



**Fort Properties Limited v Kenya National Highways Authority & another;
Co-operative Bank of Kenya Limited & another (Garnishee) (Constitutional
Petition 29 of 2020) [2024] KEELC 3594 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 29 OF 2020**

**LL NAIKUNI, J
APRIL 24, 2024**

BETWEEN

FORT PROPERTIES LIMITED PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED GARNISHEE

NATIONAL BANK OF KENYA LIMITED GARNISHEE

RULING

I. Introduction

1. This ruling is in respect to three (3) interlocutory Notice of Motion applications making the subject matter before the Honourable Court for its determination rather convoluted. The first one is dated 14th June, 2023 filed by the 1st Respondent, Kenya National Highways Authority; the second one dated 15th June, 2023 by the Petitioner, Fort Properties Limited and the third one dated 15th September, 2023 by the 1st Respondent herein.
2. Upon service of the applications to the Respondents in each of these applications, tendered their responses to the said applications through filing replying affidavits and grounds of opposition respectively. For ease of reference, the Honourable Court though will deal with each application separately and in a distinct manner but eventually in simultaneous way render one omnibus ruling.



II. The Notice of Motion application dated 14th June, 2023

3. This application was the one filed by the 1st Respondent herein. It was brought against the Petitioner/ Respondent under the provision of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule 1, Order 29 Rule 2(2) & 4(1), Order 9 Rule 9, Order 21 Rule 8 (2), and Order 51 Rule 1 of the Civil Procedure Rules, 2010 (as revised), Section 68 of the *Kenya Roads Act* No.2 of 2007, Section 21(3)& (4) of the Government Proceedings, Cap.40 Laws of Kenya. The 1st Respondent sought for the following orders:-
- a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That the Honourable Court be pleased to issue an order directing the 1st Garnishee to unfreeze, and or unblock the sum of Kshs. 738,758,414.87 held in 1st Respondent/Applicant's Account No.01141160XXXX held at the 1st Garnishee and which the 1st Garnishee has placed in a suspense account;
 - e. That the Honourable Court be pleased to review and vary paragraph 26 of its Ruling dated 15th May, 2023 and Orders therein which states that:
 - “a) That the Notice of Motion application dated 11th August, 2022 by the Petitioner/ Decree Holder herein be and is hereby allowed as against the 1st Respondent against the 2nd Respondent/Judgment Debtor.
 - b) That the Petitioner/Decree Holder may pursue execution of the Decree against the 1st Respondent/Judgment Debtor in the laid down, proper and legal process; and
 - c) That costs of the application be borne by the 1st Respondent, 1st and 2nd Garnishees jointly and severally awarded to the Petitioner.”
 - f. That the Honourable Court be pleased to vary paragraph 26(a) and (b) of the Ruling dated 15th May, 2023 and Orders therein to read as follows:

“That the Notice of Motion application dated 11th August 2022 by the Petitioner/ Decree Holder herein be and is hereby allowed as against the 1st Respondent/ Judgment Debtor to the extent that the Petitioner/Decree Holder may pursue execution of the Decree against the 1st Respondent/Judgment Debtor in the laid down, proper and legal process.”
 - g. That the Honourable Court be pleased to issue any other or further orders as the Honourable Court may deem fit to grant;
 - h. That costs of this Application be provided for.
4. The application by the Plaintiffs herein was premised on the grounds, testimonial facts and averments made out under the 29th Paragraphed Supporting Affidavit with one (1) annexure marked as “JM - 1”, of Jessica Mbae, the Assistant Director, Legal Services of the 1st Respondent/Applicant herein and dated 14th June, 2023 averred that:



- a. The 1st Respondent/Applicant [Kenya National Highways Authority] is a statutory corporation established under the [Kenya Roads Act](#).
- b. According to statute, any execution against the 1st Respondent/Applicant has to follow the provisions of Section 68 of [Kenya Roads Act](#) and Sections 21(3) & (4) of the [Government Proceedings Act](#).
- c. The 1st Respondent/Applicant was at all material times in these proceedings represented by in-house Counsel Mr. Nathaniel Munga, Advocate.
- d. The 1st Respondent/Applicant had appointed the Law firm of Messrs. Prof. Albert Mumma & Company Advocates [“Incoming Advocates”] to represent it in this matter in place of the said Nathaniel C. Munga, Advocate [“Outgoing Advocate”].
- e. Both the 1st Respondent/Applicant’s said incoming and outgoing Advocates have filed a consent dated 9th June 2023 effecting change of representation and it was necessary that an order of court do issue adopting the consent.
- f. Further, on 15th May, 2023, the Honourable Court delivered a ruling ordering at Paragraph 26 of the ruling as follows:

“ a) That the Notice of Motion application dated 11th August 2022 by the Petitioner/Decree Holder herein be and is hereby allowed as against the 1st Respondent/Judgment Debtor, the 1st and 2nd Garnishees but disallowed against the 2nd Respondent/Judgment Debtor.

b) That the Petitioner/Decree Holder may pursue execution of the Decree against the 1st Respondent/Judgment Debtor in the laid down, proper and legal process; and

c) That costs of the application be borne by the 1st Respondent, 1st and 2nd Garnishees jointly and severally awarded to the Petitioner.”

- g. In consequence of the above ruling of the court, the 1st Respondent/Applicant's incoming advocates had discovered that the Petitioner/Decree Holder proceeded to extract two differing orders purporting them to be orders flowing from the said ruling of the court.
- h. The first order was issued to the Petitioner/Decree Holder on 23rd May 2023 and states in material parts as follows:

“ It is hereby ordered:

1. That the Notice of Motion application dated 11th August 2022 by the Petitioner/Decree Holder herein be and is hereby allowed as against the 1st Respondent/Judgment Debtor, the 1st and 2nd Garnishees but disallowed against the 2nd Respondent/Judgment Debtor.

2. That the Petitioner /Decree Holder may pursue execution of the Decree against the 1st Respondent/Judgment Debtor in the laid down, proper and legal process; and



3. That costs of the application be borne by the 1st Respondent, 1st and 2nd Garnishees jointly and severally awarded to the Petitioner.”
- i. The above Orders Nos. 1 and 2 of the Order issued on 23rd May 2023, were contradictory in themselves and compliance with one rendered the other moot which, at any rate, was absurd in law.
- j. In its wisdom, the Honourable Court, being aware of provision of Section 68 of *Kenya Roads Act* and Sections 21(3) & (4) of the *Government Proceedings Act* and attachment of the 1st Respondent/Applicant's property or funds to satisfy decree against the 1st Respondent/Applicant by applying the laid down, proper and legal process.
- k. The garnisheeing, therefore, of the 1st Respondent/Applicant's accounts, as the Petitioner/Decree Holder had done was in breach of provision Section 68 of *Kenya Roads Act* and Sections 21(3) & (4) of the *Government Proceedings Act* and Order 29 Rule 2(2) & 4(1) of the Civil Procedure Rules, 2010 and laid to waste the order that the Petitioner/Decree Holder should execute the decree in accordance with the proper and laid down law.
- l. From the foregoing, it could be deduced that the order which the court in fact intended to grant was the order at Paragraph 26(b) and (c) of the ruling. Consequently, there were sufficient reasons for court to vary its orders so that the orders was in accord with the law and reasoning as set out by the court in its said ruling and also so that the orders was clear to the parties more so the Petitioner/Decree Holder and the Garnishees.
- m. It never ended there. The second order purportedly issued to the Petitioner/Decree Holder by the same court [but on 5th June 2023] states:-

“It is hereby ordered:

1. That an order is hereby issued to the above named garnishees and the Judgment Debtors to attend before the court on a date to be appointed, to show cause why the said garnishee should not pay to the decree holder the decretal balance herein or so much thereof as may be sufficient to satisfy the said sum of Kshs. 242,950,000.00 together with court interest of Kshs. 386,667,886.00 at 12% of principal amount from 21st March 2014 to 11th August 2022, mesne profits of Kshs.24,000,000.00, rent of Kshs.168,580,645.00 commencing from 2nd June 2015 to 11th August 2022, penal interest of Kshs.109,447,144.00 at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of Kshs.931,645,675.00 excluding the 2nd Respondent.
2. That an order nisi be and is hereby issued forthwith attaching the principal amount of Kshs.242,950,000.00 together with court interest of Kshs.386,667,886.00 at 12% of principal amount from 21st March 2014 to 11th August 2022, mesne profits of Kshs. 24,000,000.00, rent of Kshs.168,580,645.00 commencing from 2nd June 2015 to 11th August 2022, penal interest of Kshs.109,447,144.00 at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of Kshs. 931,645,675.00 which sum is held to the credit of both



the 1st Judgment Debtor bank account held by the garnishee herein Co-operative Bank of Kenya Account No. 01141160XXXX at its head office branch Nairobi and the 2nd Judgment Debtor account No. 01001032XXXX held by the 2nd garnishee herein National Bank of Kenya Limited at its Hill Branch, Nairobi excluding the 2nd Respondent.

3. That a garnishee order absolute is hereby issued to satisfy the said sums of Kshs. 242,950,000.00 together with court interest of Kshs.386,667,886.00 at 12% of principal amount from 21st March 2014 to 11th August 2022, mesne profits of Kshs.24,000,000.00, rent of Kshs.168,580,645.00 commencing from 2nd June 2015 to 11th August 2022, penal interest of Kshs.109,447,144.00 at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of Kshs. 931,645,675.00.
 4. That the amount of Kshs.931,645,675.00 held in both the Respondent's/Judgment Debtor's (SIC) bank account No. 01141160XXXXheld by the 1st Garnishee, Co-operative Bank of Kenya Limited, Nairobi and Account No. 010010329XXXX held by the 2nd Garnishee, National Bank of Kenya Limited Nairobi, be withheld or placed in a suspense account for security purposes pending further directions of this Honourable Court.
 5. That the Petitioner/Decree Holder may pursue execution of the Decree against the 1st Respondent/Judgment Debtor in the laid down, proper and legal process; and
 6. That costs of the application be borne by the 1st Respondent, 1st and 2nd Garnishees jointly and severally awarded to the Petitioner.”
- n. The 1st Respondent/Applicant had discovered that the Petitioner/Decree Holder had served the two conflicting orders dated 23rd May 2023 and 5th June 2023 respectively on 1st Garnishee herein – the Co - Operative Bank of Kenya Limited who had acted on the same by freezing and blocking and suspending the 1st Respondent's Account No. 011411609XXXX.
- o. The said two orders dated 23rd May 2023 and 5th June 2023 were extracted in complete breach of the mandatory provisions of Order 21 Rule 8(2) of the Civil Procedure Rules, 2010 which stipulates that the person seeking to extract an order must first prepare a draft which shall be submitted for the approval of the other party. No such draft was served on the 1st Respondent/Applicant.
- p. The purported order issued on 5th June 2023, demanded that the garnishees and the Judgment Debtors do attend before the court on a date to be appointed, to show cause why the said garnishee should not pay to the decree holder the decretal balance herein.
- q. At the same time, the said order [issued on 5th June, 2023] purported that both garnishee order nisi and absolute have been issued all at once when, at the same time, the garnishees and the Judgment Debtors was required to attend before the Court on a date to be appointed, to show cause why the said garnishee should not pay to the Decree Holder the decretal balance herein.



- r. Further, according to the order issued on 5th June 2023, the court has granted both a garnishee order absolute to satisfy the decretal amount [Order 3] on the one hand, and an order directing the garnishees to withhold and put in a suspense account the 1st Respondent/ Applicant's funds in the respective accounts pending further directions of this Honourable Court, on the other hand.
- s. The order issued on 5th June 2023 was therefore internally contradictory and incapable of being complied with by the 1st Respondent/Applicant without grave, unfairly prejudicial and unjust consequences falling on the 1st Respondent/Applicant.
- t. As things stand, the 1st Garnishee herein Co-operative Bank Of Kenya Limited proceeded on 7th June 2023 to block and suspend the 1st Respondent/Applicant's account held with it on account of these conflicting and internally contradictory orders.
- u. Accordingly, the 1st Respondent/Applicant's day to day operations had been ground to a complete halt when it was a government agency against whom any execution ought to follow laid down, proper and well-known legal process.
- v. Indeed, this very Honourable Court, being well aware of the laid down, time tested, prudent and proper legal process for execution of a decree against the 1st Respondent/Applicant directed the Petitioner/Decree holder to follow those processes in its Order at paragraph 26(b) of the Ruling and Order dated 15th May 2023.
- w. The legislature in its wisdom drafted the provision of Section 68 of *Kenya Roads Act* and Sections 21(3) and (4) of the *Government Proceedings Act* solely to prevent instances such as those witnessed here where a litigant had attached funds of the 1st Respondent/Applicant without the previous written permission of the Director General of the 1st Respondent/Applicant contrary to Section 68(b) of the *Kenya Roads Act*.
- x. In essence the Petitioner/Decree holder had taken advantage of the lack of clarity in the two orders purported to have been issued by the court and is now circumventing the mandatory provisions of Section 68 of the Kenya Roads Act and Sections 21(3) and (4) of the *Government Proceedings Act* in the guise of garnishee proceedings.
- y. The 1st Respondent/Applicant was apprehensive that unless this Honourable Court reviews and varies its ruling and order, the government projects being implemented by the 1st Respondent/Applicant that had underlying costs and contractual obligations would be affected at huge financial cost to the tax payers at a level that had not been witnessed before.
- z. It was from the foregoing sufficient reasons that the 1st Respondent/Applicant sought to vary the ruling of the court to make it clear that no funds of the 1st Respondent/applicant can be attached in any manner other than those provided in Section 68 of *Kenya Roads Act* and Sections 21(3) and (4) of the *Government Proceedings Act*.
- aa. No prejudice whatsoever or at all shall be suffered by the Petitioner/Decree Holder as it shall still be free to pursue execution of the decree against the 1st Respondent/Applicant by applying the laid down, proper and legal process of execution stipulated in the statutes.
- ab. It was in the interest of justice that the instant application be granted as prayed.



III. The Response to the Notice of Motion application dated 14th June, 2023 by the Petitioner

5. The Petitioner opposed the notice of motion application dated 14th June, 2023 through a replying affidavit dated 19th June, 2023.

