



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR MISC. APPLICATION NO. 219 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF MILIMANI RESIDENT MAGISTRATES COURT CIVIL CASE NUMBER 6632 OF 2002

AND

IN THE MATTER OF THE JUDGMENT DATED 23RD JANUARY 2008

AND

IN THE MATTER OF SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA

AND IN THE MATTER OF:

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

Ex parte:

1. *Macharia Njeru*

2. *Grace Macharia*

RULING

The application before court is the applicants' Notice of Motion dated 15 October, 2019 filed under Order 53 Rule (3) of the Civil Procedure Rules, 2010, and Section 8 (2) of the Law Reform Act, Cap 26. It seeks, in the main, an order of Mandamus to compel the respondent to pay the applicants the sum of Fifty One Thousand Nine Hundred and Ninety Seven shillings and Sixty Five Cents (Kshs 51,997.65). This sum is said to be due and owing as from the 28th day of February 2008 on account of a judgment against the respondent in the Chief Magistrates Court at Milimani in Civil Suit No. 6632 of 2002. The applicants seek this amount together with costs and interest accruing from the date of the judgment till payment in full.

The motion is supported by a statutory statement verified by an affidavit sworn by Macharia Njeru on 10 July 2019.

According to the applicants, they obtained judgement against the respondent for Kshs 51,997.65 in Civil Case No. 6632 of 2002 on 23 January 2008. It is their contention that since the respondent is the natural and presumptive legal successor of the defunct City Council of Nairobi, it is under obligation to satisfy the decretal sum awarded against it.

They also contend that their efforts to have the respondent or its predecessor pay the decretal sum have borne no fruit. The respondent has not explained and neither is there any justification for failure to satisfy the decretal sum for the past 11 years.

The respondent neither filed any affidavit nor grounds of objection to the applicant's motion; it instead filed a notice of preliminary objection dated 30 September 2019 in which it objects to the hearing of the motion on the grounds that, this honourable court lacks jurisdiction to determine this matter; that the application offends section 21 of the Government Proceedings Act, cap. 40; that the application is bad in law and fatally defective; and, that it is in the interest of justice that the application be dismissed with costs.

On 10 June 2020, the Court (Mativo), J. directed that the preliminary objection be disposed of first; it is this preliminary object that is the subject of this ruling.

Mr. Gitonga, the learned counsel for the respondent urged that the application is contrary to section 21 of the Government Proceedings Act. The section, according to the learned counsel enjoins a decree holder to apply to the court which issued the decree for a certificate and that it is this certificate that ought to have been served upon the government entity concerned before one can seek an order for mandamus to enforce payment. Nonetheless, he admitted that the decree itself had been served to his client.

Counsel also urged that according to section 9(2) of the Law Reform Act, cap. 26, the applicant's application could only be made within six months from the date of refusal to pay. Since the decree was obtained in the year 2002, the application was filed outside the limitation period and without leave of the court.

In response to these submissions, Ms. Nzuki, the learned counsel for the applicant relied on her written submissions dated 9 July 2020. She added that section 9 (2) of the Law Reform Act is inapplicable to the present application because the respondent has not demonstrated that the applicant's application is one of the matters specified in that section. She urged that the application is for execution whose limitation period is 12 years as per the Limitation of Actions Act, cap.22. The decree was issued on 28 February 2008 and certified copy was served on 17 March 2008. Other copies were served in 2017 and 2018.

As far section 21 of the Government Proceedings Act, cap. 40 is concerned, it was argued on behalf of the applicants that the main provisions of this section on satisfaction of orders against the Government require, firstly issuance of a certificate in the prescribed form containing particulars of the order; secondly, service of the certificate of order. Once this is done, the accounting officer for the County Government is required to pay the amount appearing on the certificate together with interest, if any.

The applicants further conceded that Section further provides that no execution or attachment is to be issued and no person is to be individually liable under any order for the payment by the County Government except as provided in that Section.

Nonetheless, they urged that this provision of the law became applicable to the County governments as from 7 January, 2016 by which time the decree and certificate of costs had been served upon the Respondent and its predecessor. It is their case that given the circumstances, the requirements of this section have been substantially met given that the Town Clerk to the respondent's predecessor and the County Secretary of the Respondent had been served with the requisite documents including notices demanding payments.

In any event, so the applicants have submitted, the provisions of section 21(2) suggest that that the requirements under section 21 are not mandatory; that section reads:

“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.” (Emphasis added)

The applicants cited the decision in **Republic v Kenya Broadcasting Corporation Ex-parte Dorcas Florence Kombo [2018] eKLR** where the court cited with approval the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** in which Majanja, J held that a decree holder's right to enjoy fruits of his judgment must not be thwarted and that the Court should adopt an interpretation that will favour enforcement and secure accrued rights. This, it was held, is consistent with the values of the Constitution, in particular, Article 10 thereof and also that it is the obligation of the court to do justice to the parties and to do so without delay as the Constitution requires in its Article 159 (2) (a) & (b). Based on this latter Article, the court was urged not to give undue regard to technicalities.

