



**Colfax Holdings v National Land Commission; National Bank of Kenya Hillplaza Branch (Garnishee); Branch Manager National Bank of Kenya Hillplaza Branch (Interested Party) (Environment & Land Petition E003 of 2022) [2024] KEELC 4510 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4510 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND PETITION E003 OF 2022**

**AE DENA, J**

**JUNE 4, 2024**

**BETWEEN**

**COLFAX HOLDINGS ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... JUDGMENT DEBTOR**

**AND**

**NATIONAL BANK OF KENYA HILLPLAZA BRANCH ..... GARNISHEE**

**AND**

**BRANCH MANAGER NATIONAL BANK OF KENYA HILLPLAZA  
BRANCH ..... INTERESTED PARTY**

**RULING**

1. The court is tasked with determination of two applications dated 6/11/2023 and 15/11/2023.

**Application Dated 6<sup>th</sup> November 2011**

2. The application dated 6/11/2023 is by the decree holder/petitioner and the same seeks for the following orders;
  1. Spent
  2. Spent
  3. Spent



4. That the garnishee do appear before court on an appointed date and time to show cause why they would not pay the Applicant the funds sufficient to satisfy the aforesaid decree and the certificate of costs dated 9<sup>th</sup> March 2023 and 5<sup>th</sup> July 2023 which amount totals to the sum of Kshs 774,532,218.
  5. That upon inter parte hearing of the application the honourable court be pleased to issue a garnishee order absolute in terms of prayer 2 as is enough to satisfy the decretal amount together with interest in order dated 9<sup>th</sup> March 2023 as well as the certificate of costs dated 5<sup>th</sup> July 2023.
  6. That the said amounts be remitted into the Applicant/Judgement holders bank account particulars whereof are given hereunder; Colfax Holdings Limited, account No. 95820400000134 within 24 hours from the date of the issuance of garnishee orders absolute.
  7. That this honourable court be pleased to issue such further orders it deems just and convenient in the interest of justice.
  8. That the costs of this application be paid out of the aforesaid account held by the garnishee.
3. The application is set upon 7 grounds as follows;
- a. That the Decree Holder obtained a judgement against the judgement debtors on 6/3/2023.
  - b. The decree and certificate of costs were issued on 9<sup>th</sup> March 2023 and 5<sup>th</sup> July 2023 respectively
  - c. That despite several reminders the decree and certificate of costs remain unsatisfied to date.
  - d. That the Judgement Debtors hold bank accounts with the garnishee being account number 01001032980000 National Bank of Kenya Hill Plaza Branch and has enough funds partially or wholly to satisfy the decree and the certificate of costs dated 9<sup>th</sup> March 2023 and 5<sup>th</sup> July 2023 respectively.
  - e. That there are good and sufficient reasons to warrant grant of the orders sought herein.
  - f. That the Respondent will not suffer ant prejudice in the event the orders sought herein are granted as prayed.
  - g. That it is in the larger interest of justice that the orders sought herein are granted as prayed.
4. The application is supported by an affidavit sworn by Harji Govind Ruda a director of the Decree Holder/Applicant. The issues outlined in the grounds in support of the application are reiterated and expounded in the said affidavit. In summary, the Decree Holder seeks that the decretal amount of Kshs 359,105,371/- with interest of Kshs 415,114,951/- making a sum total of Kshs 774,532,218/- be satisfied by the garnishee vide account number 01001032980000 National Bank of Kenya Hill Plaza Branch belonging to the Judgement Debtor. The Applicant states that no appeal has been preferred against the government and it is in the interest of justice that the application be allowed as prayed.
5. In response to the application dated 6/11/2023, the garnishee filed a replying affidavit sworn by Kennedy Chemitei a Senior Relationship Manager at the garnishee. He stated that where no response has been made, the court should consider the same as a denial and not an admission. He admitted that the judgement debtor holds an account being 01001032980000 domiciled in the garnishees hill branch. That the account and the funds therein are held in trust for various designated recipients for compensation and is therefore not available for satisfaction of any decree as the funds due to the general use by the Respondent/Judgement Debtor and are thus not available for attachment. The Garnishee



prays for legal costs of Kshs 50,000/- incurred in the present application to be borne by the Judgement Debtor/Respondent.