IV. The Notice of Motion application dated 15th June, 2023

6. The Petitioner herein, Fort Properties Limited moved this Honourable Court for the hearing and determination of their Notice of Motion application dated 15th June, 2023. It was brought under the provision of Article 159(2) of *the Constitution* of Kenya, 2010, Section 10 of the *High Court (Organization and Administration) Act*, Section 1A, 1B, 3A and 3B of the *Civil Procedure Act*, Cap 21 Laws of Kenya. The Petitioner sought the following orders:-

- a. Spent.
- b. That the 1st Garnishee do appear before the court to show cause why they should not pay to the decree holder Kshs 765,645,675.00/- plus costs from the total amount held by the 1st Garnishee herein Co-operative Bank of Kenya in the 1st Respondent/Judgment Debtor's account number 011411609XXXX at its head branch Nairobi.
- c. That the garnishee order nisi issued on 5th June 2023 is hereby made Absolute and the funds be paid out to the Decree holder's account details as follows:-

Account Name: Fort Properties Limited

Bank: NCBA

Account Number: 67036XXXX

Account Branch: Moi Avenue,mombasa Branch

Swift Code: Cbafkenx

Bank Code: 07

Branch Code: 020

- d. That costs for this Application be provided for.
7. The application by the Petitioner herein was premised on the grounds, testimonial facts and averments made out under the 11th Paragraphed Supporting Affidavit of Ketan Patel, the director of the Petitioner/ Decree Holder sworn and dated 15th June, 2023 with two (2) annexures marked as "KP – 1" and "KP – 2" "2a – b", who averred that:
 - a. The Decree holder instituted garnishee proceedings against the 1st & 2nd Respondents/ Judgment debtors herein vide Application dated 11th August 2022.
 - b. The Ruling was delivered on 15th May 2023 allowing the application for garnishee order nisi against the 1st Respondent/Judgment Debtor. (Annexed in the supporting affidavit and marked as 'KP -1').
 - c. Service of the garnishee order nisi was effected upon the 1st Garnishee herein Co - Operative Bank of Kenya at its Mombasa branch on 7th June 2023 as well as at its head branch Nairobi on 8th June 2023. (Annexed in the supporting affidavit and marked as "KP - 2a – b").



- d. There was no dispute about the debt, and there is no contest that the 1st Garnishee herein Co-operative Bank of Kenya holds the funds in the 1st Respondent/judgment debtor's account number 0114116XXXX at its head branch Nairobi.
- e. There was a Judgment of this Honourable court delivered on 28th October 2021 by Hon. Justice L. L. Naikuni which stands partially satisfied to date, save that the partial payment of Kenya Shillings One Sixty Six Million (Kshs.166,000,000.00/=) was done by the Respondents after the filing of the garnishee application dated 11th August 2022.
- f. It was imperative that a garnishee order absolute be issued transferring the decretal amount to the Decree holder/Applicant's bank account details as follows:-

Account Name: Fort Properties Limited

Bank: NCBA

Account Number: 670365XXXX

Account Branch: Moi Avenue,mombasa Branch

Swift Code: Cbafkenx

Bank Code: 07

Branch Code: 020
- g. It would be in the best interest of justice to release the funds to the Decree Holder and protect the process of this Honourable court.

V. The Response to the Application dated 15th June, 2023

8. The 1st Respondent through the Grounds of opposition opposed dated 17th July, 2023 opposed the Notice of Motion application dated 15th June, 2023. They were on the following points of law:-
 - i. The application, not being a judicial review application for an order of Mandamus, offends the provisions of Section 68 of *Kenya Roads Act*.
 - ii. The application, having been brought under the provision of Order 23 of the Civil Procedure Rules, 2010, it thus offended the provisions of Order 29 Rule 2(2)(c) and 4(1) of the Civil Procedure Rules, 2010 which expressly state that no order against the Government may be made under the provision of Order 23 of the Civil Procedure Rules, 2010.
 - iii. The application offended the provisions of Section 21(3) & (4) of the *Government Proceedings Act* for the reasons, amongst others, that a Certificate of Costs had not yet been issued.
 - iv. The application was incompetent as it was premised on a purported order nisi alleged to have been granted on 15th May, 2023 and issued on 5th June 2023 and which in any case was recalled by the court on 21st June 2023 and never existed.
 - v. The applicant had not demonstrated compliance with the provision of Order 23 Rule 1 (2) of the Civil Procedure Rules, 2010.
9. The 2nd Respondent opposed the Notice of Motion application dated 15th June, 2023 through an 18th Paragraphed Replying Affidavit sworn by Brian Ikol, the director Legal Affairs and Dispute Resolution at the National Land Commission on 25th September, 2023 where he averred that:-



- a. During the construction of Mombasa Port Area Road Development Project(MPARD)Mombasa Southern Bypass and Kipevu New terminal Link Road (package one) the Respondent herein compulsorily acquired the suit property herein inter alia as per the provisions of Article 40 of *the Constitution* and Part VIII of the *Land Act*.
- b. A Notice of intention to acquire was published vide gazette notice numbers 405 & 406 of 24th January 2014 and subsequently a Notice of inquiry was published vide Kenya Gazette Notice No. 17960 of 21st March 2014
- c. The Commission acquired 1.6853 Hectares of the Petitioner's land on L.R. No.MN/VI/4931 and an award of Kenya shillings Two Fourty Two Million Nine Fifty Thousand (Kshs. 242,950,000/-) made broken down as follows;Area of land acquired-1.6853 HectaresValue of land acquired – Kshs. 211,260,870.00Add 15% disturbance allowance – Kshs. 31,689,130.00Total = Kenya shillings Two Fourty Two Million Nine Fifty Thousand (Kshs. 242,950,000/-).
- d. With regard to land parcel No.MN/VI/4929 and pursuant to a request by KENHA, the Commission degazetted the same vide Kenya Gazette No. 1701 of 19th February 2017. The construction of the New Kipevu Terminal Link terminated before the location of the plot to join the Kipevu terminal link access road developed by the Kenya Ports Authority.
- e. The 2nd Respondent forwarded to the 1st Respondent the revised Compensation Schedule based on the new Valuation amount for KeNHA to release the requisitefunds. Based on the re-valuation, the sum had reduced from a sum of Kenya Shillings Two Forty Two Million Nine Fifty Two Thousand (Kshs. 242,952,000.00) to Kenya Shillings Two Thirty Four Million Nine Sixty Thousand Eight Fifty Two Hundred (Kshs. 234,960,852.00/=).
- f. The 2nd Respondent duly transferred to the 1st Respondent the sum of Kenya Shillings One Fifty Million (Kshs.150,000,000.00/=) on 1st July, 2022 in part compliance with the Judgment of a sum of Kenya Shillings Two Thirty Four Million Nine Sixty Thousand Eight Fifty Two Hundred (Kshs. 234,960,852.00/=) leaving a balance of a sum of Kenya Shillings Eighty Four Million Nine Sixty Thousand Eight Fifty Two Thousand (Kshs. 84,960,852.00/=).
- g. On 22nd July 2022 the 2nd Respondent paid to the Petitioner/Decree holder the sum of Kenya shillings One Fifty Million (Kshs. 150,000,000/=) and it was hence incorrect and perjury for the Applicant to state that the 2nd Respondent is yet to release any funds to them.
- h. Further on 29th November 2022, the 2nd Respondent caused to be released to the Petitioner/Decree Holder the sum of Kenya shillings Sixty Million (Kshs. 16,000,0000/=) as compensation in satisfaction of the Judgement of this Honourable Court.Annexed in the affidavit and marked “NLC – 1” was proof of the said transmissions.
- i. It was apparent that the orders of garnishee order nisi and absolute were obtained through concealment of material facts to wit; that the Petitioner/Applicant had already been paid as at the time of making the Application.
- j. It was hence quite obvious that the figure of Kenya Shillings Nine Thirty One Million Six Fourty Five Six Seventy Five Kshs. 931,645,675.00/=) was arrived at without factoring the above payments and the same continued to be used as a basis for subsequent calculations on interest.



- k. The figure of Kenya shillings Nine Thirty One Million Six Forty Five Six Seventy Five (Kshs. 931,645,675.00/=) being sought by the Petitioner is arbitrary, excessive, exaggerated and had no basis. In any event the figure was not supported and does not flow by the Judgement of this Honourable court as rendered on 21st October 2021.
- l. The orders sought could not even issue since the said figure was yet to be ascertained and was a subjective figure that was not supported by any scientific or arithmetic processes.
- m. In any event a cursory glance at the Petitioner's Application before this Honourable Court revealed the following glaring errors;
 - a. That this Honourable Court for example never made any order requiring the Respondents to make compensation for penal interest which the Petitioners had assessed at Kenya Shillings One Hundred Nine Million Four Hundred Fourty One Fourty Four Hundred (Kshs. 109,447,144.00/=). The court already awarded interest on the principal sum and was hence very strange that the Petitioner was seeking further interest on interest already awarded.
 - b. That the Honorable Court never made any orders requiring the Respondents to compensate the Petitioners for rent which the Petitioner had assessed at Kenya Shillings One Sixty Eight Million Five Eighty Six Four Five (Kshs. 168,580,645.00/=) This was because the Court already granted mesne profits.
- n. It was not clear how or through which method the Applicant arrived at Kenya shillings Three Eighty Six Million Six Sixty Seven Eight Eighty Six Hundred (Kshs. 386,667,886.00/=) as interest. The figure was neither simple interest, compound interest or even reducing balance. The parameters or methodology used had not been explained and neither was the period or the amount that the Petitioner took into consideration. The figure offended "the induplum principle rule and it could not even be enforced.
- o. The entire Application by the Petitioner offended the provisions of Section 21(4) of the Government Proceedings Act and order 29 Rule 2 (2)(c) of the Civil Procedure Rules, 2010 as the 2nd Respondent herein was a public entity created by statute.
- p. The accounts listed were special accounts and allowing the orders sought would portend the following;
 - i. Thousands of Kenyans whose properties had been compulsorily acquired and demolitions done to pave way for developments will remain homeless
 - ii. Government projects which come with attendant penal consequences would stall with the contractual obligations in terms of breach being passed on to the Mwananchi
 - iii. The court would be setting a dangerous precedent where government assets would be attached effectively grinding service delivery to a halt by government offices noting the domestic and foreign debts by the country.
- q. The Affidavit was in opposition to the Application dated 15th June 2023 by the Petitioner and pray that the same be dismissed.



VI. The Notice of Motion application dated 15th September, 2023

10. The second application is by the 1st Respondent dated 15th September, 2023. It was brought under the provision of Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, Cap. 21 and Section 7 of the Appellate Jurisdiction Act. The 1st Respondent sought for the following orders:-
- a. Spent.
 - b. That the Notice of Appeal dated 10th November, 2021 filed by the 1st Respondent/Applicant together with the Letter Requesting for Proceedings filed in this Court on 16th November, 2021 be deemed as properly filed and served.
 - c. That in the alternative, the Honourable Court be pleased to grant leave to extend the time for giving notice of intention to appeal from a judgment of this court delivered at Mombasa on 28th October, 2021.
 - d. That costs of this Application be provided for.
11. The application by the 1st Respondent herein was premised on the grounds, testimonial facts and averments made out under the 7 Paragraphed Supporting Affidavit of Nathaniel Munga, the Senior Legal Officer of the 1st Respondent sworn and dated 15th September, 2023 with two (2) annexures marked as “KP – 1” and “KP – 2”, “2a – b”, who averred that:
- a. The application sought the Notice of Appeal dated 10th November, 2021 filed by the 1st Respondent/Applicant together with the Letter Requesting for Proceedings filed in this Court on 16th November, 2021 be deemed as properly filed and served or, in the alternative, an extension of time be granted for giving notice of intention to appeal from a Judgment of this court delivered at Mombasa on 28th October, 2021.
 - b. The Law firm of Messrs. Prof. Albert Mumma & Company Advocate came on record after Judgement pursuant to an Order of this Court dated 21st June, 2023.
 - c. The Counsel for the 1st Respondent/Applicant took up the matter from the previous Advocate and proceeded on the premise that the Notice of Appeal dated 10th November, 2021 and the Letter Requesting for Proceedings dated 12th November, 2021 had both been filed in this Court on 16th November, 2021 and duly served.
 - d. Subsequent thereto and upon further perusal of the court file, Counsel had discovered that although the Letter Requesting for Proceedings dated 12th November, 2021 had been filed in this Court on 16th November, 2021, a copy of the Notice of Appeal duly filed was missing on the court file.
 - e. Additionally, upon inquiry, the Applicant's Advocates discovered that the receipt issued upon filing the Notice of Appeal was not traceable even after diligent search.
 - f. In the circumstances, the 1st Respondent/Applicant was apprehensive that the Notice of Appeal dated 10th November, 2021 may have been misplaced or erroneously filed in the wrong file in consequence of which the 1st Respondent/Applicant would be prejudiced should its appeal not be admitted for the reason that the notice was not on the court's record.
 - g. This application seeking that the Notice of Appeal dated 10th November, 2021 filed by the 1st Respondent/Applicant together with the Letter Requesting for Proceedings filed in this Court on 16th November, 2021 be deemed as properly filed and served was merited as the discovery



that the notice of Appeal was not in the court file was only made after the Applicant's newly appointed Advocates perused the court file.

- h. The alternative prayer seeking leave to extend the time for giving notice of intention to appeal would serve the interests of justice as otherwise the Applicant would be left without a remedy to ventilate its appeal with the risk of loss of a large sum of tax payer's money.
- i. That the provision of Section 7 of the [Appellate Jurisdiction Act](#) empowers this court to extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case was fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.
- j. Counsel had moved with speed upon coming on record to peruse the court file and regularize the record.
- k. That leave to file and serve the notice of appeal ought not to be denied to the Applicant who sought to appeal a decision with a substantial amount of over Kenya Shillings Seven Hundred Million (Kshs. 700,000,000/-) to be borne by the taxpayer.
- l. It was in the interest of justice that the instant application be granted as prayed.

VII. The Responses to the Notice of Motion application dated 15th September, 2023

- 12. While opposing the Notice of Motion application dated 15th September, 2023, the Petitioner filed Grounds of opposition dated 6th November, 2023 on the following points of law:-
 - i. The instant Application was fatally defective in that the Applicant had not demonstrated that he had sought or that he intended to seek stay of execution in the Court of Appeal contrary to the provisions of Order 21 Rule 22 of the Civil Procedure Rules, 2010.
 - ii. The Application herein was fatally defective in that the Applicant never demonstrated what loss if any at all it would suffer if the application was disallowed.
 - iii. The present Application was based on gross misapprehension of the law in that the present application could not be premised on the merits of the intended appeal and the delay in bringing the instant application was not only inordinate but reckless.
 - iv. The present application was based on flawed understanding of the law in that the inaction of a Counsel could not be the basis for allowing for such an application.
 - v. The present application was untenable in law in that it made no offer as to costs nor did the applicant furnish any security for the remainder of the decretal sum.
 - vi. The Applicant had misled this Honourable Court and continued to enjoy interim orders in the ongoing garnishee proceedings before this Honourable Court and therefore the same should not be allowed.
 - vii. The application herein was untenable in law in that it had not demonstrated sufficient cause for this Honourable Court to issue the orders sought nor never did it meet the basic principles for granting a leave to extend time for giving notice of intention to appeal.
 - viii. The application herein was frivolous and an abuse of court process in that the Judgment sought to be appealed was issued on 28th October 2021 and therefore, afterthought and an attempt



to deny the Petitioner/1st Respondent the fruits of a Judgment justly obtained and partially satisfied.

