



Gituthi & 2 others (All Petitioners suing on their own behalf and on behalf of other 57 Petitioners/Decree -Holders) v National Land Commission & another; National Bank of Kenya Limited & another (Garnishee) (Environment & Land Petition 5 of 2018) [2024] KEELC 5856 (KLR) (26 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5856 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND PETITION 5 OF 2018**

**LN GACHERU, J
AUGUST 26, 2024**

BETWEEN

**STEPHEN MBUGUA GITUTHI 1ST PETITIONER
EUNICE NJERI NYOIKE 2ND PETITIONER
ALLN MWANGI MAINA 3RD PETITIONER
ALL PETITIONERS SUING ON THEIR OWN BEHALF AND ON BEHALF OF
OTHER 57 PETITIONERS/DECREE -HOLDERS**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
ATHI WATER SERVICES BOARD 2ND RESPONDENT**

AND

**NATIONAL BANK OF KENYA LIMITED GARNISHEE
COOPERATIVE BANK OF KENYA LIMITED GARNISHEE**

RULING

1. The Notice of Motion Application for determination is the one dated May 8, 2023, which is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 23, Rules 1, 2, 8 and 10 and Order 51, Rules 1 and 10 the Civil Procedure Rules, wherein the Petitioners/Decree-Holders have sought for the following Orders:

1. That pending the hearing of this Application, the Court be pleased to issue a GARNISHEE ORDER NISI against the National Bank of Kenya, Hill Plaza Branch (hereinafter “the



1st Garnishee in respect of Bank Account Number 01329800000 and Cooperative Bank of Kenya Limited (hereinafter “the 2nd Garnishee) in respect of Bank Account Number 01136084618500 or any other of the Respondent/Judgment-Debtors Bank Accounts in any banking institution(s) within the jurisdiction of this Court ordering that all monies deposited, lying and being held in deposit by the 1st and 2nd Garnishee respectively to the credit of National Land Commission and Athi Water Services Board be attached and utilized to satisfy the sum of Kshs.8,314,364/- being the decretal sums and costs herein.

2. The 1st and 2nd Garnishee herein be ordered to appear before the Court on a date fixed by the Court and show cause why they should not pay the Petitioners/Decree-Holders the debt due from them to the judgment debtors, being monies/funds held in Bank Account Number 01329800000 at the National Bank of Kenya, Hill Plaza Branch and Bank Account Number 01136084618500 at Cooperative Bank of Kenya Limited or so much thereof as may be sufficient to satisfy the decree and Certificate of Taxation herein given on 17th January, 2023, plus the costs of these garnishee proceedings.
 3. The Garnishee Order NISI be made absolute, and the monies held in Bank Account Number 01329800000 by the 1st Garnishee, National Bank of Kenya, Hill Plaza Branch on behalf of the National Land Commission and in Bank Account Number 01136084618500 by the 2nd Garnishee, at Cooperative Bank of Kenya Limited on behalf of Athi Water Services Board be and hereby attached to settle the Decree and Certificate of taxation herein given on 17th January 2023 in the sum of Kshs.8,314,364/- plus the costs of these garnishee proceedings.
 4. The costs of this Application be borne by both Respondents/Judgment-Debtors and be recovered and retained out of the money under the Garnishee Order.”
2. The Application is supported by the grounds set out on the face of the said Application, and on the Supporting Affidavit of NJUGUNA MURI, sworn on 8th May, 2023. The genesis of the instant Application is that the Petitioners/Decree-Holders sued the Respondents for the illegal and unconstitutional acquisition of their suit properties and improvements thereon through Gazette Notice N0.9589, dated 18th November 2016, Gazette Notice No.10870 of 3rd November 2017, Gazette Notice No.2188 of 9th March 2018 and Gazette Notice No.2189 dated 9th March 2018.
 3. Through its Decree issued on 7th August, 2019, the Court found in favour of the Petitioners/Decree-Holders, and determined that the Respondents’ acquisition of the Petitioners/Decree-Holders suit properties was carried out ultra vires *the Constitution*, and statutory law and thus infringed the Petitioners/Decree-holders’ right to property. Additionally, the Court directed the Respondents to defray the costs of the Petition jointly. Subsequently, the costs of the Petition were assessed at Kshs.8,314,364/=, vide a Certificate of Taxation issued by the Deputy Registrar of this Court dated 17th January, 2023.

