



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 186 OF 2013

BETWEEN

DR. EZEKIEL NYANGOMA OKEMWA.....CLAIMANT

VERSUS

KENYA MARINE & FISHERIES RESEARCH INSTITUTE.....RESPONDENT

RULING

1. Judgment was delivered in this Cause in favour of the Claimant, on 8th July 2016.
2. The Respondent belatedly made an application for stay of execution pending appeal, which was allowed in a ruling dated 7th November 2019.
3. The Respondent was ordered to deposit the decretal sum together with costs and interest, in a joint interest earning bank account, in the names of the Parties' Advocates. This was to be done within 30 days. It was not done, and the order of stay of execution, became void. The Claimant has sought to execute decree by way of attachment and sale Respondent's movable property.
4. In an application dated 3rd February 2020, the Respondent opposes execution by way of attachment and sale of its property, holding that it is a Government Institution, established under Science, Technology and Innovation Act No 28 of 2013, and therefore a Government body, pursuant to Section 3 of the Interpretation and General Provisions Act, Cap 2 the Laws of Kenya. It is protected against execution under Section 21 [4] of the Government Proceedings Act. It further invokes Order 22 and 29 of the Civil Procedure Rules in objecting to execution.
5. The application is grounded on the affidavit of Prof. James Njiru, Respondent's Director, sworn on 3rd February 2020.
6. The application is opposed through an affidavit sworn by the Claimant, on 18th February 2020. His position is that the Respondent is State Corporation with its own capacity to sue and be sued. It is a corporate entity with perpetual succession, and is not 'government' within the meaning of Government Proceedings Act. Section 21 [4] of this Act, does not apply to the applicant. The Respondent in any event, did not advance this argument, during its application for stay of execution. It has repeatedly failed to comply with the orders of the Court.
7. The application was argued orally in Court by respective Counsel, on 12th February 2020.
8. Counsel for the Respondent underscores that the Respondent is insulated against execution by the Government Proceedings Act and the Civil Procedure Act. Execution can only be under a writ of mandamus. There is no other option. The Respondent relies on ***Kisya Investments Limited v Attorney-General [2005] e-KLR***, in submitting that if execution is allowed against Government property, there would be no end to the list of assets likely to be auctioned, and no Government can survive such an onslaught. The Government will not only be bankrupt, but its constitutional and statutory duty will not be capable of performance. The Respondent further relies on ***Nahashon Omwoha Osiako & 66 others v. Attorney- General & Another [2017] e-KLR*** which emphasizes the principle in Kisya decision.
9. The Claimant adopts the decision in ***Ikon Prints Media Company Limited v. Kenya National Highways Authority & 2 Others [2015] e-KLR***, where the Court held that Kenya National Highways Authority is a body corporate with perpetual succession, capable of existing independently. It was the view of the Court that the Authority is not government or agent of government for purposes of Government Proceedings Act. Secondly, the Claimant relies on another High Court decision in ***Greenstar Systems Limited v. Kenyatta International Convention Centre [KICC] & 2 others [2018] e-KLR***, where it was held that that KICC is an independent corporation with perpetual succession capable of suing and being sued in its own name.