- ix. The instant application should be dismissed with costs to the Petitioner/1st Respondent.
13. At the same time, the Petitioner also opposed the Notice of Motion application dated 6th November, 2023 through a 26 Paragraphed Replying Affidavit sworn by Ketan Patel, a director of the Petitioner company who averred that:-
- a. The same was a delaying tactic by the 1st Respondent/Applicant, all with intentions of frustrating the Petitioner in its quest to reap the fruits of the Judgment.
 - b. Indeed, there was a Judgment issued by this Honorable Court against the 1st Respondent/Applicant delivered on 28th October 2021 by Honorable Justice L. L. Naikuni.
 - c. The 1st Respondent/Applicant in a bid to satisfy the decretal sum had already transferred to the Petitioner a sum of Kenya Shillings One Sixty Six Million (Kshs.166,000,000/-) in partial satisfaction of the Decree leaving a balance of a sum of Kenya Shillings Seven Sixty Five Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs.765,645,675/-).
 - d. The 1st Respondent Respondent/Applicant in a bid to satisfy the decretal sum had already transferred to the Petitioner a sum of Kenya Shillings One Sixty Six Million (Kshs.166,000,000/-) in partial satisfaction of the Decree leaving a balance of a sum of Kenya Shillings Seven Sixty Five Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs. 765, 645,675/-).
 - e. The 1st Respondent/Applicant had failed to disclose to this Court that there was pending garnishee proceedings herein whose purpose is to ensure the 1st Respondent/Applicant satisfied the remainder of the decretal sum.
 - f. The 1st Respondent/Applicant's failure to fully satisfy the Decree was the reason the Petitioner moved this Court via the said garnishee proceedings.
 - g. The period of delay was inordinate and in view of the fact that the Judgment therefore allowing the 1st Respondent/Applicant to file an appeal at this late stage would be prejudicial to the Petitioner.
 - h. A delay of two years was inordinate and that the 1st Respondent/Applicant who sought leave to appeal out of time was guilty of laches.
 - i. Although the notice of appeal was lodged timeously and the allegation that the latter was served within the stipulated time the Petitioner never received a stamped filed copy and despite undertaking to serve the same on 15th November 2021, the 1st Respondent/Applicant failed to do so.
 - j. The alleged service was in violation of Rule 77 (1)of the Court of Appeal Rules, and as such, there was no service at all.
 - k. Having been aware of the Decree and further partially satisfying the same clearly indicates that the instant application was an afterthought and the same should have been brought to the attention of the court at the first instance.
 - l. The said notice of Appeal was an afterthought at this juncture and the same together with the instant application ought to be dismissed with costs to the Petitioner.



- m. In the pending garnishee proceedings, the 1st Respondent/Applicant had not denied its indebtedness to the Petitioner and the intention to satisfy the remainder of the decretal sum, which intention was pegged on the new financial year, and therefore bringing the instant application before the Honourable court was a violation of the rules of justice not to mention procedure.
- n. It was futile for the 1st Respondent/Applicant to raise issues of typed proceedings at this stage just as it was futile to delve into the merits of the intended Appeal, for reason that execution was almost complete.
- o. Further had the 1st Respondent/Applicant been truly aggrieved by the Judgment delivered on 28th October 2021 as alleged in the instant application, it was upon the 1st Respondent/Applicant together with their Counsel on record to follow up on the progress of the appeal and the same had not been done in the two years that had lapsed.
- p. Having waited two years for the entire decretal sum to be satisfied, it would greatly be prejudicial to the Petitioner if the instant application was allowed.
- q. This application had been filed to direct the court's attention from the fact that there was an ongoing garnishee application which is coming up for ruling on notice as to confirmation of the decree Nisi into Decree Absolute.
- r. It was not enough to allude filing of the Notice of Appeal within the stipulated time while at the same time failing to even file an application for stay of execution at the very onset, and by partially satisfying the Decree, the 1st Respondent/Applicant's intentions in pursuing the intended appeal are in bad faith.
- s. Nonetheless, there was inordinate delay in filing the application.
- t. A period of two (2) years after Judgment and during execution points out to a deep apathy petitioner.
- u. The 1st Respondent/Applicant would not suffer any prejudice by abandoning the instant application and finalizing garnishee proceedings, seeing as the Decree had been partially satisfied without any prejudice on the part of the 1st Respondent/Applicant.
- v. Delays defeated equity and equity aids the vigilant, not those who sleep on their rights.
- w. It would be in the interest of justice that the application herein be dismissed with costs to the Petitioner/1st Respondent. Prejudice would be occasioned upon the Petitioner/1st Respondent if the instant application was allowed.

VIII. Submissions

- 14. On 27th September, 2023 while all the parties were present in Court, as indicated above, it directed that the three (3) Notice of Motion applications dated 14th June, 2023, 15th June, 2023 and 15th September, 2023 respectively be disposed off by way of written submissions. Pursuant to that all parties complied and obliged. Besides that, the parties were granted an opportunity to orally highlight their submissions, a task Mr. Matheka Advocate and Mr. Ochieng Advocate holding brief for Professor Mumma Advocate executed with high degree of diligence, devotion and dedication befitting quality standards of professionalism. The Honourable Court is sincerely grateful to them. On 18th January, 2024 a ruling date was reserved for 11th March, 2023 by Court accordingly. However, due to unavoidable



circumstances beyond the Court's control such as the Judges training which was held in between among other reasons, the Ruling was eventually delivered on 24th April, 2024.

A. The Written Submissions by the Petitioner on the Notice of Motion application dated 14th June, 2023

15. The Petitioner through the Law firm of Messrs. Wandai Matheka & Company Advocates filed their written submissions dated 20th July, 2023. Mr. Matheka Advocate commenced his submissions by observing that the subject matter of these submissions was a Notice of Motion Application dated 14th June 2023. He held that having established that prayers numbers 1, 2 and 3 of the instant application were already spent, he would be submitting on the remaining grounds being prayers numbers 4, 5, 6 and 7. The Petitioner/Respondent filed its Replying Affidavit dated 19th June 2023 in total opposition of the same.
16. The Learned Counsel provided Court with the brief facts of the matter. To begin with, he averred that Judgment in the instant suit was entered by this court on the 21st October 2022 in favor of the Petitioner/Applicant for a sum of Kenya Shillings Nine Thirty One Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs. 931,645,675/-). The claim by the Applicant was for the enforcement of the award arising from the compulsory acquisition of the property belong to the Applicant by the Respondents through the due process for public use way back in the year 2014. Although the award was granted, to date, the 1st Respondent had only made part payment having transferred a sum of Kenya Shillings One Sixty Six Million (Kshs. 166,000,000/-) hence leaving an outstanding balance of a sum of Kenya Shillings Seven Sixty Five Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs.765,645,675/-). Thus, as result of the failure to transfer the said outstanding balance of the Judgment award to the Applicant, it necessitated in the institution of garnishee proceedings against the 1st and 2nd Respondents herein vide application dated 11th August 2022. On 15th May, 2023, this Honourable Court delivered its Ruling allowing the application wholly in favour of the Applicant herein. Upon receipt of the certified copy of the Ruling dated 15th May 2023, they extracted the first order issued on 23rd May but the same could not be acted upon because it never had a garnishee order nisi. Upon that realization, they extracted another order which was issued on 5th June 2023 which was based on the prayers on the face of the Application. This order was served upon the 1st Garnishee who holds the 1st Respondent's bank account. As a result of the garnishee order nisi, the 1st Respondent rushed to court in a bid to frustrate the Petitioner efforts in reaping the fruits of its successful litigation, despite the 1st Respondent acknowledging its indebtedness and partially satisfying a valid decree given by this court on 28th October 2021 of payment of Kenya Shillings One Sixty Six Million (Kshs. 166,000,000/-).
17. The Learned Counsel relied on the following four (4) issues for determination: - Firstly, whether the 1st Respondent had proffered a reason as to why the Garnishee order nisi should be lifted. The Learned Counsel submitted that the general rule was that the burden of proof lied with the Garnishee to show that the funds in its possession were not due to the Applicant, or that a third party's rights were involved. Since serving the garnishee order nisi upon the 1st Garnishee, it had never raised an objection against the order nor disputed the sums claimed. Therefore, it followed that in the absence of any dispute as to the sums claimed by the Petitioner/Respondent, the Court was not barred from issuing an order absolute.
18. He held that there were two stages involved in Garnishee proceedings. The first stage was for "the garnishee order nisi" to issue ex parte upon receipt of an application by the decree holder while the second stage was for "the garnishee order absolute". At the first stage, the Judgement Creditor makes



an application ex - parte to the Court that the Judgment debt in the hands of the third party, the Garnishee, be paid directly to the Judgment Creditor unless there was explanation from the Garnishee why the order nisi should not be made absolute. It was also agreed that the Ruling of 15th May 2023 was a garnishee order nisi, therefore satisfying the first part of garnishee proceedings.

19. The Learned Counsel argued that if the Judgment Creditor satisfied the Court on the existence of the Garnishee who was holding money due to the Judgment Debtor, such third party (Garnishee) would be called upon to show cause why the Judgment Debtor's money in its hands should not be paid over to the Judgment Creditor, and if the Court was satisfied that the Judgment Creditor was entitled to attach the debt, the Court would make a garnishee order nisi attaching the debt. The essence of the order nisi was to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the Judgment Creditor of the amount of debt owed to the Judgment Debtor. It was a requirement that a copy of the order nisi must be served on the Garnishee and Judgment Debtor at least 7 days before the adjourned date for hearing. In this regard, the Petitioner filed its application seeking garnishee order nisi, served the same day on 30th September, 2022 and despite service, none of the Respondents filed any responses to the application by the Petitioner/ Respondent herein. Thus, the Honourable court proceeded to hear and subsequently rendered its ruling which resulted in the order dated 15th May 2023 and served upon the 1st garnishee on 23rd May, 2023.
20. The Learned Counsel further averred that the Garnishee, where necessary also had an option of disputing liability to pay the debt. The primary object of a garnishee order was to make the debt due by the debtor of the Judgment Debtor available to the Decree Holder in execution without driving him to the suit. The Learned Counsel submitted that no objection in that regard had been raised whatsoever. In this case, the 1st Respondent had merely denied the process of the Court and had generally raised doubts to the correctness of the Ruling dated 15th May 2023. However, only the 1st Respondent had filed documents affirming that there indeed was money in those bank accounts. In fact, the 1st Respondent at paragraph 20 of the supporting affidavit sworn by Jessica Mbae averred that indeed the 1st garnishee already complied with garnishee order nisi, which in essence affirmed the fact that there was money in the 1st Respondent/Applicant's account no.01141160XXXX to partially satisfy the balance of the decretal sum.
21. The Learned Counsel posited that the Petitioner/Respondent and the Applicant in this application as a bona fide service provider, was entitled to the fruits of its labour. To buttress on this point, he cited the case of:- "Misc Civil App. No. 241 of 2019 Nyandaro & Co. Advocates – Versus - National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Ltd (eKLR)", noted that:
 - “ 13. A litigant is entitled to reap the fruits of his successful litigation. As a result, where a Judgment - Debtor fails to comply with the terms of a Judgment, the Judgment - Creditor is entitled to enforce such Judgment by adopting a suitable procedure provided under the law. By the process of garnishee, the court has power to order the garnishee to pay directly the sums it owes the Judgment - Debtor to the garnishor or so much of it as may be sufficient to satisfy the amount of the judgment and the cost of the garnishee proceedings. In this regard, the provisions of Order 23 Rule 4 provide with sufficient clarity what this court should do where the Garnishee admits the debt as in this case.”
22. The Learned Counsel submitted that instead of complying with the decree of this Honourable Court, the 1st Respondent has acted in bad faith, going as far as misrepresenting the purpose of the funds contained in its accounts at the Garnishee bank accounts despite knowledge of their indebtedness to the Petitioner. He stated that it had refused to acknowledge that the property was



compulsorily acquitted through a paid up inter – governmental project being Mombasa Port Area Road Development Project (MPARD) Mombasa Southern Bypass & Kipevu in conjunction with the Government of Japan. Further, the Petitioner/Respondent had since 28th October, 2021, been holding a mere paper in the name of a Judgment, despite a notice to show cause having been served upon the Director General of KENHA on 20th April, 2022.

23. The Learned Counsel urged this Honourable Court not to allow its processes for misuse in the manner that the 1st Respondent was doing. Further, the 1st Garnishee on the other hand, had not expressed any dispute against the claim made by the Applicant with regard to the present order nisi despite having been served with the Garnishee order nisi dated 15th May 2023. In view of the foregoing, the Learned Counsel submitted that it was in the interest of justice that the instant application be dismissed for failing to proffered a reason as to why the garnishee order nisi should be lifted.
24. Secondly, on whether the Petitioner/ Respondent had complied with the Provisions of Section 68 of the Kenya Road Act, Cap. 409. The Learned Counsel contended that by dint of Section 68 (a) of the *Kenya Roads Act*, the Director General was on 19th November 2021 was served with a duly sealed decree dated 17th November 2021. Further on 20th April 2022, the Director General was further served with a Notice to Show Cause dated 25th February 2022. In regard to informing the Director General, the Petitioner/Respondent complied and further, that the law placed a mandatory obligation on the 1st Respondent/Applicant, through its Director General, to promptly pay any decretal amount awarded against it from its revenue. Indeed, that the Director General does not have to be compelled by a court to discharge his statutory obligation as he was required by law to pay in order to save the 1st Respondent/Applicant's assets. With regard to the instant issue, the Learned Counsel was guided by the case of “Ikon Prints Media Company Limited – Versus - Kenya National Highways Authority & 2 others [2015] eKLR”, where the court stated as follows:

“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)

25. Further to the foregoing, the Court pronounced itself stating that:-

“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 1st 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 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not Judgments against the government but against an independent juridical body.

