



LRMG Proprietary Limited v JKUAT Enterprises Limited (Miscellaneous Application E852 of 2021) [2024] KEHC 886 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 886 (KLR)

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

MISCELLANEOUS APPLICATION E852 OF 2021

FG MUGAMBI, J

JANUARY 30, 2024

BETWEEN

LRMG PROPRIETARY LIMITED CLAIMANT

AND

JKUAT ENTERPRISES LIMITED RESPONDENT

RULING

Background

1. The parties herein were involved in arbitration proceedings. An award was entered in favour of the claimant and adopted as an order of this Court on 10th March 2023. By this application dated 18th April 2023, brought under section 21(4) of the *Government Proceedings Act*, Cap 40 and order 22 rule 22 of the *Civil Procedure Rules*, the respondent (who is the applicant in this instance), seeks to stop execution of the said decree.
2. The application is premised on the grounds on the face of it and the supporting and further affidavits sworn by Martin Muange Mweu, the applicant's Head of Consultancy on 18th April 2023 and 15th May 2023 and written submissions dated 25th May 2023.
3. The applicant's case is that JKUAT Enterprises Limited is wholly owned by Jomo Kenyatta University of Agriculture and Technology (JKUAT) which is a government institution wholly owned by the Ministry of Education and is thus a state corporation. As such, the proclamation and intended attachment and sale is illegal and un-procedural as it contravenes section 21(4) of the *Government Proceedings Act*. The applicant also fears that some of the property which is owned by JKUAT University listed in the schedule of assets for attachment shall be wrongly attached and sold in execution of the decree.



4. The application is opposed through the affidavit sworn by Francis Nduta Karingi, the respondent's Senior Partner on 5th May 2023 and written submissions dated 7th June 2023.
5. The respondent argues that the instant application is fatally defective, incompetent, bad in law and should be struck out with costs. This is so because HCC Misc. No. 852/2021 was a miscellaneous application already decided and could therefore not be sustained for a subsequent application. The respondent also submits that the injunctive and declaratory orders sought are final in nature and cannot be granted without a suit and that this Court therefore has no jurisdiction to hear and determine the instant application.
6. The respondent contended that the applicant is not "the Government" or a "Government Department" for purposes of the *Government Proceedings Act* and that the applicant only filed the application at the point of execution seeking to avoid its obligations. The respondent highlighted that the applicant duly entered into a contract with it for the supply of services as a limited liability company and hired private lawyers as an independent body and that the applicant is a business entity incorporated under the *Companies' Act*.

Analysis

7. I have carefully considered the pleadings, evidence, submissions as well as the authorities cited by Counsel in support of their depositions. The main issues that stand out for determination are:
 - i. Whether the application of 18th April 2023 is competent;
 - ii. Whether the applicant is a state corporation and
 - iii. Whether section 21(4) of the *Government Proceedings Act* is applicable to the applicant.

Whether the application of 18th April 2023 is competent;

8. Misc. Application No. E852 of 2021 was filed by the claimant seeking to have the arbitral award of 29th June 2021 recognized and enforced as an order of this court. The application was opposed by the applicant herein. It was heard and determined, thereby giving raise to the execution of the arbitral award. The applicant now challenges the mode of execution of the decree.
9. The truth is that there are no specific rules or guidelines on how exactly a decree extracted from an arbitral tribunal's decision would be executed. There does appear to be an unwritten acknowledgement that the rules and procedures governing execution at the High Court, would be applicable. (See *Equity Bank Limited v Adopt A Light Limited*, [2015] eKLR).
10. The basis for this is that once the arbitral process determines the issues placed before it and a decree is issued, the Arbitration Tribunal must resort to the High Court when executing the decree. I do agree with the Learned Judge in *Equity Bank Limited v Adopt A Light Limited* (*supra*) that the *Civil Procedure Act* ought to apply when a decree extracted from a decision of an arbitral tribunal is to be executed, as in the present case.
11. I have perused the record before me. For precisely these reasons I am persuaded that the position stated by the claimant is the correct one, which is that that the applicant ought to have filed a Notice of Motion application, premised on a suit, since the Miscellaneous Application had been determined and could not be sustained for a subsequent application. Technically therefore, the application as brought is fatally defective and is one for striking out.



12. Even if I was wrong under any circumstances and I had to determine the matter, for the sake of finality, I may perhaps comment on the application of the [Government Proceedings Act](#) herein.
13. Section 2 of the [State Corporations Act](#), No. 18 of 1986 defines a state corporation. Section 2(c) of the [Act](#), which the applicant relies on, states that a state corporation is:
- “(c) a bank or a financial institution licensed under the [Banking Act](#) (Cap. 488) or other company incorporated under the [Companies Act](#) (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;...”
14. The evidence on record confirms that the applicant is a private limited liability company incorporated in 2002, under the [Companies Act](#) of 1978, Cap 486, Laws of Kenya (Repealed), with a nominal share capital of Kshs. 200,000/- and 10,000 shares of Kshs. 20/- each. The applicant was in fact described as such in the contract between the parties, which was the subject of the dispute before the arbitral tribunal.
15. According to the official company search dated 10th January 2023, the sole shareholder of the applicant is JKUAT. JKUAT is established as a body corporate capable of suing and being sued pursuant to section 3 of the [Jomo Kenyatta University of Agriculture and Technology Act](#), Act No. 8 of 1994. The statute gives JKUAT the powers to carry out investments, and the applicant is one such investment vehicle. The structure, governance, management and financing of JKUAT leaves no doubt that it is incorporated as a state corporation due to the high level of management and control that the Government exercises in the Institution.
16. Section 21(4) of the [Government Proceedings Act](#) 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 persons 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.”
17. My reading of the above section is that for any party to benefit from the protection in execution proceedings accorded by section 21(4) of the [Act](#) it must fall within the description of government, a government department or an officer of the government. There is sufficient jurisprudence affirming that state corporations, although controlled and managed by government are not government, a government department or an officer of the government as contemplated by the [Act](#). They are independent legal persons and cannot invoke section 21(4) as a bar to execution.
18. In [Ikoni Prints Media Company Limited V Kenya National Highways Authority & 2 Others](#), [2015] eKLR, the Court observed as follows:
- “Foremost though, it is important to point out that it would not be tenable to invoke the [Government Proceedings Act](#) (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently.
- It is dependent on Government funding but it is not government or servant of or agent of Government for the purposes of the [Government Proceeding Act](#). The 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve



the Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body.”

19. This position was also adopted in *Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 Others*, [supra] eKLR, where the Court observed that:

“The above authority which is of persuasive value upholds the view that a state corporation or parastatal is not automatically subject to the *Government Proceedings Act*. Where proceedings are instituted under this Act the Hon Attorney General will be a party. The Hon Attorney General is not a party in the present proceedings.”

From 2015 when the Arbitration commenced to the point of execution the Applicant has always participated and held itself out as a body corporate and not as a Government department or agency. It is too late in the day for the Applicant to now seek to don a different coat. Its invocation of the *Government Proceedings Act* is but a last-ditch attempt to scuttle the execution proceedings against it. Based on its previous engagement in this matter the Applicant is estopped from relying on the provisions of the *Government Proceedings Act* as a challenge to execution against it. (See also *Anniversary Press (K) Limited v National Water Conservation & Pipeline Corporation*, [2020] eKLR).

20. The rationale for this unanimous view by the Courts is to ensure that the right to access to justice under Article 48 of the Constitution is not infringed. (See *Joseph Nyanamba & 4 others v Kenya Railways Corporation* [supra] and *African Commuter Services Ltd v The Kenya Civil Aviation Authority & 2 Others* [supra]). It also serves to ensure that courts do not act in vain. (See *Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 others* [supra]).
21. In any case, I note that the applicant had already made part payment of the arbitral award being Kshs. 1,485,293/=. This was way back in 2021. There were discussions between the parties on a payment proposal for the balance of the award. All this time up to the point of execution the applicant has always participated and held itself out as a body corporate and not as a Government department or agency. It is too late in the day for the applicant to now seek to don a different coat, hoping to scuttle the execution proceedings against it. I take the view that a state corporation or parastatal is not automatically subject to the *Government Proceedings Act* and for the reasons that I have stated, that section 21(4) is not applicable in the circumstances.

Determination

22. Accordingly, the application dated 18th April 2023 is devoid of merit and is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE

