Tom Ojienda & Associates v Nairobi City County; Cooperative Bank of Kenya (Garnishee) (Miscellaneous Application E138 of 2021) [2024] KEELC 1662 (KLR) (5 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1662 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION E138 OF 2021

JO MBOYA, J

APRIL 5, 2024

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES ..... APPLICANT

AND

NAIROBI CITY COUNTY ..... RESPONDENT

AND

COOPERATIVE BANK OF KENYA ..... GARNISHEE

RULING

1. The Decree Holder/Applicant herein has approached the Honourable court vide Notice of Motion Application dated the 27th March 2024 brought pursuant to Section 1A, 1B, 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; Order 23 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010; and in respect of which same has sought for the following reliefs;

    i. .....Spent.

    ii. That the Honorable court be pleased to make a Garnishee Order Nisi against Cooperative Bank of Kenya, City Hall Branch Account Number 01141709410000, the Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to credit of Nairobi City County the Judgment Debtor herein, be attached to answer the Decree issued on 19th March 2024 for the sum of Forty-Three Million, Five Hundred and Eighty-Two Thousand, One Hundred and Forty-Five Cents [Kshs.43, 582, 145.40/=] being the amount in respect of which Judgment was entered in favor of the Applicant herein.

    iii. That an order Nisi upon the Garnishee do issue and the same be served on the Garnishee forthwith.

iv. That the Garnishee does appears before this court on an appropriate date and time to show cause why it would not pay the Applicant the sum of Forty-Three Million, Five Hundred and Eighty-Two Thousand, One Hundred and Forty-Five Cents [Kshs.43, 582, 145.40/=] being the decretal sum as per the decree issued on the 19th March 2024.

v. That upon the inter-partes herein of the application, the honorable court be pleased to issue a Garnishee order absolute in terms of [ii] as is enough to satisfy the decretal amount of Forty-Three Million, Five Hundred and Eighty-Two Thousand, One Hundred and Forty-Five Cents [Kshs.43, 582, 145.40/=] as per the decree dated the 19th March 2024.

vi. That the said sums of money being Forty-Three Million, Five Hundred and Eighty-Two Thousand, One Hundred and Forty-Five Cents [Kshs.43, 582, 145.40/=] be remitted into the Applicant's Judgment Holders bank account particulars whereof are given hereunder, M/s Prof Tom Ojienda & Associates, Absa Bank of Kenya Account No. [sic] 2024XXXXXX89 Hurlingham Branch [swift code; Barckenx] within 24 hours from the date of issuance of the Garnishee Order absolute.

vii. That the cost of this Application be borne by the Respondent/Judgment Debtor.

2. The instant Application is premised on numerous grounds which have been enumerated in the body of the Application. Furthermore, the Application under reference is supported by the affidavit of Prof. Tom Ojienda [SC] sworn on even date and in respect of which the Deponent has annexed various documents, inter-alia a copy of the Ruling on taxation of the advocate client bill of costs, the decree upon adoption of the certificate of taxation and a copy of the Ruling rendered vide Milimani High Court Commercial Case No. E411 of 2023 Absa bank Kenya PLC vs Kenya Deposit Insurance Corporation [UR].

3. Instructively, the subject Application came up for directions and certification on the 28th March 2024, whereupon this court proceeded to and indeed certified the application as extremely urgent and thus deserving to be heard and disposed of on priority basis.

4. Nevertheless, even though the subject Application had sought for issuance of an Order Nisi, [which is a preliminary Order upon the filing of a Garnishee Application] to freeze the Judgment Debtor's/ Respondent's named account with the Garnishee herein, the court herein declined to grant the order Nisi, either in the manner sought or at all.

5. To the contrary, the Court ordered and directed that learned counsel for the Applicant does appear before the court on the 4th April 2024 with a view to addressing the court on the import, tenor and implication[s] of Section 21(4) of the *Government Proceedings Act*, Chapter 40 Laws of Kenya, which essentially prohibits execution and attachment against the assets and/or properties of the Government; as well as the County Government[s].

6. Pursuant to and in line with the directions of the court, Learned counsel for the Applicant proceeded to and indeed filed extensive written submissions dated the 3rd April 2024, as pertains to the legality and unconstitutionality of Section 21(4) and 5 of the *Government Proceedings Act*, Chapter 40, Laws of Kenya; and thereafter appeared before the court on the 4th April 2024, with a view to highlighting same.