26. The Learned Counsel submitted having partially satisfied this Court's decree to the tune of a sum of Kenya Shillings One Sixty-Six Million (Kshs. 166,000,000/-) leaving an outstanding balance. The failure to pay the balance of the Judgment award due to the Petitioner/Respondent was unexplained. The Director General and other top officers of the 1st Respondent were public servants subject to the provision of Article 10 of *the Constitution* of Kenya, 2010, and their failure to pay the Applicant the fruits of the Judgment was a dereliction of public duty. The Director General and other responsible KENHA officials should be personally held accountable for the amount due if they continue to operate public office with impunity.
27. Thirdly, on whether the 1st Respondent was a government agency and therefore subject to *Government Proceedings Act*, Cap. 40. The Learned Counsel asserted by answering the query in the negative. He held that the 1st Respondent, despite being a state corporation, was not subject to the *Government Proceedings Act*, Cap. 40 in the event execution was imminent, as it was in the instant case herein. In support of their submission, they were guided by the case of "Kenya National Highways Authority – Versus - Ahmednassir Maalim Abdullahi [2021]eKLR" where Justice Mwita opined as follows:-
- “46. I agree with the holding by Onguto,J, in *Ikon Prints Media Co. Limited - Versus - Kenya National Highways Authority & 2 Others (supra)*, that Section 68 must be given an interpretation that is in accord with the constitutional principle that all persons are equal before the law and must be subjected to the rule of law.
47. As I have already stated, the section only restricts attachment, but does not make it illegal. The applicant's argument that the section must be read as making execution illegal would lead to an absurdity. A lawful process under one statute cannot be illegal under another. In fact, the section gives the applicant time to pay but not to make the process illegitimate.
48. Fundamentally, the law directs the Director General to pay without delay but he has not. While the same law restricts a successful litigant from execution on the premise that there will be prompt payment, the person directed to pay does not pay. That is what prompted the Respondent to argue, and correctly so in my view, that such a provision places one of the parties at an advantage over the other despite the clear constitutional stand that every person is equal before the law and has the right to equal protection and equal benefit of the law.
49. Looking at Section 68 vis – a - vis *the Constitution*, does it afford all persons equal protection and benefit? Why would a successful litigant fail to enjoy the fruits of his litigation yet the person who is commanded to pay fails discharge his statutory obligations to the detriment of the successful litigant? Does the section violate the right of access to justice and the rule of law?
28. The Learned Counsel stated that in the instant application, the 1st Respondent/Applicant relied on the provision of Section 68 to argue that the section made attachment of its assets illegal. In its view, one could only attach with the prior written permission of the Director General of the 1st Respondent/Applicant. He reiterated their averments in the Petitioner/Respondent's Replying affidavit dated 19th



June 2023 and further state that the provision of Section 68 (a) only places a restriction against attachment as the headnote clearly suggests. It never made attachment illegal per se. The import of the section is that instead of attaching its assets, the applicant's Director General was commanded by the section to pay the decretal amount promptly from amounts in its revenue. This view was informed by the fact that the section uses the word "but" and goes on to state that:- "the Director-General shall, without delay, cause to be paid out of the revenue of the Authority the amounts awarded against the Authority."

29. Further the section stated in mandatory terms that payment must be made without undue delay. In other words, where payment was to be made without delay, ordinarily there would be no reason to attach against the Applicant. Therefore, the section never contemplated a successful litigant moving the process towards attachment. That was why the law demanded in mandatory terms, that the Direct General should promptly pay, which to date, he had refused and/or declined to do so. Indeed while they were independent, such organs of state were expected to comply with the law. To strengthen on this point, the Counsel referred Court to the Case of:- in "Communications Commission of Kenya and 5 Others – Versus - Royal Media Services and 5 Others [2014] eKLR" where the Court held:-

"independence" is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance."

30. Accordingly, the Learned Counsel submitted that there was a sense in which, though a state organ, an independent corporation such as the 1st Respondent, was separate and independent from the Government. What was in contest herein was the question whether, as an independent institution, the 1st Respondent/Applicant was shielded from the consequences of its power to sue and be sued in its corporate name as recognized by the provision of Article 253 of *the Constitution* of Kenya, 2010 and by dint of Section 21 of the *Government Proceedings Act*, Cap. 40.

31. It was the Learned Counsel's contention that in as much as the 1st Respondent/Applicant was independent and clothed with requisite constitutional powers to sue and be sued in its own corporate name, it was not "the Government" or a "Government Department" for purposes of the *Government Proceedings Act*, Cap. 40. Indeed, it was in recognition of this independence that it had engaged the services of their Advocate on record herein to offer it legal representation. Consequently, the 1st Respondent was amenable to the usual legal consequences flowing from such processes, including execution of ensuing decrees. This was because there was no such protection afforded by its organic legislation, the *Kenya Roads Act*, Cap. 409 to shield the 1st Respondent from the execution process. Moreover it was telling that whereas the *Government Proceedings Act*, Cap. 40 was amended by the Government Proceedings (Amendment) Act, 2015 to include County Governments, Parliament, in its wisdom, it never considered extending the same shield to independent corporations such as the 1st Respondent/Applicant.

32. The Learned Counsel was accordingly guided by the path taken in "Petition No. 513 of 2013: Ikon Prints Media Company Limited – Versus - Kenya National Highways Authority & 2 Others (supra)" that:

"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 1st 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 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any Judgments decreed against the 1st Respondent are not Judgments against the government but against an independent juridical body.”

33. The Learned Counsel averred that there were various ways and reasons as to why entities deemed government agencies so as to escape satisfying legal liabilities which were due. It could not therefore be that the 1st Respondent Applicant could appoint an advocate without resort to the opinion of the Attorney General, but when it comes to paying the Petitioner, then it hides behind the government. Nonetheless and having said all that, they further submit that this court's hands were tied as it has already pronounced itself as to what Kenya National Highways Authority (the 1st Respondent) is, which is a state corporation. As such, this court could not review this fact as it would be tantamount to sitting on its own appeal.

34. Fourthly, on whether the application dated 14th June, 2023 was merited and had met the conditions for review. The Learned Counsel asserted that the legal provisions for such an application for review was found under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1(b) of the Civil Procedure Rules, 2010 which provided for the requirements that must be met. The said provision states as follows:

“(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

35. Therefore, Order 45 of the Civil Procedure Rules, 2010 above is very explicit that a court can only review its orders if the following grounds exist:-

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed, or the order was made: or

(b) There was a mistake or error apparent on the face of the record of



- (c) There were other sufficient reasons: and
- (d) The application must have been made without undue delay.
36. Coming to the Applicant's grounds herein among others, they allege that the orders of this court issued on 15th May, 2023 were unenforceable for the reasons that the orders served upon them on 23rd May 2023 and 8th June, 2023 respectively were contradictory and compliance with one rendered the other moot. The 1st Respondent had further stated in its grounds that in its wisdom, the Honourable court, being aware of the provision of Section 68 of *Kenya Roads Act*, Cap. 409 and Section 21(3) & (4) of the *Government Proceedings Act*, Cap. 40 and Order 29 Rule 2 (2) & 4(1) of the Civil Procedure Rules, 2010 which forbids attachment of the 1st Respondent Applicant's property or funds to satisfy a debt, directed the Petitioner/Decree - Holder to pursue execution of the decree against the 1st Respondent by applying the laid down proper and legal process and that unless this Honourable court reviewed and varied its ruling and order, the government projects being implemented by the 1st Respondent that had underlying costs and contractual obligations would be affected at huge financial costs to the tax payers at a level that had not been witnessed before.
37. The Learned Counsel submitted that the foregoing grounds were baseless, as from the Petitioner/ Respondent's perspective, the Honourable court allowed the application dated 11th August, 2022 in its entirety, which in essence sought garnishee order nisi. Irrespective of the foregoing, the proceedings before this Honourable Court on 21st June, 2023 showed that the court recalled the order dated 5th June, 2023 for review to align with the ruling of 15th May, 2023. In any event, the Court already pronounced itself and the Court could not then sit on its own appeal.
38. The Learned Counsel further submitted that by virtue of the partially unsatisfied decree to the tune of a sum of Kenya Shillings Seven Sixty Five Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs 765,645,675/-) indebted as the outstanding balance owed to the Petitioner/Decree Holder by the 1st Respondent/Judgment - Debtor and further averment at paragraph 21 of the Petitioner/ Respondent's Replying Affidavit, it was apparent to this Court that such a fact was within the knowledge of the 1st Respondent. There was no error apparent on the face of the record. However, any error which may be there in stating the correct applicable order could be rectified or amended, and such error never went into the root of the matter. In the circumstances, the Learned Counsel averred that the 1st Garnishee clearly failed to challenge the Garnishee Order Nisi. The 1st Respondent/ Applicant could not blame the Petitioner/Respondent of this court for the orders made nisi in their absence. This was since the first stage in garnishee proceedings, the order nisi was made "ex - parte" after which the decree holder was directed to serve the garnishee to appear and either admit or deny owing the Judgment - Debtor any money.
39. Finally, on the issue of costs, the Learned Counsel submitted that in respect of the 1st Garnishee, they averred that indeed the 1st Garnishee held funds on behalf of the 1st Respondent. To date, the 1st Garnishee continued to hold that money on behalf of the 1st Respondent despite failing and or refusing to partially satisfy the decree of this Honourable court. The 1st Respondent/Applicant's failure to pay the balance of the decretal sum was what precipitated the orders of the Garnishee nisi of 15th May 2023. The Learned Counsel therefore submitted that the 1st Respondent/Applicant be the one to bear the costs of the Petitioner/Respondent in respect of the Garnishee order served upon the 1st garnishee. In



that regard, they were guided by the provision of Order 23 Rule 10 of the Civil Procedure Rules, 2010 which provides:-

“The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, shall be to the discretion of the court, and the cost of the decree holder shall, unless otherwise directed be retained out of the money recovered by him under the Garnishee order and in priority to the amount due under the decree.”

40. The Learned Counsel argued that they took cognizance of the fact that like any discretion, the discretion under the provision of Order 23 Rule 10 would be exercised judicially. It was the failure by the 1st Respondent/Applicant to pay that dragged the Petitioner/Respondent back to this Court and thereby leading the Petitioner/Respondent to incur legal costs. Had the 1st Respondent/Applicant discharged its duty to satisfy the said decree, the Petitioner/Respondent would not have incurred the legal costs it now seeks that it be awarded.
41. In conclusion, the Learned Counsel prayed that the instant application be dismissed with costs to the Petitioner/Respondent, and that the 1st Respondent be compelled to pay the Petitioner/ Respondent the balance of the decretal sum being a sum of Kenya Shillings Seven Sixty-Five Million Six Fourty Five Thousand Six Seventy-Five Hundred (Kshs. 765,645,675/-).

B. The Written submissions by the Petitioner to the Notice of Motion application dated 15th June, 2023

42. The Petitioner through the Law firm of Messrs. Wandai Matheka & Company Advocates filed their written submissions dated 20th July, 2023. Mr. Matheka Advocate submitted that the subject matter of these submissions was a Notice of Motion Application dated 15th June 2023 seeking that the garnishee order nisi herein be made ABSOLUTE. The 1st Respondent filed Grounds of Opposition dated 17th July 2023 and hence the reason why this submissions had been filed late. The Learned Counsel rehashed on the brief facts of the case as already stated above. The Learned Counsel submitted that consequently, the instant application dated 15th June 2023 sought for the garnishee order nisi to be made absolute, for reason that despite the 1st Respondent acknowledging its indebtedness pursuant to a valid decree given by this court on 28th October 2021 the Judgment Debtor had to date not completed payment to the Applicant. On the issues for determination, the Learned Counsel relied on the following singular issue - Whether the garnishee order nisi made on 15th May 2023 should be made absolute in terms of prayer 3 of the application
43. On analysis and rule of law, the Learned Counsel submitted that it was the Applicant's submission that every person had the right to administrative action, which was expeditious, efficient, lawful, reasonable and procedurally fair and that its right to fair administrative action as embodied in the provision of Article 47 of *the Constitution* had been and was still being violated by the Respondent. They found it useful to start by referring to the concise definition of garnishee proceedings in the case of:- “Misc Civil App. No.2 41 of 2019 Nyandaro & Co. Advocates – Versus - National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Ltd (eKLR)” where Justice Mativo in defining garnishee proceedings, relied on the “Nigerian Supreme Court decision in C.B.N – Versus - Auto Import Export” in the following words:

“Garnishee proceedings are special specie of process by which a Judgment Creditor may attach (or garnishee) debts due in satisfaction of the Judgment debt. The debt owed by the third party to the Judgment Debtor, on being attached, shall ultimately be paid by him to the Judgment Creditor on the order of court. thus, garnishee proceedings involve the



attachment of debt due from a third party to the Judgment Debtor, and the use of the amount of that debt in liquidating the judgment debt. In garnishee proceedings, the third party indebted to the Judgment Debtor is called the garnishee. The Judgment Creditor on the other hand I referred to as the garnishor.”

44. According to the Counsel, the purpose of garnishee proceedings was to facilitate the satisfaction of Judgment debts so long as there is a discernible debt due and owing to the Judgment Debtor. Further, once such indebtedness is established, it was inconsequential to the garnishee who the debt is paid to. The foregoing was further fortified by Order 23, Rule 1 of the Civil Procedure Rules, 2010 on attachment of debts which provides that:-

“ 1

- (1) A court may, upon the ex parte application of a Decree - Holder, and either before or after an oral examination of the Judgment - Debtor, and upon affidavit by the Decree - Holder or his Advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the Judgment - Debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, Rule 42 owing from such third person (hereinafter called the “garnishee”) to the Judgment - Debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree-holder the debt due from him to the Judgment - Debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.”

45. The Learned Counsel submitted that the above rule contemplated the existence of a decree for the amount claimed; and there existed a decree given on 28th October 2021 on record. The same satisfied the requirements of Order 23 of the Civil Procedure Rules, 2010. To this end there was no doubt the 1st Respondent was indebted to the Applicant and the same had not been denied.
46. On whether the garnishee order nisi made on 15th May, 2023 should be made absolute in terms of prayer of the Application. The Learned Counsel submitted that in the affirmative, that the garnishee order nisi given on 15th May 2023 be made absolute. The Applicant had followed procedure in this regard when it instituted garnishee proceedings vide application dated 11th August 2022, served the consequent orders given on 15th May 2023 upon the 1st Respondent and finally, in filing the instant application pursuant to Order 23 of the Civil Procedure Rules, 2010. There was no provision under Order 23 requiring a Notice to Show Cause to issue. The only requirement under Order 23 Rule 1 was the existence of an unsatisfied decree, the amount and another person indebted to the Judgment - Debtor. In the instant case the Petitioner had conceded that there existed a partially unsatisfied decree to the tune of Kenya Shillings Seven Sixty Five Million Six Fourty Five Thousand Six Seventy Four Hundred (Kshs.765,645,675/-) indebted to the 1st Respondent/Judgment - Debtor. Further, there were no arguments before this honorable court suggesting that the procedures laid down in the provision of Order 23 had not been followed.



47. The fundamental consideration was that the decree had been obtained by a party and it should not be deprived of the fruits of that decree for good reasons. Until that decree was set aside, it stood good and it should not be lightly dealt with. A litigant was entitled to reap the fruits of his successful litigation. Therefore, the Learned Counsel submitted that as a result, where a Judgment - Debtor failed to comply with the terms of a Judgment, the Judgment - Creditor was entitled to enforce such Judgment by adopting a suitable procedure provided under the law, which the Applicant had adhered to. Further, by the process of garnishee, the court had power to order the garnishee to directly pay the sums it owed the Judgment Debtor to the Applicant or so much of it as may be sufficient to satisfy the amount of the Judgment and costs of the garnishee proceedings. The Learned Counsel relied on the case of:- “Barclays Bank of Kenya Limited – Versus - Kepha Nyabera 191 others(2013) eKLR” where the court of Appeal stated as follows:-

“25. A Judgment Creditor has no greater rights in the judgment debtors assets held by the garnishee than the judgment debtor does In the present case, the 1st Respondent has no greater right than the Judgment Debtor (2 Respondent) had to the funds held by the Appellant bank. The rights of the 1 Respondent over the funds held by the Appellant bank are Co - extensive and limited to the exact rights that the judgment debtor had over the funds. What were the rights of the judgment debtor in relation to the accounts held by the appellant bank?

26. The rights of the judgment debtor are contractual rights that govern the relationship between the 2 Respondent and the Appellant in their capacity of bank/customer relationship with the bank having security over liabilities of the 2nd Respondent. The Appellant bank was a secured creditor. A secured creditor with a perfected security interest in a deposit account has rights that are superior to a subsequent judgment (unsecured) creditor. The situation is different if the garnishee creditor is not secured. In such a case, the judgment creditor with a garnishee order would rank in priority.”

48. Further to the foregoing, the Learned Counsel submitted that the Petitioner/Applicant had a valid decree against the 1st Respondent as well as a garnishee order nisi which was still in force, and that there was a debt due from the 1st Garnishee to the 1st Respondent which had already been attached. The provisions of Order 23 Rule 4 of Civil Procedure Rules, 2010 provide with sufficient clarity what this honorable court should do where the garnishee admitted the debt as in this case as follows:

Order 23, rule 4: Execution against garnishee.

4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. m No.17 or 18 Appendix A, as the case may require.

49. The above provision was explicit where the debt was not disputed. The 1st Respondent admitted the claim. The 1st Respondent’s grounds of opposition, the Learned Counsel submitted that the 1st Respondent had raised grounds of opposition seeking dismissal of the instant application on grounds that the same offends the provisions of Order 29 Rule 2(2) (c) and 4 (1) of the Civil Procedure Rules,



2010 which prohibited any order against the government. In that regard, they wished to respond as hereunder.

50. On whether the 1st Respondent was a government agency and therefore subject to *Government Proceedings Act*, Cap. 40. The Learned Counsel submitted that in regard to the instant issue, in the negative that the 1st Respondent, despite being a state corporation, was not subject to the *Government Proceedings Act*, Cap. 40 in any event execution was imminent, as is the case herein. In the negative they were further guided by the provision of Section 3 of the *Kenya Roads Act*, Cap. 409 and Section 3 of the *State Corporations Act*. The provision of Section 3(1) of both Acts provide as follows:

- “ 1) The President may by order establish corporation as a body corporate to perform the functions specified in order.
- 2) A state corporation established under this section shall:-
 - a) Have perpetual succession;
 - b) In its corporate name of suing and being sued
 - c) Subject to this Act, be capable of holding and alienating movable and immovable property.”

51. From the foregoing, contrary to the 1st Respondent’s assertions, they affirmed that the 1st Respondent is a state corporation and not subject to the *Government Proceedings Act*, Cap. 40. Indeed while they were independent, such organs of state was expected to collaborate with other state and non-state actors to realize their mandate. Hence in “Communications Commission of Kenya and 5 Others – Versus - Royal Media Services and 5 Others, [Supra]” the Supreme Court of Kenya, in its consideration of the meaning of independence in relation to Article 34(5) of *the Constitution*, held that:

“independence” is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance...”

52. The Learned Counsel argued that there was a sense in which, though a state organ, an independent corporation such as the 1st Respondent, is separate and independent from the Government. What was in contest herein is the question whether, as an independent institution, the 1st Respondent/Applicant was shielded from the consequences of its power to sue and be sued in its corporate name as recognized by the provision Article 253 of *the Constitution* of Kenya, 2010 by dint of Section 21 of the *Government Proceedings Act*. In as much as the 1st Respondent/Applicant is independent and clothed with requisite constitutional powers to sue and be sued in its own corporate name, it is not “the Government” or a “Government Department” for purposes of the *Government Proceedings Act*, Cap. 40. Indeed, it was in recognition of this independence that it has engaged the services of their Advocate on record to offer it legal representation. Consequently, the 1st Respondent was amenable to the usual legal consequences flowing from such processes, including execution of ensuing decrees. This is because there was no such protection afforded by its organic legislation, the *Kenya Roads Act*, Cap. 409 to shield the 1st Respondent from the execution process.

53. Whereas the *Government Proceedings Act*, Cap. 40 was amended by the Government Proceedings (Amendment) Act, 2015 to include County Governments, Parliament, in its wisdom, never considered extending the same shield to independent corporations such as the 1st Respondent/



Applicant. They were accordingly guided by the path taken by Justice L. Onguto in “Petition No. 513 of 2013: Ikon Prints Media Company Limited – Versus - Kenya National Highways Authority & 2 Others (Supra)” that:

“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 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on Government funding but it is not government or servant of or agent of Government for the purposes of the Government Proceedings Act. The 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body...”

54. The Learned Counsel submitted that there were various ways and reasons as to why entities were deemed government entities. However, it had never been a reason that they were deemed government agencies so as to escape satisfying legal liabilities which was due. Therefore, it could not be that the 1st Respondent/Applicant could appoint an advocate without resort to the opinion of the Attorney General, but when it came to paying the Petitioner, then it hid behind the government. Nonetheless and having said all that, they further submitted that this court’s hands was tied as it had already pronounced itself as to what Kenya National Highways Authority (the 1st Respondent) was, which was a state corporation. As such, this court could not review this fact as it would be tantamount to sitting on its own appeal.
55. In conclusion, the Learned Counsel submitted and prayed that the Honourable Court allow the instant application in its entirety.

C. The Written Submissions by the 1st Respondent to the Notices of Motion application dated 14th June, 2023 and 15th June, 2023.

56. The 1st Respondent through the Law firm of Messrs. Prof. Albert Mumma & Company Advocates filed their written submissions dated 18th August, 2023. Mr. Ochieng Advocate holding brief for Professor Mumma Advocate commenced by stating that the submissions of the 1st Respondent were in support of the Notice of Motion application dated 14th June 2023 seeking to review and vary the ruling dated 15th May 2023. Besides, the 1st Respondent opposed the Petitioner’s Notice of Motion application dated 15th June 2023 through these submissions.
57. The Learned Counsel recounted the brief facts of the case as stated herein. He submitted that the Petitioner filed an application dated 11th August, 2022 where it sought six prayers. The Petitioner sought order nisi forthwith attaching the funds of the 1st Respondent held by the two Garnishees. The application equally sought that the Garnishees and the 1st Respondent be ordered to attend court on a date to be appointed to show cause why the garnishees should not pay the decretal balance. Thirdly, the application sought that upon the inter parties hearing of the application a garnishee order absolute be issued. In the alternative, the Petitioner sought that in the interim the court direct that the amount of a sum of Kenya Shillings Nine Thirty One Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs.931,645,675.00/=) held by the garnishees be withheld or placed in a suspense account for security purposes pending further directions of the Honorable court. In a ruling dated 15th May, 2023, this court gave three orders. First, the court allowed the Petitioner’s application dated 11th August, 2022 against the 1st Respondent. Secondly, the Petitioner was directed to pursue execution



of the decree against the 1st Respondent in the laid down, proper and legal process. Lastly, costs were awarded to the Petitioner. In consequence of the above ruling of the court, Petitioner proceeded to extract two differing orders purporting them to be orders flowing from the said ruling of the court. The first order was issued to the petitioner/decreed holder on 23rd May 2023 and states in material parts as follows:

“It is hereby ordered:

1. That the Notice of Motion application dated 11th August 2022 by the Petitioner/Decree Holder herein be and is hereby allowed as against the 1st Respondent/Judgment Debtor, the 1st and 2nd Garnishees but disallowed against the 2nd Respondent/Judgment Debtor.
2. That the Petitioner/Decree Holder may pursue execution of the Decree against the 1st Respondent/Judgment Debtor in the laid down, proper and legal process; and
3. That costs of the application be borne by the 1st Respondent, 1st and 2nd Garnishees jointly and severally awarded to the Petitioner.”

58. As extracted, Orders Nos. 1 and 2 of the Order issued on 23rd May 2023, were contradictory in themselves and compliance with one renders the other moot which, at any rate, is absurd in law. The second order purportedly issued to the Petitioner by the same court [but on 5th June 2023] restated all the prayers in the Petitioner's Notice of Motion application. The Petitioner then proceeded on 7th June 2023 to serve the order dated 5th June 2023 on 1st Garnishee herein Co - Operative Bank of Kenya Limited who acted on the same by freezing and blocking and suspending the 1st Respondent's Account No.01141160XXXX. Upon being notified that its account at the 1st Garnishee has been frozen, the 1st Respondent filed its Notice of Motion application dated 14th June, 2023 seeking an interim order of stay of the court's orders given on 15th May, 2023; an order directing the 1st Garnishee to unfreeze the 1st Respondent's account; and that the court be pleased to review and vary paragraph 26 of its ruling. The Petitioner then filed yet another Notice of Motion application dated 15th June, 2023 seeking that the 1st Garnishee do appear before the court to show cause why they should not pay the decretal sum; and that the garnishee order nisi issued on 5th June, 2023 be made absolute. The Petitioner thereafter responded to the 1st Respondent's application through the Replying Affidavit of Ketan Patel dated 19th June, 2023. Similarly, the 1st Respondent replied to the Petitioner's application of 15th June, 2023 through the 1st Respondent's Grounds of Opposition dated 17th July, 2023. When this matter came up for directions on the 1st Respondent's application on 21st June, 2023, the court directed that the two Notice of Motion applications dated 14th June, 2023, and 15th June, 2023 be disposed of simultaneously by way of written submission; there be an interim stay, and the two orders extracted on 15th May, 2023 and 5th June, 2023 be recalled and be aligned with the directions in the ruling delivered on 15th May, 2023.

59. On the issue for determination, the Learned Counsel relied on the following three (3) aspects. Firstly, on whether the Petitioner's application for garnishee order absolute violated statutory provisions on execution against funds of the government. The Learned Counsel submitted that the Petitioner's application seeking garnishee order absolute was bad in law and an abuse of process of this court. The same ought to not issue for the reasons that this court lacks jurisdiction to issue any process of execution in the nature of attachment of funds belonging to the government. The Petitioner's application thus ran contrary to the provision of Section 68 of the *Kenya Roads Act*, Cap. 409 as read together with the provision of Order 29 Rules 2 (2)(c) & 4(1), and Section 21 (3) & (4) of the



Government Proceedings Act, Cap. 40. The Petitioner's application offended the provision Section 68 of the Kenya Roads Act, Cap. 409 by purporting to invoke the jurisdiction of this court to issue its process of execution against the 1st Respondent against the clear provisions of the Act. The provision of Section 68 is titled 'Restriction on execution against property of Authority' and provided in part that: no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property.

60. It was the Learned Counsel's submission that the Petitioner's application was both a process of execution and sought attachment of the funds of the Authority, all of which are explicitly prohibited under Section 68 of the Kenya Roads Act, Cap. 409. Therefore, this court ought to dismiss the application with costs for being contrary to Section 68 of the Kenya Roads Act, Cap. Even if one were to assume and argued that Section 68 does not render the application a nullity, the provision of Order 29 Rules 2 (2) (c) & 4(1) of the Civil Procedure Rules, 2010 would still bar the attachment of the Authority's funds, and the jurisdiction of this court to issue its execution process against the funds of the government held by the 1st Respondent as a statutory corporation. Order 29 Rules 2(2)(c) provides that:

“No order against the Government may be made under (c) Order 23 (Attachment of debts). Further, Order 29 Rule 4(1) provides that: No order for the attachment of debts under Order 23...shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the Government.”

61. Therefore, it was the Learned Counsel's submission that the provision of Order 29 of the Civil Procedure Rules, 2010 renders the Petitioner's application and any purported attachment of the Authority's funds a nullity and with no effect. The Petitioner's submission that the 1st Respondent was not subject to the Government Proceedings Act, Cap. 40 for being a state corporation lacked any grounding in the law. Instead, the 1st Respondent submitted that the purpose of the Government Proceedings Act, Cap. 40 as outlined is its long title is: to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government. Such that even granting as the Petitioner purported that the 1st Respondent was not government, the funds that Petitioner sought to attach were still subject to the Government Proceedings Act, Cap. 40 for rightly being the property/funds of the government.
62. There was no doubt that the 1st Respondent as established under Section 3 was allocated by Parliament for specific use including for compulsory the Authority's docket. Based on the affairs of the Authority and the source of its funds, it was their submission that it was inevitably conclusive that the funds sought to be garnished by the Petitioner fell within the four corners of the Government Proceedings Act, Cap. 40 and no execution could issue against the same. To bolster this argument on the nullity of execution against the persons other than the government in certain cases involving the affairs or property of government, they relied on the Honourable Court's Ruling dated 15th May, 2023 and on the persuasive dicta in “Jamleck Waweru Karanja – Versus - County Government of Nakuru [2020] eKLR” where Justice Mbaru held thus:

“Therefore, the law as it stands, no execution can be levied against the property of a Government and or a County Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the Government,...See Republic versus Attorney General & another ex-parte Stephen Wanyee Roki (2016) eKLR.”



63. Moreover, the Learned Counsel submitted that the Petitioner's contention that the Government Proceedings Act, Cap. 40 should not apply to the 1st Respondent for being independent corporation with ability to appoint an advocate without resort to the opinion of the Attorney General was flawed and misleading. They submitted that the government can sue or be sued through other such person/office established under any written law as envisaged under the provision Section 12(1) of the Government Proceedings Act, Cap. 40 and no opinion of the Attorney General was needed. Therefore, the 1st Respondent could be sued as government pursuant to the provisions of the Kenya Roads Act, Cap. 409 without being divested of its status under Section 12(1) of the Government Proceedings Act, Cap. 40.
64. In any event, a similar question on the independence of state organs from the direction of the Attorney General had arisen in the past and had been consistently dealt with to the effect that no such permission or opinion as alleged by the Petitioner was required. In any event, even the National Land Commission which the Honourable Court correctly held that was a government enjoyed the status of body corporate, capable of suing and being sued yet was still government. The Petitioner's contention to that end was therefore lame and plainly wrong. To buttress on this argument, the Counsel cited the cases of:- "Republic – Versus - Attorney General; Law Society of Kenya (Interested Party): Ex- parte: Francis Andrew Moriasi (2019) eKLR; Republic – Versus - Hon. Attorney General; Law Society of Kenya (Interested Party): Ex-parte: Law Society of Kenya - Nairobi Branch (2023)".
65. In rebuttal to the Petitioner's assertion that independence of state corporations divested the corporation of government's character for Kenya in the case of:- "In the Matter of Interim Independence Electoral Commission (2011) eKLR" were enumerated by the apex court at paragraph 54 thus:
- “the totality of governance powers is share out among different organs. These organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.”
66. Lastly, the Petitioner could not be heard to argue as they purport that the provision of Section 21(3) & (4) of the Government Proceedings Act, Cap. 40 never extended to the authority because Parliament never incorporated it in the amendment; or that its rights to the provision of Article 47 and to reap the fruits of its successful litigation had been violated. Nor could the Petitioner argue to be a party equal to the government in execution against the funds of the government. The Learned Counsel submitted that first, it was trite law that the provision of Section 68 of the Kenya Roads Act, Cap. 409 was to be read as supplementing and or replicating the provisions of Section 21(3) & (4) of the Government Proceedings Act, Cap. 40 hence there was no harm in omitting state corporations in the amendment to the Government Proceedings Act, Cap. 40. The 1st Respondent relied on the dicta of the Constitutional Court on similar contention in the case of: "Pravin Bowry – Versus - Ethics & Anti-Corruption Commission [2015] eKLR" in which Lenaola J. (as he then was) while dealing with the constitutionality of Section 61A of ACEC [sic] Act which was similar to the provisions of Section 68 of the Kenya Roads Act, Cap. 409 rendered himself thus:
- “It must be noted that the Petitioner has not complained of either Section 21(3) and (4) of the Government Proceedings Act nor Order 29 Rule 4(1) of the Civil Procedure Rules but it matters not because the principle in both is replicated in the impugned Section 61A of the EACC Act.”[sic]



67. Similarly, the Learned Counsel submitted that the immunity against execution granted to the government was sound and never in any way violated any of the Petitioner's right as alleged or at all. The same issues of violation of constitutional rights as purported by the Petitioner had been conclusively dealt with twice by three Judges of the Constitutional court in the case of:- "Kisya Investments Limited – Versus – Attorney General & Another [2005] eKLR" and "Pravin Bowry (Supra)". Consequently, the Learned Counsel urged this court to find the Petitioner's Notice of Motion purported garnishee order nisi irregular, illegal, null and void for violating dismiss the same with costs.
68. Secondly, on whether the Petitioner had complied with the land down procedure for the issuance of order absolute. The Learned Counsel submitted that contrary to the assertion by the Petitioner that there was no provision in the provision of Order 23 requiring a Notice to Show Cause to issue, the 1st Respondent submits that the Petitioner failed to comply with Order 23 Rule 1(2) hence ought not to be granted the order absolute sought. Order 23 Rule 1(2) states in no uncertain terms that:
- “ At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the Judgment - Debtor.”
69. To date, the 1st Respondent had never been served with any order nisi in the requisite form or at all nor filed a return of service on the same. This court, being a court equity ought not to aid a party disobeying the law by entertaining the Petitioner's application. The same ought to be dismissed with costs.
70. Thirdly, on whether the court's ruling allowed the Petitioner to execute against funds in KENHA's account without following the prescribed statutory process for execution, the Learned Counsel submitted that in its wisdom, the Honourable Court, being aware of Section 68 of *Kenya Roads Act* and Sections 21(3)&(4) of the *Government Proceedings Act* and Order 29 Rule 2(2) & 4(1) of the Civil Procedure Rules, 2010 which forbid attachment of the 1st Respondent's property or funds to satisfy a debt, directed the Petitioner to pursue execution of the decree against the 1st Respondent by applying the laid down, proper and legal process. However, the Petitioner chose instead to attach the funds of the Authority by exploiting what appears to be a gap in the ruling of the court dated 15th May, 2023. The gap is twofold: First, the Petitioner had a choice to choose to execute the first order which allowed the application in omnibus without qualification and which the Petitioner had indeed used to purport to attach the year 2023, was contradictory in themselves and compliance with one rendered the other moot which, at any rate, was absurd in law.
71. In other words, the Learned Counsel respectfully submitted that once the Petitioner executed the first order allowing its omnibus application by execution in the laid down, proper and legal process did not apply as there would be no more debts after garnishees release the attached funds. On the basis of the conflicting interpretation of the ruling of the honorable court, the Learned Counsel submitted that there existed sufficient reasons to warrant the review of the ruling as provided under Order 45, Rule 1 of the Civil Procedure Rules, 2010. The sufficient reason which was analogous to error apparent or mistake was that the Order issued on 5th June 2023 was internally contradictory and incapable of being complied with by the 1st Respondent without grave, unfairly prejudicial and unjust consequences falling on the 1st Respondent.
72. Consequently, the Learned Counsel submitted that the 1st Respondent had laid sufficient basis for the court to review and vary the ruling of the court to make it clear that no funds of the 1st Respondent could be attached in any manner other than those provided in the provision of Section 68 of *Kenya Roads Act*, Cap. 409 and Sections 21(3) and (4) of the *Government Proceedings Act*, Cap. 40.



73. In conclusion, the Learned Counsel submitted that in no way did the 1st Respondent's application seeking to reopen the case or urge the court to sit on appeal on its decision as wrongly claimed by the Petitioner. He submitted that the provision of Order 45 of the Civil procedure Rules, 2010 permitted this court to clarify any confusion caused by its ruling. Granting a review as requested would accord the court opportunity to align its orders to cure the ambiguity which the Petitioner had unfairly exploited to circumvent the mandatory provisions of Section 68 of the *Kenya Roads Act*, Cap. 409 and Sections 21(3) and (4) of the *Government Proceedings Act*, Cap. 40 in the guise of garnishee proceedings. The Learned Counsel urged the court to allow the 1st Respondent's Notice of Motion application dated 14th June, 2023 as prayed and to dismiss the Petitioner's application with costs.

IX. Analysis & Determination.

74. I have carefully read and considered the pleadings herein by the Petitioner and the Respondents being the three applications herein, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.

75. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

- a. Whether the Notice of Motion application dated 14th June, 2023 is merited and whether the parties are entitled to the reliefs sought?
- b. Whether the Notice of Motion application dated 15th June, 2023 has merit and whether the parties are entitled to the reliefs sought??
- c. Whether the Notice of Motion application dated 15th September, 2023 has merit and whether the parties are entitled to the reliefs sought??
- d. Who will bear the Costs of the Notice of Motion applications dated 14th June, 2023, 15th June, 2023 and 15th September, 2023.

Issue No. a). Whether the Notice of Motion application dated 14th June, 2023 is merited?

76. Under this sub-title, the main substratum herein pertains to the execution orders in form of Garnishee orders. The Plaintiff this Honourable Court will examine two issues for determination:

- i. Whether the Honourable Court can issue an order to the 1st Garnishee to unfreeze or unblock the sum of Kenya Shillings Seven Thirty Eight Million Seven Fifty Eight Thousand Four Fourteen Hundred and Eighty Seven cents (Kshs.738,758,414.87/=) held in 1st Respondent/applicant's Account No.01141160XXXX held at the 1st Garnishee and which the 1st Garnishee has placed in a suspense account ?
- ii. Whether the Honourable Court can and should review Paragraph 26 of its ruling dated 15th May, 2023?

77. The first issue for determination, I made the order on 15th May, 2023 I clearly stated that:-

- a. That the Notice of Motion application dated 11th August 2022 by the Petitioner/Decree Holder herein be and is hereby allowed as against the 1st Respondent Judgement Debtor, the 1st and 2nd Garnishees but disallowed against the 2nd Respondent Judgement/Debtor.
- b. That the Petitioner/Decree Holder may pursue execution of the decree against the 1st Respondents /Judgment Debtors in the laid down, proper and legal process; and



- c. That costs of the application to be borne by 1st Respondent, 1st and 2nd Garnishee jointly and severally awarded to the Petitioner.
78. In the application dated 11th August 2022, the Petitioner/Decree Holder sought for the following orders therein:-
- a. Spent.
 - b. That this Honourable Court be pleased to issue an Order Nisi forthwith attaching the principal amount of Kshs. 242,950,000.00 together with court interest of Kshs. 386,667,886 at 12% of the principal amount from 21st March 2014 to 11th August 2022, mesne profits of 24,000,000.00 and court interest at 12% being Kshs. 168,580,645.00 commencing from 2nd June 2015 to 11th August 2022, penal interest of Kshs. 109,447,144.00 at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of Kshs. 931,645,675.00 which sum is held to the credit of both the 1st Judgment debtors bank account held by the 1st Garnishee herein Co-operative Bank of Kenya account no. 01141160XXXX at its Head Office branch Nairobi and the 2nd Judgment debtor account number 010010329XXXX held by the 2nd Garnishee herein National Bank of Kenya Limited at its Hill Branch, Nairobi;
 - c. That this Honourable Court be pleased to order the above-named Garnishees and the judgment debtors to attend before the court on a date to be appointed, to show cause why the said garnishee should not pay to the decree holder the decretal balance herein or so much thereof as may be sufficient to satisfy the said sum of Kshs. 242,950,000.00 together with court interest of Kshs. 386,667,886 at 12% of principal amount from 21st March 2014 to 11th August 2022, mesne profits of Kshs. 24,000,000.00 rent of Kshs. 168,580,645.00 commencing from 2nd June 2015 to 11th August 2022, penal interest of Kshs. 109,447,144.00 at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of Kshs. 931,645,675.00;
 - d. That upon the inter parties hearing of this Application, this Honourable Court be pleased to issue a Garnishee Order Absolute in terms of prayer 3 herein above and/or in the alternative;
 - e. That pending the hearing and determination of this application and in the interim the Honourable Court be pleased to direct that the amount of Kshs. 931,645,675.00 held in both the Respondent/Judgment Debtor's bank account number 01141160XXXX held by the 1st Garnishee Cooperative Bank of Kenya Nairobi and account number 010010329XXXX held by the 2nd Garnishee National Bank of Kenya Nairobi, be withheld or placed in a suspense account for security purposes pending further directions of this Honourable Court; and
 - f. That cost of this application be provided by the Respondent/Judgment Debtor.
79. This Honourable Court gave a go ahead for the Petitioner/Decree Holder may pursue execution of the decree against the 1st Respondent/ Judgment Debtors in the laid down proper process. According to the 1st Respondent, they have to follow the provisions of Section 68 of *Kenya Roads Act* and Sections 21(3)&(4) of the *Government Proceedings Act*. The 1st Respondent/Applicant was at all material times in these proceedings represented by in-house counsel Mr. Nathaniel Munga, Advocate. Both the 1st Respondent/ Applicant's said incoming and outgoing advocates have filed a consent dated 9th June 2023 effecting change of representation and it is necessary that an order of court do issue adopting the consent.
80. According to the 1st Respondent, the incoming advocates have discovered that the petitioner/decree holder proceeded to extract two differing orders purporting them to be orders flowing from the said



ruling of the court. The first order was issued to the petitioner/decreed holder on 23rd May 2023 and states in material parts as follows:

“It is hereby ordered:

1. That the Notice of Motion application dated 11th August 2022 by the Petitioner/Decree Holder herein be and is hereby allowed as against the 1st Respondent/Judgment Debtor, the 1st and 2nd Garnishees but disallowed against the 2nd Respondent/Judgment Debtor.
2. That the Petitioner /Decree Holder may pursue execution of the Decree against the 1st Respondent/Judgment Debtor in the laid down, proper and legal process; and
3. That costs of the application be borne by the 1st Respondent, 1st and 2nd Garnishees jointly and severally awarded to the Petitioner.”

81. According to the 1st Respondent the above Orders Nos. 1 and 2 of the Order issued on 23rd May 2023, are contradictory in themselves and compliance with one renders the other moot which, at any rate, is absurd in law. This Court does not find anything contradictory in the orders issued on 23rd May, 2023 as they were the same orders issued on 15th May, 2023. The Honourable Court clearly meant the Notice of Motion dated 11th August, 2022 was found merited only to the 1st Respondent and not the 2nd Respondent.

82. According to the 1st Respondent, the Honourable Court, being aware of Section 68 of *Kenya Roads Act* and Sections 21(3) & (4) of the *Government Proceedings Act* and attachment of the 1st respondent/applicant's property or funds to satisfy decree against the 1st Respondent/applicant by applying the laid down, proper and legal process. Section 21 of the *Government Proceedings Act* provides as follows:-

21. Satisfaction of orders against the Government

- (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:



Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

- (4) 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.
- (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

- 83. Sub section (2) and (3) provides for execution of decrees where damages have been awarded against Government bodies. Garnishee proceedings are special specie of process by which a Judgment Creditor may attach (or Garnishee) debts due in satisfaction of the judgment debt. The debt owed by the third party to the Judgment Debtor, on being attached, shall ultimately be paid by him to the Judgment Creditor on the order of court. Upon the grant of the ex parte order nisi which directs the garnishee to appear in court on a specified date to show cause why an order should not be made upon it for payment to the Judgment Creditor the amount of the debt owed to the judgment debtor, the Judgment Creditor must ensure that the ex parte order is served on the Judgment Debtor and the garnishee.
- 84. According to the Petition on whether the 1st Respondent had proffered a reason as to why the Garnishee order nisi should be lifted, the Learned Counsel submitted that the general rule is that the burden of proof lies with the Garnishee to show that the funds in its possession are not due to the Applicant, or that a third party's rights are involved. Since serving the garnishee order nisi upon the 1st Garnishee, it has not raised an objection against the order nor disputed the sums claimed. It therefore follows that in the absence of any dispute as to the sums claimed by the Petitioner/Respondent, the Court is not barred from issuing an order absolute.
- 85. There were two stages involved in Garnishee proceedings. The first stage is for "the garnishee order nisi" to issue ex parte upon receipt of an application by the decree holder while the second stage is for "the garnishee order absolute". At the first stage, the judgment creditor makes an application Ex - parte to the Court that the judgment debt in the hands of the third party, the Garnishee, be paid directly to the Judgment Creditor unless there is explanation from the Garnishee why the order nisi should not be made absolute. It was also agreed that the Ruling of 15th May 2023 was a garnishee order nisi, therefore satisfying the first part of garnishee proceedings.
- 86. According to the Petitioner, if the Judgment Creditor satisfied the Court on the existence of the Garnishee who is holding money due to the judgment debtor, such third party (Garnishee) will be called upon to show cause why the Judgment Debtor's money in its hands should not be paid over to the Judgment Creditor, and if the Court is satisfied that the Judgment Creditor was entitled to attach the debt, the Court will make a garnishee order nisi attaching the debt. The essence of the order nisi was to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the Judgment Creditor of the amount of debt owed to the Judgment Debtor. It is a requirement that a copy of the order nisi must be served on the Garnishee and Judgment Debtor at least 7 days before the adjourned date for hearing. In this regard, the Petitioner filed its application seeking garnishee order nisi, served the same day on 30th September, 2022



and despite served, none of the Respondents filed any responses to the application by the Petitioner/ Respondent herein. Thus, the Honourable court proceeded to rendering with the proceeding, which resulted in the order dated 15th May 2023 and served upon the 1st garnishee on 23rd May, 2023.

87. I take note that there was no objection by the Garnishees neither did they dispute liability to pay the debt. The primary object of a garnishee order is to make the debt due by the debtor of the Judgment Debtor available to the decree holder in execution without driving him to the suit. However, I agree with the Petitioner that the 1st Respondent has filed documents affirming that there indeed is money those accounts. In fact, the 1st Respondent at paragraph 20 of the supporting affidavit sworn by Jessica Mbae avers that indeed the 1st garnishee already complied with garnishee order nisi, which in essence affirms the fact that there is money in the 1st Respondent/Applicant's account no.01141160XXXX to partially satisfy the balance of the decretal sum. I have noted that the 1st Respondent has vehemently held that the Petitioner was in breach of the provision of Section 68 of *Kenya Roads Act*, Cap. 409 taking the it was state corporation and hence a Government agency under the ambit of the *Government Proceedings Act*, Cap. 40.

