



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. 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 KENYAGARNISHEE

RULING

[1] The Notice of Motion dated **14 June 2019** was filed herein by the law firm of **Prof. Tom Ojienda & Associates** pursuant to **Sections 1A, 1B, 3A and 80** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Order 45 Rule 1** and **Order 50** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] the Court be pleased to review and/or vary and/or set aside its Ruling and Orders dated **10th June 2019**;

[c] the Court be pleased to reinstate the Garnishee Order *Nisi* issued on **28th May 2019**;

[d] the Court do call for the cross-examination of the Manager of the Garnishee (National Bank of Kenya, Hill Plaza Branch) on the operations of the account held by the Garnishee on behalf of the Respondent particularly National Bank of Kenya Hill Plaza Branch Account No. [xxxx] for the last twelve months;

[e] In the alternative, the Court do direct the Manager of the Garnishee to file an affidavit detailing all the operations of the Account particularly National Bank of Kenya Hill Plaza Branch Account No. [xxxx] for the last twelve months;

[f] that the Court do call **Brian Ikol** for cross-examination on the contents of Paragraphs 10, 11 and 12 of the Replying Affidavit sworn by him on **29th May 2019**;

[g] that the costs of the application be borne by the Respondent/Judgment Debtor

[2] The application is premised on the grounds set out on the face of the application and supported by the affidavit sworn by **Prof. Tom Ojienda** on **14 June 2019** as well as the documents annexed thereto. By way of summary, it was averred by the Applicant/Judgment Debtor that that on the **21 June 2017**, the Court entered Judgment in its favour for the sum of **Kshs. 220,735,840.88**; and that the Respondent has unsuccessfully tried, on two separate occasions to obtain stay of execution against itself. It was further averred by the Applicant that, despite Judgment having been entered against the Respondent/Judgment Debtor way back on **21 June 2017**, the Respondent has taken deliberate steps to frustrate the Applicant and to ensure that the Applicant does not enjoy the fruits of its Judgment; and that it was in that regard that

the Applicant sought a Garnishee Order *Nisi* against the Respondent's National Bank of Kenya Hill Plaza Branch Account No. [xxxx].

[3] It was further the contention of the Applicant that, whereas the Garnishee entered appearance and confirmed through the affidavit sworn by **Timothy Kosgei** that it had sufficient funds in the aforementioned account to cater for the Judgment Debt, whereupon a Garnishee Order *Nisi* was issued, the Respondent thereafter applied for the setting aside of the Order *Nisi* contending, falsely, that the said account is a special compensation account as contemplated under **Section 115(2)** of the **Land Act, 2012**, and that it was being used solely for purposes of receiving and making payments to persons whose parcels of land had been compulsorily acquired by the Government. It was the assertion of the Applicant that in so saying, the Respondent deliberately misled the Court, as it is evident that the said account is also used for different operations of the Respondent, including but not limited to acquisition of motor vehicles of commissioners, fuel purchase, repairs, air ticketing and quarterly rents. It was further the contention of the Applicant that the said account is also an interest earning account; and therefore, that the interest generated from the deposits is sufficient to satisfy the Judgment Debt without affecting the deposits made into the account. Thus, the Applicant contended that sufficient reason has been given by it to warrant the review of the Court's Ruling dated **10 June 2019**.

[4] The application was opposed by the Respondent and a Replying Affidavit to that effect filed herein on **20 June 2019**, sworn by its acting Secretary/CEO, **Mr. Kabale Tache**. It is the contention of the Respondent that as a public body, it draws its entire funding from the National Government for its operations; and therefore, its assets are protected from garnishee proceedings by dint of **Sections 21(4)** of the **Government Proceedings Act** and **Order 29 Rule 2(2)(c)** of the **Civil Procedure Rules**. It was further the averment of the Respondent that the present application amounts to abuse of the court process, granted that the Applicant has since obtained a Garnishee Order *Nisi* in respect of its **National Bank of Kenya Hill Plaza Branch Account No. [xxxx]** vide the Court Order dated **14 June 2019**. The Respondent was thus of the contention that to reinstate the Garnishee Order *Nisi* of **28 May 2019** would amount to unjust execution against it to the tune of **Kshs. 441,471,681.76**. However, this argument is no longer tenable, granted that the Garnishee application dated **14 June 2019** was withdrawn on **20 June 2019**.

[5] The Respondent reiterated its posturing that its **National Bank of Kenya Hill Plaza Branch Account No. [xxxx]** is a special compensation account and is used only for purposes of receiving and making payments for compulsory land acquisitions; and that if the Garnishee Order *Nisi* issued on **28 May 2019** were to be reinstated, it would not only have the effect of stopping payments of compensation to project affected persons, but also ground all ongoing government projects, including the construction of Phase 2A of the Standard Gauge Railway, the LAPPSET Corridor, the Thwake Multi-purpose Dam project and the Eldoret Bypass project.

[6] In addition to its Replying Affidavit, the Respondent filed a Notice of Preliminary Objection dated **19 June 2019**, contending that the Court has no jurisdiction to hear and determine the Garnishee application by dint of **Section 21(4)** of the **Government Proceedings Act** and **Order 29 Rule 2(2)(c)** of the **Civil Procedure Rules**.

[7] The application and the Preliminary Objection were canvassed by way of written submissions pursuant to the directions issued herein on **20 June 2019**; which included the direction that the Preliminary Objection be argued alongside the review application. Thus, the Applicant's written submissions filed on **27 June 2019** in support of its review application and in opposition to the Preliminary Objection; while the Respondent's written submissions were filed on **29 June 2019**. In his submissions, Counsel for the Applicant relied on the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**, contending that there are valid reasons to review the Ruling dated **10 June 2019**, namely:

[a] that the subject account is not a special account for purposes of **Section 115(2)** of the **Land Act**, but an account used for the benefit of the Respondent as well;

[b] that the account is also an interest earning account; and,

[c] that this is one of the deliberate actions to frustrate the Applicant from enjoying the fruits of its Judgment.

[8] However, for the Court to be convinced that the subject account is not a special purpose account, Counsel conceded that it would be necessary to first dispose of the aspect of the Applicant's application that seeks the cross-examination of **Brian Ikol, Kabale Arero and Tom Chavangi**, all officers of the Respondent. Counsel relied on **Judicial Review No. 501 of 2016: Reuben Kitonyi Ngila vs. Governor of Central Bank of Kenya [2017] eKLR**; **Nyeri High Court Civil Appeal No. 63 of 2016; Joachim Ndaire Macharia vs. Mary Wangare Ndaire & Another**; and **Civil Appeal No. 124 of 1996: East Africa Packaging Industries Limited vs. Zoeb Alibhai [1977] eKLR**.

[9] In opposition to the Preliminary Objection, Counsel for the Applicant submitted that, since the Respondent is a separate legal entity capable of suing and being sued in its own name, the Preliminary Objection ought to be dismissed for being frivolous and an abuse of the court process. He pointed out that the Respondent has held itself out, throughout these proceedings, as an independent commission and therefore cannot now purport to say that it is a dependent Government department and hide behind **Section 21** of the **Government Proceedings Act**. Counsel relied on **Petition No. 513 of 2013: Ikon Prints Media Company Limited vs. Kenya National Highways Authority & 2 Others [2015] eKLR** and **Miscellaneous Civil Application No. 278 of 2017: Greenstar Systems Limited vs. Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR**, in urging the Court to dismiss the Preliminary Objection.

[10] In opposition to the review application, Counsel for the Respondent relied on **Francis Njoroge vs. Stephen Maina Kamore [2018] eKLR** and **Mwihoko Housing Company Limited vs. Equity Building Society [2007] 2 KLR 171** to buttress his submission that the grounds advanced in support of the motion do not meet the criteria set out in **Order 45 Rule 1** of the **Civil Procedure Rules**. And, in support of the Respondent's Preliminary Objection, Counsel reiterated the posturing that by dint of **Section 21(4)** of the **Government Proceedings Act** and **Order 29 Rule 2(2)(c)** of the **Civil Procedure Rules**, no execution, including attachment of debts, can issue against the Respondent as an organ of government. Counsel relied on **Article 260** of the Constitution for the definition of the terms "State" and "state organ". The cases of **Okiya Omtatah Okoiti & Another vs. Attorney General & Others [2013] eKLR**; **Association of Retirement Benefits Schemes vs. Attorney General & 3 Others [2017] eKLR** and **Kisya Investments Ltd vs. Attorney General &**

Another [2005] 1 KLR 74 were cited in support of the position taken by the Respondent.

[11] In the light of the foregoing, it is imperative for me to first consider and determine the question of jurisdiction because, as was aptly stated in the Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[12] The Court of Appeal further observed in the MV Lilian S Case, (per Nyarangi, JA) that:

"...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it..."

[13] Needless to say that a preliminary objection is that point which, if raised, is capable of disposing of the entire suit or application (see Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd [1969] EA 696). Hence, the question for determination, in respect of the Preliminary Objection is whether the Respondent is protected from execution by dint of **Section 21(4)** of the **Government Proceedings Act** as read with **Order 29 Rule 2(2)(c)** of the Civil Procedure Rules.

[14] **Section 21(4)** of the **Government Proceedings Act** provides that:

"...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.

[15] **Order 29 Rule 2(2)** of the **Civil Procedure Rules**, on the other hand, provides that:

"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).**

[16] Thus, the question to pose is whether the Respondent, the National Land Commission is "the Government" for purposes of the **Government Proceedings Act**. As has been pointed out herein above, the contention of the Applicant is that it is an independent commission and therefore a distinct and separate juridical entity with a corporate seal and perpetual succession; capable of suing and being sued. Accordingly, the submission of the Applicant was that execution by way of attachment of debts pursuant to **Order 23** of the **Civil Procedure Rules** is permissible. The Respondent took an entirely contrary stance to that of the Respondent.

