



Githanga & 3 others v County Government of Nyandarua; Kenya Commercial Bank & another (Garnishee) (Cause 358 of 2016) [2022] KEELRC 13191 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13191 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 358 OF 2016
HS WASILWA, J
NOVEMBER 15, 2022**

BETWEEN

**GEDION GITOGO GITHANGA 1ST DECREE HOLDER
STEPHEN MUNGAI KABURU 2ND DECREE HOLDER
JOHN ITATHI MWANGI 3RD DECREE HOLDER
SARAH WAMAITHA IRUNGU 4TH DECREE HOLDER**

AND

COUNTY GOVERNMENT OF NYANDARUA JUDGMENT DEBTOR

AND

**KENYA COMMERCIAL BANK GARNISHEE
EQUITY BANK KENYA LIMITED GARNISHEE**

RULING

1. Judgement in this cause was delivered on July 12, 2022 for the claimants'/decree holders as against the respondent/ judgement debtor herein for a sum of Kshs 1Million for each claimant, amounting to Kshs 4 Million for breach of contract. To satisfy this decree, the claimants/decree holders made an application dated September 19, 2022 seeking to have respondent's accounts held at Kenya Commercial Bank-Ol Kalou Branch and Equity Bank Limited-Ol Kalou Branch as garnishees.
2. The respondent having been aggrieved by the judgement of the court had filed a notice of appeal dated July 25, 2022 and appeal filed on September 20, 2022 serialized as Civil Appeal Number E091 of 2022 Nakuru Court of Appeal. Soon after, the garnishee application was filed. In response to the said application the respondent filed a preliminary objection dated October 4, 2022 which came out as follows; -



- a. That the respondent- County Government of Nyandarua is a state organ and/or a public entity as stipulated under article 1 (3) of the [Constitution](#) and therefore part of the National Government of which no attachment can issue against its movable or immovable properties.
 - b. That order 29 rule 2(2) and rule 4(1) of the [Civil Procedure Rules](#) prohibit the execution of decrees and orders against the Government/County Governments and also prohibit attachment of debts/deposits owing to the Government especially by way of garnishee proceedings.
 - c. That the decree holder/applicants have not complied with the mandatory provisions of section 21 of the [Government Proceedings Act](#) requiring the extraction and issuance of a certificate of order against the Government/County Government before compliance and satisfaction of an order/decreed against the Government can commence.
 - d. That the decree holder/applicants have failed to invoke the requisite procedure for satisfaction of orders/decrees against the County Government through seeking prerogative orders as envisaged by section 8 of the [Law Reform Act](#) and as applied under order 53 of the [Civil Procedure Rules](#).
 - e. That the decree holder/applicants have proceeded to execute their decree contrary to the mandatory legal procedure requiring taxation of costs prior to execution of a decree and have also failed to seek leave of the court on execution of the decree without taxation of costs.
 - f. That the decree holders' mode of execution is highly irregular and thus their application dated September 19, 2022 is not only incompetent but fatally defective reasons whereof the same ought to be struck out /dismissed with costs to the judgment debtor/respondent.
3. This ruling is therefore in relation to the above preliminary objection. Directions were taken for the preliminary objection to be disposed of by way of written submissions with the respondent/judgment debtor filing on the October 13, 2022 and the claimants/decreed holder filing on the October 26, 2022.

Respondent's Submissions.

4. The respondent raised four issues for determination in relation to the preliminary objection namely; whether the County Government is exempted from execution proceedings especially garnishee proceedings, whether section 21 of the [Government Proceedings Act](#) applies to County Governments, whether it's necessary to seek prerogative orders for satisfaction of decrees/orders against the County Government and whether a court's decree can be executed prior to the taxation of costs.
5. On the first issue, the respondents submitted that as per article 1(3) & (4) of [the Constitution](#), the County Government is a state organ which has its functions distinct from the National Government as stipulated under article 189(1)&(2) of the [Constitution](#). Accordingly, it was argued that the County Governments just like the National Government are immune from attachments of either their movable or immovable properties. To support this argument, they relied on the case of [Kisya Investments Limited v Attorney General and another](#) [2005] eKLR where the court quoted a New Zealand case, - [Auckland Harbour Board vs R](#) (1924) AC 318, it was held (p 326) by Viscount Haldane in the Privy Council that;

“The second situation which arises from the above is that once a decree or judgment is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, the Comptroller and Auditor General etc for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries



and Departments do not have their “own” funds to settle such decrees or payments...If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgments and it will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached, its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore, the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt, but it’s Constitutional and Statutory duties will not be capable of performance. This will lead to a chaos, anarchy and the breakdown of the Rule of Law.”

6. On the same note, the respondent submitted that order 29 of the [Civil Procedure Rules](#) deals with proceedings against Government, which expressly prohibits against attachment of debts, deposits owing to the Government. Further that Garnishee proceedings against the Government is prohibited under orders 23 of the [Civil Procedure Rules](#). In support of this they cited the case of [Takaful Insurance of Africa Limited \(Kenya\) V County Government of Garissa and 2 others; Governor Central Bank of Kenya\(Garnishee\)](#)[2021] eKLR, where the court held that;

“The next question is whether a County Government can be subject of Garnishee proceedings? Or is it exempted from such proceeding as the National government. In making a determination on this subject which has been considered severally by the courts one would have to read together the provisions of the Constitution of Kenya 2010, the Government Proceedings Act and the Civil Procedure Rules. 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. The import of the above provision of the Constitution is that the Government in Kenya is split into two levels. One is the Government at the National level and the second is Government at the County level, both form “governments” that are separate and distinct with different functions as set out in the Constitution. 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. And in this regard the Garnishee order Nisi and any subsequent order made must and are hereby set aside.”

7. Counsel reinforced further on the above argument and cited the case of [Kennedy Wainaina Ngenga versus 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.”

8. On the second issue, the Respondent submitted that section 21 of the *Government Proceedings Act* prohibits satisfaction of judgements/decrees against a Government unless, there has been a certificate of Order issued against the said Government. Wherein in this case, there is no such certificate that was issued against the County Government therefore the said Execution proceedings cannot be allowed in light of section 21 of the *Government Proceedings Act*. To support their argument, they relied on *Republic v County Government of Kwale; Charpenel Enterprises Limited (Ex parte)* (Judicial Review Application 020 of 2021) [2021] KEHC 200 (KLR) (9 November 2021) (Judgment) where the Justice Mativo held that;

“As was held in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza (supra)*, the Certificate of Order against the Government is not only a requirement but it is also a condition precedent to the satisfaction or enforcement of decrees issued against the Government. Section 21 of the *Government Proceedings Act* provides that the Certificate of Order against the Government should be issued by the court after the expiry of 21 days from the date of entry of the judgment. Once the Certificate of Order against the Government is served, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereto. The applicability of section 21 of the *Government Proceedings Act* to County Governments is not in doubt. Section 21 (5) provides that:- 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... My reading of section 21 is that it is peremptory for the Certificate of Order against the Government to be served before an enforcement action such as the mandamus sought in this application is sought.”

9. In light of the above, the Respondent argued that the only remedy available for the Decree holders is to institute Judicial review proceedings and seek an Order of mandamus as provided for under section 8(1) of the *Law Reforms Act*, compelling the County Government to settle the decree in question and not seek for garnishee proceedings as sought in the application of September 19, 2022. They thus urged this Court to strike out the said application. To further give emphasis they relied on the case of *Republic V Chief magistrates Court Embu Ex parte Johnson N Nyaga and 3 others; David Muigai Kinyanjui (Interested party)* [2021] eKLR, where the Court stated that ;

“It is trite that execution against the government should be through judicial review proceedings, mounted under Order 53 of the Civil Procedure Rules, after a certificate of order against government is served upon the government in compliance with section 21 of the *Government Proceedings Act*. Section 21(5) extends the application of the said section, with necessary modifications, to any civil proceedings by or against a county government. It therefore means that the process of execution against the 4th ex-parte applicant must be made within the provisions of section 21 of the *Government Proceedings Act*.”

10. On the last issue of whether a decree can be executed before taxation of costs, it was argued that section 94 of the *Civil Procedure Act* provides for execution before ascertainment of costs only with leave of the



court, which was not sought in this case. They relied on the case of *Bamburi Portland Cement Company Limited V Imranali ChandBhai AbdulHussein* [1996] eKlr where the Court of Appeal stated that;

“I would like to end by making some pertinent observations as regards the execution of the decree. Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter partes. Order 21 r 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.”

11. In conclusion, the Respondent submitted that the Preliminary objection raised has satisfied all the conditions set and justified as such ought to be allowed while the entire Garnishee proceedings as set out in the application of September 19, 2022 is devoid of merit and the same ought to be struck out and the Garnishee Order Nisi issued on September 22, 2022 be set aside.

Claimants/ Decree Holders Submissions.

12. The decree holders on the other hand submitted on only one issue; whether the Preliminary Objection is merited. It was argued that indeed the County Government is a state Organ who is protected under section 21 of the *Government Proceedings Act*, however that since the Respondent has not disputed owing the said sum and since 21 days have lapsed from the date the decree was issued, the County ought to be compelled to pay the said sums of money. To support its case they relied on the case of *Shams Enterprises Limited V Isiolo County and another* [2018] Eklr where that Court held that;

