



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**MISC. APPL.(JR) NO.15 OF 2011**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. MUNICIPAL COUNCIL OF BUSIA.....RESPONDENTS**

**2. THE CLERK, MUNICIPAL OF BUSIA**

**AND**

**JULIUS ORINA MANWARI T/A MANWARI & COMPANY ADVOCATES.....EX-PARTE APPLICANT**

**AND**

**COUNTY GOVERNMENT OF BUSIA.....INTERESTED PARTY**

**RULING**

[1] This judicial review matter has a long history traceable to the order made by the court on 5<sup>th</sup> May 2011 granting the ex-parte applicant leave to institute judicial review proceedings for an order of *mandamus* against the respondents, **Municipal Council of Busia** and the **Clerk of the Council**, whose functions were later taken over by the interested party, the **County Government of Busia**.

Pursuant to grant of leave, the exparte applicant filed the substantive application vide the Notice of Motion dated 25<sup>th</sup> November 2011.

[2] The motion was heard and determined by this court (**Kimaru J**) on the 30<sup>th</sup> July 2013 in the following terms:-

“This court holds and finds that the exparte applicant was infact instructed by the respondents to act, in the various cases that were the subject of taxation. Since instructions were not disputed then it follows that the exparte applicant is entitled to be paid his fees. The respondents cannot raise legal technicalities to defeat the legitimate claim by the exparte applicant to be paid his costs. The respondents did not appeal by way of reference against the decision that was made by the taxing officer when he assessed the legal fees to be paid to the ex-parte applicant. They cannot, in this application challenge the validity or otherwise of the said taxed bill of costs. This court agrees with the exparte applicant that the respondents have not only frustrated him from being paid the said sum of money, but have blatantly refused to pay the same. The remedy that ex-parte applicant craves for is an appropriate one to compel the respondents to perform their legal and statutory duty.

In the premises therefore, this court allows the exparte applicant’s application to be granted the judicial review orders of *mandamus*. The respondents are ordered to pay the ex-parte applicant the sum of ksh.7,804,294/= within thirty (30) days of this court’s ruling. The respondents are hereby compelled by order of *mandamus* to pay the amount in performance of their statutory duty. The exparte applicant shall have the costs of this application and costs for the application which sought to be granted leave to file the present application for judicial review. It is so ordered.”

[3] *Mandamus*, being a remedy through which a public officer is compelled to do or undertake a duty imposed upon him by the Law, would normally be granted if the duty is in the nature of a public duty and affects the rights of an individual provided there is no other appropriate remedy. The person or public body or authority to whom it is issued must be under a statutory or legal duty to do something (see, **Shah Vs. Attorney General (No.3) (1970) EA 543**).

The legality of the order issued herein cannot be questioned at this stage but by way of an appeal to the Court of Appeal. The bone of

contention at this stage and which in effect gives rise to the present application dated 11<sup>th</sup> August 2021 made by the interested party is apparently enforcement of the order of *mandamus* against officers of the interested party.

[4] Such enforcement of the accruing decree would normally be against public officers in their official rather than personal capacity. In such circumstances the public officer is simply being compelled to facilitate the payment due to an *ex parte* applicant. No personal inability is imposed on the public officer. An order of *mandamus* would relate to his official public duty prescribed by the Law, so that his failure or neglect to perform such duty as commanded by an order of *mandamus* would constitute contempt of court for which the public officer may be cited and punished appropriately. This means that in the event of disobedience of an order of *mandamus* contempt of court proceedings ought to be instituted against the responsible public officer.

Such proceedings are meant to show the court's displeasure at the failure of a public officer to comply with the direction of the court given at the instance of the Republic which employs the public officer. Contempt proceedings are also meant to uphold the dignity and authority of the court.

[5] A decree for payment money or costs issued against the Government in favour of a litigant unlike in ordinary civil proceedings can only be enforced by way of an order of *mandamus* compelling the responsible officer in the relevant public body to pay the decretal amount. This is because the Government is protected and given immunity from execution and attachment of its property under s.21 (4) of the **Government Proceedings Act**, which provides that:-

**“Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court order 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.”**

[6] Generally, s.21 of the **Government Proceedings Act** provides for the manner in which orders made against the Government can be satisfied. In that regard s.21 (3) of the Act imposes a statutory duty on the accounting officer of the Government in the following terms:-

**“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.”**

[7] It may be noted that under the aforementioned provision payment is not done subject to availability of funds or budgetary allocations and particularly approval of Government expenditure in the financial year subsequent to which Government liability accrues.