7. For coherence, Learned Senior counsel for the Applicant thereafter adopted the written submissions dated the 3rd April 2024; and ventured forward to highlight same, in an endeavor to persuade the court that an order Nisi ought to issue and/or be granted in execution against the funds belonging ton the Respondent albeit held by the Garnishee.

a. Applicant's Submissions:

8. Learned Senior counsel for the Applicant, namely, Professor Tom Ojienda, [SC] contended that the provisions of Section 21[4] and 5 of the *Government Proceedings Act*, Chapter 40 Laws of Kenya confer upon the Government and by extension the County Government preferential treatment under the law, which preferential treatment was contended to be contrary to and in violation of the provisions of Article 27[1] and [2] of *the Constitution* 2010.

9. Furthermore, learned counsel for the Applicant contended that the Government, its department as well as the county government have deployed the provisions of Section 21[4] of the *Government Proceedings Act* in a retrogressive manner with a view to defeating the rights of citizens to realize judgment and decrees, if any, issued against the government. In this regard, learned counsel for the Applicant submitted that the preferential treatment flowing from the impugned provisions of Section 21[4] of the *Government Proceedings Act* ought not to be complied with insofar as same is discriminatory in nature.

10. Secondly, learned counsel for the Applicant has submitted that whereas the provisions of Section 21[4] of the *Government Proceedings Act* insulates the Government and County Government from execution proceedings, whilst the Provisions of Section 22[1] of the same Act, allows the Government to execute for any Judgment and decrees against her citizens[subjects].

11. Consequently and in this regard, learned counsel for the Applicant has contended that the impugned provisions of the law, are skewed in favor of the Government and hence same are unconscionable and discriminatory.

12. Thirdly, learned counsel for the Applicant has submitted that the Section 21[4] of the *Government Proceedings Act*, Chapter 40, Laws of Kenya, have in any event been declared unconstitutional and thus same are deemed to be non-existent and inoperative, for as long as the order declaring same to be unconstitutional has not been set aside and/or varied by an appellate court.

13. To this end, learned counsel for the Applicant cited and relied on the decision rendered vide Milimani Commercial Case No. E411 of 2023 Between Absa Bank Kenya PLC [Absa] vs Kenya Deposit Insurance Corporation [UR], wherein the Applicant contends that the impugned provisions were indeed declared unconstitutional.

14. Arising from the foregoing position, learned counsel for the Applicant has therefore proceeded and invited the court to find and hold that Section 21[4] of the *Government Proceedings Act*, [supra] is therefore no longer operative and cannot be deployed to defeat the issuance of the Order Nisi sought by the Applicant.

15. Further and in addition, learned counsel for the Applicant has submitted that where a statute and/or provisions of statute has been declared unconstitutional then such a statute or provision is deemed to be inoperative and therefore no rights can be build upon same for whatever purpose.

16. In this regard, learned counsel for the Applicant cited and relied on the holding of the case of Waweru & 3 Others [Suing as Officials of Kitengela Bar Owners Association & Another] vs National Assembly & 2 Others ; Institute and Certified Public Account [ICPK] & 2 Others.

17. Finally, Learned Senior counsel for the Applicant has submitted that the Applicant herein has demonstrated and established that same is entitled to the grant of an Order Nisi, with a view to preserving the monies that are currently held in the designated account with the Garnishee herein.

18. To support the contention that the Applicant has established and satisfied the requisite ingredient[s] to warrant the grant of an order Nisi, learned counsel has cited and relied on inter-alia the holding in Ngaywa Ngigi & Kibet Advocates vs Invesco Assurance Ltd; Diamond Trust Bank [Garnishee] [2020]eKLR, Choice Investment Ltd vs Jeromnmon [Midland] Bank Ltd [Garnishee] (1981) 1ALL 225 and Otieno Ragot & Co Advocates vs City Council of Nairobi [2015]eKLR, respectively.

19. Premised on the foregoing, Learned Senior counsel for the Applicant has therefore implored the Honourable court to find and hold that the Applicant is entitled to an order Nisi in accordance with the provisions of Order 23[1] of the Civil Procedure Rules 2010.

Garnishee's Submissions:

20. Learned senior counsel Mr. Waweru Gatonye [SC] appeared before the court and sought to address Honourable court on whether or not an Order Nisi could be granted against the Garnishee, either in the manner sought or at all.

21. Furthermore, Learned senior counsel contended that the subject account, which the Applicant sought to Garnishee was not an ordinary account belonging to and operated by the Respondent Judgment Debtor. For coherence, learned counsel pointed out that the said account was a Revenue account held in the name of the Respondent, but used for collection of taxes by Kenya Revenue Authority [KRA].

22. Additionally, Learned senior counsel contended that there was need for the Garnishee to be afforded time to file an affidavit and thus to demonstrate to the court that the monies in the designated Account held by the Garnishee were not attachable vide Garnishee proceedings or at all.

23. Be that as it may, when the court invited the attention of Learned senior counsel for the Garnishee to the provisions of Order 23 Rule 1 of the Civil Procedure Rules 2010; and in particular, the aspects that denotes that an order Nisi is to be dealt with by the court Ex-parte and hence neither the Respondent/ Judgment Debtor nor the Garnishee has a right of audience.

24. Instructively and upon the intervention by the court pertaining to the import and tenor of Order 23 Rule 1 of the Civil Procedure Rules 2010, Learned counsel for the Garnishee intimated to the court that same shall therefore await further directions and guidance by the Honourable court upon rendition of the ruling on the issue on the Order Nisi.

25. Arising from the foregoing position, the court thereafter issued further directions and in particular, that the Ruling on the question of the Order Nisi shall be rendered on the 5th April 2024; at 9 O'clock.

Issues for Determination:

26. Having reviewed the Application under reference; the provisions of Order 23 Rule 1 of the Civil Procedure Rules, 2010; and upon considering the submission[s] by Learned Senior Counsel for the Applicant [both written and oral]; the following issues crystalize and are thus worthy of determination;

    i. Whether the provisions of Section 21[4] of the *Government Proceedings Act*, Chapter 40, Laws of Kenya, have been declared unconstitutional and are thus inoperative or otherwise.

    ii. Whether the Applicant herein has established and demonstrated the requisite ingredients to warrant the grant of an Order Nisi, either in the manner sought or otherwise.

Analysis And Determination:

Issue Number 1. Whether the provisions of Section 21[4] of the *Government Proceedings Act*, Chapter 40, Laws of Kenya, have been declared unconstitutional and are thus inoperative or otherwise.

27. Learned senior counsel Prof. Tom Ojienda [SC] who appeared before the court contended that the provisions of Section 21[4] of the *Government Proceedings Act* have accorded to and in favor of the Government and the County Government undue and preferential treatment, which is not only skewed but also discriminatory in nature. In this regard, learned senior counsel contended that the impugned Section[s] are thus contrary to and in violation Article 27[1] of *the Constitution* 2010.

28. Further and in any event, learned senior counsel for the Applicant submitted that the impugned Section, namely, Section 21[4] of the *Government Proceedings Act*, has since been declared unconstitutional and hence same is in-operational and otiose.

29. To anchor the submissions that the impugned Section has since been declared unconstitutional and thus rendered void, until the order declaring same unconstitutional is set aside by the appellate court, learned senior counsel cited and relied on the decision in Milimani Commercial Case No. E411 of 2023 Between Absa Bank Kenya PLC [Absa] vs Kenya Deposit Insurance Corporation [UR]. In particular, Learned counsel has invited the court to take cognizance of paragraphs 27 to 37 of the said decision.

30. Having reviewed the submissions by Learned senior counsel for the Applicant and upon consideration of the cited Decision by the High Court; I beg to take the following position.

31. To start with, I have read through and examine the ruling rendered in the Milimani Commercial Case No. E411 of 2023 Between Absa Bank Kenya PLC [Absa] vs Kenya Deposit Insurance Corporation [UR], which is contended to have declared the provisions of Section 21 of the *Government Proceedings Act* to be unconstitutional. However, I am afraid that I have not discerned any paragraph wherein the learned Judge has ventured forward and declared the named provisions to be invalid and unconstitutional, either in the manner adverted to by learned senior counsel for the Applicant or at all.

32. Furthermore, it is my humble view that the various sentiments [observations] which have been expressed by the learned Judge in the named decision, inter-alia, that the *Government Proceedings Act* is skewed, discriminatory and thus a misnomer in law, do not amount to and/or constitute a declaration of invalidity and/or unconstitutionality, whatsoever.

33. Instructively, where a court of law, the learned Judge who rendered the decision in Absa case not excepted, is obliged to make a declaration of invalidity and unconstitutionality of an Act or provisions of an Act, then same [court] is called upon to speak with clarity insofar as any such declaration of invalidity and unconstitutionality, is bound to have serious legal ramifications and/or consequences.