“The defendant is a County Government and as submitted in the Preliminary objection falls under the Protection of Section 21(4) of Government Proceedings Act. However the defendant has not taken any steps to discharge the liability as in the consent recorded by the court on November 28, 2016, despite letters of demand being send to them. The defendant does not deny owing the plaintiff. The defendant does not give any proposal of how they intend to pay the decretal sums. In this matter the Respondent has identified monies held on behalf of the defendants by the Garnishee and I don’t think that it would be fair and just to cause them to use another procedure to realise a decree that was entered into by the consent of the parties. In light of Article 159(2)(d) and Article 48 of the Constitutionccof Kenya 2010 I’m of the view that both Judicial Reviewed Garnishee proceedings are procedures in execution of a decree. In the decision of the Court of Appeal in Joseph Nyanamba & 4 others vs Kenya Railways Corporation [2015] it was held that S.21 of Government Proceedings Act impedes the provisions of access to justice as provided by Article 48 of the Constitution. The decision of Hon Mabeya J in African Commuter Services Ltd vs The Kenya Civil Aviation Authority & 2 others [2014] eKLR also fortifies the position in The Court of Appeal decision in Joseph Nanyamba (supra) where he held:“That all litigants be treated equally without exceptionthe greater public interest requires that the applicant be allowed to enforce its and thereby maintain and sustain the constitutional value and prince of governance by the rule of law than uphold narrow interests of allowing a state and public corporations to prevaricate or suspend the sale of land by refusing to obey a court decision. “This court therefore finds that the preliminary objection cannot be sustained for reasons that it breaches the provisions of the constitution and also that it will not bring this



matter to an end. The Preliminary objection is overruled and the garnishee order nisi is made absolute.”

13. It is the decree holders’ submissions that they have a right to institute garnishee proceeds to realize the fruit of the Judgment regardless of provisions of section 21 of the Government Act. They argued that Article 48 gives them right to access justice and Article 159 (2)(a) -(d) provides for justice to be administered without undue regard to procedural technicalities, which provisions are supreme over the provisions of section 21 of the Government Proceedings Act. To support this argument, they relied on the case of Blues Shield Insurance Company Limited V County Government of Mombasa; National Bank of Kenya and another (Garnishee) [2019] eKLR where the Court held that; -

“In light of Article 159 (2) (d) and Article 48 of the Constitution of Kenya 2010, I am of the view that both judicial review and garnishee proceedings are procedures of execution of a decree. In the decision of the court of Appeal in Joseph Nyanamba & 4 others vrs Kenya Railways Corporation (2015), it was held that section 21, of Government Proceedings Act impinges the provisions of access to justice as provide for by Article 48 of the Constitution.¹⁸ The decision of Hon Mabeya J in African Commuter Services Ltd vrs The Kenya Civil Aviation Authority & 2 others (2014) e KLR also fortifies the position in the Court of Appeal decision in Joseph Nyanamba (Supra) where he held:“That all litigants be treated equally without exception.....the greater public interest require that the applicant be allowed to enforce its and thereby maintain and sustain the constitutional value and principle of governance by the rule of law than uphold narrow interests of allowing a state and public corporations to prevaricate or suspend the sale of land by refusing to obey a court decision”.¹⁹ This court therefore finds that the preliminary objection cannot be sustained for reasons that it breaches the provisions of the Constitution and that it will not bring this matter to an end. The Preliminary objecting is therefore overruled and the garnishee order absolute is hereby issued given that the decretal sum has been outstanding for more than 15 years.”

14. In conclusion, the decree holders submitted that the Garnishees have filed replying affidavits ascertaining that they hold monies in the Respondent’s name which is sufficient to pay the decretal sum in full and therefore the Preliminary objection raised be dismissed and the Garnishee order be made absolute to allow them enjoy the fruits of their judgement.
15. I have considered the averments herein. The issue is whether garnishee orders can issue against the County Government.
16. The applicants have argued that the County Government is part of the government and no execution by attachment can issue against its movable or immovable property.
17. Indeed the County Government is part of government as a whole as Article 13 of the constitution provides that the sovereign power under this constitution is delegated to national executive and the executive structures on the County Government.
18. Order 29 Rule 2 (2) of the CPA on the other hand provide for rules to be followed when proceeding against the government.
19. Under Order 29 Rule 2, rules to apply for execution against the government shall be as provided for under the Government Proceedings Act (cap 40).
20. No order can be made against the government under Order 14 Rule 4 on impounding of documents, under Order 22 on execution of the decrees and orders, Order 23 (attachment of debts) e.t.c.



21. To execute against the government, an application has to be made under Section 21 of the [Government Proceedings Act](#).
22. This position has been adopted by this court previously where this court has held (see Kennedy Wainaina Njenga Vs County Government of Nairobi & Co-op Bank of Kenya (Garnishee) 2019 eKLR that garnishee proceedings could not hold against the County Government of Nairobi and the execution could only proceed as per the [Government Proceedings Act](#).
23. The respondent agreed in principal that they could not proceed against the respondent through garnishee proceedings but argued that since the applicants have not disputed owing the said money and since 21 days have lapsed from the date the decree was issued, the respondent applicant should be compelled to pay the said sums of money.
24. Having considered the arguments for and against the garnishee proceedings, I agree with the applicants herein that no garnishee proceedings can proceed against them except as provided for under the [Government Proceedings Act](#) and this is by an application for Judicial Review which the Respondents have not yet filed.
25. It is therefore my finding that the preliminary objection herein is merited and is allowed and an order made dismissing the applicant/decree holder's application to attach by way of garnishee proceedings as against the respondents applicants herein.
26. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF NOVEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjiru for Decree Holder – present

Respondents/Applicants – absent

Court Assistant - Fred