The Petitioners/decree-holders’ Case

4. The Petitioners/Decree-Holders contended that the Respondents have neglected and/or failed to settle the costs, and the Certificate of Taxation remains unsatisfied to the tune of Kshs.8,314,364/=, exclusive of the costs of this Garnishee proceedings. They further contended that the 1st Garnishee is indebted to the 1st Respondent/Judgment-Debtor vide a credit balance in Bank Account Number 01329800000, by the 1st Garnishee, National Bank of Kenya, Hill Plaza Branch; while the 2nd Garnishee is indebted to the 2nd Respondent/Judgment -Debtor vide a credit balance in Bank Account Number 01136084618500, by the 2nd Garnishee, at Cooperative Bank of Kenya Limited. Further,



the foregoing credit balances are capable of satisfying the Certificate of Taxation herein, including costs of the instant Application.

5. The Petitioners/Decree-Holders argued that the 1st and 2nd Garnishees, are within the jurisdiction of this Court, and either of their credits is sufficient to satisfy the Decree, and Certificate of Taxation. Further, that the Court ordered the Respondents to meet the costs of the Petition, jointly and not severally. They further contended that the 1st Respondent is an Independent Commission, while the 2nd Respondent is an independent Corporation; Furthermore, that both the 1st and 2nd Respondents are endowed with perpetual succession, and the power to sue and be sued in their own names. They urged the Court to allow the Application in the interests of justice, and attach the credit deposits in satisfaction of the aforesaid Certificate of Taxation.

The Respondents' Response

6. The Application is opposed by the 1st Respondent/Judgment-Debtor through the Replying Affidavit of Brian Ikol, sworn on 5th June, 2023, in his capacity as the 1st Respondent/Judgment-Debtor's Director of Legal Affairs and Dispute Resolution.
7. The 1st Respondent/Judgment-Debtor affirmed that the Court awarded the costs of the Petition to the Petitioners/Decree-Holders, and the same was taxed at Kshs.8,314,364/- and the amount was to be borne by the 1st and 2nd Respondents.
8. The 1st Respondent/Judgment-Debtor described itself as an independent Commission, established under Article 67(1) of *the Constitution*, and that operational mandate is derived from the *National Land Commission Act* No.5 of 2012, and primary responsibility is the management of public land on behalf of both the National and County governments.
9. It was his further averments that pursuant to Part eight (8) of the *Land Act*, the 1st Respondent is charged with the mandate to compulsorily acquire land for public purpose or public use on behalf of the National or County governments, upon such requests being made.
10. The 1st Respondent/Judgment-Debtor also averred that in the discharge of its statutory mandate, it receives compensation funds from various acquiring bodies, which funds are then transmitted to persons or entities affected by the land acquisitions in question. Further, that it holds the said funds in trust for the persons affected by land acquisition projects in a special compensation account, pursuant to the provisions of Section 115 of the *Land Act*.
11. In a Notice of Preliminary Objection dated 5th June, 2023, the 1st Respondent/ Judgement debtor argued that the instant proceedings offend the provisions of Order 29, Rule 2 of the Civil Procedure Rules, which prohibits the issuance of execution and attachment orders against the Government, except in accordance with the provisions of the *Government Proceedings Act*.
12. It was further averred that by instituting these proceedings against the 1st and 2nd Respondents, which are government institutions within the purview of Article 67 of *the Constitution*, as read together Sections 65 of the *Water Act*, 2016, the Petitioners/ Applicants have violated the provisions of Order 29, Rule 4, of the Civil Procedure Rules, which prohibits the issuance of Garnishee Orders against the Government.
13. Further, the 1st Respondent averred that the instant proceedings offend the provisions of Section 21 (1) and (4) of the *Government Proceedings Act*, and Order 29, Rule (2) and (4) of the Civil Procedure Rules, because the 1st and 2nd Respondents are government institutions.



14. On its part, the 2nd Respondent opposed the instant Application through Grounds of Opposition dated 20th June, 2023, and argued that the Application is devoid of merit and offends the provisions of Order 29, Rule 2 (2) (b) and (c) of the Civil Procedure Rules, as read together with Order 29, Rule 4 of the Civil Procedure Rules, and Section 21(1) and (4) of the [Government Proceedings Act](#).
15. Further, the 1st Garnishee opposed the Application through the Replying Affidavit of CHRISPUS MAITHYA, sworn on 16th June, 2023, in his capacity as the Head of Legal Affairs of the 1st Garnishee.
16. The 1st Garnishee affirmed that the Judgment Debtor is the holder of Bank Account Number 01329800000, at the 1st Garnishee Bank, and the same is sufficiently funded.
17. Further, that the 1st Garnishee is aware from engagement with the Judgment-Debtor that the funds held in the said account are held in trust for various designated recipients of compensation, which renders the said funds unavailable for satisfaction of any decree. Furthermore, the funds in the mentioned account are not available for Judgment-Debtor's general use. The 1st Garnishee prayed for the award of Kshs.50,000/- being legal for costs incurred in the present Application.
18. The 2nd Garnishee also opposed the instant Application through the Replying Affidavit of ROSE MULUSA sworn on 30th May, 2023, in her capacity as the Service Manager of the 2nd Garnishee.
19. The 2nd Garnishee averred that it does not hold any account or funds in favour of the Respondents/ Judgment-Debtors at all. Further, that the Bank Account Number 01136084618500, at Cooperative Bank of Kenya Limited belongs to an entity different from the 2nd Respondent/Judgment-Debtor. The 2nd Garnishee contended that it holds no account in favour of the Respondents/Judgment-Debtors, and therefore, it is not in a position to pay the Petitioners the sums claimed.

