



County Secretary The County Government of Bungoma & 5 others v Kenya County Government Workers Union Bungoma County Branch; National Bank of Kenya Limited & 3 others (Garnishee) (Judicial Review E001 of 2022) [2022] KEELRC 13237 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13237 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW E001 OF 2022
JW KELL, J
NOVEMBER 17, 2022**

BETWEEN

**COUNTY SECRETARY THE COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT
SECRETARY COUNTY PUBLIC SERVICE BOARD BUNGOMA COUNTY 2ND RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER COUNTY GOVERNMENT FINANCE OF BUNGOMA 3RD RESPONDENT
THE CHIEF OFFICER IN CHARGE OF FINANCE COUNTY GOVERNMENT OF BUNGOMA 4TH RESPONDENT
THE GOVERNOR COUNTY GOVERNMENT OF BUNGOMA 5TH RESPONDENT
COUNTY GOVERNMENT OF BUNGOMA 6TH RESPONDENT**

AND

KENYA COUNTY GOVERNMENT WORKERS UNION BUNGOMA COUNTY BRANCH EXPARTE

AND

**NATIONAL BANK OF KENYA LIMITED GARNISHEE
EQUITY BANK (KENYA) LIMITED GARNISHEE
KENYA COMMERCIAL BANK GARNISHEE
CO-OPERATIVE BANK OF KENYA GARNISHEE**



RULING

1. The *exparte* applicant is a registered trade union under the Trade Unions Act 233 of 2007 as Kenya County Governments workers union.
2. The *exparte* applicant is a judgment holder having obtained a judgment on behalf of its members in a judgment in Bungoma ELRC No 1 of 2019 between itself and the Bungoma County Public Service Board and the County Government of Bungoma delivered by Justice Nderi Nduma on the May 13, 2020. The decree was as follows:-
 - a. The court do hereby declares that the continued employment of the listed 463 grievant/ members of the petitioner by the respondents on the casual basis is a violation of sections 5,35 and 37 of the Employment Act cap 11 of 2007 and violates article 27,28,41 and 232 of the Constitution of Kenya 2010.
 - b. The court do hereby directs the respondents to place all the affected employees, referred to above on payroll and apply to each one of them the minimum terms and conditions of service as provided under parts 11, iii, iv, v and vi of the Employment Act cap 11 of 2007.
 - c. The respondents be and are hereby ordered to compute , file and pay arrear salary due and owing to all the grievants, named in this petition under their Employment within 60 days.
 - d. Costs of this petition do follow event.
3. On the July 7, 2022 the court considered application for *mandamus* by the *exparte* applicant and issued judgment for an order of *mandamus* to issue directed to the respondents in the petition to comply with the decree set out above.
4. The *exparte* applicant filed the instant application by way of notice of motion brought under section 1A,1B, 3 & 3A of the Civil Procedure Act and order 23 rule 1 & 2 Rules dated September 27, 2022 seeking the following orders:-
 - i. That this application be certified urgent and same be heard on priority basis.
 - ii. That a garnishee nisi order do issue attaching the 6th respondent's/6th judgment debtor's
 - a. Account number xxxx, Kenya Commercial Bank, Bungoma Branch.
 - b. Account number xxxx National Bank of Kenya, Bungoma Branch.
 - c. Account number xxxx Equity Bank (Kenya limited, Bungoma Branch.
 - d. Account number xxxx Cooperative Bank of Kenya Bungoma Branch.So as to satisfy the certificates of costs herein and clause (v) of the decree herein at the tune of Kshs 701,899 plus interest.
 - iii. That the garnishees herein do within seven days after service of this order inform this court what is due for the 6th respondent from their account.
 - iv. That after expiry of 7 days from the date of service of this order a garnishee absolute order do issue attaching the 6th respondent's /6th judgement debtor's account above and a tune of Kshs 701,899/- be released to the *exparte* applicant.



v. That costs be provided for.

5. The grounds of the application were that the respondents had failed to satisfy the decree and the costs of the suit amounting to Kshs 303,710/- and judicial review assessed at Kshs 399,189/- making a total Kshs 701,899/- plus interest. The *ex parte* applicant seeks for garnishee nisi order to attach the listed 6 bank accounts of the 6th respondent held by the 4 garnishees to recover total sum of Kshs 701,899/- plus interest. The application is supported by the affidavit of Moses Maelo Muyundi on same grounds and annexing the certificates of costs and the decrees as well as a letter to the respondent on the claim.

