



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

APPLICATION NO. E026 OF 2021

REPUBLIC.....APPLICANT

-VERSUS-

COUNTY SECRETARY,

COUNTY GOVERNMENT OF KITUI.....1ST RESPONDENT

COUNTY GOVERNMENT OF KITUI.....2ND RESPONDENT

Ex parte:

POWERPUMP TECHNICAL COMPANY LIMITED

JUDGMENT

The application before court is the applicant's motion dated 18 June 2021. It is said to have been filed under Section 5 (1) of the Judicature Act (Cap 8), Sections 3, 3A, 63 (c) & (e) IA, 1B and 89 of Civil Procedure Act, Orders 39 Rule 2A (2) and 51 Rule 1 of the Civil Procedure Rules 2010, Order 52 Rule 2 of the Rules of Supreme Court of England 1999.

The prayers in the motion have been framed as follows:

“1. THAT this application be certified as urgent and fit to be heard ex parte in the 1st instance.

2. THAT the County Secretary, County Government of Kitui be committed to Civil jail for a period of six (6) months by this Honourable Court for being in contempt of court of the court order granted on the 15th July, 2019 in the High Court Misc. Application No. 479 of 2019, Power Pump Technical Co. Ltd —vs- County Government of Kitui.

3. THAT the Officer Commanding the Central Police Station Kitui Town do enforce the orders of this Honorable Court.

4. THAT the Respondent be condemned to pay the costs of this application.”

The application is supported by the affidavit of Philip Kioko Kathenge, the managing director of the applicant company.

It is the applicant's case that on or about June, 2008, the then County Council of Kitui entered into an agreement for the construction of a slaughter house at Kabati market within Kitui County. The agreement contained an arbitration clause according to which the parties were enjoined to refer their dispute to an arbitrator in the event of a dispute.

A dispute in fact arose subsequently and the same was submitted to an arbitrator for resolution; the arbitrator made his award on 8 December 2021 but was amended on the basis of a consent of the parties to the dispute on 16 January 2017 in the following terms:

“i) THAT the Award No. 1 of sum of Kshs. 3, 791, 415 .96 with interest at the rate of 14.5% p.a with effect from 1/9/16 is corrected to read 3, 792, 415. 96 together with interest at the rate of 14 % p.a. with effect from 20 May 2011 until payment in full.

ii) That Award No. 2 of the sum of Kshs. 2, 405, 340/ in respect of the watchmen's wages accrued at the rate of Kshs. 9, 000/—

per month per watchman, as at 30/7 / 14 is amended to read that the salaries accrued at the rate of Kshs. 27, 000 per month with effect from 30/7 / 2014 together with the interest at the rate of 14.5% p.a with effect from 3/7 / 2014 until payment in full.

iii) THAT the award of costs is amended and awarded as follows:

a) The costs of the reference is assessed at the sum of Kshs. 3, 176, 797 and the 1st Respondent is directed to reimburse the Claimant 50% of the said sum i.e. Kshs. 1, 588, 398/- already paid to the Tribunal within thirty (30) days of the publication of this corrected award;

b) The costs of the arbitration is (sic) assessed pursuant to section 32B of the Arbitration on (Amendment) Act, 2009, at the sum of Kshs. 1, 500, 000 to be paid by the 1st Respondent the Claimant within thirty (30) days of publication of this corrected award;

iv) THAT each party do bear its costs of the application to amend the award.”

By a ruling delivered by this Honourable Court (Nzioka, J) on 31 October 2018, the amended award was adopted as the judgment of the Court. The applicant was also awarded costs of the suit.

The respondents did not honour the award as a result of which the applicant moved this Honourable Court for the order of mandamus to compel the respondents to settle the court decree. The application was allowed and granted on 15 July 2019.

Although the respondents have been prevailed upon to pay the decretal sum, they have failed to do so hence the instant application.

The applicant urges that the refusal by the 1st respondent to comply with lawful orders of this Honourable court is in contempt of court.

By reason of the provisions of section 44 of the County Government Act No. 17 of 2012, the County Government of Kitui is seized of powers to pay the liabilities of the said County Government and to comply with lawful orders of the court directed at the County Government.

The respondents opposed the motion and filed a replying affidavit sworn by Dr. Joshua Kimwetich Chepchieng', the Acting County Secretary of Kitui County Government.

Dr. Kimwetich does not necessarily contest facts pertaining to the history of the decree the payment of which the applicant has sought to enforce.

As far as the arbitral award is concerned, he swore that the award was made 8 December 2017 and that once the 2nd Respondent was notified of the award, it immediately wrote to its former advocates vide a letter dated 18 December 2017 asking for the details of the award.

Unfortunately, the 2nd respondent's previous advocates did not advise the respondents appropriately on how to deal with the issue and that it is only when they received a letter dated 22 January 2018 (it is not clear from whom) that they learned that at some point the award was corrected and the amount payable to the applicant had been varied upwards on the basis of a consent between J.K Mwalimu Advocates, who were the 2nd respondent's previous advocates and the applicant's advocates, Kyalo & Associates.

