



**Republic v Chief Officer Health & 3 others; Ogada (Exparte Applicant) (Judicial Review 7 of 2023) [2023] KEELC 18667 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
JUDICIAL REVIEW 7 OF 2023  
MN KULLOW, J  
JUNE 27, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CHIEF OFFICER HEALTH ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY COUNTY GOVERNMENT OF MIGORI .... 2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER FINANCE COUNTY GOVERNMENT OF MIGORI ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF FINANCE, COUNTY GOVERNMENT OF MIGORI ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**GEORGE OUMA OGADA ..... EXPARTE APPLICANT**

**RULING**

1. The ex-parte Applicant herein filed an Application by way of an Ex-parte Chamber Summons dated 28<sup>th</sup> March, 2023 and brought under Certificate of Urgency; seeking the following orders: -
  - i. Spent
  - ii. That leave be granted to the Applicant to apply for the judicial review order of Mandamus to compel the Respondents, for and on behalf of the County Government of Migori to jointly and/or severally pay the Applicant Kshs. 9,200,000/= to satisfy this Court’s Judgment and Decree dated 10/02/2022 or appear before the Hon. Court to show cause why he should



not be committed to civil jail for failing to perform his statutory duty by satisfying the court Judgment/ Decree and assessed costs.

- iii. That cost of this Application be borne by the Respondents.
2. The Application is premised on the grounds set out in the Applicant's Verifying Affidavit sworn 28/03/2023 in terms of Order 53 Rule 4 of the *Civil Procedure Rules*. It is the Applicant's contention that he instituted the suit against the Respondents vide Migori CMELC No. 69 of 2019; the same was heard and judgment entered in his favor against the Respondents. That the decree, certificate of costs and certificate of Order against the government were duly served upon all the respondents.
3. However, it is his claim that the Respondents have refused and/or failed to comply with the conditional order for stay of execution issued on 27/9/2022 in ELC Misc. E003 of 2022, hence the instant Application for leave to apply for an order of mandamus, to compel the respondents to settle the decree and the assessed costs.
4. The Application was opposed; the Respondents filed a Replying Affidavit sworn by Gideon Otieno Orimbo, Legal Counsel employed by the County Government of Migori, on 17/04/ 2023. He avers that following the general elections; there were changes and transition in the administration of the county government of Migori, which caused substantial disruption and paralysis in the operations and functioning of the various departments within the county government. This as a result led to the non-compliance with the orders issued on the deposit of security for costs in Migori ELC Misc. Application No. E003 of 2022.
5. It was his contention that the County Government of Migori is keen on prosecuting the Appeal No. 45 of 2021, arising from the decree and judgment in Migori CMELC No. 69 of 2019. He maintained that the delay in prosecuting the Appeal was not deliberate but due to the changes in administration at the county government.
6. He further stated that the county government of Migori is facing financial crisis due to non-disbursement of funds from the national government and maintained that no prejudice would be suffered if the execution of the said decree awaits the outcome of the Appeal.
7. In conclusion, it was his claim that the Appeal stands to be rendered nugatory if execution is carried out and the Appeal succeeds since the Appellant has no known means to refund the decretal amount if paid out. He thus urged the court to dismiss the Application.
8. On 29/03/2023, I issued directions on the disposal of the Chamber Summons Application by way of written submissions. On a perusal of the record, I have noted that only the Respondents filed their submissions, which I have read and taken into account. Be that as it may, I will proceed to render my decision on the Application as hereunder;

### **Analysis and Determination**

9. The sole issue arising for determination is whether in the circumstances, Leave can be granted to the ex-parte Applicant as sought;
10. The ex-parte Applicant herein is seeking leave to apply for an Order of mandamus, to compel the Respondents to pay the decretal sum in compliance with the judgment and decree of the trial court issued on 09/11/2021 and 10/2/2022 respectively.
11. The Respondents in response stated that there is a valid Appeal filed in court vide Migori ELC Appeal No. 45 of 2021, which is pending for hearing and determination. They thus maintained that if the orders sought herein are granted and execution proceeds, then the Appeal stands to be rendered



nugatory. It was therefore his contention that the Application as filed is premature and thus urged the court to dismiss the same in the interest of justice and allow the Appeal to be heard and determined.

12. It is not in dispute that there is an Appeal No. 45 of 2021 pending for hearing and determination before this court; arising out of the judgment and decree of the trial court and which the ex-parte applicant now seeks to execute through the intended judicial review process. This court has perused the said ELC Appeal No. 45 of 2021 and I do note that there is a pending Application for stay of execution of the judgment and decree of the trial court. I do therefore acknowledge the risk of allowing the orders herein and the implication it would have on the ELC Appeal No. 45 of 2021 if the Order for stay of execution sought is granted.
13. To this end, I am guided by the provisions of Section 3A of the Civil Procedure Act, which grants this court the inherent powers to issue such orders as may be necessary to meet the ends of justice and where equity so demands. Further, this court is duty bound to ensure that its decision does not cause injury to any of the parties before it and must therefore balance the interest of all parties.
14. In conclusion, having considered the facts of this case, the affidavits filed by both parties, the Respondents' submissions as well as the grounds set out in the Memorandum of Appeal in ELC Appeal No. 45 of 2021; I find that this is a proper case for this court to exercise its discretion in favour of the Respondents.
15. Accordingly, in the interest of justice and to further prevent the abuse of the court process; this court on its own motion will proceed to grant an Order for Stay of the Proceedings herein pending the hearing and determination of the Appeal No. 45 of 2021. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27<sup>TH</sup> DAY OF JUNE, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

In presence of; -

for the ex-parte Applicant

for the Respondents

Court Assistant– Tom Maurice/ Victor