The Petitioner's Response

20. The Petitioners/Judgment-Debtors filed a Further Affidavit sworn by NJUGUNA MURI on 11th July, 2023, in his capacity as an Advocate for to the Petitioners/Judgment-Debtors. He reiterated the averments contained in the Supporting Affidavit of NJUGUNA MURI dated 8th May, 2023, and stated that the 1st Respondent is neither the National or County government nor a department or office of both, and therefore the provisions of the [Government Proceedings Act](#), and Order 29 of the Civil Procedure Rules do not apply to it because the preceding provisions have not been incorporated into the [National Land Commission Act](#).
21. In response to the 2nd Respondent's Grounds of Opposition dated 30th June, 2023, the Petitioners/ Judgment-Debtors argued that the 2nd Respondent is a body Corporate pursuant to the provisions of Section 65 of the [Water Act](#), and Legal Notice No. 28 of 26th April, 2019. Further, that the 2nd Respondent took over the legal proceedings, assets and liabilities of the now defunct Athi Water Services Board, pursuant to the provisions of Section 65, 152, 156 (3) of the [Water Act](#), as read together with Legal Notices No.27 and 28 both dated 26th April, 2019.
22. He further contended that neither the provisions of the [Government Proceedings Act](#) and Order 29 of the [Civil Procedure Act](#) were incorporated in the [Water Act](#), 2016, therefore the 2nd Respondent is not the national or county government nor a department of either of the two.
23. The Petitioners/ Applicants further contended that pursuant to the provisions of Section 111 (1A) of the [Land Act](#), any funds paid by the 2nd Respondents into the 1st Respondent's compensation account held with the 1st Garnishee are not limited to compensation funds and includes "survey fees, registration fees and any other costs before acquisition is undertaken."



24. It was also contended that the costs awarded by the Court challenging the creation of wayleaves on the suit properties are subsumed under the description “any other costs before acquisition is undertaken” as set out under Section 111 (1A) of the Land Act, therefore, those funds are liable to be attached.
25. In response to the averments contained in the 2nd Garnishee’s Replying Affidavit dated 30th May, 2023, it was contended that Bank Account Number 01136084618500, held at Cooperative Bank of Kenya Limited belonged to Athi Water Services Board, and currently is the property of the 1st Respondent, pursuant to the provisions of Sections 65, 152, 156 (3) of the Water Act, as read together with Legal Notices No.27 and 28 both dated 26th April, 2019.
26. Further, it was argued that according to the provisions of Section 152 of the Water Act, 2016, Bank Account Number 01136084618500 at Cooperative Bank of Kenya Limited, is capable of forming the subject of the present Garnishee proceedings. It was also contended that the 2nd Garnishee failed to reveal the name of the entity that holds Bank Account Number 01136084618500, at Cooperative Bank of Kenya Limited, whereas the Petitioners presented evidence showing that the said bank account belongs to the 2nd Respondent as the successor to the now defunct Athi Water Services Board.
27. It was the Petitioners further contention that pursuant to the provisions of Section 112 of the Evidence Act, the 2nd Garnishee holds special knowledge of the actual identity of the “different entity” which allegedly is the holder of Bank Account Number 01136084618500 at Cooperative Bank of Kenya Limited.
28. The Petitioners filed a 2nd Further Affidavit on 13th December, 2023, sworn by NJUGUNA MURI (Advocate), the Petitioners’ Advocates on record. The Petitioners annexed a letter by the 2nd Respondent dated 31st July, 2023, addressed to the Petitioners’ Advocates and copied to the Deputy Registrar of this Court whereby, the 2nd Respondent disclosed that it had drawn a cheque for the amount of Kshs.4,152.182/=, in favour of the Petitioners’ Advocates, which payment constitutes half of the amount awarded as costs to the Petitioners.
29. The Petitioners averred that the said payment was done through the account of the 2nd Respondent, with the 2nd Garnishee at its Ridgeways Branch, through Account Number 0114184618501. The Petitioners argued that it was both perjurious and misleading for the 2nd Garnishee to have sworn that it does not hold any account or funds for the 2nd Respondent as stated on paragraphs 4 and 6 of the Replying Affidavit of ROSE MULUSA, dated 30th May, 2023.
30. Further, that the 2nd Respondent holds bank account at the 2nd Garnishee, which accounts are sufficiently funded and the same should be attached to satisfy the decretal costs because the Court directed that the costs of the Petition be met by the Respondents jointly.
31. The Application was canvassed by way of written submissions.

The Petitioners’ Submissions

32. The Petitioners’ filed written submissions on 11th July, 2023, and further Submissions on 13th December, 2023, through the Law Firm of MURI MWANIKI THIGE & KAGENI LLP, and raised Five (5) issues for consideration by the Court as follows:
 - (a) Whether the 1st Respondent/judgment-Debtor is shielded from Garnishee proceedings pursuant to the provisions of Section 21 (4) of the Government Proceedings Act and Order 29, Rule 2 (2) of the Civil Procedure Rules.



- (b) Whether the 1st Respondent/judgment-Debtor is shielded from Garnishee proceedings pursuant to the provisions of Section 21 (1) and (4) of the [Government Proceedings Act](#) and Order 29, Rules 2 and 4 of the Civil Procedure Rules.
 - (c) Whether the 1st Respondent's Account Number 0132980000 held at the National Bank of Kenya, the 1st Garnishee can be attached to satisfy the judgment debt.
 - (d) Whether Account Number 01136084618500 held at the Cooperative Bank of Kenya Ltd, the 2nd Garnishee, belongs to the 2nd Respondent and whether the account can be attached to satisfy the judgment debt.
 - (e) Whether the Garnishee proceedings should be allowed with costs and a decree NISI issued and made absolute, against the two Garnishees to satisfy the judgment-debt.
33. The Petitioners submitted that the 1st Respondent namely the National Land Commission, is endowed with powers to sue and be sued in its own name and bears the consequences of those powers. Reliance was placed in the case of Tom Ojienda & Associates V National Land Commission & Another [2019] eKLR, to buttress the argument that the 1st Respondent is not a government agency, and therefore, it is not subject to the provisions of the [Government Proceedings Act](#).
34. It was further submitted that other Constitutional Commissions which are similar to the 1st Respondent have been declared by the Courts not to be shielded by the Government Proceedings Acts, from Garnishee proceedings. Reliance was sought in the holding of the court in the cases of Rose Aoko Ogwang V National Gender and Equality Commission [2020] eKLR; and, Gabriel Nyamu Ngundi T/A Grama Enterprises Ltd V Government of Makueni County [2016] eKLR.
35. The Petitioners further submitted that the 2nd Respondent was neither the subject of the provisions of Section 21(1) and (4) of the [Government Proceedings Act](#) nor of Order 29 Rule 2 (2) of the Civil Procedure Rules. That the 2nd Respondent assumed the assets and liabilities as well as legal proceedings of the defunct Athi Water Services Board, pursuant to the provisions of Section 65, 152, 156 (3) of the [Water Act](#) as read together with Legal Notices No.27 and 28 both dated 26th April, 2019.
36. It was the Petitioners' further submissions that the 2nd Respondent is a body Corporate with capacity to sue and be sued, perpetual succession and a common seal and the right to make independent actions. Therefore, a Judgment against the 2nd Respondent does not constitute a judgment against the government. They relied in the cases of Ikon Prints Media Company Ltd V Kenya National Highways Authority & 2 others [2015] eKLR; Greenstar Systems Ltd V Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR; Kenya Revenue Authority V Habimana Sued Hemed & Another [2015] eKLR; Coast Development Authority V Endebess Development Co. Ltd [2023] KECA 440 (KLR); Anniversary Press (K) Ltd V National Water Conservation & Pipeline Corporation [2020] eKLR, to anchor the proposition that neither the [Government Proceedings Act](#) nor Order 29 Rule of the Civil Procedure is applicable to the 2nd Respondent, therefore, its accounts can be attached to satisfy the judgment-debt.
37. On the question of whether the 1st Respondent's account number 0132980000, with the 1st Garnishee is a Special Compensation Account within the meaning of Section 115 (2) of the [Land Act](#), the Petitioners submitted that an acquirer of land through compulsory acquisition under the [Land Act](#), cannot pay any compensation to the Special Compensation Account. It was their further submission that monies are paid to the 1st Respondent by the 2nd Respondent in respect of cases whereby a person/entity refuses to accept an award by the 1st Respondent, which monies are then deposited into the Special Compensation Account.