The respondents' previous advocates, it is urged, did not advise the respondents that he had the option of approaching this Honourable Court in order to set aside the award within a period of 3 months of the date of the award.

Nonetheless, being dissatisfied with the judgment of this Honourable Court, the 2nd respondent preferred an appeal in the Court of Appeal No 171 of 2019 but the appeal has not been heard to date.

Dr, Chepchieng swore that he is aware that on 15 July 2019 the applicant obtained the order of mandamus to compel him to pay the decretal sum.

The respondents, according to Dr. Chepchieng, have not deliberately declined to pay the applicant; it is his case that since 2019 the 2nd respondent, as was the case with the rest of the 47 Counties, has faced financial constraints due what I understand to be delays in the disbursement of funds by the National Government. In any event, he has urged, the decretal sum sought has not been budgeted for in the 2021/2022 Financial Year.

Again, the Auditor General's office is currently verifying claims of County Governments pursuant to a directive by a Cabinet Secretary made last year and that once the claims have been verified they will be presented before the County Executive Committee Finance for approval before they are settled.

Dr. Chepchieng pleaded with the court he should not be cited for contempt and committed to civil jail since he had just taken office and also because there had been delays in the disbursement of funds by the Treasury to the counties to settle pending bills.

As noted earlier, the facts, material to the applicant's application, are not in dispute. Most crucial for an application of this nature, it is not in dispute that the order of mandamus compelling the 1st respondent to pay the applicant the sum of Kshs. 22, 500,000/- together with interest

was served upon the 1st respondent, or at the very least, going by his own sworn affidavit, the 1st respondent is aware of the existence of the order. To quote the 1st respondent, this is what he swore in his replying affidavit on this issue:

‘16. THAT the Applicant went ahead and filed an application seeking mandamus in Nairobi Misc Application No 479 of 2019 which was allowed on 15th July 2019.’

The order for mandamus of application that is referred to in this deposition was allowed in these terms:

“a. An order of mandamus be and is hereby issued directed against the respondent compelling it satisfy the Decree issued on 31st October 2018 in Milimani HC MISC App. No. 192 of 2018 and pay the ex parte applicant the sum of Kshs. 22.5 Million together with interest thereon with effect from 20th May 2011 until payment in full.”

Thus, it is clear from the 1st respondent’s own deposition that he was aware of the order that is the subject of these proceedings and therefore the submission by his learned counsel that the 1st respondent cannot be cited for contempt of an order that he was neither served nor aware of is not sustainable.

If anything, there is no deposition in the 1st respondent’s affidavit to the effect that the order has not been complied with only because he was not served or that he was not aware of the order.

That said, the reasons given by the respondents for not complying with the order are, in my humble view, not satisfactory. It is not for this Honourable Court to interrogate how judgment against the 2nd respondent was obtained and neither should it be concerned that the applicant eventually obtained the order for mandamus in pursuit of the execution of the decree. There is no evidence and, indeed none has been suggested, that of all the arguments that the applicant has raised against the decree, there is none that suggests that the decree has been set aside or varied either by this Honourable Court or by the Court of Appeal to which an appeal has been preferred.

In the same breath, there is no evidence that the order of mandamus to which reference has already been made arose from the proceedings to enforce settlement of the decree has been stayed or set aside or even appealed against.

All that this Honourable Court would be concerned with at this stage of the proceedings is why the 1st respondent should not be punished for disobeying a valid court order. The obligation to obey court orders is not subject to debate and going by the 1st respondent’s counsel’s submissions and the legal authorities that he has invoked, it is clear that counsel is under no illusion that court orders must be obeyed. It is trite that it is the unqualified obligation of every person against, or in respect of whom, an order has been made by a court of competent jurisdiction, to obey it unless and until that order has been discharged (per Somervell and Romer, L.JJ. in **Hadkinson v Hadkinson [1952] 2 All ER 567**).

As I have noted, no reason or any satisfactory reason, for that matter, has been given by the 1st respondent why he has not complied with this Honourable Court’s order made on 15 July 2019. It could be, as the 1st respondent has alleged that, there is no provision for payment of the applicant’s claim in the County’s 2021/2022 budget but no explanation has been given why no provision has been made in the subsequent years long after the award was made by the arbitrator. Again, there is no basis for the argument that a court valid court decree or order is subject to verification by the office of the Auditor-General, or any other office for that matter, before it can be complied with.

I am therefore inclined to find the 1st respondent in contempt of court. Accordingly, I order the 1st respondent to appear in person in open court on 2 March 2022 to show cause why he should not be committed to civil jail. The applicant will have the costs of the application. The applicant’s application is allowed in those terms. Orders accordingly.

SIGNED, READ AND DELIVERED ON 27TH JANUARY 2022

NGAAH JAIRUS

JUDGE