**Total (Kenya) Limited v Kenya Railways Corporation**

**Division:** High Court of Kenya at Nairobi

**Date of ruling:** 27 January 2004

**Case Number:** 1389/01

**Before:** Ochieng AJ

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Civil Procedure – Execution – Garnishee proceedings – Applicant attaching bank balance of State*

*corporation – Whether permitted by law.*

*[2] State corporation – Execution by attachment – Whether execution by attachment of a debt in the*

*nature of a bank balance of a state corporation proper – Section 88 – Kenya Railways Corporation Act*

*(Chapter 397).*

**RULING**

**Ochieng AJ:** The Plaintiff Total (Kenya) Limited has filed a chamber summons application seeking orders directed at the Garnishee Kenya Commercial Bank Limited, compelling it to pay over to the Plaintiff such sums as are in the Defendant’s account with the Garnishee, to the extent necessary to discharge the decretal debt payable by the Defendant to the Plaintiff. In effect, the Plaintiff is seeking a garnishee order to attach the funds held by Kenya Commercial Bank Limited in favour of the Defendant Kenya Railways Corporation. On 4 December 2003 the application first came before Nyamu J, and the court granted the garnishee order *nisi*. The court further directed the Garnishee to show cause why it should not pay to the Applicant, the monies held by it on account of the Respondent, or so much thereof as may be sufficient to satisfy the debt together with costs. The court records show that the Applicant herein did extract the formal garnishee order *nisi* on 5 December 2003. However, the record does not have any evidence to prove that the said order was served upon the Garnishee. But what is clear is the fact that the said Garnishee was served with a hearing Notice requiring them to attend court on 20 January 2004, to show cause. Be that as it may, the Garnishee did not attend court to show cause. Meanwhile, the Defendant must have become aware of the garnishee proceedings. On 19 January 2004 the Defendant filed a notice of motion seeking leave to have its new lawyers M/s Ochieng Onyango, Kibet and Ohaga Advocates come on record in place of M/s Mereka and Company advocates. By the said notice of motion, the Defendants also sought leave to be heard in opposition to the garnishee proceedings. Counsel for the Plaintiff did not oppose the request by the law firm of Ochieng Onyango, Kibet and Ohaga Advocates to act for the Defendant. Consequently, this Court did grant the said lawyers leave to come on record. Thereafter the substantive garnishee proceedings went ahead. Mrs *Kambuni* submitted that the only avenue open to the Defendant in these proceedings would be to satisfy the Court that they had settled the decretal amount. It was counsel’s submission that once the Garnishee (Kenya Commercial Bank Limited) did not attend court to show cause why the money in the account should be attached, the court ought to proceed to make absolute the Garnishee Order *nisi*. The Applicant further submitted that the provisions of section 88 of the Kenya Railways Corporation Act Chapter 397 did not avail any recourse to the Defendant. The said section reads as follows: “Notwithstanding anything to the contrary in any law. (*a*) Where any judgment or order has been obtained against the Corporation, no execution or attachment, or process in the nature thereof shall be issued against the Corporation or against any immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings, but the managing director shall, without delay, cause to be paid out of the revenue of the Corporation such amounts as may, by the judgment or order, be awarded against the Corporation to the person entitled thereto; (*b*) No immovable property of et Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without previous written permission of the managing director”. The Plaintiff/Applicant submits that section 88 specifies the kinds of property belonging to the Defendant, which cannot be attached. The specified kinds of property do not include liquid cash, and more particularly when such funds are in the hands of a third party such as the Garnishee. The Plaintiff therefore urged the court to make absolute the garnishee orders *nisi*. In his reply, Mr *Kanjama* advocate stated that it is the norm for the Defendant to appear in Garnishee proceedings. Mr *Kanjama* conceded that the Defendant owes the decretal amount. He also concedes that the Plaintiff was entitled to the fruits of the judgment in these proceedings. However, he states that whereas the Defendant has not yet been able to pay the Decretal amount due to the Plaintiff, this court would be wrong to issue the orders sought, as the same are prohibited by the provision of section 88 of the Kenya Railways Corporation Act. It is the submission of counsel that it was the intention of the Legislature when they enacted the provisions of section 88, to safeguard all the assets of the Defendant. He submitted that a similar provision was introduced into the statutes governing all state Corporations and local authorities, with a view to safeguarding the assets of bodies corporate which were entrusted with public statutory duties; the safeguard is meant to shield their assets from Judgment creditors who may seek immediate gratification of the Decrees or orders in their favour. Mr *Kanjama* submitted that the only recourse available to the Plaintiff would be to proceed by way of judicial review to obtain an order of mandamus directed at the managing director, to compel him to pay the decretal amount. If the managing director failed to comply with such an order the Plaintiff would then need to apply to court to have him committed to civil jail for contempt of court. Mr *Kanjama* cited the following case to back his submissions, *Wambugu and Co Advocates v Managing Director Kenya Railways Corporation* [2001] LLR 4491 (HCK)*.