Response

6. The respondents did not file response to the application.
7. The 1st and 2nd garnishee did not file response.
8. The 3rd garnishee filed replying affidavit of Oscar Kikech of October 5, 2022.
9. The 4th garnishee filed notice of preliminary objection dated October 5, 2022 and grounds of opposition of even date.

The Hearing

10. The application came up for interpartes hearing on October 12, 2022. The applicant submitted that the application against the 4th garnishee be marked as withdrawn with no orders as to costs as they had objected *vide* a notice of preliminary objection and grounds of opposition. The 4th garnishee in rejoinder told the court the issue of costs be addressed in the ruling.
11. The 3rd garnishee prayed for ruling relying on the affidavit of Oscar Kikech of October 5, 2022. The court examined the said affidavit and found that the 3rd garnishee was not opposed to the application save for stating its costs be set off from the account it held in its bank for the 6th respondent.
12. The respondents' counsel in court told the court they had not been able to file response to the application and were opposed to the county bank accounts listed being attached as they are county revenue accounts. The respondents' counsel further told the court they were not opposed to payment of the debt but had transition issues the elections having been held during the period the said costs were assessed.
13. The *ex parte* applicant's counsel in rejoinder told the court to expunge the submissions on feet by counsel. That submissions were not pleadings. The court agreed with the counsel that submissions are not pleadings. The court in its decision will not consider the facts stated on the floor by counsel for the respondents. The *ex parte* applicant counsel submitted that since there is no objection by the 1st and 3rd garnishees the application dated September 22, 2022 be allowed in terms of prayers 4 and 5 of the application.

Determination

14. Issue for determination in the application would be whether the application is competent in law and if so whether the prayer sought should be granted.
15. The court noted that though the *ex parte* applicant told the court it had withdrawn the case against the 4th garnishee following their objection, the said objection was still on record and raised legal issues which the court has to determine and would have still have determined even if none of the parties raised them in the instant application. The said legal points go to the root of the cause being the jurisdiction



of the court to grant orders sought. The issue being whether or not garnishee orders can issue against the 6th respondent's bank accounts.

16. In normal execution proceedings garnishee proceedings may follow the issuance of a certificate of costs if there is no settlement. Indeed order 23(1) provides: "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."
17. The legal questions which the *ex parte* applicant opted to run away from addressing by simply informing the court they withdrew the case against the 4th garnishee who had raised the legal points of law under notice of preliminary objection dated October 5, 2022 were:-
 - a. That the application for execution of decree is contrary to provisions of order 29 rule 2 ad 4 of the *Civil Procedure Rules*.
 - b. That the institution of garnishee proceedings against the 1st respondent , a government, offends the provisions of section 21 of the *Government Proceedings Act*.

Whether the institution of garnishee proceedings against the 6th respondent, offends the provisions of section 21 of the *Government Proceedings Act*.

18. The first issue for the court to consider is whether the 6th respondent (county government of Bungoma) is government for the purposes of application of the *Government Proceedings Act*. The court in determination of the issue considered the *Constitution* of Kenya take on the government of Kenya. The *Constitution* of Kenya 2010 states as follows in relation to the Government:-

"Article 6 (1) the territory of Kenya is divided into the counties specified in the first schedule.
(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."

From the foregoing law it is stated Kenya has two levels of governments, at the national and county. Bungoma County government is thus a distinct county level government as envisaged under article 6 (1 &2) of the *Constitution*.

19. The *Government Proceedings Act* provides for the procedure of satisfaction of decree awards against the government under section 21 which reads:-

"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.” (emphasis provided).

For emphasis purpose of this ruling section 21 (4) (supra) states that 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 such money or costs. Section 21(5) provides for the [Government Proceedings Act](#) to apply to any civil proceedings by or against the county government.

Whether application for execution of decree against the 6th respondent is contrary to provisions of order 29 rule 2 of the Civil Procedure Rules.

