



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 513 OF 2013**

**IN THE MATTER OF ARTICLES 22, 23 & 165(3) (b) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FREEDOMS  
UNDER ARTICLE 40 OF THE CONSTITUTION**

**BETWEEN**

**IKON PRINTS MEDIA COMPANY LIMITED.....PETITIONER/APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY FOR TRANSPORT AND**

**INFRASTRUCTURE DEVELOPMENT.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Judgment was on 7<sup>th</sup> November 2014 entered in favour of the Petitioner against the 1<sup>st</sup> Respondent. The judgment amount was Kshs. 70,551,306/= to which was to be added interest. The Petitioner's costs were subsequently taxed at Kshs. 1,094,362/70 on 8<sup>th</sup> July 2015. The 1<sup>st</sup> Respondent is yet to settle the decretal sum as well as accrued interest and the taxed costs.
2. Consequently, on 24<sup>th</sup> September 2015 the Petitioner filed the instant motion seeking to enforce the decree. The Petitioner seeks this court's orders that the Director General of the 1<sup>st</sup> Respondent do within thirty (30) days pay the decretal sum and that in default he does appear before this court in person and show cause why he should not give written permission for the attachment of the 1<sup>st</sup> Respondent's properties. The Petitioner further seeks this court's orders that in default of appearance or payment by the 1<sup>st</sup> Respondent, the Petitioner be granted leave to exercise the decree.
3. The application which is supported by the affidavit of Chukwuma Nduche is based on the simple fact that the 1<sup>st</sup> Respondent has not satisfied the decree. The Petitioner also states that the 1<sup>st</sup> Respondent did not prefer an appeal against the judgment and despite demands for settlement the

- 1<sup>st</sup> Respondent has failed to oblige.
4. The 1<sup>st</sup> Respondent opposes the application. An affidavit in Reply was sworn by one John Otiato and duly filed on 14<sup>th</sup> September 2015. A singular ground of objection was also filed. The singular ground read as follows:

***“The Petitioner’s affidavits application offends the provisions of Section 68 of the Kenya Roads Act (Cap 408) Laws of Kenya”.***

5. The Replying Affidavit is to the same effect as the singular ground of objection save that the Replying Affidavit also states that an appeal has been preferred against the judgment now sought to be enforced. Further the Replying Affidavit is also to the effect that execution is barred by the Section 68 of the Kenya Roads Act (Cap 408).
6. Oral arguments were made before me on 21<sup>st</sup> October 2015.
7. Mr. Lutta reiterated the undisputed fact that the decretal sum is due. Counsel further stated that the 1<sup>st</sup> Respondent is not covered under the Government Proceeding Act and that with the leave of the court the decree-holder could execute by attaching the assets of the 1<sup>st</sup> Respondent. Counsel summed up by stating that courts do not and should never issue orders in vain.
8. Mr. Kiplimo, for the Respondent, pointed out that the 1<sup>st</sup> Respondent had preferred an appeal against the judgment in question. Counsel also stated that the decree had not been settled as appropriation for such expense (payment and satisfaction of court orders) had not met with Parliament’s approval. Counsel finally submitted that the process adapted by the Petitioner in enforcing the settlement of the decretal sum was erroneous as the Director General of the 1<sup>st</sup> Respondent is a public officer who should only be forced or prompted into action through the judicial review process.
9. In my view, the instant application’s survival is pegged on a construction of the provisions of **Section 68 of the Kenya Roads Act (Cap 409) Laws of Kenya**. Section 68 reads as follows:

***“68.Restriction on execution against property of Authority***

***Notwithstanding anything to the contrary in any law—***

***(a) where any judgment or order has been obtained against an Authority, no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property, but the Director-General shall, without delay, cause to be paid out of the revenue of the Authority such amounts as may, by he judgment or order, be awarded against the Authority;***

***(b) no property of an Authority shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Director-General.*** (emphasis is mine)

10. 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 1<sup>st</sup> Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependant on Government funding but it is not government or servant of or agent of Government for the purposes of the Government Proceeding Act. The 1<sup>st</sup> Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1<sup>st</sup> Respondent are not judgments against the government but against an independent juridical body.
11. Secondly, the fact that an appeal has been preferred and, in particular, Civil Appeal no. 219 of 2015 filed in the Court of Appeal, is not a bar to any execution proceedings. On this point Order 42 Rule 6 of the Civil Procedure Rules is relatively clear. An appeal never operates as a stay of execution or proceedings under a decree or order appealed from. There has to be a formal order of stay.