* In that case the Applicant had filed an application pursuant to the provisions of Order XXII, rules 1 and 10 of the Civil Procedure Rules. In other words, the application was brought under the same rules as in this case. It is even more interesting to note that not only is the Garnishee the same party, (Kenya Commercial Bank Limited), but also that the bank account number is exactly the same, ie account number 22977358 at the bank’s Moi Avenue Branch, Nairobi. In that case Lenaola J held “that no execution, or attachment shall be issued against the Kenya Railways Corporation but; “The managing director shall, without delay cause to be paid out of the corporation such amounts as may, by the judgment or order be awarded against the corporation to the person entitled to it. The upshot of the above provision is much the same as Mwera J found: - “that the applicant ought to proceed by way of mandamus to compel the Managing Director of the Judgement debtor corporation to pay the sum claimed”. I have perused the provision of section 67 of the Kenya Ports Authority Act Chapter 391 and fount it to be in the same words of Section 88 of the Kenya Railways Corporation Act (Chapter 397). A perusal of section 110 of the Kenya Posts and Telecommunications Corporation Act (Chapter 411) shows that the limitations imposed by statute on execution against the properties of State Corporation is not the same. Section 110 reads as follows: “Notwithstanding anything to the contrary in any law: (*a*) Where any judgment or order has been obtained against the corporation, no execution or attachment, or process in the nature thereof shall be issued against the corporation or against any property of the corporation”. (The rest of the section is exactly the same as that of section 88 in the Kenya Railways Corporation Act and section 67 in the Kenya Ports Authority Act.) To my mind, the wording of section 110 of the Kenya Posts and Telecommunications Corporation Act appears to be definitely all-inclusive. The said provision restricts execution or attachment against the corporation or against any property of the corporation. It is my view that the said phrase “any property of the Corporation” definitely extends to and includes money in the account of the corporation or any third party who holds such money for the said corporation. It is a cardinal rule of interpretation that when a provision enumerates specific matters, the said provision is ordinarily deemed to exclude any matters not incorporated therein. I therefore must ask myself whether or not section 88 of the Kenya Railways Corporation Act is wide enough to include a restriction against the processes of execution by way of garnishee proceedings. It would appear that that section could have been perhaps better worded (as in the case of the Kenya Posts and Telecommunications Corporation Act, Chapter 411; so that it would have been clear that all execution and attachment was not allowed against all the corporation’s property. But having searched my soul and hard I find that the first part of the section may be deemed to provide the all inclusive protection to the corporation’s property. By the first part of the section, I mean the following: “Notwithstanding anything to the contrary in any law: (*a*) Where any judgment or order has been obtained against the corporation, no execution or attachment, or process in the nature thereof, shall be issued against the corporation”. The garnishee proceedings are a process by which execution is levied against the corporation, in so far as it relates to funds that are held by a third party (in this case Kenya Commercial Bank Limited), in favour of judgment debtor (in this case the Corporation). In arriving at this conclusion, I must say that I sympathise with the decree holder in the difficulties it has experienced in trying to earn the fruits of the judgment. However, this Honourable Court is only enjoined to make decisions in accordance with the provisions of the law. I am therefore constrained to set aside the orders made by Nyamu J on 4 December 2003 and proceed so to do. I now make the following orders: (a) The garnishee order *nisi* issued on 4 December 2003 is hereby vacated. (b) The chamber summons dated 4 December 2003 is dismissed. (c) Each party to bear its own costs. For the Plaintiff: *LM Kambuni* instructed by *Kambuni & Githae Adv* For the Defendant: *CN Kanjama* instructed by *Ochieng’, Onyango, Kibet & Ohaga Adv*