



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA
AT NYERI
CAUSE NO. 18 OF 2015

FRANCIS KARONGO WAGANA.....CLAIMANT

VERSUS

NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES (NUWASE).....RESPONDENT

AND

NYERI WATER & SANITATION COMPANY LTD.....1ST GARNISHEE

NAIROBI WATER & SANITATION COMPANY LTD.....2ND GARNISHEE

NAKURU WATER & SANITATION COMPANY LTD.....3RD GARNISHEE

KERICHO WATER & SANITATION COMPANY LTD.....4TH GARNISHEE

KISUMU WATER & SANITATION COMPANY LTD.....5TH GARNISHEE

RULING

1. The Application before me is the notice of motion application dated 1st July 2020 expressed to be brought under Order 23 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1, 2, 3 and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya seeking the following orders:-

i. Spent

ii. That a Garnishee Order Nisi do issue against the Garnishees ordering all union dues from them due to the judgment-debtor be attached to satisfy the decree issued on 4th September 2019 together with interest and costs awarded to the applicant until the decree is satisfied.

iii. That the Garnishees do appear before court on an appointed date and time to show cause why the garnishee order nisi should not be made absolute and that the sum of Kshs. 1,264,000/- plus interest should be recovered from the union dues each of the Garnishees pays to the Respondent until full satisfaction of the decree and further costs of the garnishee proceedings.

iv. Costs of the application be provided for.

The application is supported by the affidavit of even date sworn by Mr. Francis Karongo Wagana the Claimant herein. In the affidavit, he deponed that Judgment in the matter was delivered on 9th April 2019 and that the costs were subsequently assessed by the Deputy Registrar of the Court. He deponed that a decree was accordingly issued on 4th September 2019 and he instructed auctioneers to attach the Respondent's property at their Buru Buru Shopping Centre office. He stated that the auctioneers were however unable to execute the warrants because the Respondent's office is not operational. He deponed further that the Respondent receives monthly union dues from its members who are employees of various water companies within the Republic of Kenya including the garnishees herein. He deponed that he can only execute the judgment by garnishee orders against the dues owing to the Respondent before such dues are received by the Respondent.

2. The Respondent was opposed and filed a Replying Affidavit sworn on 27th July 2020 by its General Secretary Mr. Elijah Otieno Awach.

He deponed that the decree was not relayed to the Respondent for approval before it was extracted and signed by the Deputy Registrar contrary to Order 21 Rule 8(2) of the Civil Procedure Rules. He deponed that the Party and Party Bill of Costs and the Notice of Taxation were also not served and similarly, no notice of intention to execute was served. He deponed that the Court should take judicial notice that there is no water company known as Nairobi Water and Sanitation Company Ltd. He deponed that the Respondent has no member from any of the garnishees except Kisumu Water & Sanitation Company Ltd and the Nairobi City Water & Sewerage Company Ltd where it has 6 members. He deponed that the Respondent is not owed any union dues by the garnishees as alleged. He deponed that the Respondent has filed an appeal against the judgment the Applicant is seeking to execute.

3. The 1st Garnishee also filed a Replying Affidavit sworn by Peter Gichaaga, its Managing Director on 14th July 2020. He deponed that the unionisable employees of the 1st Garnishee were previously represented by the Respondent but later communicated their cessation of membership to the Respondent and instructed the 1st Garnishee to stop all contributions to the Respondent. He deponed that the employees instead joined Kenya County Government Workers Union (KCGWU). He deponed that the 1st Garnishee entered into a recognition agreement with Kenya County Government Workers Union on 10th March 2017 in accordance with the Labour Relations Act and as such the 1st Garnishee is bound to remit the employees' contributions to KCGWU as provided by Gazette notice no. 1069B dated 2nd August 2013. He deponed that the 1st Garnishee does not hold any monies and does not remit employees' contributions to the Respondent. He deponed that further, the members' deductions are remitted to the Union and the 1st Garnishee only acts on instructions for any remittances and deductions. He deponed that the 1st Garnishee is an agent of the County Government and is a private company rendering public services controlled by public authorities and hence falls within the ambit of the Government Proceedings Act and Order 29 of the Civil Procedure Rules apply. He deponed that any execution against it is irregular.

4. By consent of the Claimant, the 1st Garnishee and the Respondent, the Court directed that the application be disposed by way of written submissions. However, by the time of writing this Ruling, only the 1st Garnishee had filed its submissions. It was submitted that by the time the decree herein was issued on 4th September 2019, the employees of the 1st Garnishee had quit membership with the Respondent in October 2016. The 1st Garnishee submitted that in any event it is an agent of the Government and hence falls within the ambit of the Government Proceedings Act and Order 29 of the Civil Procedure Rules and any executions against it would be irregular. The 1st Garnishee cited the case of **Mengich t/a Mengich & Co. Advocates v Joseph Mabwai & 10 Others [2018] eKLR** to support its contention that it was improperly enjoined since the applicant has not demonstrated how the company is indebted to the Respondent. The 1st Garnishee further cited the cases of **Kennedy Wainaina Ngenga v County Government of Nairobi; Co-operative Bank of Kenya Limited (Garnishee) [2019] eKLR** and **Barnabas Kariuki v Nyeri Water & Sewerage Company Ltd MELC No. 65 of 2018** issued on 26th July 2019 (Unreported) to support the position that although the 1st Garnishee is a private company, it is an agent and instrumentality of the local government and hence the Government Proceedings Act and Order 29 of the Civil Procedure Rules apply to it making any executions against it irregular.

5. This application raises only one issue for determination namely, whether garnishee orders as sought in the motion can be issued against the Garnishees herein. In the case of **Mengich t/a Mengich & Co Advocates & Another v Joseph Mabwai & 10 Others (supra)** it was held that

12. Second, being a garnishee application, the only proper party to be garnisheed is the Bank. The rest of the Respondents are improperly enjoined in the application since they are not holding any money capable of being garnisheed nor has it been alleged they hold any funds either individually or jointly. There is nothing to show that they are indebted to a judgment debtor as the law requires.

13. My above view is fortified by Order 23, Rule 1 of the Civil Procedure Rules, 2010 on attachment of debts which provides that:-

1.(1) 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

Further in relation to executions against a Government entity, the Government Proceedings Act applies. Section 17 of the Government Proceedings Act provides:

17. 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.

The question may arise as to whether this provision applies to County Governments as well or only to National Government. The Government Proceedings Act does not define the term "Government" and neither does such a definition appear in Article 258 of the Constitution. However, an answer may be found in Section 2 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya. This section provides:

"the Government" means the Government of Kenya

Article 189(1)(a) of the Constitution provides that Government at either level shall perform its functions, and exercise its powers, in a

manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level. In my view a holistic approach to this provision would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in the spirit of co-operation and complementarity. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution. Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, section 7 of the Sixth Schedule to the Constitution (Transitional And Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

6. It follows therefore that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels – National Government represented by the Executive Arm headed by the President of the Republic of Kenya and comprising of the 3 arms of Government – Executive, Judiciary and Legislature; and the County Government headed by Governors. Noting that Article 189(1)(a) of the Constitution requires that the Constitutional status and institutions of government at both the National and County levels be respected, I would hold that in my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.

7. The notice of application before me must fail because the entities enjoined in the matter are agents and instrumentalities of the County Governments. Although they are limited liability companies, the provisions of the Government Proceedings Act equally applies to them and execution cannot issue against them without following the laid down procedures in executing against the Government. Additionally, there was no demonstration that the Garnishees have been recipients of monies for and on behalf of the Respondent as to permit a reach for them through Garnishee proceedings. As the Applicant failed to satisfy the requirement to pave way for issuance of garnishee, I would therefore dismiss the application and order that each party bears their own costs.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2020

Nzioki wa Makau

JUDGE