20. Order 29 rule 2 of the [Civil Procedure Rules](#) applies to proceedings by or against the government as follows:- ‘(1) except as provided by the [Government Proceedings Act](#) (cap 40) or by these rules—
 - (a) these rules shall apply to all civil proceedings by or against the government; and
 - (b) civil proceedings by or against the government shall take the same form as civil proceedings between subjects and shall, if no special form is applicable, take the form of a suit instituted by a plaintiff.



- (2) No order against the government may be made under—
- (a) Order 14, r 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).’
21. The court finds the instant application is brought under order 23 of the [Civil Procedure Rules](#) which proceedings are prohibited under order 29(2) of the [Civil Procedure Rules](#)(supra). The court is of the opinion that the application is bad in law for it offends the provisions of the [Government Proceedings Act](#) section 21 outlined above which position of the law is emphasized under order 29 rule 2 of the [Civil Procedure Rules](#) prohibiting issuance of garnishee nisi orders to attach bank accounts of the 6th respondent, a county government.
22. The foregoing position of the court has been upheld in several decisions of superior courts. In [Takaful Insurance of Africa Ltd \(Kenya\) v County Government of Garissa & 2 others; Governor Central Bank of Kenya \(garnishee\)](#) [2021] eKLR Justice Ali- Aroni held “whether the county governments are part of government is now moot. based on the law as quoted above and authorities cited, much has been said and the matter is now settled. And therefore, touching on the matter before court the 1st judgement debtor is government and therefore no garnishee proceedings ought to have been brought against it.” In the decision the learnt judge upheld the decisions in [Kennedy Wainaina Ngenga v County Government of Nairobi & Cooperative Bank of Kenya \(garnishee\)](#) 2019 eKLR where Muigai J stated *inter alia* “The above legal provisions confirm that the process of execution with regard to Government Institutions is prescribed by the [Government proceedings Act](#). The [Civil Procedure Act](#) & rules 2010 also prescribe the execution process and exempts the Government from the said process. This means although execution is a right enforced by a decree holder against a judgment debtor execution shall be carried down where it involves government and it shall be within the purview of [Government Proceedings Act](#). Therefore, the garnishee proceedings herein against the judgement debtor; the county government of Nairobi are improper in law to the extent of the recovery process. However, the judgement debt remains unchallenged and a valid order and decree of this court.” And the decision of Justice Ogola in [In Club Limited v the Governor, Kajiado County Government & Kenya Commercial Bank](#) Misc application No 442 of 221 where the judge held that county government is “government” as per the [Government proceedings Act](#). Therefore, the provisions of the said [Government Proceedings Act](#) apply to proceedings brought against county governments hence garnishee proceedings instituted by the applicant in that case were not sustainable.
23. The court has demonstrated the law applicable in civil proceedings to recover debts against government. The court has also ably demonstrated that county governments are ‘government’ and are protected from normal execution process such as the instant garnishee proceedings specifically as stated under section 21(5) of the [Government Proceedings Act](#). Attachment under order 23 of the [Civil Procedure Rules](#) invoked in the instant proceedings is specifically prohibited under order 29(2) of the [Civil Procedure Rules](#).
24. Taking into consideration the relevant law as outlined above and guided by similar decisions of equal status courts on garnishee proceedings against county governments, the court finds and



determines that the 6th respondent being a county government is protected from attachment *vide* garnishee proceedings and that the instant application is thus not sustainable. The application is determined to be bad in law. The *ex parte* notice of motion application dated September 27, 2022 is dismissed. For avoidance of doubt it is to be noted that the judgement and the decree of this court remain in force unless ordered otherwise.

25. On the question of costs in the application, the court considered the *ex parte* applicant role of protecting vulnerable employees like in the instant case and to temper justice with mercy orders each party to bear own costs in the application.
26. It is so ordered.

DATED , SIGNED AND DELIVERED IN OPEN COURT THIS 1TH NOVEMBER 2022 AT BUNGOMA .

J.W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

For Exparte Applicant: Ms Komoro holding brief for Mr Wamalwa.

For Respondent:- Ms Walaka holding brief for Cyril Wayong'o

3rd Garnishee – Ativa

1st Garnishee- Absent

2nd Garnishee- Absent

4th Garnishee -Absent