However, enforcement of an order of *mandamus*, is not the same as execution proceedings in ordinary civil suits. Indeed, it was held by the **High Court in Republic Vs. the Attorney General & Another, *ex parte* James Koroso Nbi Judicial Review Miscellaneous Application No.44 of 2012**, that in seeking an order of *mandamus*, the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government through Parliament has directed him to do. The relief sought is not **“execution or attachment”** or process in the nature thereof. It is not sought to make any person individually liable for any order or **“for any payment”** a debt held to be due by the High Court in accordance with a duty cast upon him by Parliament.

It was further held in the same case, that in cases of *mandamus* it is recognized that when statutory duty is cast upon a public officer in his official capacity and the duty is owed not to the state but the public any person having sufficient legal interest in the performance of the duty may apply to the courts for an order of *mandamus* to enforce it.

[8] In relation to this case and indeed the present application which was canvassed by way of witness submissions, there was no dispute that the *ex-parte* applicant had a right and still has a right to enforce the order of *mandamus* issued in his favour against the respondents and by extension the interested party and its officials, but the procedure adopted in doing so was not proper in the circumstances. Instead of proceeding against the interested party and its official by way of contempt of court proceedings the *ex-parte* applicant went for ordinary execution of a decree against officials of the interested party more or less in their individual rather than official capacity for which the order of *mandamus* was issued. At most, the officials should have been issued with notices to show cause why they should not be punished for contempt of court in disobeying the order of *mandamus* issued against them. It was also unnecessary for the *ex-parte* applicant to go after or move against the interested party's **County secretary** when it was clear that the interested party's accounting officer for the purposes of the order of *mandamus* was not the County secretary but the County Executive in charge of finance who is the rightful official under obligation to pay funds, hence duty bound to comply with the order sought against him.

Indeed, the **Public Finance Management Act**, vests management and control of Public Finance in the **County Executive Committee Member in charge of Finance**.

[9] Herein, the Notice to show cause issued by the Deputy Registrar, of this Court dated 7<sup>th</sup> July 2021, was for committal to civil jail in execution of the decree issued in favour of the *ex-parte* applicant against the interested party's officials or public officers. They were required to appear before the Deputy Registrar on 28<sup>th</sup> July 2021 and when they failed to personally do so warrants for their arrest were issued for execution by the Officer Commanding police division (OCPD) Busia for their failure to pay the decretal sum which at the time amounted to ksh.21,671,455/=

**Prayer 2** of the present application seeks for the lifting and setting aside of the warrant or warrants of arrest issued by the Deputy Registrar on 28<sup>th</sup> July 2021 and for all the reasons foregoing, the prayer is well merited and is hereby granted. **Prayer 3** cannot stand in view of the observation made hereinabove by the court respecting the ex-parte applicant's irregular manner of enforcing an order of *mandamus*.

It would therefore follow that the ex-parte applicant's opposition to the application on the basis of the averments the contained in the replying affidavit are devoid of merit.

[10] In sum, the proceedings before the Deputy Registrar on which this application is anchored were improper and a nullity for the purposes of enforcing the order of *mandamus* and are hereby set aside together with all consequential order. However, there being no dispute that the interested party is indebted to the ex-parte applicant in the amounts specified in the order of *mandamus* together with costs and interest and also there being no dispute that the remedy is yet to be realized in faovur of the ex-parte applicants due to the interested party's County Executive in charge of finance procrastination and failure to comply with the orders of mandamus issued by this court on 30<sup>th</sup> July 2013, it is hereby ordered that a Notice to show cause do issue to the said County Executive member in charge of Finance to show cause why contempt of court proceedings cannot be commenced against him.

Both parties shall bear own costs of the application.

Ordered accordingly.

**J.R. KARANJAH**

**J U D G E**

**[DATED & DELIVERED THIS 17TH DAY OF FEBRUARY 2022]**