



**Shah & 2 others v Chairperson, Mvita Constituency Development Fund Committee & 3 others
(Environment & Land Case 50 of 2016) [2024] KEELC 939 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 50 OF 2016
NA MATHEKA, J
FEBRUARY 28, 2024**

BETWEEN

**RATILAL CHELA SHAH 1ST PLAINTIFF
DI NUMATI RATILAL CHELA SHAH 2ND PLAINTIFF
BHIKHU RATILAL GHEI-A SHAH 3RD PLAINTIFF**

AND

**CHAIRPERSON, MVITA CONSTITUENCY DEVELOPMENT FUND
COMMITTEE 1ST OBJECTOR
M.P HON ABDULSWAMAD SHARIFF NASSIR 2ND OBJECTOR
CONSTITUENCY DEVELOPMENT FUND BOARD 3RD OBJECTOR
MVITA, CONSTITUENCY DEVELOPMENT FUND 4TH OBJECTOR**

RULING

- 1 The application is dated 29th September 2023 and is brought under Order 51 Rule 1 and Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010 and section 3,4 and 80 of the *Civil Procedure Act* seeking the following orders;
1. That the Honourable Court be pleased to certify this matter urgent and service thereof be dispensed with in the first instance.
 2. That there be a stay of execution of the warrants of attachment and warrant of the attached goods by Autoland Auctioneers, the property of the 4th objector pending inter parties hearing of this application.
 3. That this Honourable Court do review its ruling and orders made on 28th September 2023.



4. That this Honourable court do address itself on prayers 4 and 5 of our Application dated 20th April 2023, as the same was not addressed in the ruling rendered on 28th September 2023.
 5. That the costs be provided for.
- 2 It is based on the following grounds that on the 12th April 2023 the decree holders through their agent Autoland Auctioneers proclaimed and have threatened to attach the goods of the 4th Defendant who was not a party to the proceedings before court in execution of this honorable court's decree. That the 4th Objector an entity created by the law was not a party to the proceedings thus should not be condemned unheard. The 4th objector is the owner of the goods attached by Fantasy Auctioneers. The 4th objector is not and was not a party to the proceedings before this honorable court as such the decree holders have no claim against it. If anything the Objectors being government entities are protected from execution by attachment under Section 21 (4), (5) of the *Government Proceedings Act*. The Honourable court in its decision of 28th September 2023 failed to address prayers 4 and 5 of our Application dated 20th April 2023.
- 3 The Plaintiffs/Respondents herein opposed the Notice of Motion dated 29th September 2023 by the Attorney General on behalf of the Defendants/ "Objectors" seeking stay of execution and review of the ruling dated 28th September 2023 on grounds that the instant application is res judicata and a grave abuse of court processes. Stay of execution in this matter has been dealt with severally and dismissed. The same issue of stay cannot be litigated ad infinitum. There are no grounds or sufficient reasons raised for review of the ruling dated 28th September 2023. The application is an abuse of court process as the same is simply purposed to delay, scuttle, prejudice and bring hardship to the Plaintiffs/Respondents' entitlement and enjoyment of the fruits of the judgement. The application is unsustainable and meritless. The application is otherwise incompetent, defective, vexatious, frivolous and scandalous.
- 4 This court has considered the application and the submissions therein. The applicants stated that the objectors being government entities are protected from execution by attachment under Section 21 (4), (5) of the *Government Proceedings Act*. Section 21(4) of the *Government Proceedings Act* Cap 40 of the Laws of Kenya provides as follows;
- “Save as provided in this Section, no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Government of any money or costs, 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.”
- 5 Considering the import of this provision in *Republic vs Otieno Kajwang & Another Ex parte Mohamed Mubumed Sirat* (Nairobi HC Misc Application No. 316 of 2008) Odunga J., observed and I agree as follows:-
- “The above provision clearly bars individual liability for orders of payment by the Government, Government Department or Government Officer and further bars execution or attachment against the Government. It is my view that where the Government is found to be liable in Civil proceedings, the only mode of realizing the fruits of Judgment is by way of an order of mandamus...”.



6 The rationale for the provision barring execution against the Government was stated in *Kisya Investments Ltd vs Attorney General & Another* (2005) 1KLR 74, as follows;

“Order 28, Rules 2(1) (a), 2 and (4) of the Civil Procedure Rules subject themselves to the provisions of the *Government Proceedings Act* which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the Courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the Court, the application of any written law cannot amount to an abuse of the process of the Court, however much its effect is harsh or even undesirable. 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 taxation or borrowing); (ii) its expenditure; and (iii) The audit of public accounts. The satisfaction of decrees or Judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the 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 moneys provided by Parliament. Parliamentary Control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. See *Halsbury’s Laws of England* 4th Edition Vol 11 Paragraph 970, 971 and 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947(Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or Judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. See *Auckland Harbour Board –vs- R* (1924) AC 318, 326”

7 As to whether Section 21 of the Act applies to County Government, in the case of *Josephat Gatheo Kibuch vs Kirinyaga County Council* (2015) eKLR the Learned Judge after considering the definition of the “County Government” under Section 2 of the County Government Act and Article 176 of the *Constitution* concluded as follows;

“In view of the foregoing definitions, a County Government is part of the State or Government. the *Constitution* of Kenya establishes two levels of Government being the National and the County Government. The provisions of Section 21 of the *Government proceedings Act* are therefore applicable to proceedings relating to a County Government.”

8 Considering a similar issue in *Republic vs Attorney General & Another exparte Stephen Wanyee Roki* (2016) eKLR Odunga J observes as follows:-

“Article 189(1) (a) of the *Constitution* provides that Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and in the case of County Government, within the County level. In my view a holistic approach to this provision



would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in the spirit of co-operation and complementariness. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution.”

9 Furthermore, the Government Proceedings Amendment Act No. 35 of 2015 provides as follows;

“Section 21 of the Government Proceedings Act is amended by inserting the following new sub-section immediately after sub-section (4)—

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government (emphasize added), or in any proceedings in connection with any arbitration in which a county government is a party”.

10 From the foregoing it is clear that the county government is included in the application of the Government Proceedings Act.

11 Further, Article 6 (2) of the Constitution of Kenya provides that the government is at national and county levels which are distinct and interdependent of each other and they work in cooperation as stated under Article 189. Therefore, there is one government which works at two levels with each level complementing each other and working in unity.

12 Since a party is barred from executing against the government, the decree holder has the option of instituting judicial review proceedings and seek for an order of mandamus. This was so stated in the case of Republic v Attorney General & another Exparte Stephen Wanyee Roki (Supra) which held that;

“It follows that the only remedy available to such a person is to institute judicial review proceedings and seek an order of mandamus compelling the County Government to settle the decree in question.”

13 It is not disputed that the objectors fall under government entities. Accordingly, I find that sufficient reasons have been given to enable this court review its orders as the court is prevented from making an order of attachment of moveable property belonging to the applicants in execution of the decree against them. I therefore conclude that the application is meritorious and I make the following orders;

1. That the decree holders acting through their agent Auto Auctioneers or any other auctioneers and or agents be permanently restrained from attaching the goods of the objectors.
2. That the proclamation dated 12th April 2023 by Autoland Auctioneers in execution of this Honourable court’s decree be raised.
3. Each party to bear their own costs of the application.

14 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

