



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLANEOUS CIVIL APPLICATION NO. E008 OF 2020

DUNCAN MUGANE GICHOVI.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF EMBU....RESPONDENT

RULING

1. The applicant approached this court vide an ex-parte application dated 26/10/2020 brought under the provisions of Order 53 Rules 1 and 2 of the Civil Procedure Rules 2010 wherein he seeks leave to file an application for an order of mandamus to compel the respondent to comply with the decree issued on 14/09/2020 in Claim No. 480 of 2017 by the Employment & Labour Court, Nyeri together with all consequential orders thereto. He also prays for costs of the application to be in cause.
2. The said application is premised on the grounds on the face of it and further the verifying affidavit, statement of facts by the applicant. In a nut shell, the applicant's case is that he is a decree holder in the judgment of the Employment and Labour Relations Court being claim No. 480 of 2017 issued vide the decree dated 14/09/2020. That despite persistent imploration the respondent has unlawfully refused, neglected and failed to satisfy the said decree and hence the instant application as it's the only available avenue to compel the respondent to satisfy the said decree.
3. At the hearing of the application, Mr. Eddy Njiru, the Learned counsel for the applicant made oral submissions and whereby he prayed the application to be allowed.
4. I have considered the application herein and annexures thereto and it is my view that the issue which I am invited to decide on is whether the same is merited.
5. As I have already noted, the application herein is seeking leave to commence judicial review proceedings seeking orders of mandamus against the respondent. The applicable law on leave is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court has been sought and granted. The reasons for the leave were explained by Waki J. (as he then was) in Republic –vs- County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996 and they include; to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty the public officers and authorities might be left with as to whether they could safely proceed with administrative action while proceedings for judicial review if it were actually pending even though misconceived.
6. The Learned Judge (as he then was) further opined that leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review and that the granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judicially.
7. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.
8. In the present application, the applicant's case is that he has a decree against the respondent issued in Nyeri Employment and Labour Relations Court Claim No. 480 of 2017 on 14/09/2020. A copy of the said decree is attached to the said application together with a copy of consent order in relation to costs. There is also a letter annexed to the application dated 30/09/2020 requesting for settlement of the decree together with costs and there is no evidence of the same having been paid and thus evidence that the respondent has unlawfully refused, neglected and/or failed to satisfy the decree. Further, the respondent is a county government and thus an entity whose execution cannot issue

without judicial review proceedings having been commenced pursuant to section 21 of the Government Proceedings Act, Cap. 40 of the Laws of Kenya. As the Court held in Miscellaneous Civil Application 350 of 2015, Republic –vs- County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR: -

“the law as it stands presently is that no execution can be levied against the property of a Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of mandamus is not complied with...”

9. To this extent, and in light of the evidence adduced, I find that the applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the respondent.

10. I find that the application has merits and it is hereby allowed as prayed.

11. It is so ordered.

Delivered, dated and signed at Embu this 27th day of January, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent