



Argos Furnishers Limited v County Government of Mombasa; Mwasi & another (Interested Parties) (Civil Case 13 of 2008) [2024] KEHC 10329 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 10329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 13 OF 2008
F WANGARI, J
FEBRUARY 23, 2024**

BETWEEN

ARGOS FURNISHERS LIMITED PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MOMBASA DEFENDANT

AND

GLORIA WANDOE MWASI INTERESTED PARTY

EVANS OANDA INTERESTED PARTY

RULING

1. Judgment in this suit was entered in favour of the Plaintiff. Execution proceedings commenced and there was partial payment of the decretal sum awarded to the Plaintiff. The Defendant thereafter failed to complete its payment towards the decretal sum.
2. Pursuant to a consent between the parties dated 26/1/2022 and which was adopted as the orders of the court on 27/1/2022, the Plaintiff sought for warrants of arrest against the Interested Parties who were employees of the Defendant as the Chief Finance Officer and County Executive of Finance respectively. Warrants of arrest were issued by the Deputy Registrar as prayed on 25/5/2023.
3. It is as a result of the said warrants of arrest that the Defendant filed the Notice of Motion dated 11/9/2023 seeking for orders of stay of execution of the warrants of arrest issued on 25/5/2023. The Defendant prayed that the warrants of arrest be declared irregular, void and a nullity ab initio as it offended Order 29, Rule 2 of the Civil Procedure Rules.
4. The 1st Interested Party also filed a Notice of Motion dated 12/9/2023 seeking to have the warrant of arrest issued against her be lifted and/ or suspended. She prayed to be given 120 days to comply with the judgment of the court, as she was not in office as at the time of issuance of the warrant of arrest.



5. The Plaintiff filed a Replying Affidavit dated 5/10/2023 in response to the 2 Notices of Motion. It was stated that the warrants of arrest arise from the default clause in the consent order and the applications were meant to deny the Plaintiff/ J.H of his judgment.
6. Parties were directed to file written submissions. Both parties complied. The Defendant filed the submissions dated 23/9/2023 while the Defendant filed their submission dated 23/10/2023.

Analysis and Determination

7. I have considered the parties' pleadings, the written submissions together with the authorities relied upon, as well as the law and in my view, the following issues are for determination;
 - a. Whether the execution proceedings were lawful
 - b. Who bears the costs?
8. On the first issue, the Defendant/J. D stated that the warrants of arrest issued offended section 21 of the [Government Proceedings Act](#), Order 29 Rule 2 and Order 53 of the Civil Procedure Rules.

Section 21 of the [Government Proceedings Act](#) provides as follows;

Satisfaction of orders against the Government

- (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.



- (4) 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.

29 Rule 2 provides as follows;

SUBPARA 2.

Rules to apply to proceedings by or against the Government

SUBPARA (1)

Except as provided by the *Government Proceedings Act* (Cap. 40) or by these Rules-

SUBPARA (a)

these Rules shall apply to all civil proceedings by or against the Government; and

SUBPARA (b)

civil proceedings by or against the Government shall take the same form as civil proceedings between subjects and shall, if no special form is applicable, take the form of a suit instituted by a plaintiff.

SUBPARA (2)

No order against the Government may be made under—

SUBPARA (a)

Order 14, rule 4 (Impounding of documents);

SUBPARA (b)

Order 22 (Execution of decrees and orders);

SUBPARA (c)

Order 23 (Attachment of debts);

SUBPARA (d)

Order 40 (Injunctions); and

SUBPARA (e)

Order 41 (Appointment of receiver).

9. The Plaintiff/ J.C relied on the consent order while applying for the warrants of arrest, and more specifically clause (e) (i) (2) which stated as hereunder;

e) In the event the County Government of Mombasa defaults from the consent:

- (i) In respect to HCCC No. 13 of 2008, the matter shall revert to the consent recorded in court on the 13th February, 2028, wherein:
- (2) Warrants of arrest shall issue by the Court against the persons who at the time occupy the position of the County Executive Finance of Mombasa County and the Chief Finance Officer for the time being.



10. From the above consent, it is clear that it offends the provision of the Government Procedure Act and Order 29 of CPR as stated herein above, and subject to interference by this court. In the Court of Appeal in the case of Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 Law Ag P said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

11. . In Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd [1982] KLR 485, Harris J correctly held inter alia, that –

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

12. In Hirani V. Kassam [1952] 19 EACA 131 the Court of Appeal held;

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

13. Further, it has been held that provisions of Section 21 of the G.P.A must be strictly followed. In Investments Ltd v AG (2005) 1 KLR 74. It was held as follows;

“Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice, the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.... History and rationale of Government’s immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of

- (i). The raising of revenue- (by taxation or borrowing);
- (ii). its expenditure; and



(iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. SEE HALSBURY'S LAWS OF ENGLAND 4TH EDN VOL. 11 PARA 970, 971 AND 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. SEE AUCKLAND HARBOUR BOARD VS. R (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but its Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property."

14. The consent order having been contrary to the public policy, and the Plaintiff having failed to fully comply with the legal provisions on execution, the prayers for stay of execution stand.
15. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh



Rai Estate of & 4 others [2013] eKLR. The Plaintiff/ D.H is still entitled to the fruits of its judgment save for the fact that the execution procedure was unlawful. For the inconvenience caused, the Plaintiff is awarded costs.

- 16 Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The applications dated 11/9/2023 and 12/9/2023 are allowed on the following terms;
 - i. The default clause in the consent order dated 26/1/2022 is hereby set aside as it offends the provisions of section 21 of the *Government Proceedings Act* and Order 22, Rule 2 of the C.P.R.
 - ii. That stay of execution of the warrants of arrests issued on 25/5/2023 is hereby granted.
 - iii. That the Plaintiff/ D.H to comply with Section 21 of the G.P.A and as read with Order 29 of the C.P.R.
 - iv. In the meantime, the Interested Party is still bound by her undertaking in respect to the extension of time to comply with the judgment.
 - v. Parties are at liberty to move the court if need be for orders.
 - b. Costs of the application to the Plaintiff/ D.H

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF FEBRUARY, 2024.

F. WANGARI

JUDGE

In the presence of;

Randiek Advocate for the Plaintiff/ D.H

Lianza Advocate h/b for M/S Kyalo Advocate for the 1st Interested Party

Barile, Court Assistant

