



**Odek v Siburi Mixed Secondary School & another; Co-operative Bank of Kenya (Garnishee)
(Appeal E090 of 2025) [2026] KEELRC 122 (KLR) (27 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E090 OF 2025
JK GAKERI, J
JANUARY 27, 2026**

BETWEEN

JOSEPH ODEK APPELLANT

AND

SIBURI MIXED SECONDARY SCHOOL 1ST RESPONDENT

**BOARD OF MANAGEMENT (SIBURI MIXED SECONDARY
SCHOOL) 2ND RESPONDENT**

AND

CO-OPERATIVE BANK OF KENYA GARNISHEE

JUDGMENT

1. This is an appeal from the Ruling of Hon. K. Cheruiyot dated 23rd October 2025 in Kisumu CMCELRC No. E226 of 2021 in Joseph Odek V Siburi Mixed Secondary School and another.
2. The brief facts of the suit before the trial court were that claimant/Applicant filed a Notice of Motion dated 7th August 2025 under Certificate of Urgency seeking various Orders including certification of urgency, Garnishee Order nisi against Account Numbers

0112907XXXX

01139076XXXX

011410762XXX

0113907XXXX

all at the Co-operative Bank of Kenya, for a decree sum of Kshs.1,006,459.90.



3. That the Garnishee be directed to appear in court to show cause why it should not pay the decree holder the sum of Kshs.1,006,459.90 with interest failing which the Garnishee Order nisi be made Garnishee Order absolute and the amount released to the Claimant/Applicant within 14 days through his advocate's bank account.
4. The applicant contended that he was awarded Kshs.652,075.00 by the Magistrates Court on 2nd August 2024 and the respondent's Appeal No. E039/2025 was dismissed on 15th May 2025 and a decree extracted.
5. By a Replying Affidavit sworn by Christine Musiga, the Principal and Secretary B.O.M of the 1st respondent, the affiant deposed that the sum of Kshs.652,075 was awarded as underpayment but denied having been served with the decree as it ought to have been served on the Attorney General not the school.
6. The affiant deposed that the accounts sought to be Garnished were school operations accounts where student capitation monies was deposited and students would go without food.
7. That the 1st respondent was a public school.
8. The Garnishee's Replying Affidavit indicated that the respondent/sought Debtors account at the Homa Bay Branch A/C No. 011410762XXX had a bank balance of Kshs.2,760,590 insufficient to satisfy the decree sum.
9. When the matter came up on 7th August 2025, the court issued a Garnishee Order nisi on the accounts to preserve the funds therein.
10. After considering the respective cases and submissions by counsel, the learned trial magistrate reasoned that the 1st respondent was a public institution founded by public funds and was a government entity or agency and thus shielded from execution by the Government Proceedings Act and dismissed the application with costs and discharged the Garnishee Order nisi.
11. This is the Ruling appealed against on six (6) grounds that the trial court erred in law and fact by:-
 1. Finding that the respondents were a public entity not subject Garnishee Proceedings.
 2. Failing to acknowledge that categorization of schools under the Basic Education Act does not alter the Corporate status of the respondents.
 3. Disregarding the applicant's evidence in the affidavits and submissions.
 4. Finding that the respondent is shielded from Garnishment.
 5. Failing to consider that the respondent is a body corporate capable of subsisting independently with perpetual succession and was not a servant or agent of the Government.
 6. Misdirecting itself on the principles applicable in Garnishee proceedings.

Appellant's submissions

12. As to whether the 1st respondent was government and thus exempted from execution, counsel cited the provisions of section 13A of the Government Proceedings Act on Notice of intention to sue to submit that the selective application of the Act was wanting and the proceedings in the lower court had proceeded without any Preliminary Objection.