88. I am of total contrary opinion to this. This position was upheld which fully agree with the decision in the case “Kisya Investments Limited – Versus – Attorney General & Another (2005) eKLR” where it was held that:-

“in execution against the Government, the Government will not be able to pay immediately upon passing of the decrees and Judgements leading to the attachment of its assets which would bring it to its knees. However, the Government is under a duty to obey the law and discharge all of its statutory and legal obligations and that the insulation and immunity granted to it were intended to protect the public interest as it is the same public who would ultimately be called upon to pay the colossal sums which may have accrued on the original decretal sum”

89. The other cases which are fully in support of this position were:- Court of Appeal No. E290 of 2023 – “Five Star Agencies Limited – Versus – National Land Commission & National Bank of Kenya”; “Misc Civil App. No. 241 of 2019 Nyandaró & Co. Advocates – Versus - National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Ltd (eKLR)”, noted that:

“ 13. A litigant is entitled to reap the fruits of his successful litigation. As a result, where a Judgment-Debtor fails to comply with the terms of a judgment, the Judgment-Creditor is entitled to enforce such judgment by adopting a suitable procedure provided under the law. By the process of garnishee, the court has power to order the garnishee to pay directly the sums it owes the Judgment-Debtor to the garnishor or so much of it as may be sufficient to satisfy the amount of the judgment and the cost of the garnishee proceedings. In this regard, the provisions of Order 23 Rule 4 provide with sufficient clarity what this court should do where the Garnishee admits the debt as in this case.”

90. Therefore, I am fully satisfied that it will totally unnecessary for this Honourable Court to issue an order for the unfreezing of the said accounts.

91. With regard to the second issue is whether the Honourable Court can and should review paragraph 26 of its ruling dated 15th May, 2023. Before delving into the prayer in the application it is important to give a background of this matter. The records shows that the facts that gave raise to the order for



review of the ruling delivered on 15th May, 2023, the Petitioner in the Notice of Motion application dated 11th August, 2022 sought for the following:-

- a. Spent.
 - b. That this Honourable Court be pleased to issue an Order Nisi forthwith attaching the principal amount of Kshs. 242,950,000.00 together with court interest of Kshs. 386,667,886 at 12% of the principal amount from 21st March 2014 to 11th August 2022, mesne profits of 24,000,000.00 and court interest at 12% being Kshs. 168,580,645.00 commencing from 2nd June 2015 to 11th August 2022, penal interest of Kshs. 109,447,144.00 at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of Kshs. 931,645,675.00 which sum is held to the credit of both the 1st Judgment debtors bank account held by the 1st Garnishee herein Co-operative Bank of Kenya account no. 01141160XXXX at its Head Office branch Nairobi and the 2nd Judgment debtor account number 010010329XXXX held by the 2nd Garnishee herein National Bank of Kenya Limited at its Hill Branch, Nairobi;
 - c. That this Honourable Court be pleased to order the above-named Garnishees and the judgment debtors to attend before the court on a date to be appointed, to show cause why the said garnishee should not pay to the decree holder the decretal balance herein or so much thereof as may be sufficient to satisfy the said sum of Kshs. 242,950,000.00 together with court interest of Kshs. 386,667,886 at 12% of principal amount from 21st March 2014 to 11th August 2022, mesne profits of Kshs. 24,000,000.00 rent of Kshs. 168,580,645.00 commencing from 2nd June 2015 to 11th August 2022, penal interest of Kshs. 109,447,144.00 at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of Kshs. 931,645,675.00;
 - d. That upon the inter parties hearing of this Application, this Honourable Court be pleased to issue a Garnishee Order Absolute in terms of prayer 3 herein above and/or in the alternative;
 - e. That pending the hearing and determination of this application and in the interim the Honourable Court be pleased to direct that the amount of Kshs. 931,645,675.00 held in both the Respondent/Judgment Debtor's bank account number 01141160XXXX held by the 1st Garnishee Cooperative Bank of Kenya Nairobi and account number 010010329XXXX held by the 2nd Garnishee National Bank of Kenya Nairobi, be withheld or placed in a suspense account for security purposes pending further directions of this Honourable Court; and
 - f. That cost of this application be provided by the Respondent/Judgment Debtor.
92. The Application was premised on the grounds that judgment was delivered on 28th October 2021 by this Honorable Court against the Respondent/Judgment Debtor in the sum of Kenya Shillings Two Forty Two Million Nine Hundred and Fifty Thousand (Kshs. 242, 950, 000.00) together with Court interest of a sum Kenya Shillings Three Eighty Six Million Six Sixty Seven Thousand Eight Eighty Six hundred (Kshs. 386,667,886.00/=) at 12% of principal amount from 21st March 2014 to 11th August 2022, mesne profits of Kenya Shillings Twenty Four Million (Kshs. 24,000,000.00), rent of Kenya Shillings One Sixty Eight Million Five Eighty Thousand Six Fourty Five Thousand (Kshs. 168,580,645.00) commencing from 2nd June 2015 to 11th August 2022, penal interest of a sum of Kenya Shillings One and Nine Million Four Fourty Seven Thousand One Fourty Four Hundred (Kshs. 109,447,144.00) at 12% commencing from 2nd June 2015 to 11th August 2022 making a total of sum of Kenya Shillings Nine Thirty One Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs. 931,645,675.00), as shown by his annexed copy of the Decree issued on 17th November 2021 marked as '1'.



93. On analysis and determination, I opined myself as follows:-

Issue No. a). Whether the Notice of Motion application dated 11th August, 2022 by the Petitioner/Decree Holder has any merit.

14. Under this Sub – heading, this being a Court of Law, its critical to appreciate two broad issues. First the n Order 23 Rules 1 (1), (2) and (3), Rule 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 legal nature, scope and effect of the garnishes orders sought by the Petitioner/Decree Holder and secondly the parties in the matter. To begin with, garnishee is one form of execution by way of execution of the decree of Court. It means notifying or warning of certain debt that must be paid before the person is entitled to receive property as an heir and the proceedings have been commenced and an order be issued by Court for the attachment. It may be attachment of a persons salary or property. The provisions of Order 23 Rules 1 (1), (2) and (3), Rule 2, 3 of the Civil Procedure Rules, 2010 makes the provision for garnishee. The said provision of the law provides:-

“The service of the order that debts due to a Judgement – Debtor liable under a decree shall be attached or notice to the garnishee as the Court may direct. If the garnishee does not dispute the debt due or claimed to be due from him or them to the Judgement Debtor or he does not appear upon the day of hearing named in an order nisi , then the Court may order execution against the person and goods of the garnishee to levy the amount due from him or so much thereof as may be sufficient to satisfy the decree, together with costs of the garnishee proceedings and the order absolute shall be in Form No. 17 or 18 of Appendix A.

15. On the second issue is on the parties being sued or involved in this matter whereby execution of the Decree is concerned. These are the Kenya National Highway Authority (KENHA) and the National Land Commission (NLC) the 1st and 2nd Respondents herein respectively. While the 1st Respondent/Judgment Debtor is established by the Kenya Roads Act under the provision of Section 3, its functions in section 4 and composition of its board of authority in section 5. is State Corporations established under the State Corporation Act, Cap 446 and Section 3 of the Kenya Roads Act, No. 2 of 2007 of the Laws of Kenya. The provision of Section 3 (1) of both the State Corporation Act and the Kenya Roads Act, provide as follows:-

- (1). The President may by order establish Corporation as a body corporate to perform the functions specified in order.
- (2). A state Corporation established under this Section shall:-
 - (a). Have perpetual succession;
 - (b). In its corporate name of suing and being sued.
 - (c). Subject to this Act, be capable of holding and alienating movable and immovable property.

For these reasons the application by the Petitioner/Decree Holder has merit.

16. The 2nd Respondent is established as a Constitutional body under Article 67 (1) of the Constitution and further Article 67 (2) read with the National Land Act, No. 5 of 2012 which makes the provision for the function and powers of the NLC. The transitional and saving provisions of the NLC Act provide that any function, transition, Civil proceedings or other processes in respect of any public land administration matter within the docket of the



Ministry of Land before the commencement of the Act is deemed to be carried by the Act as per the provision of Section 30 of the NLC Act. The enactment of the NLC Act is in furtherance of the objects and the principles of devolved government in land management and land administration.

17. Primarily, the first issue to ponder is whether NLC should be treated strictly as Government per se on matters of execution of Court Decrees. An analysis of the functions of the Respondents/Judgment Debtors leaves no doubt in the court's mind that NLC is a government agency or organ. Government is not defined either in the *Government Proceedings Act*, Cap. 40 or the *Civil Procedure Act*, Chapter 21 Laws of Kenya and the rules made thereunder. However, reading of Sections 2, 12, 19 and 21 of the *Government Proceedings Act* as to what constitutes civil proceedings by and against the Government, and orders against the Government, which is reproduced in Order 29 Rule 1(1) of the Civil Procedure Rules, leaves no doubt that the Government includes Government departments, Government organs, agencies of the Government and officers of the Government.
18. Having established that the 2nd Respondent/Judgment Debtor herein is a government agency, it follows that the laid-out procedure in law in executing decrees against the Government is provided through the law. To begin with, the provision of Order 29 Rule 2 (2) of the Civil Procedure Rules 2010 provides as follows:

QUOTE

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

- (a) Order 14, rule 4 (Impounding of documents);
- (b) Order 22 (Execution of decrees and orders);
- (c) Order 23 (Attachment of debts);
- (d) Order 40 (Injunctions); and
- (e) Order 41 (Appointment of receiver)

Further, the provisions of Order 29 Rule 4 (1) of the Civil Procedure Rules, 2010 provides:

“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.”

Section 21 (1) of *Government Proceedings Act* provides:

“Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.”



Section 21 (3) of [Government Proceedings Act](#) provides:

A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

Section 21 (3) of [Government Proceedings Act](#) provides:

If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

Section 21 (4) of [Government Proceedings Act](#) provides:

“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.”

19. The upshot of the above provisions of law and rules is that although execution is a right enforced by a Decree Holder against Judgment Debtor, execution of decrees against Government agencies should be carried out within the purview of [Government Proceedings Act](#) or seeking specific prerogative writs in form of “Mandamus” or “Prohibition” under the Administrative Law in form of Judicial Review proceedings. For these reasons therefore, the execution intended by the Petitioner/Decree – Holder against the 2nd Respondent Judgment/ Debtor in the manner envisaged from the filed Notice of Motion application dated 11th August, 2022 is far-fetched and hence disallowed.

Issue No. b). Whether the parties herein are entitled to the relief sought – of the Garnishee proceedings be instituted for execution of the decree issued on 17th November 2021 against the Respondents/ Judgment Debtors.

20. There is no doubt or challenge from any of the parties that a Judgment Debt exists. In fact, a perusal of the court record shows that on 8th June 2022 this matter came up a Notice to show cause against the 1st and 2nd Respondents/Judgment Debtors and their Learned Counsels informed the Honorable Court that they were making strides to comply with the Decree issued by the Court on 17th November 2021 despite budgetary constraints. This shows cooperation on the Respondents/Judgement Debtors part and the Court is aware to the fact that the process of complying with the said Decree on the part of any Government agency may be a long and bureaucratic one.
21. Nonetheless, the Petitioner/Decree Holder obtained Judgment for a total of Kenya Shillings Nine Thirty One Million Six Fourty Five Thousand Six Seventy Five Thousand (Kshs. 931,645,675.00/=) against the 1st and 2nd Respondents/Judgement Debtors and is entitled



to enjoy the fruits of the said judgement. My view is that this sustainable as far as the 1st Respondent Judgement/Decree Holder is concerned. However, as it is evident that the 2nd Respondent/Judgement Debtor is a Government agency and therefore, the Garnishee proceedings herein against it is improper in law to the extent of the recovery procedure. What then is the recourse available to the Petitioner/Decree Holder as far as the 2nd Respondent Judgement/Debtor is concerned?

22. In the case of “Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR Githua J opined that:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*.

The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment.

Once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

23. There is no evidence that the Petitioner/Decree Holder has made any effort to apply for the certificate of costs to be served upon the Attorney General and the accounting officer for execution of the decree as per Section 21 of the *Government Proceedings Act*, which is the proper procedure for execution of decrees against the Government. Judgment debts due from or to Government carry interest as prescribed under Section 26 of the *Civil Procedure Act*, Cap 21 and Section 20 of the *Government Proceedings Act*.

94. The ruling was delivered on 15th May, 2023 on the following terms:-



- a. That the Notice of Motion application dated 11th August 2022 by the Petitioner/Decree Holder herein be and is hereby allowed as against the 1st Respondent Judgement Debtor, the 1st and 2nd Garnishees but disallowed against the 2nd Respondent Judgement/Debtor.
 - b. That the Petitioner/Decree Holder may pursue execution of the decree against the 1st Respondents /Judgment Debtors in the laid down, proper and legal process; and
 - c. That costs of the application to be borne by 1st Respondent, 1st and 2nd Garnishee jointly and severally awarded to the Petitioner.
95. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the *Civil Procedure Act* provides as follows:-
- “ Any person who considers himself aggrieved -
- a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
96. The provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides that: -
- Any person considering himself aggrieved -
- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or
 - b. By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.
97. The provisions of Order 45 were restated by the Court of Appeal in the case of:- “Benjoh Amalgamated Limited & Another – Versus - Kenya Commercial Bank Limited (2014) eKLR” where the Court held that: -
- “ In the High Court both the *Civil Procedure Act* in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”
98. The Applicant alleges that the Petitioner/Decree Holder proceeded to extract two differing orders purporting them to be orders flowing from the said ruling of the court. According to the 1st Respondent Orders Nos. 1 and 2 of the Order issued on 23rd May 2023, are contradictory in themselves and compliance with one renders the other moot which, at any rate, is absurd in law. In its wisdom,



the Honourable Court, being aware of Section 68 of *Kenya Roads Act*, Cap. 409 and Sections 21(3) & (4) of the *Government Proceedings Act*, Cap. 40 and attachment of the 1st respondent/applicant's property or funds to satisfy decree against the 1st Respondent/applicant by applying the laid down, proper and legal process. The garnisheeing, therefore, of the 1st Respondent/applicant's accounts, as the petitioner/decreed holder has done is in breach of Section 68 of *Kenya Roads Act*, Cap. 409 and Sections 21(3)&(4) of the *Government Proceedings Act*, Cap. 40 and Order 29 Rule 2(2) & 4(1) of the Civil Procedure Rules, 2010 and lays to waste the order that the petitioner/decreed holder should execute the decree in accordance with the proper and laid down law.

99. According to Section 68 of the *Kenya Roads Act*:-

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 the 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.

100. Clearly there Section 68 (b) of the *Kenya Roads Act* gives an exception to the restriction. It is important to note that the interpretation and application of this section can vary depending on the specifics of a case. This does not amount to discovery of new or important evidence. In the present matter, the Applicant has not shown that there is discovery of new or important matter of evidence that the Applicant could not have placed before the Court during the hearing of the application.

101. As regards the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of “Nyamogo & Nyamogo – Versus - Kogo (2001) EA 170” the court held as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning where there may be conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.”



102. Similarly, in the case of “Timber Manufacturers and Dealers – Versus - Nairobi Golf Hotels (K) HCCC No. 5220 of 1992”, Emukule J held that;

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

103. The Applicant contended that there is an error apparent on the face of the record to review the orders of this Court. According to the 1st Respondent it can be deduced that the order which the court in fact intended to grant is the order at paragraph 26(b) and (c) of the ruling. Consequently, there are sufficient reasons for court to vary its orders so that the orders are in accord with the law and reasoning as set out by the court in its said ruling and also so that the orders are clear to the parties more so the Petitioner/Decree Holder and the garnishees. The 1st Respondent/applicant has discovered that the petitioner/decree holder has served the two conflicting orders dated 23rd May 2023 and 5th June, 2023 respectively on 1st garnishee herein Co - Operative Bank of Kenya Limited who has acted on the same by freezing and blocking and suspending the 1st respondent's Account No. 01141160XXXX.

104. According to the 1st Respondent, the said two orders dated 23rd May 2023 and 5th June 2023 were extracted in complete breach of the mandatory provisions of Order 21 Rule 8(2) of the Civil Procedure Rules, 2010 which stipulates that the person seeking to extract an order must first prepare a draft which shall be submitted for the approval of the other party. No such draft was served on the 1st Respondent/Applicant.

105. The Honourable Court has gone through the said orders, and the order issued on 5th June, 2023, and they are in line with the Notice of Motion application dated 11th August, 2022 and this Court having found the application merited then the said two orders are in order and not contradictory to each other. The Order issued 23rd May, 2023 mirrors the orders of the court on 15th May, 2023 and the order issued on 5th June, 2023 just echoes out the orders of the Notice of motion application dated 11th August, 2022 which was allowed on 15th May, 2023. The grounds laid by the Applicant do not disclose an error apparent on the face of the record.

106. In the case of “Abasi Belinda – Versus - Fredrick Kangwanu and Another (1963) EA 557” Bennet J aptly held as follows;

“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

107. The Court is also mandated to consider if there are sufficient reasons to review the Court's ruling. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of “The Official Receiver and Liquidator – Versus - Freight Forwarders Kenya Ltd (2000) eKLR” stated that;

“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

108. The Applicant has not demonstrated any sufficient reason to warrant a review of the Court's order.



109. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay. The Application was filed 14th June, 2023 to review the ruling of this Court of 15th May, 2023 which by all accord was filed without unreasonable delay.
110. To this end, I find the Notice of Motion application dated 14th June, 2023 is unmeritorious and therefore dismissed.

Issue No. b). Whether the Notice of Motion application dated 15th June, 2023 has merit?

111. Under this sub-title, this Honourable Court will examine the facts upon which the Decree holder instituted garnishee proceedings against the 1st & 2nd Respondents/Judgment Debtors herein vide Application dated 11th August 2022. The Ruling was delivered on 15th May 2023 allowing the application for garnishee order nisi against the 1st Respondent/Judgment Debtor. (Annexed in the supporting affidavit and marked as “KP -1”). Service of the garnishee order nisi was effected upon the 1st Garnishee herein Co-operative Bank of Kenya at its Mombasa branch on 7th June 2023 as well as at its head branch Nairobi on 8th June 2023. (Annexed in the supporting affidavit and marked as “KP -2a – b”). There was no dispute about the debt, and there is no contest that the 1st garnishee herein Co-operative Bank of Kenya holds the funds in the 1st Respondent/judgment debtor’s account number 01141160XXXX at its head branch Nairobi.
112. There was a Judgment of this Honourable court delivered on 28th October 2021 by Hon. Justice L. L. Naikuni which stands partially satisfied to date, save that the partial payment of a sum Kenya Shillings One Sixty Six Million (Kshs.166,000,000.00/=) was done by the Respondents after the filing of the garnishee application dated 11th August 2022. It is imperative that a garnishee order absolute be issued transferring the decretal amount to the Decree holder/Applicant’s bank account details as follows:-
- Account Name: Fort Properties Limited
- Bank: NCBA
- Account Number: 670365XXXX
- Account Branch: Moi Avenue, Mombasa Branch
- Swift Code: Cbafkenx
- Bank Code: 07
- Branch Code: 020
113. The 2nd Respondent opposed the Notice of Motion application dated 15th June, 2023 through an 18th paragraphed replying affidavit sworn by Brian Ikol, the director Legal Affairs and Dispute Resolution at the National Land Commission on 25th September, 2023 where he averred that during the construction of Mombasa Port Area Road Development Project(MPARD)Mombasa Southern Bypass and Kipevu New terminal Link Road (package one) the Respondent herein compulsorily acquired the suit property herein inter alia as per the provisions of Article 40 of *the Constitution* and Part VIII of the *Land Act*.
114. A Notice of intention to acquire was published vide gazette notice number 405 & 406 of 24th January 2014 and subsequently a Notice of inquiry was published vide Kenya Gazette Notice No. 17960 of 21st March 2014. The figure of Kenya shillings Nine Thirty One Million Six Fourty Five Thousand Six Seventy Five Hundred (Kshs. 931,645,675.00/=) being sought by the Petitioner is arbitrary, excessive, exaggerated and has no basis. In any event the figure is not supported and does not flow by the judgement of this Honourable court as rendered on 21st October 2021. The orders sought cannot



even issue since the said figure is yet to be ascertained and is a subjective figure that is not supported by any scientific or arithmetic processes. The accounts listed are special accounts and allowing the orders sought would portend the following;

- i. Thousands of Kenyans whose properties have been compulsorily acquired and demolitions done to pave way for developments will remain homeless
- ii. Government projects which come with attendant penal consequences will stall with the contractual obligations in terms of breach being passed on to the Mwananchi
- iii. The court will be setting a dangerous precedent where government assets will be attached effectively grinding service delivery to a halt by government offices noting the domestic and foreign debts by the country.

115. A garnishee order nisi can be made absolute under certain conditions. The garnishee order nisi is an order made by the court when the judgment creditor satisfies the court on the existence of the garnishee (third party) who is holding money due to the judgment debtor. Garnishee is strictly between the judgment creditor and the garnishee who is indebted to the judgment debtor, the judgment debtor is a stranger to garnishee “UBA Plc – Versus - Ekanem (2010) 6 NWLR (Pt. 1190) 207”. A garnishee is to appear in Court to show cause as to why the funds he owes the judgment debtor should not be paid to the Judgment Creditor. A garnishee is not supposed to shield or protect the money of the Judgment debtor.

116. This Court already rendered itself and granted the Order Nisi on 15th May, 2023 in its ruling after the judgment creditor satisfied the Court on the existence of the garnishee (third party in this instance the Co – operative Bank of Kenya Limited) who is holding money due to the judgment debtor. The 1st Garnishee has been called upon to show why the judgment debtors’ money in its hands should not be paid over to the judgment debtor. The 1st Garnishee failed to attend court to show good cause why the order nisi should not be made absolute.

117. The garnishee order nisi can be made absolute in the following scenarios:

- a. If the garnishee does not appear on the day of hearing, the court may grant an order absolute against the garnishee either to the tune of the judgment debt or any part of it as may be sufficient to satisfy the judgment or order, together with the costs of the garnishee proceedings.
- b. If the garnishee does not, within the time prescribed, pay to the judgment creditor the amount due from him and does not dispute the debt.
- c. If the garnishee does not appear as ordered, the court, on proof of service, may make the garnishee order nisi absolute.
- d. If the garnishee fails to attend court or does not dispute the debt due or claimed to be expected from him to the judgment debtor

118. Going by the above conditions, I am fully satisfied that the Petitioner has made out a case for the grant of the Garnishee order absolute and therefore I proceed to allow the Notice of Motion application dated 15th June, 2023 as there has been no objection from the 1st Garnishee as to the payment of the said decretal amount.

Issue No. c). Whether the Notice of Motion application dated 15th September, 2023 has merit?

119. Under this sub title, the Court will discuss the merits of seeking leave to file a notice of appeal out of time. This Honourable Court rendered itself finalizing the case on 28th October, 2021 downed its



tools. This Court has been called upon to exercise its discretion to grant leave to the Applicant to lodge the appeal out of time. In the case of:- “Buscar EA Ltd t/a Starways Express & another – Versus - Patrick Ngala Riziki [2019] eKLR”, the court cited the case of “Leo Sila Mutiso – Versus - Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)” where the Court of Appeal stated as follows with regard to how such leave should be exercised.

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

120. As regards the length of delay, in the case of:- “Andrew Kiplagat Chemaringo – Versus - Paul Kipkorir Kibet [2018] eKLR”, this Court stated as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

121. The impugned judgment was delivered on 28th October, 2021 whereas the instant application was filed on 15th September, 2023. The delay of filing the present application was approximately one year and 11 months. In a bid to explain the delay, the Applicant contended that the Law firm of Prof. Albert Mumma & Company Advocates came on record after Judgement pursuant to an order of this Court dated 21st June, 2023. Counsel for the 1st Respondent/Applicant took up the matter from the previous advocate and proceeded on the premise that the Notice of Appeal dated 10th November, 2021 and the Letter Requesting for Proceedings dated 12th November, 2021 had both been filed in this Court on 16th November, 2021 and duly served.

122. Subsequent thereto and upon further perusal of the court file, Counsel has discovered that although the Letter Requesting for Proceedings dated 12th November, 2021 has been filed in this Court on 16th November, 2021, a copy of the Notice of Appeal duly filed is missing on the court file. Additionally, upon inquiry, the Applicant’s Advocates discovered that the receipt issued upon filing the Notice of Appeal was not traceable even after diligent search. In the circumstances, the 1st Respondent/Applicant is apprehensive that the Notice of Appeal dated 10th November, 2021 may have been misplaced or erroneously filed in the wrong file in consequence of which the 1st Respondent/Applicant will be prejudiced should its appeal not be admitted for the reason that the notice is not on the court’s record. The alternative prayer seeking leave to extend the time for giving notice of intention to appeal would serve the interests of justice as otherwise the Applicant would be left without a remedy to ventilate its appeal with the risk of loss of a large sum of tax payer’s money. Counsel has moved with speed upon coming on record to peruse the court file and regularize the record.

123. In contention, the Petitioner argued that the same is a delay tactic by the 1st Respondent/Applicant, with intentions of frustrating the Petitioner in its quest to reap the fruits of the judgment. The 1st Respondent/Applicant in a bid to satisfy the decretal sum has already transferred to the Petitioner a sum of Kenya Shillings One Sixty Six Million (Kshs.166,000,000/-) in partial satisfaction of the Decree leaving an outstanding balance of a sum Kenya Shillings Seven Sixty Five Million Six Fourty Five Six Seventy Five Hundred (Kshs.765,645,675/-). The 1st Respondent Respondent/Applicant in a bid to



satisfy the decretal sum has already transferred to the Petitioner for a sum Kenya Shillings One Sixty Six Million (Kshs.166,000,000/-) in partial satisfaction of the Decree leaving a balance of a sum Kenya Shillings Seven Sixty Five Million Six Fourty Five Six Seventy Five Hundred (Kshs.765,645,675/-). The 1st Respondent /Applicant has failed to disclose to this court that there are pending garnishee proceedings herein whose purpose is to ensure the 1st Respondent/Applicant satisfies the remainder of the decretal sum.

124. The 1st Respondent/Applicant's failure to fully satisfy the Decree is the reason the Petitioner moved this court via the said garnishee proceedings. The period of delay is inordinate and in view of the fact that the Judgment therefore allowing the 1st Respondent/Applicant to file an appeal at this late stage would be prejudicial to the Petitioner. A period of two (2) years after judgment and during execution points out to a deep apathy Petitioner. The 1st Respondent/Applicant will not suffer any prejudice by abandoning the instant application and finalizing garnishee proceedings, seeing as the Decree has been partially satisfied without any prejudice on the part of the 1st Respondent/Applicant.
125. The Court is in agreement with the Submission of the Learned Petitioner/Respondent in the instant application. Indeed, I did direct that the advocates for the 1st Respondent come on record in June 2023 and they only filed this application on 15th September, 2023 yet they took over the matter from the previous advocate in good terms so I am sure that they had been looped into the happenings of the suit, they have not explained the delay in filing the same after taking over. I find that in the circumstances of the application before this Court, the Applicants have failed to demonstrate the existence of the parameters set out in "Leo Sila Mutiso (supra)". The upshot is that I decline to grant the prayer to extend time. The application dated 15th September, 2023 lacks merit and is dismissed with costs to the Petitioner/Respondent.

Issue No. d). Who will bear the Costs of Notice of Motion application dated 14th June, 2023, Notice of Motion application dated 15th June, 2023 and Notice of Motion application dated 15th September, 2023.

126. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh" eKLR (2014) and "Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014)".
127. In this case, this Honourable Court moved to award the Petitioner and the 1st Garnishee the costs of all the three application to be paid by the 1st Respondent.

X. Conclusion & Disposition

128. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the three (3) applications, this court arrives at the following omnibus decision and makes the orders below:-
- a. That the Notice of Motion application dated 14th June, 2023 be and is hereby found to lack merit hence is dismissed in its entirety with costs to the Petitioner/Respondent.
 - b. That the Notice of Motion application dated 15th June, 2023 be and is found to have merit hence allowed in its entirety with costs to the Petitioner/Applicant.



- c. That the Notice of Motion application dated 15th September, 2023 be and is hereby found to lack merit hence dismissed in its entirety with costs to the Petitioner/Respondent.
- e. That this Honourable Court be and is hereby pleased to issue an order that the garnishee order nisi issued on 5th June 2023 be and is hereby made absolute and the funds be paid out to the below stated Decree Holder's account details within the next thirty (30) days from the date of this Ruling as follows:-
- Account Name: Fort Properties Limited
Bank: NCBA
Account Number: 670365XXXX
Account Branch: Moi Avenue, Mombasa Branch
Swift Code: Cbafkenx
Bank Code: 07
Branch Code: 020
- d. That costs of the Notices of Motion application dated 14th June, 2023; 15th June, 2023 and 15th September, 2023 be awarded to the Petitioner and 1st Garnishe to be paid by the 1st Respondent and herein.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF APRIL 2024.

**HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Kalekye, the Court Assistant.
b. Mr. Matheka Advocate for the Petitioner.
c. Mr. Ochieng Advocate for the 1st Respondent.
d. Mr. Kongere Advocate for the 1st Garnishe.