38. For this argument, the Petitioners relied on Annexure “M4” ,which is a letter dated 3rd November, 2017, to anchor the argument that the 1st Respondent failed to pay the disputed amounts to a Special Compensation Account following the Petitioners rejection of the awards, and failed to inform the Petitioners and the 2nd Respondent of the same pursuant to the requirements of Section 115 (2) of the Land Act. Therefore, the 1st Respondent cannot turn the account in question into a Special Compensation Account having failed to comply with the relevant statutory requirements.
39. Further, it was submitted that if it is accepted that the funds in the account are compensation funds for the Kigoro-Gigiri Water Project, as claimed by the 1st Respondent, then those funds are meant to compensate the Petitioners/ Applicants, who were never compensated for the compulsory acquisition of their properties for the benefit of the 2nd Respondent.
40. The Petitioners also submitted that this Court vide a Judgment dated 23rd February, 2023, rendered in Murang’a ELC Constitutional Petition No. E001 OF 2021 Stephen Mbugua Gituthi & 37 Others V National Land Commission, Athi Water Works Development Agency and the Hon. Attorney-General, provided for the compensation of the Petitioners by the 1st Respondent in respect of the compulsory acquisition of their properties.
41. The Petitioners relied on the provisions of Section 111 (1A) of the Land Act, to anchor the proposition that the phrase “any other costs before acquisition is undertaken” includes costs awarded by the Court in respect of a suit challenging the creation of wayleaves on the suit properties. Further, that this position is further supported by the ejusdem generis rule of statutory construction as elaborated by the court in the case of Spentech Engineering Ltd V Methode Ltd & 2 Others [2017] eKLR.
42. Reliance was placed in the case of Sparkle Properties Ltd V National Land Commission & Another [2022] KEELC 3687 (KLR), to support the argument that full and just compensation enjoins the 1st Respondent to fully offset the financial detriment suffered by the petitioners including the costs incurred in challenging the procedure used to compulsorily acquire their lands.
43. The Petitioners further relied in the case of Milimo, Muthomi & Co. Advocates V Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme, Cooperative Bank of Kenya Ltd & Another (Garnishee [2021] eKLR to support the proposition that the compensation purpose relied on by the 1st Respondent does not rank higher than the payment of the judgment-debt as ordered by this Court.
44. It was the Petitioners’ further submission that Account Number 01136084618500, held at the Cooperative Bank of Kenya Ltd, the 2nd Garnishee, belongs to the 2nd Respondent as evidenced by annexure “M4”. They also submitted that annexure “M4” is a letter authored by the 2nd Respondent and stamped as received by the 2nd Garnishee; whereby, the 2nd Respondent does not deny holding the said account.
45. Further, that the 1st Respondent and the 1st Garnishee in their Replying Affidavits did not deny receiving the monies which are the subject of the letter. The Petitioners submitted that they have demonstrated that the stated bank account belongs to the 2nd Respondent, and that the 2nd Garnishee failed to establish the identity of “different entity” which allegedly is the holder of Account Number 01136084618500 held at the Cooperative Bank of Kenya Ltd, the 2nd Garnishee in accordance with the requirements of Section 107 of the Evidence Act.
46. For this argument, the Petitioners relied in the case of MNK V POM, Initiative for Strategic Litigation in Africa (ISLA) (amicus Curiae) [2023] KESC 2 (KLR), and reiterated that the identity of the said “different entity” is a matter within the special knowledge of the 2nd Garnishee pursuant to the provisions of Section 112 of the Evidence Act;



