

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 271 OF 2017

ROSE NGII MWANZIA.....CLAIMANT/RESPONDENT

VERSUS

KENYA WATER INSTITUTE....RESPONDENT/APPLICANT

RULING

1. The motion before me is the Respondent/Applicant's Notice of Motion Application dated 19th November 2019. The motion which was under a certificate of urgency seeks in the main for stay of execution and decree of the court made on 30th January 2019. The motion was premised on the grounds on the face of the application and was supported by an affidavit of sworn by Mr. Paul Gisemba of the State Law Office. The Application seeks for orders *inter alia*;

a) **THAT** the court be pleased to order a stay of execution of the judgment and decree of Employment and Labour Relations Court in ELRC NO 271 of 2017 made on the 30/01/2019 and any subsequent orders in furtherance of the said decree until the final determination of this application.

b) **THAT** the respondent be given 90 days after service of the Certificate of Order Against the Government which is mandatory under Order 29 R. 3 of the Civil Procedure Act to enable it to satisfy the decree.

c) **THAT** the costs of this application do abide by the outcome of this Application.

2. The Claimant/Respondent filed a replying affidavit sworn on 2nd December 2019 and deposed that in spite of being served with the Decree and certificate of taxation both dated 24th October 2019, the Respondent did not satisfy the Judgment of the Honourable Court that was delivered on 30th January 2019. The Claimant deposed that the contention she had unlawfully and unprocedurally commenced execution proceedings is false and totally misplaced and the Respondent is not the Government as alleged. She deposed that the Respondent/Applicant is a body corporate, established by the Kenya Water Institute Act and therefore a legal person separate from the Government capable of suing and being sued. She asserts that the execution is lawful since the Respondent is not the Government and that the provisions of the Government Proceedings Act as well Order 29 Rule 3 of the Civil Procedure Rules do not apply to the Respondent. The Claimant deposed that the judgment herein was delivered on 30th January 2019 over ten months ago and the Respondent has never demonstrated any interest in satisfying the Judgment

3. The motion was urged orally before the Court and a Ruling reserved for today. The Respondent argued through State Counsel Mr. Gisemba that according to Order 29(3) of the Civil Procedure Act, being a Government Institution it is a requirement that a certificate of order against the Government should be processed prior to payment of a decree. He argued that it is not correct for the Claimant to state that the Respondent is not a Government institution as it is established under the Kenya Water Institute Act and is funded as an entity of the Government and thus enjoys protection in terms of the Government Proceedings Act. The Respondent prayed for 90 days as the nearest source of income generates from fees collection which will happen in the new term in January 2020.

4. In reply, the Claimant relied on the replying affidavit and the list of authorities filed herein. The Claimant argued that the Respondent is not the Government and that Section 3 of the Kenya Water Institute Act establishes a body corporate with perpetual succession that can sue and be sued in its own name. It was argued by Miss Kiongera, Counsel for the Claimant that judgment against the Respondent is not judgment against the Government. The Claimant relied on the case of **Ikon Prints Media Co Ltd v Kenya National Highways Authority & 2 others [2015] eKLR** and argued that to rely on the Government Proceedings Act is a means of stopping the execution which ought not be allowed. The Claimant cited the case of **Tom Ojienda & Associates v National Land Commission & Another [2019] eKLR** where it was held that the fact that the Respondent was being represented by the Attorney General in itself does not make it the Government but it shows the independence to engage advocates of their choice. The Claimant further argued that the issue of funding of the institution does not grant it the right of being a government body as it is an independent authority. The Claimant submitted that the Respondent is capable of being executed against and urged the dismissal of the application with costs.

5. The Respondent never during its appearance before Court assert its character was that of a Government Institution to which the Government Proceedings Act applies. The mere fact that the Respondent was able to retain the services of the Attorney General's Chambers did not accord it special status barring any distress for satisfaction of the decree of the Court. If that had been the intent of Parliament the framers of the statute would have excluded the words **capable of suing and being sued in its own name and a body corporate with perpetual succession** in Section 3(2) of the KEWI Act. The law provides clearly that the Institute shall in its corporate name, be capable of purchasing or otherwise acquiring, holding and alienating movable or immovable property and subject to the provisions of this Act, of doing or performing all such acts or things as may by law be done or performed by a body corporate. This is not in doubt the function of independent bodies as the Respondent. From the foregoing it is amply clear there is no merit in the motion before me and it accordingly must suffer the singular fate due to it. Dismissal with costs as I do hereby order.

It is so ordered.

Dated and delivered at Nyeri this 21st day of January 2020

Nzioki wa Makau

JUDGE