34. Nevertheless, in respect of the subject decision, [Absa Bank case], the learned Judge did not in my humble view, make any express and explicit declaratory orders declaring the provisions of Section 21 of the *Government Proceedings Act*, Chapter 40, Laws of Kenya, invalid and unconstitutional. For good measure, my humble reading of the various paragraphs drives me to the conclusion[s] that the Learned made observation[s], but failed to venture forward and render a precipitate Declaratory Orders, either as envisaged vide the provisions[s] of Article 23 of *the Constitution*, 2010, or at all.

35. To my mind, there being no such express and explicit declaration of invalidity and unconstitutionality, in terms of the Provisons of Article 2[4] of *the Constitution*, 2010; this court cannot therefore be called

upon to proceed on the basis of supposition, inference and/or anticipation, in an endeavor to discern the intendment of the Learned Judge.

36. Suffice to point out that if the learned Judge in the Absa Bank case had ventured forward and rendered an effective and efficacious determination, declaring the impugned Section as invalid and unconstitutional, [in the manner in which Section 13A of the same Act was declared] then this court would be obliged to heed and comply with such a declaration. For good measure, where the provision of the law is declared to be invalid and unconstitutional, then same remains inoperative and otiose, unless such a declaration is varied and set aside by an appellate court.

37. For coherence, this court has since made a finding to that effect and in this regard, it suffices to adopt and reiterate the pronouncement made by this Court in the case of Silvya Merie v James Mwangi Kaguya & 2 Others [2022]eKLR, where this court stated and held thus;

> 83. Perhaps one other issue, that befits being mentioned, is the fact that the Application for Contempt has been brought and/or anchored on the basis of contempt Act, No. 46 of 2016. However, it is common knowledge that the said Act was declared unconstitutional and the Declaration to that effect, has not been reversed on Appeal.
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> 83. Consequently, the invocation of and reliance on the said Act, was Erroneous. Simply put, that the said subject Application for Contempt, would similarly, be stillborn on that account."

38. Pertinently, if there was an explicit and clear declaration of invalidity and unconstitutionality in the Absa case, [which is not the case], there would be no difficulty in upholding the submissions by Learned senior counsel for the Applicant.

39. Unfortunately, in my humble understanding and appreciation of the cited paragraphs, which were highlighted by Learned Senior Counsel, I have not been able to extricate and decipher any such declaration[s].

40. Perhaps and for the sake of brevity, it is appropriate to reproduce the various paragraphs which have been relied upon and amplified by Learned senior counsel for the Applicant.

41. Same are reproduced as hereunder;

Paragraph 27.

I find Section 13A [and even Section 21 of the Act] discriminatory in the sense of discriminating against ordinary litigants and giving preferential, differential, differentiated and discriminatory treatment to the government, in litigation. This is juridically unsupportable, as in litigation, every party is equal before the law and should be treated equally. In ligation there should be neither a Goliath nor a David.

Paragraph 28

To the extent its provisions make parties and equal litigation, uneven the plain field, pulls a rug under the feet of the pensively less a litigants in favor of Government entities, discriminate against nongovernmental litigants, make them and equal before the law and oust them from the seat of justice, this Act is a misnomer in law.

Paragraph 31

The Act is clearly skewed to give the government, unconscionable and discriminatory comparative advantage in suits against it. Right from the filing of the suit to the execution process, this is untenable

under the 2010 Constitution. Hence this Act is among the laws that were supposed to be repelled or otherwise amended but, escaped the watchful eyes of parliament and law reform commission.

Paragraph 32

To the extent that such provisions are discriminatory, curtail meaningful to access to justice, and impeded the smooth administration of justice, they offend *the constitution*. Notably, this constitution has been lauded as one of the most progressive constitutions in the world. It being the supreme law of the land, it cannot suffer subsistence in the statute books, of laws that are retrogressive, oppressive, repressive or takes Kenya back to or remind it of its dark past. It is a document and a legal order that has set Kenya on transformative path that she must tread.

Paragraph 37

Sections 13A and 21 of the *Government Proceedings Act* and indeed the entire Act, are discriminative, a claw back in the gains so far made under this constitution, a curtailment of the right to access to justice and a clog of the process of court.

42. The foregoing excerpts, constitutes the closest that the learned Judge in the Absa case came to making a declaration. However, there is no gainsaying that no precipitate declaration of invalidity and unconstitutionality as envisaged under Articles 2[4] and 23 of *the Constitution* 2010; was made, proclaimed and/or decreed, whatsoever.

43. Nevertheless and before departing from the subject issue, namely, the Constitutionality or otherwise of the impugned Section, there is one other matter that deserves mention and a short highlight.