47. Further, that non-disclosure of the same amounts to concealment of a material fact from the Court by the 2nd Garnishee. Reliance was placed in the case of *Karani V Judicial Service commission* [2022] KESC 37 (KLR). Further, the Petitioner submitted that the said bank account number devolved to the 2nd Respondent, which succeeded the now defunct Athi Water Services Board, in accordance with Section 65, 152, 156 (3) of the *Water Act*, as read together with Legal Notices No.27 and 28 both dated 26th April, 2019. They relied in the case of *Anniversary Press (K) Ltd V National Water Conservation & Pipeline Corporation* [2020] eKLR.
48. On the question of whether the instant Application should be allowed, and a Decree NISI issued, and made absolute against the two Garnishees to satisfy the judgment-debt, the Petitioners submitted that neither the 1st or 2nd Respondents deny that they owe the judgment debt. Further, that the 1st or 2nd Respondents have not denied that they were served with demands for payment of the sums certified in the Certificate of costs as attested to by annexure “M3”.
49. It was their submissions that the 1st and 2nd Garnishees are holding monies belonging to the 1st and 2nd Respondents, which can be used to satisfy the judgment debt and they urged the Court to allow the instant Application.
50. For this argument, reliance was placed in the case of *Millimo, Muthomi & Co. Advocates V Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme, Cooperative Bank of Kenya Ltd & Another (Garnishee)* [2021] eKLR.
51. The Petitioners filed Further Submissions on 13th December, 2023, and affirmed that the 2nd Respondent made a payment of Kshs.4,152.182/=, through its accounts with the 2nd Garnishee in favour of the Petitioners. Further, that joint liability means that both the 1st and 2nd Respondents are liable to fully settle the liability in question.
52. Reliance was placed in the cases of *Arthur Kibira Apungu & Another V IEBC & 2 others* [2016] eKLR; *Ndeti & Another (Suing on his own behalf and as administrators of Gerald Ndeti Mutua (deceased) V Mwangangi & Another* [2022] KEHC 15732 (KLR); *Republic V Permanent Secretary in Charge of Internal Security office of the President & Another ex-parte Joshua Mutua Paul* [2013] eKLR; *Dubai Electronics V Total Kenya & 2 others* (HCCC No. 870 of 1998); and, *Intercounties Imports and Exports V National Land Commission & 3 Others; Park Avenue Investments Ltd & 3 others (interested Parties)* [2023] KEHC 17560 (KLR).

1st Respondent/judgment-debtor’s Submissions

53. The 1st Respondent filed its written submissions on 18th December, 2023 through NJUGUNA JACKLINE ADVOCATE, whereby two issues for determination were identified namely:
 - i. Whether garnishee proceedings can be pursued against the 1st Respondent/Judgment-Debtor.
 - ii. Whether the Court can issue the orders sought.
54. Reliance was placed on the averments set out in the 1st Respondent’s Notice of Preliminary Objection dated 5th June, 2023 and Supporting Affidavit of BRIAN IKOL, and Supplementary Affidavit dated 12th October, 2023. It was submitted that the 1st Respondent is established pursuant to the provisions of Article 67 of *the Constitution*. That the 1st Respondent is recognized under Chapter 15 of *the Constitution* as being one of the Constitutional Commissions, which are fully funded by the exchequer.



55. The 1st Respondent relied on Sections 21(4) of the *Government Proceedings Act* and Order 29, Rule 2 (2) (c) of the Civil Procedure Rules to support the argument that the 1st Respondent cannot be the subject of Garnishee proceedings as it is part of government. Further reliance was placed in the case of *Okiya Omtata Okoiti & Another V A-G & 7 others* [2013] eKLR.
56. The 1st Respondent further submitted that the test for determining whether an entity is a governmental body was elaborated by the court in the case of *Association of Retirement Benefits Schemes V Attorney-General & 3 Others* [2017] eKLR; wherein, the court adopted the seven-point criteria developed by the Supreme Court of India in the case of *International Airport Authority (R.D. Shetty) V The International Airport Authority of India & Others*. Further reliance was made in the case of *Kisya Investments Ltd V Attorney-General & Another* [2005] 1 KLR 74, where the rationale for the prohibition against execution and attachment of the government was explained in detail.
57. Reliance was also placed in the case of *Five Star Agencies V National Land Commission & others (ELC Civil Case No. 445 of 2014)*, to buttress the position that the proper mode of execution against the government is set out under Section 21 of the *Government Proceedings Act* which requires an applicant to apply for a certificate of order and costs against the government which are enforced by way of an order of mandamus and later contempt of Court.
58. The 1st Respondent also relied the following cases: *Permanent Secretary Office of the President, Ministry of Internal Security & Another ex-parte NASSIR MWANDHI* (2014) eKLR; *Samuel Kamau Macharia & Another V Kenya Commercial Bank & 2 Others* Supreme Court Appl. No. 2 of 2011 [2012] eKLR; *Speaker of the National Assembly V James Njenga Karume* (1992) eKLR; and, *Samson Chembe Vuko V Nelson Kilumo & 2 Others* [2016] eKLR, to advance the argument the instant proceedings have not followed the prescribed procedure hence jurisdiction of the court has improperly been invoked.