12. I now come quickly to the more arguable points made in opposition to the motion.
13. First, Mr. Kiplimo argued that Section 68 of the Kenya Roads Act prohibits any execution against the 1<sup>st</sup> Respondent. Secondly, It was argued that the application is pre-emptive and premature as Parliament is yet to effect the necessary allotment to enable the 1<sup>st</sup> Respondent to settle the decretal amount.
14. Section 68 of the Kenya Roads Act which has been reproduced above in paragraph [ 9 ] seeks to prohibit any execution proceedings against the 1<sup>st</sup> Respondent. It is a rare statutory provision. Ordinarily it is never and should never be the intention of any legislation to place parties in a position where the courts judgment is never realized. Courts, as they say, do not and should not act in vain. Consequently, in reviewing or interpreting such statutory provisions, the construction must be liberal and lean towards the Constitutional principle that every person including judicial persons are equal before the eyes of the law and must be subjected to the rule of law.
15. It is clear to me that Section 68 never intended to have a situation where the Authority , in this case the 1<sup>st</sup> Respondent runs away from any legal liability. The section did not state so either. Instead the section expressly made provision for the Director General to ensure that ‘without delay’ judgments or orders awarded against the authority are settled. The Director General has a statutory compulsion to ensure that payment is made without undue delay.
16. The mischief intended to be arrested by the section, in my view, was the embarrassment and prejudice which so often accompanies the ordinary process of attachment and execution. It is noteworthy that subsection (b) of the said section expressly states that any execution or attachment can only be proceeded on with once the director general of the Authority grants written permission. If therefore there is any delay in honouring a court judgment or order, it is for the Director General to explain to the court and to the judgment –creditor the cause or reason for the delay. It is however clear from a reading of Section 68 of the Kenya Roads Act that the court judgment or order must ultimately be honoured , either involuntarily or voluntarily. I hasten to add that the director general can also not arbitrarily refuse to grant permission for the execution to proceed. Where he does so, the court can intervene.
17. Payment towards satisfaction of any decretal amount is to be made out of the revenue of the Authority. It would however be sacrilege to hold that the payment is to be made only when the Director General deems it fit. The statute itself dictates that it be made without delay.
18. Where therefore there is delay in payment, the judgment creditor has the right to invoke the due process of law to enable him enjoy the fruits of his judgment.
19. It is not surprising therefore after more than six months wait for the judgment amount, the Petitioner moved the court with a view to accessing the fruits of judgment.
20. The question raised by 1<sup>st</sup> Respondent as to the procedure adopted is aptly answered when one considers that this was not an ordinary civil litigation. It was not an ordinary civil suit. It was a Constitutional litigation. That is where the judgment originated from. In Constitutional litigation the court must ensure that the ends of justice is met and if need be fashion appropriate reliefs either at judgment stage or even post judgment stage, once the parties appear before the court.
21. In the instant case the Petitioner had moved to court on the basis that its fundamental rights and freedoms under the Bill of Rights including the right to protection of property and to fair administrative action guaranteed under Articles 40 and 47 of the Constitution respectively had been violated. The petitioner sought relief under Article 23 of the Constitution. The latter Article allows the court to grant various reliefs including remedies in judicial review. The Article does not say that the reliefs suggested or recommended are exhaustive. Neither does Article 23 say when the reliefs are available. In my view the reliefs can be availed by the court at any stage of the proceedings, including post judgment stage so long as the court is still seized of the matter.
22. In my view however, it would be unnecessary to invoke judicial review proceedings or remedies now. Rather, it would be more appropriate to have the Director General explain the cause of any further delay in satisfying the decretal sum. It would be important to explain to the court as well as the judgment debtor why the payment has not yet been made as provided for under Section 68 of the Kenya Roads Act.
23. I take note of the fact that the Replying Affidavit was not sworn by the Director General, neither does the deponent state that it is sworn on behalf of the Director General nor under his authority. The court should therefore not deem any deposition akin to an explanation as being attributed to the Director General.

24. In conclusion, I hold the view that the application by the judgment- creditor is merited. The director general ought to attend before the court and explain to the court and to the judgment-creditor the reason why the court judgment is yet to be honoured and what steps are being taken if any to ensure that the same is honoured. I would however still give the director general time to settle the decretal sum.

25. I consequently partially allow the application and make the following orders:

- a. The 1<sup>st</sup> Respondent's Director General Peter M. Mundinia shall within thirty (30) days following service of this order upon the 1<sup>st</sup> Respondent cause to be paid to the Petitioner the decretal sum together with all accrued interest and taxed costs.
- b. That in default of such payment the 1<sup>st</sup> Respondent's Director General Peter M. Mundinia shall appear before this court to show cause why he should not give written permission to the Petitioner pursuant to section 68(b) of the Kenya Roads Act (Cap 408) to attach the 1<sup>st</sup> Respondent's property in execution of the decree of this court made herein on 7<sup>th</sup> November 2014.
- c. There will however be no order as to costs
- d. This Petition will be mentioned on such date to be fixed in the court registry for further directions, if need be.

26. Orders accordingly.

**Dated, delivered and signed at Nairobi this 9<sup>th</sup> day November, 2015**

***J.L.ONGUTO***

**JUDGE**