The applicants also urged this court to adopt the reasoning in **Republic v Kenya Broadcasting Corporation Ex-parte Dorcas Florence Kombo** (supra) on issuance of the order of mandamus to compel settlement of a decretal sum; in that case the court is said to have noted as follows:

“In this case, the Applicants herein have moved this Court to compel the satisfaction of a Judgement already decreed in their favour by a competent Court of law. The Respondents have not given any reason why the decree has not been satisfied more than three years down the line. If the Court were to decline to grant mandamus, applicants would be left without an effective remedy despite holding a decree.”

Again, the applicants urged this honourable court to follow the decision in **Kenya Bus Service Ltd & another V Minister for Transport & 2 Others [2012] eKLR** where the constitutionality of section 13(A) of the Government Proceedings Act was questioned. In that case the court is said to have stated as follows on this question:

“By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See “Law and Practical Programme for Reforms” (1992) 109 SALJ Article 48 must be located within the Constitutional imperative that recognises as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.

The provisions for demanding prior notice before suing the government is justified on the basis that the government is a large organisation with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable the effect of mandatory notice provisions cause hardship to ordinary claimants.

I am of course aware that pre-litigation protocols, for example Order 3 rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.”

And with that the applicants urged the honourable court to find that the requirements of section 21 of the Government Proceedings Act have been complied with and the respondent’s Preliminary Objection should be dismissed and the application allowed.

Section 9(2) of the Law Reform Act, cap. 26 which the learned counsel for the respondents made reference to on the argument that the applicant’s motion is out of time reads as follows:

9. (2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

Subsection (3) states in express terms the time within which an application for the order of certiorari should be made; it is of little relevance to the applicant’s allocation which seeks the order for mandamus. Subsection (1), on the other hand, talks about the power to make rules to provide for any matters of procedure with respect to applications for judicial review orders.

Indeed, there are no other rules besides Order 53 of the Civil Procedure Rules. Nowhere in that Rule is it stated that an application for the order of mandamus must be made within six months of the date of the act complained of. It is only in Order 53 Rule 2 that a specific timeline is given for the application for the order of certiorari. That particular Rule reads as follows:

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. (Emphasis added).

I would agree with the applicants that it has not been demonstrated that their application is one of those ‘specified proceedings’ contemplated in section 9(2) of the Law Reform Act which rules prescribe that may be made within six months of the act or omission complained of. According to Order 53 of the Civil Procedure Rules which, no doubt, are the rules envisaged in section 9(2) of the Law Reform Act it is only the prerogative order of certiorari that is subject to limitation period.

This does not in way suggest that the timing for the application for any of the order for judicial review does not matter; being discretionary remedies the urgency or the laxity, with which an applicant moves the court for these orders will certainly be factor that may influence whether to grant leave to make the necessary application or ultimately, whether the application ought to be allowed. But this is not the case here; the point here is that neither section 9(2) of the Law Reform Act nor Order 53 of the Civil Procedure Rules prescribes the limitation of time within an application for mandamus must be made.

Turning back to section 21 of the Government Proceedings Act, is a provision of the law that deals with satisfaction of orders against the Government; it prescribes, among other things, that a certification of order to be issued by a court officer after 21 days after the order was made or if the order is for payment of costs which have to be taxed, the certificate of order may be issued after such taxation; that the certificate may be served upon the Attorney General; and the form and contents of the certificate. Perhaps, I should produce it here for better understanding; it reads as follows:

21. Satisfaction of orders against the Government

(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).

Subsection (5) which deals with County Governments of which the respondent is one was introduced by Act No. 5 of 2015; this Act was specifically meant to amend the Government Proceedings Act to the extent of introducing this new provision.

The date of commencement of the Act is 7 January 2016 meaning that it is the same date that the amendment took effect. There is no provision in that Act that suggests that the amendment is retrospective in its effect. It follows that the applicants' application cannot be impugned for not complying with legal requirements that were not in existence when the respondent's predecessor and the respondent itself or their respective accounting officers were served with the decree and the certificate of costs requiring them to settle the decretal sum and costs due to the applicants.

I would, for the reasons given, dismiss the respondent's preliminary objection. The costs shall abide the outcome of the substantive motion.

Dated, signed and delivered on 26th February 2021

Ngaah Jairus

JUDGE