



**BGP Kenya Limited v Erin Energy Kenya Limited; Ministry of Energy (Garnishee) (Commercial Case 269 of 2017) [2025] KEHC 9428 (KLR) (Commercial and Tax) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9428 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 269 OF 2017**

**AA VISRAM, J**

**JUNE 26, 2025**

**BETWEEN**

**BGP KENYA LIMITED ..... PLAINTIFF**

**AND**

**ERIN ENERGY KENYA LIMITED ..... DEFENDANT**

**AND**

**MINISTRY OF ENERGY ..... GARNISHEE**

**RULING**

1. The facts giving rise to the present applications are common ground and can be gleaned from the parties' pleadings and the court's ruling of 25<sup>th</sup> May, 2018. The Garnishee ("the Ministry") entered into four (4) Production Sharing Contracts (PSC) for oil blocks L1B, L16, L27, and L28 on 10<sup>th</sup> May, 2012, with CAMAC Energy Kenya Limited, which later changed its name to Erin Energy Kenya Limited, the Defendant herein ("Erin"), for purposes of conducting petroleum exploration development. Erin then subcontracted the Plaintiff ("BGP") sometime in the year 2014, to carry out 2D Seismic Data Acquisition and Processing Services on its two Oil Exploration Blocks, to wit, No. L1B and L16. Consequently, the two parties entered into two contracts dated 23<sup>rd</sup> September, 2014 and 13<sup>th</sup> October, 2014, respectively.
2. BGP claimed that under the terms of the contracts, it used its resources, fulfilled its obligations, and completed the required work on time and to Erin's satisfaction. However, Erin failed to pay the full amount of the invoices, leaving an outstanding balance of USD 9,521,315.49 since February 2015. As a result, BGP filed this suit against Erin.



3. On 1<sup>st</sup> August, 2017, a default judgment was entered in BGP’s favour for USD 12,235,688.70, and a formal decree for that amount was issued on 1<sup>st</sup> October, 2018.
4. In an effort to realize the fruits of its judgment, BGP commenced various execution proceedings which led to Warrants of Arrest being issued by the court against Erin’s directors. Faced with the foregoing realities and in part settlement of the decretal sum, the parties entered into a consent dated 21<sup>st</sup> November, 2022, that was adopted as an order of the court, and which stated in part, that ‘[T]he legal ownership, use and possession of the Seismic Data acquired by the Plaintiff in favour of the Defendant pursuant to the two 2D Seismic Service data acquisition contract dated 23<sup>rd</sup> September, 2014 and 13<sup>th</sup> October, 2014 in respect to two oil exploration Block No. L1B and L16 within the Republic of Kenya be and is hereby vested and remained to the Plaintiff, BGP Kenya Limited in part settlement of judgment and the decree herein’ (“the Consent Order”)
5. The terms of the Consent Order triggered the filing of two applications by BGP and the Ministry. BGP’s application is dated 16<sup>th</sup> November, 2023, and seeks an order directing the Ministry to deliver the Seismic Data in compliance with the terms of Consent Order, whereas the Ministry’s application is dated 25<sup>th</sup> April, 2024, and seeks to set aside the Consent Order. The court directed that the two applications be heard and determined together, and the same were canvassed by way of written and oral submissions by the parties’ respective Counsel.

### **BGP’s Application**

6. BGP’s application is based on the facts set out in its motion and the supporting affidavit of its General Manager, Zhang Zhongmin, sworn on 16<sup>th</sup> November, 2023. BGP states that it obtained a judgment for USD 12,235,686.67, together with interest and costs, and extracted a decree which remains unsatisfied. It further states that the decretal sum relates to the acquisition and supply of seismic data to Erin for use in its oil exploration blocks. The data was delivered to Erin on 16<sup>th</sup> March, 2015, 5<sup>th</sup> May, 2015, and 2<sup>nd</sup> September, 2015.
7. BGP averred that Erin has no known assets within the jurisdiction and, pursuant to a Consent Order, transferred ownership of the seismic data to BGP in partial settlement of the decree. BGP further deposed that the Ministry is currently in possession of the seismic data but has refused to release it, despite multiple requests, and being served with the Consent Order. BGP contended that it is seeking to recover the judgment amount and requires court assistance to enforce the judgment. It submitted that it is fair and just for the court to direct the Ministry to release the seismic data because it is lawfully entitled to the fruits of its judgment.

