



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.300 OF 2015**

**JAMLECK WAWERU KARANJA.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU.....RESPONDENT**

**RULING**

Through application dated 21<sup>st</sup> February, 2020 and Notice of Motion under the provisions of section 21(1)(2)(3)(4) of the Government Proceedings Act, Order 22 Rule 22 and section 1A, 1B and 63(e) of the Civil Procedure Act and Order 22 Rule 22 and 29 of the Civil Procedure Rules and seeking for orders that the court be pleased to set aside and quash notice of attachment dated 18<sup>th</sup> February, 2020 in execution for money and subsequent proclamation by Director 'O' Auctioneers attaching property belonging to the respondent herein. The respondent as the applicant is also seeking that the execution proceedings to enforce the judgment and decree herein be declared a nullity and the court to cancel and set aside by lifting the warrants of attachment and sale the same being irregular. That the claimant to bear the costs of the auctioneers and costs of the application.

The application is supported by the affidavit of Rita Asekenye and on the grounds that the matter was referred to mediation which the parties attended and reached agreement executed on 13<sup>th</sup> May, 2019 and which was adopted on 18<sup>th</sup> November, 2019. The respondent has never been served with any court process and the proclamation and attachment is irregular as there is no draft decree and the proclamation and attachment is contrary to section 21(4) of the Government Proceedings Act. Execution against the government can only lie by institution of judicial review proceedings to compel the government to settle the decree. The execution proceedings by the claimant are irregular.

In the Supporting Affidavit of Rita Asekenye, advocate for the respondents herein reiterates the grounds to the application.

In reply, the claimant filed Replying Affidavit of Elijah Maragia Ogaro advocate for the claimant and who avers that the respondents are aware of the settlement agreement herein adopted by the court on 18<sup>th</sup> November, 2019 but has failed to pay. The instant application is meant to delay the payments. The Government Proceedings Act only applies to the National government and not County Government.

The respondent signed a mediation settlement agreement dated 13<sup>th</sup> May, 2019 and a decree has since been extracted. Under paragraphs (g) and (h) of the agreement the parties agreed that there would be payment of Ksh.899, 288.20 with a stay of execution until 30<sup>th</sup> November, 2019. The agreement stands. The respondent has not indicated how they intend on making payment.

Mr Ogaro also avers that the instant application is meant to stall the process of payment despite the agreement between the parties and should be dismissed with costs.

It is not in dispute that following mediation, parties herein reached agreement dated 13<sup>th</sup> May, 2019 and under the agreement and at clause 5 (h) agreed that;

*(h) that there be a stay of execution until the 30<sup>th</sup> of November, 2019.*

The matter thus settled and stay of execution addressed and settled can the claimant move the court as herein and seeking to attach the respondent's property through proclamation and attachment of its property?

Attachment against the County Government is regulated under section 21 of the Government Proceedings Act pursuant to Act No. 35 of 2015, and where under section 2, County Government is defined as a government. This allowed the amendment of section 21 of the Government Proceedings Act to include subsection 21(5) providing as follows;

*(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.*

Therefore, the respondents as a County Government, any execution proceedings against it should comply with the provisions of section 21 of the Government Proceedings Act.

**Section 21 (1) of the Government Proceedings Act** provides that;

*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.*

On the other hand, **Section 21 (3) of the said Act** provides that;

*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.*

In this case, following the settlement agreement following mediation, the court adopted the award as the judgement of the court on 18<sup>th</sup> November, 2019. The respondent did not pay before the agreed period where there was stay until 30<sup>th</sup> November, 2019.

Without payment, The claimant proceeded with execution proceedings.

It is clear that even though one may not pursue execution proceedings against the government *per se*, a party wishing to realize the fruits of a judgement against the government must first start by securing a certificate of costs and certificate of order against the Government as held in the case of **Republic versus Principal Magistrate's Court at Mavoko & another Ex-Parte Joseph Ole Lenku Governor Kajiado County & another [2018] eKLR**.

Armed with the certificate of costs and certificate of order against the respondent, County government of Nakuru, the next step would have been for the claimant to seek a writ of mandamus compelling the relevant officer in the county government of Nakuru to honour the decree as held in the case of **Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic versus The Attorney General & Another ex parte James Alfred Koroso** and the finding that;

*...In the present case the ex parte applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized...*

Therefore, the law as it stands, no execution can be levied against the property of a Government and or a County Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of mandamus is not complied with. See **Republic versus Attorney General & another ex-parte Stephen Wanyee Roki (2016) eKLR**.

Application by the respondent with regard to execution proceedings commenced by the claimant are irregular is correct as set out above. The warrants of dated 14<sup>th</sup> February, 2020 together with the proclamation and notice of attachment dated 18<sup>th</sup> February, 2020 and issued to Direct 'O' Auctioneers are irregular. These warrants are recalled and set aside.

**Accordingly, application dated 21<sup>st</sup> February, 2020 is found with merit and is hereby allowed as prayed, notice of attachment dated 18<sup>th</sup> February in execution of decree and proclamation by Direct 'O' Auctioneers against the respondent is hereby set aside. Save costs due to the auctioneers shall be borne by the claimant and each party to bear own costs for the application.**

Dated and delivered electronically this 25<sup>th</sup> June, 2020.

**M. MBARU JUDGE**