[17] There is no dispute that the Respondent is an independent commission and therefore a state organ for purposes of **Chapter 15** of the **Constitution**. Accordingly, in respect of it and similar commissions, **Article 253** of the **Constitution** stipulates as follows:

Each commission and each independent office—

- (a) is a body corporate with perpetual succession and a seal; and**
- (b) is capable of suing and being sued in its corporate name.**

[18] Moreover, the Constitution provides, in **Article 249(2) and (3)**, that:

- (2) The commissions and holders of independent offices—**
 - (a) are subject only to this Constitution and the law; and**
 - (b) are independent and not subject to direction or control by any person or authority.**
- (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.**

[19] In the premises, I have no quarrel with the position taken in Okiya Omtatah Okoiti & Another vs. Attorney General & 7 Others (supra) that:

“Article 248 of the Constitution creates Commissions ... and independent offices ... and taking all the definitions above together, it is difficult to understand the worth of the objection raised. One cannot reasonably fail to note that Commissions and Independent Offices are part of the national governmental structure of the State of Kenya and to say otherwise would be absurd...”

[20] Indeed, while they are independent, such organs of state are expected to collaborate with other state and non-state actors to realize their mandate. Hence in Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others, [2014] eKLR the Supreme Court of Kenya, in its consideration of the meaning of independence in relation to **Article 34(5)** of the **Constitution**, held that:

“[I]ndependence’ is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance...”

[21] Accordingly, there is a sense in which, though a state organ, an independent commission such as the Respondent, is separate and independent from the Government. It is noteworthy too, that the issue in the Okiya Omtatah Case (supra) was the question of legal representation, and the Learned Judge did acknowledge that such institutions are therefore at liberty to seek legal advice and representation from the Attorney General. What is in contest herein is the question whether, as an independent institution, the Respondent is shielded from the consequences of its power to sue and be sued in its corporate name as recognized by **Article 253** of the Constitution by dint of **Section 21** of the **Government Proceedings Act**. In my considered view, it is to that extent that the facts are distinguishable.

[22] Having given consideration to the submissions and the authorities cited by learned counsel herein, I take the view that, inasmuch as the Respondent is independent, and clothed with requisite constitutional powers to sue and be sued in its own corporate name, it is not “the Government” or a “Government Department” for purposes of the **Government Proceedings Act**. Indeed, it was in recognition of this independence that it engaged the services of the Applicant herein to offer it legal representation. Consequently, my considered view is that the Respondent is amenable to the usual legal consequences flowing from such processes, including execution of ensuing decrees. This is because there is no such protection afforded by its organic legislation, the **National Land Commission Act**, to shield the Respondent from the execution process.

[23] Moreover, it is telling that whereas the **Government Proceedings Act** was amended by the **Government Proceedings (Amendment) Act, 2015** to include County Governments, Parliament, in its wisdom, did not consider it apposite to extend the same shield to independent commissions such as the Respondent. I would accordingly take the path taken in Petition No. 513 of 2013: Ikon Prints Media Company Limited vs. Kenya National Highways Authority & 2 Others [2015] eKLR that:

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

[24] The same position was taken in Miscellaneous Civil Application No. 278 of 2017: Greenstar Systems Limited vs. Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR thus:

“From 2015 when the Arbitration commenced to the point of execution the Applicant has always participated and held itself out as a body corporate and not as a Government department or agency. It is too late in the day for the Applicant to now 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. Based on its previous engagement in this matter the Applicant is estopped from relying on the provisions of the Government Proceedings Act as a challenge to execution against it.”

[25] The foregoing being my view of the matter, it follows that the Preliminary Objection is wholly untenable and is hereby dismissed. Having so found, the next issue to consider is the merit or otherwise of first limb of the Applicant’s omnibus application, namely: whether or not to grant leave for the cross-examination of the deponents of the affidavits filed herein on behalf of the Respondent, namely **Brian Ikol** and **Kabale Tache**. In this regard, **Order 19 Rule 2(1)** of the **Civil Procedure Rules** recognizes that:

“(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

[26] Thus, this being a discretionary power, it is to be exercised judiciously and therefore some good reason ought to be shown to warrant the invocation of the power. In connection with this provision, it was observed in G G R vs. H P S [2012] eKLR that:

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on

record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”

[27] In the instant matter, it has been asserted that the Court was misled in connection with the Respondent’s **National Bank of Kenya Hill Plaza Branch Account No. [xxxx]**; and that it is necessary to ascertain the truth in respect of that account. That, to my mind, is sufficient reason for the Court to grant Prayers 6 of the application dated **14 June 2019**. I note that there is no affidavit filed herein that is attributed to the Manager of the Garnishee or **Tom Chavangi** as was urged by Counsel for the Applicant. Accordingly, no sufficient basis has been laid in support of Prayers 4. Accordingly, it is hereby ordered as hereunder:

[a] That **Brian Ikol** be summoned for purposes of cross-examination in respect of his averments in Paragraphs 10, 11 and 12 of his Replying Affidavit sworn on **29 May 2019**.

[b] That the Ag. CEO of the Respondent be summonsed for cross-examination in respect of averments in paragraphs 14, 15, and 16 of his Replying Affidavit sworn on **18 June 2019**.

[c] Further directions in respect of the remaining prayers to be made after the proposed cross-examination.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF JULY 2019

OLGA SEWE

JUDGE