### **Application dated 15<sup>th</sup> November 2023**

6. The Notice of Motion dated 15/11/2023 is made under the provisions of Article 40,67,159,201,248 of *the Constitution*, sections 1A,1B,3A of the *Civil Procedure Act*, Section 21[4] of the *Government Proceedings Act*, Order 29 Rule 2[2][c], Order 42 Rule 6 and Order 50 of the *Civil Procedure Act*. The applicant/judgement debtor seeks for the following prayers;
  1. Spent
  2. Pending the hearing and determination of this application interpartes this honourable court be pleased to grant a stay of execution of the garnishee order Nissi issued on 8<sup>th</sup> November 2023 and the judgement of this honourable court made on 6<sup>th</sup> March 2023.
  3. That this honourable court be pleased to set aside and/or vary the interim garnishee order Nissi issued on 8<sup>th</sup> November 2023
  4. That this honourable court be pleased to grant a stay of execution of the judgement of this honourable court made on 9<sup>th</sup> March 2017 pending the filing of an appeal.
  5. Any other order this court may deem fit to make in public interest
  6. That the costs of this application be granted to the Applicant.
7. The application is premised upon grounds listed on its face and the supporting affidavit of Brian Ikol Director Legal Affairs and Dispute Resolution of the National Land Commission. It is averred that on 8/11/2023 this court made a garnishee order Nissi against the accounts of the Applicant being account number 01001032980000 at National Bank of Kenya Hill Branch held by the garnishees herein requiring that all the money deposited by the garnishees be attached to answer to the decree and certificate of costs dated 9/3/2023 and 5/7/2023 for a sum of Kshs 774,532,218.
8. It is averred that the orders were obtained through material non-disclosure of the fact that the sums were not ascertained and hence incapable of attachment by way of garnishee as the decree was Kshs 359.105,371/- but the same was increased to Kshs 774,532,218. That there is no evidence that the land was taken from the year 2015 for interest to be computed from that time. That even after the said calculations, the same offend the in duplum rule which puts a limit to interest payable. It is stated that the Applicant herein is a government entity under Section 21[4] of the *Government Proceedings Act* and Order 29 Rule 2[2][c] of the *Civil Procedure Rules*.
9. The Applicant states that the orders were obtained through concealment of the well laid down procedure of executing against government which include seeking for orders of mandamus to compel performance and filing contempt proceedings where the non-compliance proceeds. At paragraph 10 the Applicant states that it is pursuing an appeal over the matter as evidenced by the Notice of Appeal dated 20<sup>th</sup> March 2023 and is awaiting typed proceedings from the court and a certificate of delay. At paragraph 12, it is averred that the account held at National Bank of Kenya Hill Branch is contemplated under sections 115[2] 115[1] of the *Land Act* as a special compensation account and only used for purposes of receiving and making payments to persons whose land parcels have been compulsorily acquired by the government.
10. That the said monies are not for use, disposal and benefit by the Applicant but are meant for compensation arising out of compulsory acquisition of land. The Applicant states that it will be



prejudiced in the event the monies in the accounts held by the garnishee are attached. That unless the court intervenes, thousands of people will be rendered destitute for lack of compensation funds. The Applicant states that it is yet to receive funds from the acquiring authority who are not parties to this suit. The Applicant further states that the public interest in the matter outweighs the interest of the judgement debtor and the reason why the application should be allowed.

11. In response to the application dated 15/11/2023, the Petitioner filed an application sworn by Harji Govind Ruda a director of the Decree Holder/Applicant. It is averred that the application is an afterthought and meant to frustrate and deny the Respondent the fruits of his judgement. The reasons for the same are listed under paragraph 4 of the replying affidavit and which include the fact that judgement in respect of the petition was issued on 9/3/2023 and despite a Notice of Appeal having been filed on 20/3/2023 no Memorandum of Appeal has been filed to date.
12. It is averred that the allegations at paragraph 3 of the Applicant's supporting affidavit are frivolous as the formula for working of the decretal sum plus interest at Central Bank rate have been clearly demonstrated and verified by an accounting firm of international repute. The same computations do not offend the provisions of Section 117 of the Land Act. That Section 21 of the Government Proceedings Act does not include state agencies or state corporations. It is further averred that the National Land Commission Act under Section 3 stipulates that the same is able to sue and be sued and the reason why the Commission has not been represented by the Attorney General.
13. That there has been no desire by the Applicant to pursue an appeal as no Memorandum of Appeal has been filed. The deponent states that there is no justification by the Respondent that the money in the account is not enough to compensate the Respondent as it is within public knowledge that the account has funds enough to settle the decretal amount. The Respondent maintains that the Judgement Debtor is not the government and as such there is no conflict between the public and private interests as averred by the Applicant.
14. The Respondent further maintains that the Applicant has not met the threshold for grant of the stay orders and as such the same should not be allowed. That the actual market value of the properties is much more than the decree. The court is urged to allow the orders sought in the Respondent's garnishee application dated 6/11/2023.
15. Both applications were canvassed by written submissions. The Petitioner's submissions on both applications are filed before court on 4/12/2023. The garnishee through its counsel intimated to court that it would rely on its affidavit in response to the applications. The National Land Commission did not file submissions.