44. For coherence, the matter relates to the decision rendered by a two-Judge bench of the High court in the case of Kisya Investments Ltd versus Attorney General & another [2005] eKLR, wherein the constitutionality of Section 21 of the *Government Proceedings Act*, Chapter 40, Laws of Kenya, was considered and dealt with.

45. For good measure, the Learned Judges of the High court in their wisdom stated and held thus;

'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 judgments and it will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached, 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 paralyzed and soon the Government will not only be bankrupt, but it's Constitutional and Statutory duties will not be capable of performance. This will lead to a chaos, anarchy and the breakdown of the Rule of Law.

> In our view, this is the rationale or the objectives of the Law that prohibits execution against and attachment of the Government's assets and property. We form this view from a general reading of the English Statutes, Halsbury's Laws of England and some case law which do not bring out all these, but one is able to construe the intentions.
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> This brings us to the proviso in Section 70 (a) of *the Constitution*:-
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> "... The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights

and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest." (Emphasis ours).

If the facts and circumstances of this case, could have led us to decide that the Applicant's fundamental rights and freedoms under Sections 70, 72, 75 and 82 have been violated or infringed upon by the operation of Sections 21 (4) of the *Government Proceedings Act* and Order XXVIII Rules 2 and 4, then we would certainly have held that the public interest herein in insulating the Government from execution and attachment overrides the Applicant's enjoyment of his rights and the fruits of judgment through execution and that it was in the public interest that the said laws have been enacted and must continue to be in force unless and until Parliament legislated otherwise.

Before we conclude, we think that it is our duty as a Court to point out that we think the problem and difficulties in this case in not necessarily the law but the office of Attorney General's conduct and performance of its duties in this case.

It is our view that satisfaction of the decree herein against the Government was to be obtained by means of the Certificate containing particulars of the decree issued by the Court and served on the Attorney General as required by Section 21 (1), (2) and (3) of the *Government Proceedings Act*. The applicant duly served such a certificate and the Attorney General was obliged to advise the relevant Ministry and Ministry of Finance of the consequences and ensure that payment was made within a reasonable time taking all circumstances into account. Alternatively, it was upon the Attorney General to appeal against the decision giving rise to this debt. [Emphasis supplied]

46. From the foregoing decision, it is imperative to point out and underscore that a Two-judge bench of the High court was called upon to make a determination on the constitutionality of inter-alia Section 21 of the *Government Proceedings Act*, Chapter 40 Laws of Kenya; and after considering the various submissions that were rendered, the court declined to declare the said provisions invalid and unconstitutional.

47. I am alive to the fact that Kenyans proclaimed *the Constitution* 2010; unto themselves and same was thereafter promulgated on the 27th August 2010; but the promulgation of *the Constitution* per se does not render previous and binding decision of the High court redundant and otiose, provided that same are read in accordance with the Provisions of Article 259 of *the Constitution*, 2010.

48. In respect of the subject matter, I am not aware whether the import and tenor of the decision [supra], was brought to the attention of the learned Judge who rendered the decision in the Absa bank case.

49. Nevertheless, it is imperative, nay, instructive to observe that the decision in the Kisya Investments Ltd versus The Honourable Attorney General [Supra],would have shed some light and illuminated the legal thinking of the learned Judge.

50. Notably and it is evident that the said decision was not brought to the attention of the Learned Judge and hence there is some scintilla of contradictory positions taken by the same High court, which may require reconciliation and harmonization, for the sake clarity and predictability of Jurisprudence.

51. Be that as it may, I have pointed out elsewhere herein before that the ruling in Absa bank case did not make any precipitate declaration of invalidity and unconstitutionality [save for what in my humble view, are observations]; and hence the only precipitate decision on the question of Section 21 of the *Government Proceedings Act* is the decision in Kisya Investments Ltd [supra].

52. Arising from the foregoing, my answer to issue number one is three-fold. Firstly, it is erroneous on the part of learned senior counsel for the Applicant to contend that the provisions of Section 21[4] of the *Government Proceedings Act*, Chapter 40 Laws of Kenya were declared unconstitutional vide the Ruling of the High Court in the Absa Bank case.

53. Secondly, it is instructive to state and underscore that a declaration of unconstitutionality and invalidity must be explicit and unequivocal in line with the Provisions of Articles 2[4] and 23 of *the Constitution*, 2010; and should not be left for anticipation, speculation and inference by all and sundry.