The Court Finds:-

10. Section 12 [1] of the Science & Technology Act [the Act] Cap 250 the Laws of Kenya, establishes Research Institutes set out in the 4th Schedule.
11. The Respondent is one of these Institutes.
12. It is run by a Board of Management, which includes among others, Principal Secretary in the parent Ministry. It also has not more than 7 members, appointed by the responsible Cabinet Secretary. The Director /CEO is an appointee of the Government. The Claimant testified on trial, that he was appointed by the former President, Daniel Arap Moi as the CEO of the Respondent.
13. Section 18 of the Act provides that, Research Institutes are financed by grants in aid from their parent Ministries. They may also accept gifts, donations, subscriptions, fees and other moneys for the implementation of approved programmes.
14. The financial year of the Research Institutes, runs concurrently with that of the Government. Their financial estimates are submitted to Treasury through the parent Ministries, for approval by the Treasury.
15. Research Institute functions, are defined under Section 14 of the Act to include: carrying out research in the fields specified in the 5th Schedule; cooperate with other organizations and institutions of higher learning in training programmes and on matters of relevant research; to liaise with other research bodies within and outside Kenya carrying out similar research; to disseminate research findings; to cooperate with the responsible Ministry, the Council and relevant Research Committee, in matters relating to research policies and priorities; and to do all such things as appear to be necessary, desirable or expedient to do so.
16. All rights in all discoveries, inventions and improvements in respect of processes, apparatus and machines made on behalf of Research Institutes shall vest in the respective Research Institutes, but may be made available by it for use in the public interest.
17. The High Court in the Greenstar decision, cited two other decisions, **Association of Retirement Benefits Scheme v. Attorney-General & 3 others [2017] e-KLR** and Indian Supreme Court case, **Shetty v International Airport Authority of India 1 S.C.R 1042**, where it was held that in determining whether an entity is a Government body or not, the Court should consider the following factors:-
 - Consider whether any share capital of the corporation is held by the Government, and if so, that would indicate that the entity is an instrumentality of the Government.
 - Whether the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation. If there is such financial assistance, this indicates that the corporation is impregnated with Government character.
 - Whether the corporation enjoys monopoly status conferred by the State.
 - Whether the body has deep and pervasive State control.
 - Whether the functions of the corporation are of public importance and closely related to Government functions.
 - If a Department of Government is transferred to a corporation, then it becomes an instrumentality or agency of the Government.
18. Section 3 of the Interpretation and General Provisions Act defines public bodies to mean the Government, or any department, institution and undertaking thereof.
19. The Court is satisfied that Research Institutes are public bodies. They fit the description of public bodies given under the Interpretation of General Provisions Act, and have the characteristics shown in the **Association of Retirement Benefits Scheme** decision, cited above. Their functions, funding and staffing cannot be separated from the Government. They are an instrumentality or agency of the Government in scientific research and technology. They are largely funded from the Treasury, and their research findings are of general public use. The Respondent is an agency of the Government of Kenya, serving the public in the advancement of a blue economy.
20. The Court does not think that such an agency or instrumentality of the Government loses its character simply because it has capacity to sue and be sued in its own name.
21. The Claimant has other avenues to execute against the Respondent. Attachment and sale of Respondent's assets through auctioning is contrary to the provisions of the Civil Procedure Rules and the Government Proceedings Act. The Court would be exposing other Research Institutes to execution by way of attachment and sale of their assets, which are public assets, in recovery of civil debts, if the process of execution initiated by the Claimant is allowed to stand.
22. He was appointed by the late President Moi. Would Moi appoint him to an entity which is unrelated to his Government? He was subjected to investigations and disciplinary proceedings at the instigation of Head of Public Service Dr. Leakey. His conduct as CEO of the Respondent was investigated by the Inspectorate of State Corporations. The history of the dispute and the law creating and governing the Respondent, leave no doubt, that the Respondent is impregnated with Government character, and sheltered from execution in the mode the Claimant has adopted.
23. Lastly, the Court must record here that it has been compelled to release this Ruling from the confines of the Trial Judge's home at Chaka, Nyeri County, owing to the prevailing restrictions imposed on physical, human contact, by the covid-19 pandemic. Other means of release of this Ruling are neither safe, nor reliable, particularly at a Court Station placed at the centre of a covid-19 pandemic. While decisions of the Court are required to be delivered in Open Court under Rule 28 of the E&LRC [Procedure] Rules 2016, it is not possible to act in accordance with this Rule at the moment, without risking lives. The Court must adopt its Rule 38, to keep the wheels of justice rolling. It is noted also,

that the Hon. the Chief Justice has directed pending decisions be delivered by 30th May 2020. Parties shall access the Ruling from the Court Registry and from the Kenya Law Reports web portal, as soon as practicable.

IT IS ORDERED: -

a. The Application filed by the Respondent on 4th February 2020 is allowed.

b. No order on the costs.

Dated, signed and released at Chaka, Nyeri County, for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge