



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW APPLICATION NO. 6 OF 2019

**IN THE MATTER OF: AN APPLICATION FOR
THE JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

**IN THE ENFORCEMENT OF COURT ORDERS
AND DECREE AGAINST THE GOVERNMENT**

AND

IN THE MATTER OF: THE LAW REFORM ACT

AND

IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT

BETWEEN

REPUBLIC.....APPLICANT

v

CLERK, COUNTY ASSEMBLY OF

KISUMU.....1st RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT

OF KISUMU.....2nd RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER IN

CHARGE OF FINANCE, COUNTY GOVERNMENT

OF KISUMU.....3rd RESPONDENT

ANNE ATIENO ADUL.....EX-PARTE APPLICANT

RULING

1. On 16 April 2020, the Court issued a judicial review order of mandamus compelling the Respondents to jointly pay the *ex-parte* applicant

the sum of Kshs 5,200,000/- being taxed costs arising from Kisumu Petition No. 297 of 2014.

2. The firm of Rodi Orege & Co. Advocates filed a Notice of Appointment of Advocates to act for the Respondents on 10 June 2020.

3. The Respondents did not make payment and on 4 August 2020 the *ex-parte* applicant filed a Motion seeking orders

a)

b) The Court be pleased to issue an order to cite and punish for contempt and commit to civil jail

a) Eliud Odhiambo Owen Ojuok, Clerk, County Assembly of Kisumu.

b) Godfrey Kigochi, County Secretary, County Government of Kisumu as the Head of the County Public Service and

c) George Omondi Okongo, County Executive Committee member in charge of finance, County Government of Kisumu for a period of six (6) months or any other period or any other sanction as this Honourable Court may deem fit and appropriate for having wilfully disobeyed the order of mandamus issued by this Court on the 16th of April 2020 and served on the Respondents.

c) The Respondents be denied audience before this Court until and unless they first purge their contempt by paying the applicant the sum of Kshs 9, 499,544/- made up as follows

(i) The sum of Kshs 5,200,000/-.

(ii) Costs amounting to Kshs 296,375/- plus

(iii) Kshs 4,003,169/- interest thereon from 12th January 2015 to 10th July 2020, in terms of the certificate of order against the Government dated 6th July 2018 which amount on account of interest continue to accumulate and to accrue until payment shall be made in full.

d) Costs of this application to be paid by the three Respondents personally.

4. On 6 August 2020, the Court dismissed the application for being defective as leave had not been sought for it to be heard during the vacation.

5. The dismissal prompted the *ex-parte* applicant to file another Motion on 22 September 2020 seeking orders

a) ...

b) The Court be pleased to order and to declare that the costs of Kshs 5,200,000/- do attract interest at court rate of 14% with effect from the date of the decree in Petition No. 297 of 2014 until payment shall be made in full.

c) The Court be pleased to declare that Eliud Odhiambo Owen Ojuok, Clerk, County Assembly of Kisumu, Geoffrey Kigochi, County Secretary, County Government of Kisumu as the Head of the County Public Service and George Omondi Okongo, County Executive member in charge of Finance, County Government of Kisumu to be in contempt of court for having wilfully disobeyed the order of mandamus issued by this Court on the 16th April 2020.

d) The Court be pleased to cite for contempt of Court Eliud Odhiambo Owen Ojuok, Clerk, County Assembly of Kisumu, Geoffrey Kigochi, County Secretary, County Government of Kisumu as the Head of the County Public Service and George Omondi Okongo, County Executive member in charge of Finance, County Government of Kisumu.

e) The Court be pleased to convict, punish and sentence without the option of a fine Eliud Odhiambo Owen Ojuok, Clerk, County Assembly of Kisumu, Geoffrey Kigochi, County Secretary, County Government of Kisumu as the Head of the County Public Service and George Omondi Okongo, County Executive member in charge of Finance, County Government of Kisumu to civil jail for a period not exceeding six (6) months or any other period as this Honourable Court may deem fit and appropriate for having wilfully disobeyed and continuing disobedience of the order of mandamus issued by this Court on the 16th April 2020.

f) The Respondents be denied audience before this Court until and unless they first purge their contempt by paying to the applicant the sum of Kshs 9,870,887/- made up as follows

(i) The sum of Kshs 5,200,000/-.

(ii) Costs amounting to Kshs 296,375/- plus

(iii) Kshs 4,374,512/- interest thereon from 12th January 2015 being the date of the decree in the primary suit to the date of this application.

g) Costs of this application to be paid by the two Respondents personally.

6. The Court certified the Motion urgent and directed that it be served upon the Respondents and that affidavits and submissions be filed and exchanged.

7. Consequently, the Clerk of the County Assembly filed a replying affidavit on 12 October 2020 prompting the *ex-parte* applicant's advocate to file a supplementary affidavit and submissions on 19 October 2020.

8. The 1st Respondent filed a further replying affidavit and submissions on 30 October 2020. The 2nd and 3rd Respondents also filed their replying affidavits on the same day.

9. Out of the blues, the firm of Otieno, Yogo, Ojuro & Co. Advocates filed on 13 November 2020 a Notice of Appointment of Advocates to come on record for the Respondents.

10. The said firm filed the Respondents submissions on 2 December 2020.

11. Since the firm of Rodi Orege & Co. Advocates were already on record for the Respondents, the Notice of Appointment of Advocates by the firm of Otieno, Yogo, Ojuro & Co. Advocates was not only irregular but fatally defective and it is struck out of the record.

12. The Court has considered the Motion, affidavits and submissions and identified the Issues requiring its determination as examined hereunder.

Interest on costs

13. The *ex-parte* applicant sought a declaration that she was entitled to interest of 14% per annum on costs of Kshs 5,200,000/- from date of the decree in Kisumu Petition No. 297 of 2014 until payment in full (12 January 2015).

14. The reason given for seeking interest was that she had been kept out of funds since the decree.

15. Challenging an award of interest at this juncture, the Respondents asserted that the *ex-parte* applicant's advocate had in a previous communication indicated a different sum of accumulated interest; the Court was *functus officio* as far as the request for interest was concerned since the Court had not awarded interest in the judgment in Kisumu Petition No. 297 of 2014 and that interest could not be awarded unless the judgment was reviewed.

16. The Court has looked at the decree issued in Kisumu Petition No. 297 of 2014, *County Assembly Service Board & Ar v County Assembly of Kisumu & Ors*. The Court did not award interest.

17. This Court would therefore be exercising the review jurisdiction through the back door by purporting to award interest when the trial Court did not award interest.

18. The Court also notes that the judicial review jurisdiction is a special jurisdiction meant to address a particular set of disputes, and a declaration that interest is payable on taxed costs is not one of them.

19. It is also not lost to the Court that the question of interest is provided for in Paragraph 7 of the Advocates Remuneration Order. Section 51 of the Advocates Act also addresses the question of costs.

20. In the case at hand, none of the parties addressed their mind to the applicability of paragraph 7 aforesaid nor did the applicant suggest even remotely suggest that it had complied with the provision precedent to claiming interest on costs.

21. The Court, therefore, declines to declare that the sum of Kshs 5,200,000/- was subject to accrual of interest.

Contempt or mandamus?

22. The Clerk of the County Assembly denied that there had been disobedience of the decree. He asserted that the liability for the costs was joint and several and that he had paid his portion of the costs being Kshs 1,026,034/- leaving a balance of Kshs 707,298/-.

23. He also urged that there had been no wilful disobedience on his part, firstly because he had not been served personally with the decree (in his further replying affidavit at paragraph 4, he admits that his office was alerted of the decree through a letter dated 13 July 2020).

24. Resisting the contempt application, the County Secretary swore that since the National Treasury had not disbursed funds to the County Government, there had been no wilful disobedience of the order to pay the *ex-parte* applicant her costs.

25. The County Executive Committee member on his part denied wilful disobedience of the decree and indicated that his hands were tied with the legal framework in place (Articles 229(7) and 228(4) of the Constitution, the Public Finance Management Act, 2012) as funds had not been allocated to settle the costs and that were payments to be made outside the legal framework, it would be an illegality.

26. He deposed that once the County Assembly passed the supplementary budget after the Christmas break, the *ex-parte* applicant would be

paid.

27. The County Executive Committee member also contended that a Notice of Entry of Judgment were not served.

28. It is not in dispute that the Court taxed the *ex-parte* applicant's costs. It is also not in dispute that the *ex-parte* applicant sought leave to commence judicial review with a view to compelling the Respondents to pay the taxed costs.

29. It is also not disputed that a demand for payment was made and that earlier, a Certificate of Costs and a Certificate of Order against the County government had been issued

30. Leave was granted and the substantive motion was filed heard and a determination made on 16 April 2020. A decree was issued forthwith.

31. In respect to the assertions on personal service and the normal strictures on contempt applications, this Court would endorse what the High Court stated in *R v Permanent Secretary Office Of The President Ministry Of Internal Security & Ar ex-Parte Nassir Mwandih* (2014) eKLR that

Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd.

32. In light of the above, the Court is satisfied that the *ex-parte* applicant has met the threshold for grant of the orders sought.

Orders

33. From the foregoing, the Court orders Eliud Owen Odhiambo, Godfrey Kigochi and George Omondi Okongo to appear in Court on 17 February 2021 to show cause why warrants of arrest should not issue with a view to committing them to civil jail.

Delivered through Microsoft teams, dated and signed in Kisumu on this 27th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For applicant Mr. Okongo instructed by Okongo Wandago & Co. Advocates

For Respondents Rodi Orege & Co. Advocates

Court Assistant Chrispo Aura