### **The Ministry’s Reply**

8. The Ministry responded to BGP’s application through a replying affidavit sworn by its Principal Secretary, Mohamed Liban, on 25<sup>th</sup> April, 2024. He deposed that Clause 14(2) of the Production Sharing Contracts required Erin to retain all geological and geophysical information and data relating to the contract area, and to deliver a copy of that information, including data and interpretations, to the Ministry. He stated that the Contracts did not grant Erin any legal ownership or agency rights over the seismic data. He further noted that it was standard practice for oil companies to subcontract data acquisition, processing, reprocessing, and marketing. In that regard, by a letter dated 2<sup>nd</sup> September, 2014, Erin had informed the Ministry that it had contracted BGP to conduct 2D seismic surveys on the relevant oil blocks.



9. The Ministry stated that Erin had requested additional support, which the Ministry provided. However, it clarified that this support did not amount to an endorsement or validation of any alleged contract between BGP and Erin. The Ministry asserted that neither party had ever provided it with a copy of any such contract, nor had they involved the Ministry in any capacity. It maintained that Erin had no lawful authority to transfer ownership of, or otherwise deal with, the data, information, or interpretations relating to the contract area. According to the Ministry, all geological and geophysical data and interpretations remained the property of the Government of Kenya, held under the custody of the Ministry. Consequently, the Ministry stated that it was never a party to the proceedings and did not consent to the transfer of any proprietary rights over the seismic data or related materials. It took the view that the Consent Order was null and void ab initio, having been obtained through a misrepresentation of facts and a misunderstanding of the law, and therefore, ought to be set aside.
10. The Ministry submitted that the procedure for executing judgments against the Government is governed by the *Government Proceedings Act* (Chapter 40 of the Laws of Kenya), which prohibits execution or attachment of Government property in satisfaction of decrees and judgments. It further argued that under the Civil Procedure Rules, 2010, garnishee orders cannot be issued to attach property that belongs wholly to the Government, whether such property is held in the accounts of a Government department or agency. The Ministry emphasized that, as a government entity funded by the National Treasury, it is subject to the principles of public finance management under the *Public Finance Management Act* (Chapter 412A of the Laws of Kenya). Accordingly, all property in its custody is public property belonging to the State and is protected from execution or attachment by garnishee proceedings.
11. For these reasons, the Ministry argued that granting the orders sought by BGP would contravene both statutory provisions and the constitutional principles of public finance management. It maintained that BGP has no enforceable claim against the Ministry, and that it is in the public interest for BGP's application to be dismissed in its entirety.

### **The Ministry's Application**

12. The Application is grounded on the facts set out on the face of the motion and the further facts set out in its supporting affidavit and supplementary affidavit sworn by Mohamed Liban on 25<sup>th</sup> April, 2024 and 1<sup>st</sup> August, 2024, respectively. It reiterated that the Consent Order is unlawful because it concerns the attachment of the property belonging to the Government of Kenya, and further, that the Ministry was not a party to the suit. It argued that the Consent Order ought to be set aside because the data is public property.

### **BGP's Reply**

13. BGP responded to the Ministry's application through a replying affidavit sworn by its General Manager, Zhan Hanhui, on 7<sup>th</sup> June, 2024. BGP contended that the application was ill-conceived and legally untenable. It argued that the Ministry was not a substantive party to the proceedings and was therefore not properly before the Court to seek any orders in its favour. BGP further stated that the dispute had already been fully determined between the relevant parties, and there were no outstanding issues for the Court to consider, as it was now functus officio. BGP maintained that, having acknowledged it was in possession of the seismic data, the Ministry had no legal rights over it and was obligated to release the data to BGP without delay.
14. BGP further stated that Erin had informed it that it was unable to settle the decretal sum, and that, in those circumstances, ownership of the data reverted to BGP. It asserted that the Production Sharing



