Ochieng & another v Kenya Railways Corporation & 2 others; KCB Bank Limited (Garnishee) (Environment & Land Case 40 of 2019) [2024] KEELC 4481 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4481 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND CASE 40 OF 2019

E ASATI, J

JUNE 6, 2024

BETWEEN

AMINA ACHIENG OCHIENG ..... 1ST DECREE HOLDER

TILAPIA BEACH RESORT LIMITED ..... 2ND DECREE HOLDER

AND

KENYA RAILWAYS CORPORATION ..... 1ST JUDGMENT DEBTOR

COUNTY GOVERNMENT OF KISUMU ..... 2ND JUDGMENT DEBTOR

THE HONOURABLE THE ATTORNEY GENERAL .. 3RD JUDGMENT DEBTOR

AND

KCB BANK LIMITED ..... GARNISHEE

RULING

1. This ruling is in respect of the Notice of Motion application dated 8th April, 2024 filed by the Plaintiff/ Decree Holder herein pursuant to the provisions of Order 23 Rules 1 and 10 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya. The application seeks for orders that;

    i. Pending the hearing and determination of the application interpartes, a Garnishee order Nisi do issue against KCB Bank Limited hereinafter referred to as the Garnishee, directing it to attach all monies held in the 1st Judgement – Debtor's Account Number 1108981917 at the Garnishee's Moi Avenue Branch Nairobi or any other money due to the 1st Judgement – Debtor, to satisfy the amount ordered paid by the Judgement Debtors joint and severally to wit, Kenya Shillings One Hundred Twenty Five Million Three Hundred Sixty-Nine Thousand Six Hundred Eighty One and Thirty Three Cents (Kshs.125,369,681.33, inclusive of costs

and interest and more particularly set out in the judgement/decree together with costs of this Garnishee application.

ii. At the further inter partes hearing of the application, the Garnishee Order Nisi issued in terms of prayer 1 above be made absolute.

iii. The costs of this applications be provided for.

2. The grounds of the application are that the Decree-Holders were successful in this suit and obtained judgement against the Judgement-Debtors jointly and severally together with costs amounting to Kshs.125,369,681.33. That the Judgement-Debtors have failed to settle the decretal sum within the stipulated time. That the 1st Judgement-Debtor operates Account Number 1108981917 Moi Avenue Branch and that there is sufficient money held in the said account capable of offsetting in full, the decretal sum herein together with all attendant costs. That it is fair and just that the said money be attached to offset the decretal sum.

3. The 1st Respondent opposed the application vide the averments contained in the Replying Affidavit sworn by Stanley Gitari on 30th April, 2024 and the Grounds of Opposition of even date. The 1st Respondent's case is that the application is devoid of merit, an abuse of the court process and bad in law. That it is not true that the 1st Judgement-Debtor has refused or declined to settle the decretal sum. That the 1st Judgement-Debtor had presented the decree to the Cabinet Secretary of Finance for inclusion in the new financial year and is still waiting for response and approval. That the 1st Judgement-Debtor being a Statutory Corporation obtains its funds from the government. That the funds are only made available to it upon the same being budgeted for and the same being allocated to it in according to the financial year budget with the approval of the Cabinet Secretary for Finance as stipulated in Part V of the *Kenya Railways Corporation Act*. That the Decree-Holder is restricted from causing execution in the nature thereof against the 1st Respondent Corporation including these Garnishee proceedings.

   That the application is bad in law as it seeks to recover Kshs.125,369,681.33 when in the judgement delivered on 24th February, 2022, the court awarded the Decree-Holders Kshs.76,873,366.

4. I have considered the application, the ground in support thereof, the grounds of opposition, the contents of the Replying Affidavit and the authorities cited. It is not disputed that the 1st Respondent against whom the application is brought is a state corporation. It was the 1st Respondent's that the mode of execution adopted by the Decree-Holder was not available as against the 1st Respondent. The 1st Respondent cited Section 88 of the *Kenya Railways Corporation Act* which provides for restriction of execution against the property of the Corporation. The 1st Respondent also relied on the case of *Wachira Nderitu Ngugi & Company Advocates –vs- City Counsel of Nairobi* [2012]eKLR and the *Civil Procedure Rules* 2010.

5. The Applicant relied on the High Court decision in Nairobi High Court Commercial and Tax Division Commercial Case No.E411 of 2023 – *Absa Bank Kenya Limited –vs- Kenya Deposit Insurance Corporation* to support the application.

6. The procedure for execution of decree against government and government agencies is well provided for in law and particularly in section 21 of the *Government Proceedings Act*. Section 21 of the *Government Proceedings Act* provides for the procedure of satisfaction of orders against government. This position has been upheld by the Court of Appeal in a number of decisions including in Civil Appeal No.E039 of 2023, Five Star Agencies Limited –vs- National Land Commission and National Bank of Kenya where the Court of Appeal firmly stated that the assets of government cannot be

attached in execution of a decree. That the only method of execution is through Judicial Review proceedings as provided for in the *Government Proceedings Act*.

7. On the basis of the provisions of Section 88 of the *Kenya Railways Corporation Act*, Section 21 of the *Government Proceedings Act* and the above cited authorities, execution of the decree herein against the 1st Judgement-Debtor by way of Garnishee proceedings is not available. I find that the application lacks merit and dismiss it. No orders as to costs.

   Orders accordingly.

RULING DATED AND SIGNED AT KISUMU AND READ THIS 6TH DAY OF JUNE, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Owiti holding brief for M. C. Ouma for the Decree-Holders.

Moraa for the 1st Judgement-Debtor/Respondent