



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC. APPLICATION NO. 442 OF 2011**

**IN THE MATTER OF THE ARBITRATION ACT, 1995 AND THE ARBITRATION RULES,  
1997**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE ADOPTION OF AN ARBITRATION  
AWARD DATED 5<sup>TH</sup> NOVEMBER, 2009 AND AN AWARD ON ASSESSMENT OF COSTS  
DATED 21<sup>ST</sup> JANUARY 2011**

**AND**

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**KILIMANJARO SAFARI**

**CLUB LIMITED :::::::::::::::::::::::::::::::::::::::DECREE HOLDER/APPLICANT**

**-VERSUS-**

**THE GOVERNOR- KAJIADO COUNTY**

**(IN PLACE OF COUNTY COUNCIL OF**

**OL KEJUADO :::::::::::::::::::::::::::::::::::::::JUDGMENT DEBTOR/RESPONDENT**

**TO:**

**THE GOVERNOR-KAJIADO COUNTY :::::::::::::::::::::::JUDGMENT DEBTOR**

**AND**

**KENYA COMMERCIAL BANK ::::::::::::::::::::::::::::::: GARNISHEE**

**R U L I N G**

1. The Application before the Court is a Notice of Motion dated 1<sup>st</sup> November 2013 and filed in

Court on 6<sup>th</sup> November, 2013. The Application is taken out under **Articles 176 & 186** of the **Constitution, section 3 (d) (i)** of the **Transition to Devolved Government Act, Section 3A** of the **Civil Procedure Act** as well as **Order 23 Rules 1 and 2** of the **Civil Procedure Rules**. The Application seeks the following orders:-

1. ***The Court be pleased to join:- The Governor-Kajiado County as a party to this suit by virtue of having assumed the roles, functions and liabilities of the County Council of Ol Kejuado as per section 3 (d) 1 of the Transition to Devolved Government Act.***
  2. ***All monies held in the various accounts by the Garnishee, especially the sums held in Account No. 1140749870 domiciled at the Garnishee Bank be attached to satisfy the Decretal amount herein for the sum of:***
    - i. ***Kshs. 1,000,000/00 being general damages for illegal distress.***
    - ii. ***Special damages in the sum of Kshs. 75,290,307/40 and Us \$ 2,844,563/00.***
    - iii. ***Interest on (i) and (ii) above at the rate of 12% per annum till payment in full.***
    - iv. ***Costs of this application and 60% of the costs the Arbitration awarded to the Applicant.***
  3. ***The Honourable Court be pleased to issue an Order for the Garnishee to appear to show cause why he should not pay to the Decree Holder the above amount due to the Judgment Debtor herein.***
  4. ***That the Honourable Court be pleased to issue an Order Nisi to that effect.***
  5. ***That costs of this Application and proceedings be provided for.***
2. The application is premised on the grounds set out therein and is supported by the affidavit of **SANDEEP R. DESAI** dated **1<sup>st</sup> November 2013** with its annexures and a **Supplementary affidavit** dated **23<sup>rd</sup> January 2013** also with annexures.
  3. In opposing the application the Judgment Debtor through the law firm of M/s P.C Onduso & Company filed grounds of opposition on 9<sup>th</sup> December 2013.
  4. By a Consent dated 24<sup>th</sup> March 2014 and filed in Court on 26<sup>th</sup> March 2014, the Attorney General took over the representation of the Respondent in this matter from the firm of P.C Onduso & Co. Advocates with effect from 26<sup>th</sup> February 2014. Upon coming on record the Attorney General filed further Grounds of Opposition to the application on 5<sup>th</sup> March 2014. With the leave of the Court parties filed written submissions to the Application. The Applicant had earlier filed its submissions on 27<sup>th</sup> January 2014 and further submissions were filed on 27<sup>th</sup> March 2014. The Respondent had filed its earlier submissions on 29<sup>th</sup> January 2014 and its further submissions on 28<sup>th</sup> March 2014.
  5. The brief history of the application is as follows. The Decree holder is the beneficiary of a final arbitral award delivered by John M. Ohaga on 5<sup>th</sup> November 2009 and an Award on assessment of costs delivered on 21st January 2010 for the amounts stated in the prayers herein above. The said award was adopted as an order of this Court on 13<sup>th</sup> December 2011.
  6. Subsequently, there was an application for stay of the Judgment. On 30<sup>th</sup> May 2013, this Court allowed a conditional stay of the said Judgment requiring the Judgment debtor to deposit a third of the decretal amount in a joint interest earning account in the joint names of itself and the applicant herein within 45 days from 30<sup>th</sup> May 2013. The said 45 days period has since lapsed and the decretal amount remains outstanding for the decree holder herein.
  7. It is now alleged by the Applicant that the Kenya Commercial Bank is holding deposits in form of general income, rates and rents accruing to the Judgment Debtor in Kajiado County Revenue Allocation Account No. 1140749870 and hence the current application for the order of garnishee by

the Decree holder. It is also alleged by the applicant that the Governor- Kajiado County has since assumed all the functions, roles, duties and liabilities of the County Council of Ol Kejuado. Hence the prayer herein to join him as a party to these proceedings to enable the application to proceed to execution stage.

8. The Application is opposed mainly on technical grounds. No party has disputed that there indeed is an arbitral award pursuant to which a Judgment has been entered in favour of the applicant herein, and that the same should be paid. No appeal has been preferred against the said Judgment either. It appears to me that the Judgment Debtor's hope of evading justice now hangs only on the technicalities which form the basis of the Judgment Debtor's objection and submissions.
9. The Attorney General took over the conduct of the matter on behalf of the Respondent by virtue of Article 156 (6) of the Constitution and Section 31 of the County Government Act No. 17 of 2012 and filed a Notice of Change of Advocates which I have already referred to. The Respondent's objection falls within three broad categories:-

- *Whether the Court has jurisdiction to hear and grant the orders sought herein.*
- *Whether suits pending against the defunct local authorities are sustainable and if so against which body, entity or person.*
- *Whether assets and liabilities of the County Council of Ol Kejuado have vested in the County Government.*

10. The Prayers as sought for in the application are essentially seeking to enjoin the Governor of Kajiado County as a party to the suit and the institution of garnishee proceedings.

11. Both parties filed two sets of submissions in regard to the current application.

## THE SUBMISSIONS

### Submissions for the Applicant

12. In its submissions, the Decree holder/Applicant extensively submitted on the issue of the applicability of the **Government Proceedings Act (Cap 40)** and **Order 29** of the **Civil Procedure Rules** to the County Government. It was submitted for the Applicant that County Government was not 'Government' as per the Government Proceedings Act. Further, it was submitted for the Applicant that **Order 29 Rule 2** did not apply to the County Government.
13. The Applicant's submissions also addressed the issue of transition to devolved Governments. In that regard, reference was made to the Transition to Devolved Governments Act, Urban Areas and Cities Act (Cap 275) and the County Government Act (No. 17 of 2012). It was implied in the Applicant's submissions that the Governor of Kajiado County had assumed the roles and functions of the defunct County Council of Ol Kejuado.
14. It was also submitted for the applicant that the mis-joinder of the Governor was not relevant or fatal to the substantive application. The Applicant referred to the case of **Dahir M Burale vs. Municipal Council of Mavoko & 2 others (2013) eKLR** where the Court held that the non joinder of Mavoko County as the successor of Municipal Council of Mavoko could not defeat the Plaintiff's claim.
15. The above notwithstanding, it was submitted for the applicant that the Governor was the accounting officer by virtue of the provisions of the Constitution and the County Government Act (No. 17 of 2012). According to the Applicant, this was the position since they had no information of the gazetment of accounting officers in the said County.

### Submissions for the Respondent

16. In reply, it was submitted for the Respondent that **section 21 (4)** of the **Government Proceedings Act** and **Order 29 rules 2 (1) (a), (2) and 4(1)** of the **Civil Procedure Rules** expressly prohibited a Judgment Debtor from initiating Garnishee proceedings to enforce a debt against Government. It was further submitted that an application under **Order 23** of the **Civil Procedure Rules** was not sustainable at law against the property of Government at any level.

17. Counsel for the Respondent also submitted on the sustainability of suits pending against the defunct local authorities. It was submitted for the Respondent that the Governor was not the successor to the County Council of Ol Kejuado and as such the current proceedings were not sustainable against him.
18. In the said submissions, reference was made to **section 59** of the **Urban Areas and Cities Act (No. 13 of 2011)** which states:-

*“Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.”*

19. In light of the above section, it was Counsel’s submission that power to proceed with and to defend actions and legal proceedings pending against defunct local authorities vested upon a “body established by law”. According to the submissions the said body is yet to be established. It is further submitted that subject to **section 6 (1)** of the **County Government Act**, the County Government has a separate and distinct existence from the office of the Governor. Therefore, according to Counsel the application should be dismissed for non-joinder of a necessary party being the Kajiado County.
20. It was finally submitted for the Respondent that the current application was premature for two reasons. Firstly, that the application was unsustainable against the Respondent and that until the body referred to in **Section 59** of the **Urban Areas and Cities Act** was set up the Application could not lie. Secondly, Counsel relied on the provisions of **regulation 12 (1) to (3)** of the **Regulation for Transfer of Assets and Liabilities** in submitting that the Applicant had failed to prove that the Transition Authority had assigned the Assets and Liabilities to the identified functions for the two levels of Government.

### **THE ANALYSIS**

21. I have considered the submissions as filed by both parties which mainly revolve around matters concerning proceedings against the Government and transition to devolved Government. However, for purposes of this ruling, I will restrict myself to the prayers made by the Applicant.

22. In my view, there are two main issues for determination:-

- i. ***Whether the Governor of Kajiado County should be enjoined as a party to this suit.***
- ii. ***Whether this Court is entitled to attach the monies held in the various accounts by the Garnishee to satisfy the decretal amount herein.***

23. With regard to the first issue, It is not in doubt that the County Council of Ol Kejuado no longer exists owing to the repeal of the **Local Government Act (Cap 265)** by **section 134 (1)** of the **County Government Act (No. 17 of 2012)**.

24. Further, Section 33 of the sixth schedule of the Constitution 2010 states:-

*“ An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”*

By virtue of the above section, it is plain that Kajiado County is the successor of the defunct Ol Kejuado Council which was a creation under the repealed Local Government Act. On this note, I agree with Counsel for the Respondent that the Governor is not a successor to the defunct Ol Kejuado Council. Therefore, the proper party to join should be the County Government of

Kajiado.

25. However, it is argued for the Respondent that the said proceedings are not sustainable against the County Government for the following reasons. First, that the body referred to in Section 59 of the **Urban Areas and Cities Act** is yet to be set up. Secondly, that in light of the provisions of **regulation 12 (1) to (3) of the Regulation for Transfer of Assets and Liabilities** the Applicant has failed to prove that the Transition Authority has assigned the Assets and Liabilities to the identified functions for the two levels of Government.
26. With regard to the first reason it is not clear which body the Respondent is anticipating to be created. The said section, as I understand it, simply provides that a suit filed against a local authority prior to the commencement of the said Act (Urban Areas and Cities Act) shall continue to be sustained in the same manner as it was instituted.
27. As for the second reason, the argument that the Applicant has failed to prove that the Transition Authority has assigned the Assets and Liabilities to the identified functions for the two levels of Government cannot stand. The implementation of the constitution is tasked upon various state organs, institutions and various commissions. The Commission for the Implementation of the Constitution was created to oversee the same. Without a doubt, the Applicant does not fall in any of the aforesaid categories. In other words it is not the Applicant's responsibility to prove that the assignment of assets and liabilities by the Transition Authority has taken place.
28. It is evident that the County Council of Ol Kejuado has a successor and assign that has taken over its functions after the repeal of the Local Government Act and subsequently the elections. This is the County Government of Kajiado. Therefore, the proceedings herein are sustainable against the said County Government.
29. Back to the main issue of joinder of parties. It is worthy to note that misjoinder or non-joinder of parties cannot be a ground to defeat the Applicant's claim or for dismissal of the substantive application. See **Order 1 rule 9** of the **Civil Procedure Rules** which states:-

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***

30. In light of the above provision, the current application cannot be dismissed for non-joinder.
31. Now to the second issue which is whether this Court is entitled to attach the monies held in the various accounts by the Garnishee to satisfy the decretal amount herein.
32. It is trite that no attachment can issue against Government property with regard to civil proceedings against the Government. The **Government Proceedings Act** at **Section 21 (4)** provides:-

***“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.”***

Further **Order 29 Rule 2 (2) (c)** of the **Civil Procedure Rules** prevents this Court from making any order of attachment of debts as against the Government. The attachment of debts is provided for under **Order 23** of the said Rules which provides for Garnishee proceedings.

33. The obvious conclusion therefore would be that the Garnishee proceedings against the Respondent and by extension the Office of the Governor are not sustainable. However, it was submitted for the Applicant that the County Government is not a 'Government' as per the Government Proceedings Act. Counsel for the Applicant referred to **Section 5 (i)** of the **Office of the Attorney General Act (No. 49 of 2012)** which provides, *inter alia*, the functions of the Attorney General as follows:-

***“representing the National Government in all civil and constitutional matters in accordance with the Government Proceedings Act (Cap 40).”***

34. It is therefore Counsel's submission that the said Act is specific that the Attorney General shall represent the National Government in accordance with the Government Proceedings Act. According to Counsel, the County Government Act (**See section 43**) says nothing about the Attorney General representing the County Government in accordance with the Government Proceedings Act.
35. It is common ground that the Government Proceedings Act came into force before devolution. There is no express definition of the term 'Government' in the said Act. In that case the term Government as used in the said act is inclusive and there is no reason why the County Government should be excluded from the operations of the said Act.
36. This begs the question, what is Government? The **Interpretation and General provisions Act**, under **section 3(1)** states that the Government means 'the Government of Kenya'. In the **Black's law Dictionary, 8<sup>th</sup> Edition** the term "Government" is defined as being:

*"1) The structure of principles and rules determining how a State or Organization is regulated.*

*2) The sovereign power in a Nation or State.*

*3) An Organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed."*

37. The second and third definition above when read together with **Article 1** of the Constitution of Kenya clearly brings out the picture that County Government is equally Government. Article 1 of the Constitution provides as follows:-

*1. (1) ...*

*(2) ...*

*(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—*

*(a) Parliament and the legislative assemblies in the county governments;*

*(b) the national executive and the executive structures in the county governments;*  
*and*

*(c) the Judiciary and independent tribunals.*

*(4) The sovereign power of the people is exercised at—*

*(a) the national level; and*

*(b) the county level.*

38. It is therefore clear that the Constitution created two levels of Government which are distinct and inter-dependent.
39. It is not in dispute that the representation of the County Government by the Attorney General as provided for in **section 43** of the **County Government Act** does not mention the Government proceedings Act. However, to interpret the same to mean that the Government proceeding Act does not apply to the County Government is in my view a narrow approach. The said section only provides that the Attorney General may represent the County Government in Court or in any other proceedings other than criminal proceedings. The section does not in any way provide for the substantive procedures of proceedings against Government.
40. In fact, the purpose of the County Government Act is to provide for County Governments' powers, functions and responsibilities to deliver services and for connected purposes. Therefore the same

- has nothing to do with the substantive law and procedures of proceedings or legal actions against Government.
- 41.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.
- 42.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.
- 43.Prayers 3 and 4 are a result of prayer 2 which sought to attach the property of the County Government held with the Garnishee and therefore the same are not allowed.
- 44.That notwithstanding, it has not escaped my mind that the Respondent indeed owes the Applicant the decretal sum claimed. Indeed, the Respondent does not deny that the award is owed and due or that they have failed to comply with orders of this court. It is unfortunate that the Respondent does not seem to be making any concrete plans to honour its obligations to the applicant by paying the amount due. Meanwhile interest is accruing on the decretal amount of which the financial burden will ultimately be borne by the taxpayer. It is prudent for the Respondent to desist from any devices of avoiding liability and pay the amounts due in the earliest time possible.
- 45.The upshot is that the Applicant’s Notice of Motion dated **1<sup>st</sup> November 2013** and filed in Court on **6<sup>th</sup> November, 2013** is hereby dismissed. I will give no order as to costs.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 13TH DAY OF JUNE 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Ndumia holding brief for McCourt for Applicant

M/s Lukobe for Respondent

Teresia – Court Clerk