



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.86 OF 2008**

**COUNTY GOVERNMENT OF KILIFI.....PLAINTIFF/JUDGMENT DEBTOR**

**VERSUS**

**JAPHETH NOTI CHARO.....DEFENDANT/DECREE HOLDER**

**RULING**

1. This suit was instituted against the Defendant Japheth Noti Charo by the now defunct Municipal Council of Malindi. On 8<sup>th</sup> May 2013, it was dismissed for want of prosecution with costs awarded to the Defendant.

2. Subsequently, the costs due to the Defendants were taxed at Kshs 212,000/-. By an application dated 5<sup>th</sup> April 2016 the Defendant sought the leave of the Court to substitute the defunct Council with its successor, the County Government of Kilifi for purposes of execution of the decree. That application was not opposed and was allowed as prayed on 18<sup>th</sup> May 2016.

3. On 8<sup>th</sup> June 2016, the Defendant took out a Notice to Show Cause why Execution should not issue against the newly substituted Judgment Debtor. Upon being served with the Notice to Show Cause, the Judgment Debtor filed this Notice of Preliminary Objection dated 14<sup>th</sup> December 2018 objecting to the execution on the following grounds:-

**1. That by dint of Section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya, Article 176(1) (of) the Constitution of Kenya, 2010 and Order 29 Rule 2(2) of the Civil Procedure Rules, 2010, the Notice to Show Cause served upon the Plaintiff on 27<sup>th</sup> November 2018 clearly contravenes the mandatory provisions of the Act and/or laws which stipulate that no execution proceedings can be commenced and/or enforced against the Government.**

**2. The Plaintiff/Judgment Debtor being a Government within the meaning of Article 176(1) (of) the Constitution of Kenya 2010 no execution proceedings can be commenced and/or enforced against it.**

**3. This Honourable Court lacks jurisdiction to hear and determine this matter under Section 6 of the Civil Procedure Act as it is Res Subjudice pursuant to:-**

**a. The( fact that the) subject notice to show cause was earlier served upon the Plaintiff/Judgment Debtor on 23<sup>rd</sup> June 2016 which is pending hearing and determination before this Honourable Court.**

4. The parties subsequently agreed to file Written Submissions in regard to the issues raised in the Preliminary Objection. I have considered the Preliminary Objection as well as the Submissions filed herein by the Learned Advocates for the parties.

5. Section 21(4) of the Government Proceedings Act Cap 40 of the Laws of Kenya provides as follows:-

**“Save as provided in this Section, no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Government of any money or costs, 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.”**

6. Considering the import of this provision in *Republic vs- Otieno Kajwang & Another Exparte Mohamed Muhumed Sirat (Nairobi HC Misc Application No. 316 of 2008)* Odunga J., observed and I agree as follows:-

**“The above provision clearly bars individual liability for orders of payment by the Government, Government Department or Government Officer and further bars execution or attachment against the Government. It is my view that where the Government is found to be liable in Civil proceedings, the only mode of realizing the fruits of Judgment is by way of an order of mandamus...”.**

7. The rationale for the provision barring execution against the Government was stated in *Kisya Investments Ltd vs- Attorney General & Another(2005) IKLR 74*, 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 Judgments 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 4<sup>th</sup> Edition Vol 11 Paragraph 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”**

8. As to whether Section 21 of the Act applies to County Government, I am again in agreement with the determination of Muchemi J in *Josephat Gatheo Kibuch –vs- Kirinyaga County Council (2015) eKLR* where the Learned Judge after considering the definition of the “County Government” under Section 2 of the County Government Act and Article 176 of the Constitution concluded as follows:-

**“In view of the foregoing definitions, a County Government is part of the State or Government. The Constitution of Kenya establishes two levels of Government being the National and the County Government. The provisions of Section 21 of the Government proceedings Act are therefore applicable to proceedings relating to a County Government.”**

9. Considering a similar issue in *Republic –vs- Attorney General & Another exparte Stephen Wanyee Roki (2016)eKLR* Odunga J. observes as follows:-

**“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 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 complementariness. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution.”

10. Arising from the foregoing, I am persuaded that the County Government of Kilifi is a ‘Government’ as per the Government Proceedings Act and the Notice to Show Cause issued to them by the Defendant/Applicant is not sustainable and must fail.

11. Accordingly I uphold the Notice of Preliminary Objection and strike out the Notice to Show Cause.

12. Each Party shall bear their own costs.

**Dated, signed and delivered at Malindi this 5<sup>th</sup> day of December, 2019.**

**J.O. OLOLA**

**JUDGE**



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