Contract did not grant the Ministry any proprietary rights over the data. Even if it did, BGP argued that such rights were inapplicable in this case, as Erin had not acquired legal ownership of the data. No payment had been made, and ownership remained with BGP until full payment was received. BGP added that Erin had informed it that the data had been handed over to the Ministry for safekeeping, and that BGP could collect it directly from the Ministry. BGP reiterated that it had written to the Ministry on numerous occasions requesting release of the data, but those letters were neither acknowledged nor answered.

15. BGP argued that the Ministry was not a party to the Consent Order and therefore had no basis to seek its setting aside. It contended that the Ministry could not be allowed to benefit from a transaction from which it had not made any contribution. Nor could it lawfully claim ownership of the data without paying for it. BGP submitted that if the Ministry wished to convert the data into its own property, it ought to first pay the decretal sum of USD 12,235,686.70.
16. BGP clarified that it had no interest in the oil blocks, which belonged to the Ministry, but only in the seismic data, which it had acquired at its own expense under contracts with Erin. On these grounds, BGP urged the Court to dismiss the Ministry's application with costs.

### **BGP's submissions**

17. In its submissions, BGP reiterated the averments set out in the pleadings that I have highlighted above. It submits that having expended its resources to acquire and process the subject Seismic Data, it is entitled under the equitable doctrine of tracing to trace the said data and recover it as its rightful property given the undeniable fact that the said was not paid for by Erin. That the Ministry has no proprietary rights and/or claims on the subject Seismic Data as the Defendant only remitted the same to it for purposes of safekeeping in accordance with the terms of the Production Sharing Contract between Erin and the Ministry.
18. BGP submits that the Ministry admitted that the said Clause 14(2) of the PSC only allowed it to keep the subject data for safekeeping but not own the same. Further, that the Ministry is not a party to this suit and therefore has no locus to apply for the orders sought in its application of 25<sup>th</sup> April, 2024. It relies on various decisions including *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation*; *Kenya Commercial Bank Group Limited (Garnishee)* [2021] KEHC 13342 (KLR) and *Safaricom Limited v King'oo & another* [2024] KEHC 4698 (KLR) to submit that a Garnishee is not a party to a suit and that such a party is limited to the extent of the execution proceedings. Consequently, that the role of the Ministry in the garnishee proceedings herein is not to try setting aside consent orders it was not a party to, rather, its role is quite circumscribed and limited to proving whether they have in storage the subject Seismic Data belonging to Erin and if not, they are to adduce evidence to that end.
19. Thus, BGP submits that the orders sought by the Ministry cannot lawfully issue as by granting them, the Court would be making forays beyond the narrow limit of the execution proceedings herein and foraging into the substantive dispute between the Erin and BGP contrary to the holding in *Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69* where the Court of Appeal stated that "a person who is not a party to legal proceedings cannot reap benefits thereof." Consequently, that allowing the Ministry to wade uninvited into these proceedings and purport to set aside the Consent Order would be prejudicial to the interests of the primary parties herein.
20. On the merits of the Ministry's application, BGP submits that given that a consent order can only be set aside on grounds that would justify the setting aside of a contract, it is of relevance that the



Court addresses itself on whether a party not privy to a consent order can apply to have the said order set aside given the doctrine of privity of contract. That the fact that the Ministry holds in storage the Seismic Data subject of the Consent Order does not in law entitle it to be a party to the consent thereto nor seek to have the consent set aside. It relies on the position of Hancox JA.,(as he was then) in *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] KECA 58 (KLR) while quoting Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110 that: -

“ As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

21. From the above, BGP reiterates that the Ministry, not being a party to the Consent Order, cannot purport to have it set aside as he is legally barred from doing so by the longstanding principle of privity of contract. As such, BGP submits that the Ministry has not met the threshold for setting aside the Consent Order as the doctrine of privity prohibits it from doing so.
22. In respect of BGP's application, it submits that the same is not only grounded on the terms of the Consent Order but also on the doctrine of tracing and it relies on Mabeya J.'s decision in *re Cytonn High Yields Solutions (In Liquidation)* [2024] KEHC 81 (KLR). That from the foregoing, BGP only needs to establish a proprietary base for the doctrine of tracing to come to its aid and that it has expressly stated that it used its own funds to acquire and prepare the subject Seismic Data and upon default of Erin in paying for the same, BGP moved the court which entered a Judgment in its favor and Erin, in partial settlement of the Decree emanating from the suit agreed to hand over the subject Seismic Data, which it never paid for to BGP. That it is therefore clear beyond peradventure that BGP not only has a well-coalesced proprietary base in the subject data herein, but is also entitled in law and equity to trace them and use the Seismic Data in recovering its expenses thereto.
23. To reinforce the foregoing fact, BGP draws the court's attention to the holding in *Middle East Bank Kenya Ltd v Widad Hussein Badru & another* [2020] KEHC 9755 (KLR) where the Court was persuaded that a party has right to trace and acquire property acquired using funds stolen from it. As such, BGP restates that if the Ministry wants to acquire the subject Seismic Data, then it should settle the decretal sum and retain the Data otherwise it would be unjust for the Ministry to purport to convert and acquire such an expensive Seismic Data for free at the expense of BGP who committed its expertise and resources to acquire the same.
24. In summary, BGP submits that garnishee proceedings are special execution proceedings wherein the garnishee has a limited and circumscribed role to play. Consequently, the Ministry cannot purport to set aside the Consent Order given that it was not a party to the substantive suit between BGP and Erin, and that its role as a garnishee is limited to revealing whether it has the Subject Seismic Data or not. Further, given that it was not a party to the substantive suit and the Consent Order, the Ministry's application does not meet the threshold for the setting aside of the Consent Order, given the Supreme Court's holding in the case of *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] KESC 2 (KLR). BGP also submits that by dint of the Consent Order and the equitable doctrine of tracing, it is entitled to the orders sought in its application as it is clear that it used its own resources to acquire and process the Subject Seismic Data, which are being kept by the Ministry for safekeeping. BGP underpins that the Ministry is not a party to this suit and has not sought to be joined to the proceedings, it has no legal and/or beneficial interest over the Seismic



Data in issue and as such it is only fair that it be ordered to release the same to BGP failing to which it should settle the decretal sum herein. In the circumstances, it urges the court to allow its application dated 16<sup>th</sup> November, 2023, as prayed.

### **The Ministry's submissions**

25. The Ministry submits that the conditions for setting aside a consent are similar to those vitiating a contract as guided by the Court of Appeal in *Flora N. Wasike v Destimo Wamboko* [1985] KECA 149 (KLR) and that Order 52, rule 15 of the Rules, vests the court with jurisdiction to set aside an order made ex-parte. The Ministry relies on the dissenting judgment of Koome JA., (as she was then) in *Ransa Company Ltd v Manca Francesco & 2 others* [2015] KECA 139 (KLR) where the Learned Judge allowed an appeal in a matter where the Appellant was not a party to the consent despite being a party to the suit. The Ministry submits that the Consent was thus entered into illegally and without furnishing the court with material evidence to confirm that indeed Erin owned the seismic data and it relies on the decision of the Court of Appeal in *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd* [1980] KEHC 11 (KLR).
26. It is the Ministry's further submission that BGP has invoked the wrong provisions of the law that ground its application. That BGP was not only required to prove that the subject data belongs to Erin but also annex an inventory of the property to be attached and a description of the same. Conversely, that BGP has not adduced any evidence to show that the subject data, which is public property, belongs to Erin and similarly, there is no inventory availed nor description of the property allegedly being attached. As a result, that this court has insufficient information on the property to be attached to enable it to arrive at an informed decision.
27. Additionally, the Ministry submits that Order 23, rule 1 of the Civil Procedure Rules relates to the attachment of debts in satisfaction of a decree from another person who is indebted to the judgment-debtor and it also relies on the court's decision in *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation* (supra). Notwithstanding, it submits that Section 21(4) of the *Government Proceedings Act* states that, no execution, 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 and that 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, which is in tandem with Order 29, rule 4 of the Civil Procedure Rules which specifically prohibits attachment of government property. The Ministry also relies on the Court of Appeal's decision in *Kisya Investments Ltd v. AG* (2005) 1 KLR 74 to reiterate that the essence of all the foregoing provisions of the law is that they protect and insulate the government against any form of execution or attachment of its property, assets, funds or personnel in or during the enforcement of any judgment, decree or other orders of the court against it or any other person as a result of which it affects the government's property.
28. Given the foregoing, the Ministry submits that the Consent Order constitutes an illegality, is against the policy of the court as it was made through misrepresentation of facts and ought to be set aside and the application dated 16<sup>th</sup> November, 2023, ought to be dismissed with costs.

