



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION / JUDICIAL REVIEW CAUSE NO. 2 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS AGAINST KISII COUNTY GOVERNMENT

IN EXECUTION OF DECREE OF KISII HIGH COURT MISC. CIVIL APPLICATION NO. 51 OF 2016

REPUBLICAPPLICANT

VERSUS

KISII COUNTY GOVERNMENT

CHIEF FINANCE OFFICER IN CHARGE OF FINANCE &

ECONOMIC PLANNING RESPONDENT

RULING

1. The *ex-parte* applicant has moved this court vide an application dated 18th November 2019 for the following orders:

1) *That the Honourable court be pleased to issue an order of Mandamus compelling the Respondent/Kisii County Government*

a) *To settle the decree given on the 25th March 2019 against her;*

ALTERNATIVELY

2) *The Ex-parte applicant be at liberty to attach and sale the Respondent's properties through the preferable auctioneers in execution of the foresaid decree to recover full Decretal sum with costs and interest thereon from the date of the date of the decree.*

3) *The respondent do bear the costs of the instant application.*

2. The application is founded on grounds set out at the foot of the application.

3. In his Statement of Facts, the *ex-parte* applicant stated that he was appointed to represent the County Council of Gusii in Kisii Chief Magistrate's Court Civil Suit No. 658 of 2009. After the promulgation of the Constitution of Kenya 2010, the defunct County Council of Gusii was substituted with the Kisii County government. Since the County Council of Gusii had not paid legal fees in the aforementioned suit, the *ex-parte* applicant filed an Advocate/Client bill of costs which was taxed and a certificate of costs issued and served upon the Respondents.

4. The certificate of costs was adopted by the court as a judgment of the court and thereafter a decree was given on 25th March 2019. The *ex- parte* applicant averred that the decree and a Notice of Demand were served upon respondent but they either ignored or refused to settle the decretal sum, prompting the *ex-parte* applicant to file the instant application.

5. The respondent entered appearance in the matter but did not file a response despite being given ample time to do so.

6. Learned counsel for the respondent also intimated to the court that the respondent was willing to settle the amount owed. However, as of when this court retired to make its determination, there was no confirmation of payment.

7. Ordinary rules of procedure for execution of a decree do not apply to the government, which includes county governments.. The elaborate process for satisfaction of orders against the government is laid out in **section 21** of the **Government Proceedings Act** thus;

21(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) 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.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court 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.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party. [Emphasis added]

8. In as much as there was no objection to the application, it behoves upon this court to satisfy itself that the conditions set out in the foregoing provision have been met. I agree with the interpretation of Order 21 above in the persuasive authority of **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex- parte Fredrick Manoah Egunza [2012] eKLR** thus;

“Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

9. I also concur with the decision in **Republic v County Secretary Migori County Government & another [2019] eKLR** where the court expressed itself as follows;

“11. I need not re-emphasize the need for strict compliance with **Section 21 of the Act** being the law of the land. In this matter I can gather from the record that a Decree and a Certificate of Costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under **the Act** is obtained. The procedure is contained in **Order 29 of the Civil Procedure Rules**. Under **Rule 3** thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.”

10. It is not disputed that the *ex-parte* applicant sought and obtained a decree against Kisii County Government in Miscellaneous Civil Application No. 51 of 2016. The applicant has also demonstrated that he has been issued with a certificate of costs against the respondent. I have not, however, come across a Certificate of Order against the Government as required in **section 21** of the **Government Proceedings Act** and **Order 29 Rule 3** of the **Civil Procedure Rules**.

11. The application also flouts **Order 21 Rules (4) and (5)** which prohibit attachment and sale of property belonging to the government. Seizure and sale of the government’s property if entertained, is likely to grind its operations to a halt, rendering it incapable of performing its Constitutional and Statutory duties. (See **Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74**)

12. The upshot is that the Notice of Motion dated 18th November 2019 is found to be premature and is hereby struck out with no orders as to costs.

Dated, signed and delivered at Kisii this 28th day of January, 2021.

A. K. NDUNG'U

JUDGE