



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 747 OF 2007

(FORMERLY HCCC No. 1289 of 2002)

JANE KENDI IKINYUA.....APPLICANT

VERSUS

NAIROBI CITY COUNTYDEFENDANT/RESPONDENT

AND

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

RULING

1. This is the preliminary objection dated 12th June 2018. The same is by the garnishee, the Cooperative Bank of Kenya Limited, Nairobi. The grounds are:-

(a) That the application for the execution of the decree is untenable in law, having been brought contrary to the provisions of order 29 rule 2 of the Civil Procedure Rules, 2010 which prohibits the issuance of execution orders against the government except in accordance with the provisions of the Government Proceedings Act.

(b) That the institution of execution proceedings against the defendant, a government within the provisions of Article 6(2) of the Constitution offends the provisions of Order 29 Rule 4 of the Civil Procedure Rules 2010 which expressly prohibits the grant of execution orders against the Government.

(c) That contrary to the express provisions of Section 21 of the Government Proceedings Act, the plaintiff/decree holder has instituted execution proceedings the defendant/judgment debtor in an unlawful manner.

(d) That the plaintiff/decree holder has obtained a garnishee order against the defendant/judgment debtor's Revenue Accounts held by the Garnishee herein contrary to the provisions of Article 207 (2) and 3 of the Constitution which provides for the manner in which revenue accounts of the County Government shall be operated.

(e) The Public Finance Management Act under Section 109 further prohibits the operation of the county revenue accounts except in accordance with the Constitution and an approval from the controller of budget must be sought.

(f) A long line decisions emanating from the superior court including; republic vs attorney general and another exparte Ongata Works Limited [2016] eKLR, Kilimanjaro Safari Club Limited vs Gonor – Kajiado County (in place of County Council of Ol Kejuodo [2014] Eklr and National Housing Corporation vs Nairobi City Council & Another [2002] eKLR have interpreted the constitution and law as prohibiting the attachment of county government accounts.

2. On the 9th May 2019 the court with the consent of parties directed that the preliminary objection be canvassed by way of written submissions.

3. On the 24th July 2019 the plaintiff/decree holder was not represented. Mr Wepo Who was then holding brief for Mr. H. Kinyanjui for the defendant sought seven (7) days to put in their submissions. The court granted the defendant leave to put in their submissions. The matter was mentioned for purpose of taking a ruling date on 18th December 2019. The defendant still had not filed their submissions. By the time of writing this ruling only the garnishee's submissions are on record.

4. The fact that the applicant/decree holder obtained a garnishee order dated 7th May 2018 against the respondent/judgment debtors revenue

accounts held by the garnishee at their City Hall Branch. The said garnishee order was served upon the garnishee on 29th August 2018 which seeks to have the two accounts of judgment debtor held by the garnishee in its city hall branch attached to satisfy the certificate of taxation given by the court on 11th October 2017. It should be noted that neither the decree holder nor the defendant filed any responses to the preliminary objection herein.

5. The Garnishee's submissions are dated 5th July 2019. It is the garnishee's submissions that the respondent/judgment debtor is the County Government of Nairobi by virtue of Section 2 of the County Government's Act as read with Article 176 of the Constitution of Kenya 2010. By virtue of Section 21(4) of the Government Proceedings Act, County Governments enjoy the same level of immunity on matters of execution as the central government. It has put forward the case of **Kisya Investments Limited vs Attorney General & Another [2005] eKLR; Kennedy Wainaina Njenga vs County Government of Nairobi; Cooperative Bank of Kenya Limited (Garnishee) [2019] eKLR; Republic vs Governor, Nairobi City County & 2 Others ex parte Salima Enterprises; Cooperative Bank of Kenya Ltd Interested Party [2019] eKLR; Republic vs County Secretary Nairobi City County & Another ex parte Wachira Nderitu Njugi & Co Advocates [2016] eKLR.**

6. The law governing execution against the government is provided for under order 29 rule 2(2)(b) of the Civil Procedure Rules 2010, which further finds anchorage under section 21 of the Government Proceedings Act. The garnishee, wishes to clarify that even if were to fulfil such an order, such would be an exercise in futility. The Account NO. 01136005723600 which appears on the garnishee order nisi served on the bank was closed on 21st January 2014 and as such the judgment creditor is seeking to attach an illusory account. The other account no. 0113600572360 is a non-existent account.

7. The chamber summons dated 27th November 2017 is incompetent. Due procedure provided under the law has not been properly adhered to prior to filing the application. The application is therefore premature. It prays that the preliminary objection be upheld and the chamber summons dated 27th November 2017 be dismissed with costs.

8. I have considered the preliminary objection herein and the submissions by the garnishee. No responses were filed in respect of the same. The issue for determination is whether the preliminary objection is merited.

9. **Order 29 rule 2(2)(b)** of the Civil Procedure Rules 2010 provides that:-

“No order against the government may be made under:-

Order 22 (execution of decree and orders)”

Order 29 rule 4(1) provides that:-

“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”

10. In the case of **Republic vs Governor, Nairobi City County & 2 Others Ex parte Salima Enterprises Ltd; Cooperative Bank of Kenya Limited interested party [2019] eKLR** J Mativo stated thus:-

“reading of the clear provisions of order 29 rule 2(2) and 4 the Civil Procedure Rules 2010 leave me with no doubt that the said provisions expressly prohibit the grant of execution orders against the government. In addition the application offends the express provision of section 21 of the Government Proceedings Act”.

I am guided by the above authority.

Similarly, in **Republic vs the Attorney General & Another ex parte James Alfred Kosoro [2013]** Odunga J stated thus:

“.....in the present case, the ex parte applicant has no other option of realising the fruits of his judgment since he is barred from executing against the government. A part from mandamus, he has no option of ensuring that the judgment he has been awarded is realized.....”

From the above cited authorities, I am convinced that the preliminary objection herein is merited. The same is upheld.

11. The upshot of the matter is that the chamber summons dated 27th November 2017 is dismissed with costs to the garnishee and the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11TH day of JUNE 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

Mr. H. Kinyanjui advocate for the defendant

Kajuju – Court Assistant