54. Thirdly and for good measure, it would be prudent and just, for the sake of posterity and observance of Article 10[2] of *the Constitution*, 2010, for Courts [Superior Courts] vested with the mandate of interrogating the Constitutionality, or otherwise of Statutes or provision[s] thereof, to endeavor and afford the Honourable Attorney General an opportunity to address Court, whenever the question of [sic]] Constitutionality of an Act of Parliament is being considered. [See the import of Article 156 of *the Constitution*, 2010]

Issue Number 2

Whether the Applicant herein has established and demonstrated the requisite ingredients to warrant the grant of an Order Nisi, either in the manner sought or otherwise.

55. On the 28th March 2024 when the subject application came up for directions and certification, this court indeed certified the Application as extremely urgent and thereafter gave direction[s] pertaining to the disposal thereof.

56. However, being alive to the import and tenor of Section 21[4] of the *Government Proceedings Act*, Chapter 40 Laws of Kenya, this court declined to grant an order Nisi and instead sought to have learned counsel for the Applicant to attend court and address the import of the impugned provisions of the Law.

57. Suffice it to point out that the court held reservations about the issuance of the order Nisi [which would have constituted execution] against the County Government of Nairobi and or her assets [finances] contrary to the law.

58. Additionally, the court held the position that an order by the court which is contrary to the express provisions of the statute, in this case Section 21[4] of the *Government Proceedings Act*, would be illegal, void and bad in law. In any event, such an order would create an absurdity and anarchy, which is antithetical to the Rule of Law.

59. Premised on the foregoing and taking into account the import and tenor of Article 47 of *the Constitution* 2010, this court desired the address by and on behalf learned counsel for the Applicant, before the court could make any further and precipitate orders, either way.

60. Notwithstanding the foregoing, I must point out that even after listening to the submissions by learned senior counsel for the Applicant, I am still not persuaded that an order Nisi [which constitutes attachment and execution] can issue against the City County Government of Nairobi and more particularly, after the amendment of the *Government Proceedings Act* and in particular the introduction Section 21[5] thereof.

61. Finally, it is not lost on the court that an order which is illegal, unlawful and void [particularly made on the face of an existing provisions of the law] is void for all intents and purposes.

62. Consequently, a court of law which is indeed the temple of justice and the custodian of the Rule of Law, cannot act in violation of the express text of the law.

63. Before departing from the issue herein, it is opportune to revisit and reiterate the hallowed dictum in the case of Benjamin Leonard Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169; where Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

64. Nourished by the foregoing dictum, it is my humble view that the issuance of an order Nisi against the Garnishee herein in the manner sought by the Applicant, shall constitute a violation of the express provisions of the law, which prohibit[s] attachment of the Assets of the Government and by extension, the County Government; and shall thus be inimical to the Rule of law.

65. Furthermore, such an act, would in my humble view, violate the provisions of Article 10[2] of *the Constitution* 2010, which underpins, inter-alia, the Rule of Law and good Governance.

Final Disposition:

66. From the foregoing analysis [details captured in the body of the ruling], it must have become evident and apparent that this court is not prepared to decree an Order Nisi on the face of the existing provisions of Section 21[4] and [5] of the *Government proceedings Act*; which provisions remain alive and existing in the statute books.

67. Nevertheless, it is also important to underscore that the fact that the Applicant cannot execute vide Garnishee Proceeding[s], does not ipso facto denote that the Respondent is immune and cannot therefore be compelled to comply with the Judgment and decrees of the court.

68. For good measure, Article 47 of *the Constitution* 2010; Fair Administrative Actions Act, 2015 and Sections 8 and 9 of the *Law Reform Act*, Chapter 26 Laws of Kenya; as well as the Provisions of Order 53 of the Civil Procedure Rules, remain beckoning and awaiting appropriate invocation.

69. In a nutshell, I find and hold that the prayer for an Order Nisi in terms of the provisions of Order 23 Rule of the Civil Procedure Rules 2010, is neither available nor legally tenable in the circumstances.

70. In short, the request for an Order Nisi is declined.

71. Furthermore, it is also important to point out that for as long as the Provisions of Section 21 of the *Government Proceedings Act*, Chapter 40, Laws of Kenya, have not been declared Unconstitutional and invalid in accordance with the Law and pursuant to a suitable Constitutional Petition, no Execution by way of attachment can be commenced and/ or be maintained against the Government and the County Government.

72. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF APRIL, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Prof. Tom Ojienda SC for the Applicant

Mr. Waweru Gatonye SC for Garnishee

N/A for the 2nd Respondent/Judgment Debtor