee Order *Nisi* was issued. It is therefore of little help for the Judgment Debtor to now argue that the matter was listed as a mention on **28 May 2019** or that substantive orders were made on a mention date. **Rule 1** is plain, that the purpose of the hearing after a Garnishee Order *Nisi* is issued is to afford the garnishee an opportunity 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; which is why the matter was listed for hearing on **4 June 2019**. It is therefore not obligatory for the Court to hear either the Garnishee or the Judgment Debtor before issuing a Garnishee Order *Nisi*.

[11] Nevertheless, before the Garnishee Order *Nisi* was made, the Garnishee was given a hearing and it confirmed, vide the affidavit of **Timothy K. Kosgei**, sworn on **28 May 2019** that the Judgment Debtor does hold an account with it, being **Account No. 0100103298XXXX**; and that as at **27 May 2019**, the account had a ledger balance of **Kshs. 5,512,458,159.60** to the credit of the Judgment Debtor, the **National Land Commission**. A Certificate of Balance was also exhibited as **Annexure TK1-a** to the said affidavit along with an

Interim Statement for **May 2019** (Annexure TK1-b). It was in the light of the foregoing that the matter was listed for further orders on **4 June 2019**.

[12] Having been thus served for purposes of **Order 23 Rule 1(2)** of the **Civil Procedure Rules**, the Judgment Debtor has made representations herein that the account in question, **Bank Account No. 0100103298XXXX**, is a special account opened pursuant to the provisions of **Section 115** of the Land Act; and is therefore not available for its daily operations. **Section 115** of the **Land Act** provides that:

**(1) After notice of an award has been served on all persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where--**

**(a) there is no person competent to receive payment; or**

**(b) the person entitled does not consent to receive the amount awarded; or**

**(c) there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which the compensation is to be paid.**

**(2) In any of the cases referred to in paragraphs (a), (b) and (c) of subsection (1), the Commission may at any time pay the amount of the compensation into a special compensation account held by the Commission, notifying any persons interested accordingly.**

[13] Documents were exhibited by the Judgment Debtor as annexures to the Replying Affidavit of **Brian Ikol** sworn on **3 June 2019** to demonstrate that the Land Compensation Account is indeed a special account for the safe custody of committed funds received by it on behalf of various government agencies such as **KURA, KeRRA, KeNHA, KETRACO** etc for compensation purposes. It is for this reason that I am therefore satisfied that the funds in issue are not debts due to the Judgment Debtor for purposes of **Order 23 Rule 1** of the **Civil Procedure Rules**. Accordingly, I would allow the Judgment Debtor's application dated **29 May 2019** and set aside the Garnishee Order *Nisi* issued herein on **28 May 2019**. As for the prayer that there be stay of execution, the Court having already pronounced itself thereon in its Ruling dated **11 July 2018**, that limb of the application is misconceived and is hereby dismissed. It further ordered that the costs of the application be in the cause.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT ELDORET THIS 10<sup>TH</sup> DAY OF JUNE 2019**

**OLGA SEWE**

**JUDGE**