### **Analysis and Determination**

29. I have considered the grounds set out in the applications, the responses thereto, and the submissions of the parties, all of which I have highlighted above. The main issues for the Court's determination are whether a garnishee order should be issued directing the Ministry to deliver to BGP the subject Seismic Data as per the Consent Order, or whether the Consent Order should be set aside?



30. I propose to first deal with the issue of whether the Consent Order should be set aside because this will determine whether the Ministry may be directed to deliver the subject data. I also note that BGP has challenged the Ministry's locus to file the present application. I will deal with that issue subsequently.
31. The principles governing setting aside of a Consent Order are well established within this jurisdiction. In *Brooke Bond Liebig v Mallya* [1975] EA 266 Mustafa Ag. VP expressed the following principles:
- The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.
32. In *Flora N. Wasike v Destimo Wamboko*(supra) Hancox JA.,(as he was then) cited Setton on Judgments and orders (7<sup>th</sup> edition) vol 1 page 124, and reiterated that:-
- “Any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”
33. The Ministry stated that the Consent Order was entered into illegally and without furnishing the court with material evidence to confirm whether Erin owned the seismic data. It stated that the seismic data is public property with both public finance and public security ramifications and that it is the owner of that data by dint of Clause 14(2) of the PSC which provides as follows:-
- ..[Erin] shall record, in an original or reproducible form of good quality, and on seismic tapes where relevant, all geological and geophysical information and data relating to the Contract Area obtained by the Contractor and shall deliver a copy of that information and data, the interpretations thereof and the logs and records of boreholes and wells, to the Minister, in a reproducible form, as soon as practicable after that information, those interpretations and those logs and records come into the possession of [Erin]' (Emphasis mine)
34. A plain reading of the Production Sharing Contract (PSC) makes it clear that Erin was not granted any legal ownership of, or agency over, the seismic data. The contract contemplated that ownership of the data would rest with the Ministry, and Erin's role was limited to recording and delivering the data to the Ministry. Although Clause 7 of the PSC permitted Erin to engage third parties, such as BGP, to provide services related to petroleum operations, the Ministry was not a party to those contracts. It follows therefore that any issues concerning whether Erin paid for those services were not the concern of the Ministry, because it was not privy to the contractual arrangements between Erin and its various service providers.
35. The Court also notes that in its plaint dated 27<sup>th</sup> June, 2017, BGP did not seek to recover the seismic data from either Erin or the Ministry. The default judgment that was entered in its favour made no reference to the seismic data. What BGP sought in that suit, was a monetary award of USD