2nd Respondent/judgment-debtor's Submissions

59. The 2nd Respondent filed written submissions on 10th August, 2023 through the law Firm of *NYAANGA & MUGUSHA & COMPANY ADVOCATES*, who submitted that the instant Application has been overtaken by events because the 2nd Respondent paid its joint part of the decree of the Court in the amount of Kshs.4,152,182/=, to the Petitioners. Reliance was placed in the cases of *Republic V Permanent Secretary in Charge of Internal Security office of the President & Another ex-parte Joshua Mutua Paul* [2013] eKLR; *Dubai Electronics V Total Kenya & 2 others* High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 of 1998; and, *Kenya Airways Ltd V Mwaniki Gichohi* in support of the argument that joint liability in the circumstance of the instant suit means half of the amount in question.
60. It was further submitted that the Petitioners cited the wrong bank account held by the 2nd Respondent at the 2nd Garnishee.

2nd Garnishee's Submissions

61. The 2nd Garnishee filed written submissions on 14th September, 2023 through the Law Firm of *MKN & COMPANY ADVOCATES*, and a single issue for determination was identified namely, whether the 2nd Garnishee holds funds to the credit of the judgment-debtor. The 2nd Garnishee affirmed that Bank Account Number 01136084618500, belongs to a different entity from the 2nd Respondent, which entity is known as Athi Water Development Agency, and that the same is different from ATHI WATER



SERVICES BOARD, and which entity the 2nd Garnishee erroneously described as the 2nd Respondent in the subject suit.

62. The 2nd Garnishee prayed that it be discharged from the current proceedings as it is not holding money for the 2nd Respondent. Reliance was sought in the decision of the Court in the case of Maurice Odour Nyakone V Diamnod Property Merchants Ltd; Cooperative Bank of Kenya & Another (Garnishee) [2021] eKLR and Machakos High Court Misc. Appl. No. 405 of 2017 Ngaywa Ngigi & Kibet Advocates V Invesco Assurance Co. Ltd; Diamond Trust Bank (Garnishee) [2020] eKLR.
63. Having considered the instant Application, the court record in general, the arguments for and against the said Application, the written submissions and the relevant provisions of law, the court finds the issues for determination are; -
1. Whether the 1st Respondent is a government department and therefore subject to the provisions of *Government Proceedings Act* and Order 29 Rule 2 of the Civil Procedure Rules?
 2. Whether the current Application is premised on the wrong procedure?
 3. What is the meaning of “joint liability” and is the 2nd Respondent discharged from further liability having paid half of the costs awarded by the Court?
 4. Are the Petitioners entitled to the Orders sought?

i). Whether the 1st Respondent is a government department and therefore subject to the provisions of *Government Proceedings Act*, and Order 29 Rule 2 of the Civil procedure Rules?

64. In the case of Otieno Ragot & Co Advocates vs City Council of Nairobi [2015] Eklr, the Court described Garnishee proceedings as follows:

“Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the Garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable.”

65. Section 21(4) of the *Government Proceedings Act* provides that:

“...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.”

66. Order 29 Rule 2(2) of the Civil Procedure Rules, provides as follows:

“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).

67. In the case of *Tom Ojienda & Associates v National Land Commission & Another* [2019] eKLR, the Court addressed the status of the National Land Commission, the 1st Respondent herein, as follows:

“Having considered the submissions and the authorities cited by learned counsel herein, I take the view that, inasmuch as the Respondent 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*. Indeed, it was in recognition of this independence that it engaged the services of the Applicant herein to offer it legal representation. Consequently, my considered view is that the Respondent is amenable to the usual legal consequences flowing from such processes, including execution of ensuing decrees. This is because there is no such protection afforded by its organic legislation, the *National Land Commission Act*, to shield the Respondent from the execution process.”

68. Further, in *Petition No. 513 of 2013: Ikon Prints Media Company Limited vs. Kenya National Highways Authority & 2 Others* [2015] eKLR, the Court declared 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...”

69. Being guided and persuaded by the above decisions of Courts, it is the finding and holding of this Court that the 1st Respondent does not constitute the government for purposes of both the *Government Proceedings Act* and Order 29, Rule 2 of the Civil Procedure Rules. Accordingly, garnishee proceedings can be brought against the 1st Respondent.

ii). Whether the current Application is premised on the wrong procedure?

70. The 1st Respondent argued and submitted that the Petitioners have not followed the prescribed procedure, and hence they have improperly invoked the jurisdiction of this Court. The 1st Respondent’s contentions and submissions were premised on the argument that it is a government department or organ. In light of the Court’s decision that the 1st Respondent is amenable to garnishee proceedings, as it is not the government or a government department, the Court holds and finds that the instant proceedings do comply with the applicable procedure.



iii). What is the meaning of “joint liability” and is the 2nd Respondent discharged from further liability having paid half of the costs awarded by the Court?

71. The 2nd Respondent argued and submitted that the instant Application has been overtaken by events because it paid its joint part of the decree of the Court in the amount of Kshs.4,152,182/=, to the Petitioners.

72. In the case of Republic v PS In Charge of Internal Security ex parte Joshua Mutua Paul [2013] eKLR, the Court held as follows:

“Clearly, therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several, the Plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the torfeasor according to their individual liability... Either he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-defendants in the event that the Plaintiff only opts to recover from one of them”.

73. Further, in the case of Africa Planning & Design Consultants –vs- Sololo Outlets Ltd (In Receivership) & Anor (2018) eKLR, the Court held as follows:

“ 17. The concept of joint and several liability is defined in Blacks law Dictionary 10th Edition as follows:

“liability that may be apportioned among two or more parties or to only one or a few select members of the group at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties”.

74. In the case of Republic v PS in Charge of Internal Security ex parte Joshua Paul [2013] eKLR, the Court held as follows:

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

75. In Dubai Electronics – Vs – Total (K) Ltd & 2 Others HCC NRB Civil 870/98, the Court declared as follows:

“Clearly therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and/or several, the plaintiff has the option of either directing his claim against any one of



the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

76. It is not in dispute that the 1st and 2nd Respondents herein bear joint liability in respect of the costs awarded to the Petitioners by this Court. The Court finds and holds that notwithstanding the fact that the 2nd Respondent has paid half of the amount claimed by the Petitioners as per the Certificate of Costs issued by the Court, the 2nd Respondent is not discharged from liability in respect of the remaining sum as claimed. Further, pursuant to the meaning and import of joint liability as elaborated in the case-law set out above, upon satisfying the full sum due to the Petitioners, the 2nd Respondent is entitled to pursue the 1st Respondent to recover its share of the costs awarded to the Petitioners.

iv). Whether the instant Application is merited?

77. Having considered the determination of the Court above, it is evident that the Petitioners/Decree-Holders’ Notice of Motion Application dated 8th May, 2023, is merited. Consequently, the court allows the said Application entirely in the following terms ;

1. A Garnishee Order Nisi be and is hereby issued against the National Bank of Kenya , Hill Plaza Branch (hereinafter “the 1st Garnishee”) in respect of Bank Account Number 0132980000 at Co-operative Bank of Kenya Limited (herein “the 2nd Garnishee”) in respect of Bank Account Number 01136084618500 or any other of the Respondent/Judgement –Debtors’ Bank Accounts in any banking institution(s) within the jurisdiction of this Honourable Court ordering that all monies deposited, lying and being held in deposit by the 1st and 2nd Garnishee respectively to the credit of National Land Commission and Athi Water Services Board, be attached and utilized to satisfy the sum of Kshs 8,314,364/= being the decretal sum and costs herein.
2. The 1st and 2nd Garnishees having participated in the instant Notice of Motion Application have not shown cause why they should not pay the Petitioners /Decree Holders the debt due from them to the Judgement debtors, being monies/funds held in Bank Account Number 0132980000 at National Bank of Kenya, Hill Plaza Branch and Bank Account Number 01136084618500 at Co-operative Bank of Kenya Limited or so much thereof as may be sufficient to satisfy the decree and Certificate of Taxation herein given on 17th January 2023, plus the costs of these garnishee proceedings.
3. Consequently, the Garnishee Nisi be and is hereby made absolute, and the monies held in Bank Account Number 0132980000 by the 1st Garnishee, National Bank of Kenya, Hill Plaza Branch on behalf of the National Land Commission in Bank Account Number 01136084618500 by the 2nd Garnishee, Co-operative Bank of Kenya Limited on behalf of Athi Water Services Board be and are hereby attached to settle the Decree and Certificate of taxation herein given on 17th January 2023, in the sum of Kshs. 8,314,364/= plus costs of these garnishee proceedings.
4. The costs of this application shall be borne by both Respondents/Judgement-Debtors and be recovered and retained out of the money under the Garnishee order.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 26TH DAY OF AUGUST, 2024.

L. GACHERU

JUDGE

26/8/2024

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

N/A - 1st Respondent/Judgment-Debtor

N/A - 2nd Respondent/Judgment-Debtor Though served with the Ruling

N/A - 1st Garnishee/Respondent Bank Notice

N/A - 2nd Garnishee/Respondent Bank

L. GACHERU

JUDGE.

26/8/202