13. Reliance was placed on paragraph 1 of the Fourth Schedule to the *Basic Education Act* to urge that the B.O.M was a body corporate with perpetual succession and the appellant's application did not fall within the matters exempted by the *Government Proceedings Act* because the 2nd respondent was a juristic person.
14. Reliance was placed on the decision in Attorney General V Kenya Commercial Bank HCCC No. 329 of 2001 where the court held that the Attorney General had no locus standi to sue on behalf of the National Irrigational Board under the *Irrigation Act* as were the sentiments of the court in Abinja Kina Ileri V Board of Management S. A. Kyeni Girls Secondary School [2019] KEHC 7458 (KLR) as well as Amira (K) Ltd V National Irrigation Board [2001] 2 E.A 323, LRMG Property Ltd V JKUAT Enterprises Ltd [2024] KEHC 886 (KLR) where the court was not satisfied that JKUAT was Government or a Government Department.
15. Other decisions cited included Ikon Print Media Co. Ltd V Kenya National Highways Authority & 2 others [2015] eKLR and Ng'ok V Attorney General & another [2005] KEHC 3192 (KLR) to submit that the respondent being a body corporate was not exempted from garnishee proceedings.
16. By 15th December 2025, the respondent had neither filed nor served submissions in respect of the appeal service of the Record of Appeal and applicant's submissions notwithstanding.
17. The respondent did not file submissions.

Analysis and determination

18. This being a first appeal the role of the court is as was articulated by the Court of Appeal in Gitobu Imanyara V Attorney General & 2 others [2016] eKLR, Selle and another V Associated Motor Boat Co. Ltd [1968] EA 123, Peter V SundayPost [1958] EA and Kenya Ports Authority V Kutson (K) Ltd among others, which is to reconsider the evidence, evaluate it and make its own conclusions bearing in mind that it neither saw nor heard the witnesses and accordingly make allowance in that respect.
19. Before delving into the specific issues, it is essential to capture the essence of garnishee proceedings.
20. Order 23 rule 1 of the Civil Procedure Rules explains the concept of garnishee proceedings.
21. As explained by the Court of Appeal in Kenya Electricity Transmission Co. Ltd V Spedag Interfreight Kenya Ltd & 4 others [2024] KECA 542 (KLR), garnishee proceedings are commenced by the decree holder against another person (Garnishee) who happens to be indebted to the judgment debtor and its purpose is for the attachment of all the debts due from the Garnishee to the decree holder to satisfy the decree.
22. The court held:

“... In other words, the garnishee who owes the judgment debtor sums in excess of the amount due to the decree holder is only obliged to pay to the judgment debtor the sum that the judgment debtor owe the decree holder. On the other hand, where the garnishee owes a lesser amount than the amount owed by the judgment to the decree holder, he can only pay the amount that he owes the judgment debtor and is not obliged to pay more than he owes. His is not the judgment debtor and, therefore, is not bound to settle the decree against the judgment debtor from his own money. That was the position adopted by the predecessor to this court in Petro Sonko & another V HADB Patel & another [1953] IEACA where the



court while holding that a garnishee cannot accelerate the time for payment of a debt and that, where the debt is not due there is nothing to be attached. The court explained that

“A Judgment creditor cannot by means of attachment stand in a better position as regards the garnishee than the judgment debtor did, he can only obtain what the judgment debtor could honestly give him”.

23. There are two stages in garnishee proceedings. The first stage is the ex parte stage where an Order is issued attaching the debt held by the garnishee to the credit of the judgment debtor. At that stage the garnishee is not directed to pay any money to the judgment debtor since the exact amount if any, held by the garnishee to the credit of the judgment debtor is not known. The Order made at this stage is known as a garnishee Order nisi. The second stage is where the garnishee appears to show cause why he should not pay to the decree-holder the debt due from him to the judgment debt or, or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.
24. It is only after the second stage that the court may direct the garnishee to settle the whole amount due under the decree if the garnishee holds to the credit of the judgment debtor a sum equal to or in excess of the decretal sum or the sum held by the garnishee to the credit of the judgment debtor where the amount owed is less than the decretal sum. The Order issued at this stage is known as a garnishee order absolute...”
25. The court further stated:

“In our view, garnishee proceedings are special proceedings which do not contemplate the existence of a contractual relationship between the judgment creditor and the garnishee. Strictly speaking they are not even execution proceedings since the property of the garnishee is not in jeopardy in such proceedings. In garnishee proceedings, the decree-holder steps into the shoes of the judgment debtor and demand that the payment due from the garnishee to the judgment debtor to be paid to the decree holder or judgment creditor instead...”
26. The foregoing sentiments of the court aptly capture the nature rationale and process of garnishment.
27. The trial court is faulted on various fronts including misdirecting itself on the applicability of garnishee proceedings against the respondents.
28. It is common round that the respondent is a public secondary school whose affairs are managed by the Board of Management appointed by the County Education Board under qualifications prescribed by the Cabinet Secretary for Education.
29. Being a public school, the school is funded by the Government or the public through capitation from government revenue from taxation.
30. Under the paragraph 15 and 16 of Part I of the 4th Schedule to *the Constitution* of Kenya, 2010, Education Policy, Standards, Curricula and examination is the mandate the National Government. Universities, Tertiary Educational Institutions an other institutions of research and higher learning and primary schools, special education, secondary schools and Special Education Institutions fall under the National Government.
31. Under the provisions of the *Basic Education Act*, every Secondary School is required to have a Board of Management (B.O.M) to discharge the functions set out under Section 59 of the Act which include receiving, collecting and accounting for any funds accruing to the institution and are empowered to recruit, employ and remunerate non teaching staff in accordance with the Act.



32. The B.O.M also manages and administers resources of the institution.
33. It is trite that under the 4th Schedule to the *Basic Education Act*, a B.O.M is a body corporate with perpetual succession and a common seal, with capacity to sue or be sued, contract, purchase, acquire, hold, charge or dispose off movable and immovable property, borrow, lend and grant money.
34. According to the appellant, the fact that a B.O.M is a body corporate meant that it was capable of being subjected to garnishee proceedings.
35. Strikingly, the 4th Schedule to the *Basic Education Act* makes no reference to debts and liabilities of schools. This is critical because B.O.Ms are not the owners of the schools. The fact that they are incorporated associations was, in the court's view intended to ensure continuity in the management of school affairs.
36. B.O.Ms do not typically have bank accounts. Schools accounts are in the name of the school and being a legal entity distinct and separate from the school, the B.O.M is legally not the school and it follows that the schools bank accounts are not B.O.M accounts.
37. The concept of legal entity has its origins in corporate law in the 19th century, principally companies but has since been extended to government bodies under Acts of parliament and the *State Corporations Act*.
38. Be that as it may, constituting a part-time board into a body corporate appears uncommon and must have been informed by certain undisclosed realities and members serve for 3 years and if re-appointed another 3 years contrary to the appellant counsel's submission that the corporate character denies the B.O.M a government tag, it does not for the simple reason that the legal personality does not constitute a B.O.M a private institution. It remains a public body and play an essential role as part of the building blocks towards the realization of the right to free and compulsory education for children in Kenya.
39. In its Replying Affidavit sworn by Christine Musiga on 28th August 2025, the affiant deposed that the *Basic Education Act* categorised schools into public and private and the respondent was in the public category.
40. In a Further Affidavit sworn by Mary Atieno Koko Advocate on 18th August 2025, the advocate deposed that although the respondent was funded public funds it was not a government institution for purposes of the *Government Proceedings Act*.
41. Under Section 43 of the *Basic Education Act*
 1. Basic educational institutions shall be categorised as-
 - a. public schools which are schools established, owned or operated by the Government and includes sponsored schools;
 - b. private schools as those established, owned or operated by private individuals, entrepreneurs and institutions.
 2. A public basic education institution shall not be converted to a private basic education institution or to any other private status without consultation with the National Education Board and approval by the Cabinet Secretary.
42. From the forgoing provisions, it is discernible that a public institution established owned and financed by the government is to all intents and purposes a government institution and that is why the Teachers Service Commission, a government agency provides and pays teachers to all public schools and public schools are not legal entities.



43. The dichotomy of institutions under Section 43 of the *Basic Education Act* was intentional and no evidence was adduced before the trial court to demonstrate that the 1st respondent was a private institution and did not fall under any of the categories under section 43 of the Act.
44. The fact that the bank accounts were in the name of the school did not make the school a private institution. It is the only way to ensure that distribution of funds by the government to schools is decentralized and serves the schools well. The accounts are opened to facilitate utilization of the funds by the people who need it. It, in the court's view, cannot be done otherwise.
45. The B.O.M of a school is a creature of law and is a public body or institution.
46. Under Section 2 of the *Government Proceedings Act* a Public body means the Government, or any department, institution or undertaking or a local authority; or any authority, board commission, or committee or other body whether paid or unpaid, which is invested with or is performing, whether permanently or temporary functions of a public nature.
47. As adverted to elsewhere in this judgment the B.O.M is constituted as a body corporate by law, but schools are not legal entities and school accounts belong to the school not the B.O.M.
48. The persuasive authorities of the High Court cited by the appellant notwithstanding, the court is guided by the sentiments of the Court of Appeal in *Five Star Agencies & another V National Land Commission & 2 others* [2024] KECA 439 (KLR), where the appellant sought garnishment of funds at National Bank of Kenya belonging to the National Land Commission (NLC) in respect of the sum of Kshs.1,185,188,463.02 and the NLC filed a Notice of Preliminary Objection premised on the provisions of Section 21(4) of the *Government Proceedings Act* the High Court dismissed the Garnishee application on the ground that mode of execution adopted by the appellant was contrary to the provisions of the *Government Proceedings Act* and Order 29 Rule 2(2) of the Civil Procedure Rules.
49. The court reasoned that notwithstanding the fact that the NLC was an independent body, it was infused with government character and was a state organ under Article 253 of *the Constitution* of Kenya and its functions were public and closely related to governmental functions and the finding was not contested on appeal.
50. The Court of Appeal observed:

“As regards the first issue, the central issue that the trial court had to determine was whether or not the NLC is analogous to the government and therefore not subject to execution in the manner provided by Order 23 Rule 1 of the Civil Procedure Rules, 2010. The court analysed various provisions of the law and judicial decisions and arrived at the conclusion that the NLC is a state organ and although independent, it is infused with governmental character. This finding of the trial court is not a contested issue in the consolidated appeals, we need not therefore belabour the findings of the trial court on the issue...

Having therefore established that the NLC is a state organ and therefore for all purposes part of the government, what mode of execution should be adopted against it?”
51. After a detailed analysis of Order 23 Rule 1 and Order 29 Rule 2(c) of the Civil Procedure Rules as well as the provisions of section 21 of the *Government Proceedings Act*, and the decisions in *Kisya Investments Ltd V Attorney General & another* [2005] eKLR, *Republic V Attorney General & another Ex Parte James Alfred Koroso* [2013] eKLR, *Republic V Attorney General & another ex parte Stephen Wanyee Roki* [2016] eKLR, *Republic V County Secretary Nairobi City County & another ex parte Wachira Nderitu Ngugi & Co. Advocates* [2016] eKLR, Kenya National Examinations Council



V Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, Republic V Permanent Secretary Office of the President Ministry of Internal Security & another ex parte Nassir Mwachhihi [2014] eKLR and Republic V Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012], the court held:

“It is clear beyond a peradventure that the procedure to be followed in execution against the government is to seek an Order of mandamus to compel the relevant person in the Government to settle the decree in question. This finding, in our view answers the question posited by the Five Star whether its right to prompt compensation and equality under the relevant provisions of *the constitution* and the *Land Act* can exist the absence of a legal remedy”.

52. The foregoing leaves no doubt that being a body corporate or independent with certain capacities or attributes such as sue or be sued, contract, own property, perpetual succession and a common seal does not exclude a body from being characterised as government.
53. BOMs of Public Schools though body corporates have no private functions. The functions of the BOM under Section 59 of the *Basic Education Act* are exclusively public to ensure that the institution fulfils its public duty to students and the public at large. In the court’s view, the BOM is infused with governmental character.
54. Being the board of a public school, which is a government institution, the B.O.M has government character.
55. The rationale of protecting the government from ordinary execution was exquisitely captured by Ibrahim and Visram JJ in *Kisya Investments Ltd V Attorney General* (supra) where the Judges stated inter alia:

“History and rationale of government’s immunity from execution arises from the following...

Firstly, there has been a policy in respect of parliamentary control over revenue and this is threefold and is exercised in respect of (i) The raising of revenue (by borrowing) (ii) Its expenditure, and (iii) the audit of public accounts. The satisfaction of a decree or judgment is deemed to be an expenditure by parliament and as a result of this must be justified in law and provided for in Government’s expenditure. It is for this reason that Section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the monies provided by parliament...

No government can possibly survive such an onslaught. The Government and therefore the state operations will grind to a halt and paralyzed and soon the government will not only be bankrupt but its constitutional and statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the rule of law. This is the rationale or the objective of the law that prohibits execution against and attachment of the government assets and property”. (Emphasis added).

56. From the foregoing, the court is in agreement with the Court of Appeal its sentiments, thus:

“Having stated the foregoing, and since decree will from time to time be issued against the Government, what then is the option available to a party who holds a decree against the Government? The only remedy available to such a person is to institute judicial review proceedings and seek an Order of mandamus to compel the Government to settle the decree



in question. This position has been pronounced in several decisions of High Court such as Republic V Attorney General and another Ex Parte James Alfred Koroso (supra)..."

57. The foregoing sentiments lay it bare that any execution against the Government must be in consonance with the provisions of Section 21 of the Government Proceedings Act which requires application and issuance of a Certificate of Order Against the Government which must be served upon the accounting officer for payment of the decretal sum and costs, if any, failing which Judicial Review proceedings for the Order of mandamus are necessary.

58. The foregoing is fortified by the sentiments of Odunga J (as he then was) in Republic V Permanent Secretary Office of the President Ministry of Internal Security & another ex parte Nassir Mwadihi (supra) thus:

"...It must be remembered that an application for an Order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the court issues such an Order, there must be proof that the provisions of the Government Proceedings Act have been complied, with respect to issuance of Certificate of Costs and Certificate of Order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, the law as a general rule required a demand by the applicant for action and refusal as a prerequisite to the granting of an Order, though there are exceptions to the rule...

The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and Orders of the court".

59. See also Republic V Permanent Secretary Ministry of State for provincial Administration and Internal Security (supra).

60. In Five Star Agencies Ltd & another V National Land Commission & 2 others (supra), the Court of Appeal stated

"It is our view that only after the procedure as laid down under Section 21 of the Government Proceedings Act has been complied with and a demand for payment made that a cause of action accrues for purposes of an application for an Order of mandamus against the Government.

61. The court is bound by these sentiments.

62. Having found that the respondents are invested with governmental character and attributes, it is imperative to unpack the concept of Government.

63. It is trite that the Government Proceedings Act has no definition of the term Government.

64. Section 2 of the Interpretation and General Provisions Act provides that the Government means the Government of Kenya.

65. Black's Law Dictionary, 10th Edition defines Government as:

1. The structure of principles and rules determining how a state or organisation is regulated.
2. The sovereign power in a Nation or state.



3. An organization through which a body of people exercise political authority; the machinery by which sovereign power is exercised.
65. Perhaps the most authoritative and persuasive rendition of what a Government body is are the sentiments of the Supreme Court of India in *Shetty V Airport Authority of India & Others* [1979] I.S.C.R 1042 cited in *Association of Retirement Benefits Scheme V Attorney General & 3 others* [2017] eKLR, thus
- a. Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality of the Government.
 - b. Where the financial assistance of the state is so much as to meet almost the entire expenditure of the corporation that fact would afford some indication of the corporation being impregnated with government character.
 - c. It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the state.
 - d. Whether the body has deep and persuasive state control.
 - e. Whether the functions of the corporation are of public importance and closely related to Government functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and
 - f. If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the government”.
66. As discernible from its preambular provision, one of the objectives of the *Basic Education Act* was the establishment of the institutional arrangement for basic education from the national to the County and school level by establishing the National Education Board Standards and Quality Assurance Commission, County Education Board and Board of Management, all under the Ministry of Education under Section 53(1) and 54(1) of the *Basic Education Act*.
67. The County Education Board is an agent of the National Education Board under Section 17(2) of the Act.
68. These bodies are governmental bodies in terms of ownership funding, are regulated by the Cabinet Secretary, perform public functions and are undoubtedly instrumentalities or agencies of government.
69. The B.O.M is in the court’s view, an agency of government and the learned trial magistrate did not err by finding that the respondent was a government entity or agency.
70. Having found as above, it clear that the mode of execution employed by the appellant against the Judgment Debtor was inconsistent with the provisions of Section 21 of the *Government Proceedings Act*.
71. Flowing from the foregoing, it is discernible that the court is not persuaded that the learned trial magistrate erred by finding that the respondents were public entities or failed to consider that the 2nd respondent was a body corporate or disregarded the appellant’s evidence.
72. The upshot of the foregoing is that the appeal lacks merit and it is dismissed.
- Parties shall bear their own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF JANUARY 2026.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