- 9,521,315.49 and USD 2,714,371.18; interest; a permanent injunction restraining the defendant from selling, disposing of, alienating, or otherwise transferring its oil exploration blocks in Kenya pending full payment and settlement, and costs—which is precisely what it was awarded.
36. BGP now, under the present application, is claiming ownership of the seismic data pursuant to the Consent Order. However, based on the facts as set out above, it has no rights to do so because Erin had no capacity to give, by way of consent judgment, or otherwise, what did not belong to it in the first place. Accordingly, I find that the Consent Order was entered into on the basis of either a misrepresentation of fact, or mistake, because Erin had no legal capacity to transfer ownership of the data. I reiterate, the data never belonged to Erin in the first place.
37. I take note of the decision of the Court of Appeal in *Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu*(supra) where the court stated that “a person who is not a party to legal proceedings cannot reap benefits thereof” however, the same court went on to interpret “any person” as anyone who is adversely affected by a decision of the court. The appellate court in *Pravin Bowry v John Ward & another* [2015] KECA 215 (KLR) however stated that “This means that the definition of a person is not restricted to the parties in the proceedings culminating in the decision sought to be appealed”. (Emphasis mine). As regards the issue of locus, in my view, the Ministry is an affected party by the Consent Order, and therefore, has a right to approach the court to seek redress even though it was not a party to the suit giving rise to the Consent Order.
38. Having stated the above, I wish to clarify that this does not affect the judgment and decree between Erin and BGP for the sum of USD 12,235,688.70, which has not been set aside, and remains valid. However, that sum may not be offset by transferring the ownership of the subject data to BGP. This is because as per the terms of the PSCs, the data belongs to the Ministry and not to Erin. Erin therefore has no legal capacity to transfer or deliver the said data to BGP in lieu of such payment arising out of the said judgment.
39. Based on the reasons set out above, I am satisfied that the Consent Order ought to be set aside.
40. Having found the above, there is no basis upon which execution proceeding may commence against the Ministry. In any event, the implication of having found that the data belongs to the Ministry, I am of the opinion that the same is protected from execution and attachment under Section 21(4) of the [Government Proceedings Act](#), which provides as follows: -
- 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.
41. Guided by the above, I am satisfied that an Applicant may not move the court by way of ordinary court proceedings grounded in Order 23 of the Civil Procedure Rules where government entities are involved. An Applicant ought to follow the process and procedure set out in the [Government Proceedings Act](#) if it intends to compel the Government to satisfy a decree. Therefore, even if BGP held a decree against the Government, which it does not, it would still have to pursue the appropriate remedy for execution against the Government, which remedy lies in Judicial Review orders of Mandamus, and not the present process. (see *Five Star Agencies Limited & another v National Land Commission & 2 others* [2024] KECA 439 (KLR)). BGP has no such decree, and this was not done. I find that the present application is not appropriate or recognized alternative.



42. Further to the above, as regards the appropriate process in relation to execution where the Government is involved, Section 21(1)-(3) of the [Government Proceedings Act](#) provides as follows: -

1. 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.

- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

- (3) 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.

43. Based on the above, it is also evident, that before a court issues such an order against Government, an Applicant ought to ensure and provide evidence of compliance with the provisions of Section 21 in respect of issuance of certificate of costs, and certificate of order against the Government. In this regard, Odunga J, (as he was then) in *Republic v Permanent Secretary Office Of The President Ministry Of Internal Security & another Ex-Parte Nassir Mwandishi* [2014] KEHC 6027 (KLR) stated that “The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view, is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.”

44. Based on the facts in the present matter, therefore, even if the Consent Order had been valid, which is not the case, the above procedure is still mandatory, and was not complied with.

45. Based on reasons set out above, I find and hold that the garnishee proceedings instituted by way of application dated 16<sup>th</sup> November, 2023, and brought under the provisions of inter alia under Order 23, rule 1, 2, and 3 of the Civil Procedure Rules are accordingly incompetent, bad in law and unsustainable. The said provisions do not apply in execution against the Government and/or State organs such as the Ministry.

### **Conclusion and Disposition**

46. The upshot is that the Plaintiff’s application dated 16<sup>th</sup> November, 2023, is hereby dismissed with costs to the Ministry.



- 47. The Ministry’s application dated 25<sup>th</sup> April, 2024, is with merit and the same is allowed with costs.
- 48. The Consent Order dated 21<sup>st</sup> November, 2022, and adopted as an order of the Court on 29<sup>th</sup> November, 2022, is hereby set aside.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF JUNE, 2025**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

Court Assistant: Sakina

.....for Plaintiff

.....for Defendant