### **Analysis and Determination**

16. When the application dated 6/11/2023 was first placed before me, I issued the following orders *exparte*;  
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  1. That the application is certified urgent
  2. That this honourable court issues a garnishee order nisi against NATIONAL BANK OF KENYA HILL PLAZA BRANCH account number 01001032980000 at National Bank of Kenya Hill Branch held by the garnishees herein requiring that all the money deposited, lying and being held in deposit by the garnishees be attached to answer to the decree and certificate of costs dated 9/3/2023 and 5/7/2023 for a sum of Kshs 774,532,218 [seven hundred and seventy four million, five hundred and thirty two thousand two hundred and eighteen] and shall be served forthwith on the garnishee.



3. That the garnishee shall appear before court to show cause as required under order 22 rule 1.
  4. That service shall also be effected against the judgement debtor herein forthwith.
  5. That the hearing date is on 20<sup>th</sup> November 2023.
17. The affidavit of service dated 11/11/2023 sworn by Boniface Musyoka Samuel a licenced court process server confirms service upon the judgement debtor and garnishee herein and hence full compliance with the orders above. It is after this service that the judgement debtor put in the application dated 15/11/2023. I would say that the application filed 15/11/2023 is more of a response/opposition to the application made by the decree holder on 6/11/2023. I'm minded to determine the two applications concurrently.
18. Black's Law Dictionary 5<sup>th</sup> edition defines garnishee proceedings as: -
- “a statutory proceeding whereby a person’s property, or credit in possession or under control of, or owing by, another is applied to payment of former debt to third person by proper statutory process against debtor and garnishee.”
19. The Nigerian Supreme Court in *C.B.N. v Auto Import Export* as mentioned in *Nyandoro & Company Advocates V National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee)* [2021] eKLR elaborated the definition of garnishee proceedings 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, is referred to as the garnisher.”
20. Mabeja J in *Cecilio Murango Mwenda T/A Murango Mwenda & Company Advocates versus Isiolo County Government & Consolidated Bank of Kenya Ltd (Garnishee)* 2017 eKLR. had this to say of the Garnishee proceedings
10. It is clear from the fore going that the judgement debtor must be served with the order nisi unless the court has ordered otherwise. From the record, it is clear that the court did not order otherwise. It therefore follows that it is a legal requirement that the Judgement debtor must be notified of the Garnishee proceedings.’
  11. In my view, the requirement for such notice is to enable the judgement debtor to appear and either dispute the alleged amount of decree or put any defence that it may have in respect of the decree holder’s claim. This is so because, there may be a defence to the decree holder’s claim, for example that the decree is statute barred or any other defence.
  12. Accordingly, my view is that although the Garnishee proceedings are between the decree-holder and the Garnishee, there is nothing in Order 23 that bars the judgement debtor from being heard. In any event, it is the cardinal principal



of the rule of law that unless expressly provided for, no adverse orders should be made without such party being heard.”

21. I think enough has been said to define what garnishee proceedings are all about. The main issue for determination emerging from both applications herein is whether the court was justified based on the application and evidence placed before it, in issuing a garnishee order nisi as against the judgement debtor herein the National Land Commission and whether the same should be made absolute as prayed by the Decree Holder. I will first pause at this and state that the court is convinced that the orders issued for the Garnishee Nisi were properly made and within the confines of Order 23 of the [civil procedure rules](#) which I hereby reproduce here below;

- (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.
- (2) 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.
- (3) Effect of garnishee order Service of an order that debts due to a judgment-debtor liable under a decree shall be attached, or notice thereof to the garnishee in such manner, as the court may direct, shall bind such debts in his hands.

#### 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. 17 or 18 of Appendix A, as the case may require.

22. However, according to the judgement debtor, it is a government entity and as such execution against it should be carried out as per the conditions set out under the [Government Proceedings Act](#) which under Section 21 provides as follows in regard to orders against the Government;

#### 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.

23. It is on the basis of the above provisions of the Government Act that the judgement debtor seeks orders of stay of execution of the garnishee order Nissi issued on 8th November 2023 and the judgement of this honourable court made on 6th March 2023. The decree holder on the other hand is keen on having the garnishee order made absolute and for the same to be complied with by the garnishee. The issue arising is whether the National Land Commission is considered part of the government/a government entity.

24. The National Land Commission is Established under Article 67 (1) of *the Constitution* of Kenya, which provides:

67. National Land Commission

1. There is established the National Land Commission.
2. The functions of the National Land Commission are—
  - a. to manage public land on behalf of the national and county governments;
  - b. to recommend a national land policy to the national government;
  - c. to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;



- d. to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- e. to initiate investigations, on its own Initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- f. to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- g. to assess tax on land and premiums on immovable property in any area designated by law; and
- k. to monitor and have oversight responsibilities over land use planning throughout the country"

25. My attention has been drawn to the first function of the National Land Commission under Section 2[a] and which is to manage public land on behalf of the national and county government. This function alone in my opinion defines amongst others the main mandate of the judgement debtor and which is carried out on behalf of the National and County governments. I am satisfied that carrying out this specific duty makes the National Land Commission a government entity and therefore entitles it the protection under the *Government Proceedings Act* as it carries out its duty for and on behalf of the government. My opinion is informed by the holding in *Samuel Ngari Githinji vs Constituency Development Fund Board & Another: Equity Bank Limited (Garnisbee)* [2021] eKLR where it was stated thus:

‘A government agency I believe is the same as a public agency. In *Black’s Law Dictionary*, 8th Edition at page 67 "Public agency" is defined as: "A government body with the authority to implement and administer particular legislation Also termed government agency; administrative agency; public agency; regulatory agency." I find the same distinguishable. Having reached the conclusion that CDFC/ NGCDFC is a government agency, it follows that the same is protected from execution by the provisions of the GP Act and Order 29 of the Civil Procedure Rules. In the circumstances, the plaintiff could only recover the judgment debt owed by the 2<sup>nd</sup> Defendant in accordance with the provisions of the GP Act and not otherwise”.

26. The Court of Appeal in Civil Appeal No. E290 of 2023 *Five Star Agencies Limited Vs National Land Commission & National Bank of Kenya* upheld Angote J finding that although NLC is a state organ and although independent, it is infused with governmental character.

27. Arising from the above it is clear that the National Land Commission is a government entity and as such execution against it shall be as per the provisions of the *Government Proceedings Act*. The Court of Appeal while discussing the rationale or the objective of the law that prohibits execution against and attachment of the government assets and property in *Five Star Agencies Limited Vs National Land Commission & National Bank of Kenya* (supra) held that; -

91. It is clear beyond any peradventure that the procedure to be followed in execution against the government is to seek an order of mandamus to compel the relevant person in the Government to settle the decree in question”.



28. Based on the foregoing this court's hands are tied and is hesitant in making the garnishee decree absolute. It is established that the Judgement debtor is a Government entity. The garnishee nissi order can therefore not be made absolute.

### **Application for Stay of execution**

29. The judgement debtor has made an application for stay of execution of the judgement of this honourable court made on 9<sup>th</sup> March 2023 pending the filing of an appeal. The principles guiding the grant of a stay of execution pending appeal are well settled as set out under Order 42 rule 6(2) of the [\*Civil Procedure Rules\*](#) which provides:

No order for stay of execution shall be made under sub rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
30. That being the case an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) and demonstrate;
- (a) that substantial loss may result to the applicant unless the order is made;
  - (b) that the application has been made without unreasonable delay, and
  - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

31. As to what substantial loss is, it was observed in [\*James Wangalwa & Another v Agnes Naliaka Cheseto\*](#) [2012] eKLR, that:

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. Has the Applicant for the stay orders met the threshold set above for grant of the orders sought? The record confirms that judgement in this matter was rendered on 6/3/2023. The Applicant has taken over a year to file the application for stay claiming that they have not been able to procure the typed proceedings in the suit. The Applicant has not tendered any evidence to show that they have been keen on following up on the same and as such no proper explanation has been given as to the delay which I must term as inordinate.
33. The Applicant has further failed to demonstrate the substantial loss to be suffered and I must admit that the application was mainly centred on setting aside the garnishee nissi orders. No appeal has



been filed before court, a Notice of Appeal is definitely not an appeal. The Applicant further failed to intimate anything on security for costs, no proposal was brought forth. I am inclined towards disallowing the prayer for stay of execution.

34. For avoidance of doubt, setting aside the Garnishee Nissi Orders does not in any way interfere with the judgement of this court rendered on 6/3/2023 and the subsequent decree. It is the garnishee proceedings only that will be affected by this order. Consequently, the court hereby orders as follows to dispense the applications dated 6/11/2023 and 15/11/2023.

I. The garnishee order Nissi issued on 8<sup>th</sup> November 2023 is hereby set aside.

II. The orders of stay of execution of the judgement made on 6/3/2023 are declined.

III. Parties shall bear their own costs.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF JUNE 2024.**

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**A.E DENA**

**JUDGE**

Mr. Borona for the Decree Holder

Mr. Mbuthya for the Defendant/Respondent/Judgment debtor

Mr. Ngaine for Interested Party/Garnishee

Mr. Daniel Disii – Court Assistant

