



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 33 OF 2017

IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA

IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND RULES 2010 CAP 21 LAWS OF KENYA

AND ORDER 53 RULE (1) & (2)

AND IN THE MATTER OF: THE CONSTITUTION OF KENYA

BETWEEN

SIMON KIMANI GITURIA.....1ST APPLICANT

BOAZ MWANZI OSOTSI.....2ND APPLICANT

SOLOMON CHEGE.....3RD APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

JUDGMENT

1. **Simon Kimani Gituria, Boaz Mwanzi Osotsi and Solomon Chege** (hereafter the Applicants) had sued the erstwhile Kiambu local authority, which was their employer, in Employment and Labour Relations Court (ELRC) Case No. 1801 of 2011, seeking a sum of Kshs. 695,843.50 being overtime pay.

2. The judgment of the ELRC cause is not attached to the pleadings before me but given the date of the said suit (hereafter the primary suit), it appears that defendant in the primary cause is the defunct local authority now subsumed in the County Government of Kiambu. The said entity, like other such devolved governments was established or formed after the 2013 general elections, pursuant to the provisions of Section 134(1) of the County Governments Act as enacted pursuant to the provisions of the section 18 of the Sixth Schedule to the Constitution. It may be safely assumed therefore that the County Government of Kiambu (the Respondent herein) was enjoined in the primary suit as a defendant after 2013.

3. The ELRC eventually found for the Applicants against the Respondent and entered judgment on 3rd June, 2016 for the former against the latter in the sum of Kshs. 695,843.50. The decree and certificate of order against the Respondent were subsequently issued. The total sum in the certificate of order is Kshs. 937,333 being made up of the initial claimed sum, interest thereon and costs. Despite the decree and certificate of order being served upon the Respondent, it appears the Respondent has not settled the debt, prompting the Applicants to file the instant motion dated 2nd November, 2018.

4. The Applicants by the motion seek an order of mandamus to compel the Respondent to satisfy the decree in the primary suit. The motion is based on the statement of facts and affidavit sworn by **Simon Kimani Gituria** on behalf of his co-applicants.

5. The Respondent opposed the motion through the replying affidavit sworn by **Dr. Martin N. Mbugua**, described as the County Secretary of the Respondent. The gist of the affidavit is that the Applicants' claim arose from actions of the defunct local authority, that the Applicants' claim was forwarded to the County Assets and Liability Committee which in turn referred the matter to the Intergovernmental Relations Technical Committee which is seized of such matters pursuant to Gazette Notice No. 2701 of 24th March, 2017; that the Intergovernmental Relations Technical Committee has not given a go-ahead for the settlement of the claim and thus the suit is premature.

6. The court subsequently directed that the motion be canvassed by way of written submissions. Only the Respondent filed submissions.

Therein, the Respondent took the position that they did not dispute the Applicants' claim but that the settlement thereof is subject to the transitional procedures prescribed in the laws envisaged in section 15(1) of the Sixth Schedule to the Constitution. These laws include the Transition to Devolved Governments Act and the Intergovernmental Relations Act.

7. The Respondent further argues that neither the provisions of Sections 33 of the Sixth Schedule to the Constitution nor Section 59 of the Urban Areas and Cities Act directly provide or imply that county governments established under the 2010 Constitution are automatically responsible to settle the liabilities arising during the period when the defunct local authorities existed. Relying on the decision of **Ngaah J. in Republic Vs. County Secretary Muranga County Government *ex parte* Thiga Thuita [2014] eKLR**, the Respondent asserted that there were transition mechanisms put in place to determine the transfer of assets and liabilities of defunct authorities to the County and National Governments.

8. The Respondent further relied on the Court of Appeal decision in **(Interim) County Secretary, County Government of Kakamega v. Republic *ex parte* Ali Adam & Another [2017] eKLR** to assert that there was no express provision in the Constitution to support the presumption that the county governments were the automatic successors of the defunct local authorities and that the transition arrangements contained in the statutes enacted under Section 15 of the sixth schedule to the Constitution must be followed by the Applicants. The court was therefore urged to dismiss the motion to allow the completion of the transition processes.

9. The court has considered the motion, the Respondent's affidavit in response and submissions. The key question arising for determination in this matter is not dissimilar to that raised in the **(Interim) County Secretary, County Government of Kakamega** case and was paraphrased as follows in **Musinga JA's** judgment:

"In other words, was it a matter of course that immediately upon coming into existence, the County Government of Kakamega, the appellant, ought to have taken up and settled all the liabilities of the defunct Municipal Council of Kakamega?"

In **Republic v. County Secretary Murang'a County Government *ex parte* Stephen Thiga Thuita, Ngaah J.** debunked the presumption by the Applicant therein that the County Government of Murang'a automatically inherited the liabilities of the erstwhile Municipal Council of Murang'a and stated that the presumption did not have any legal foundation.

10. In the **(Interim) County Secretary County Government of Kakamega** case, the learned Judges of Appeal (majority) agreed that there was no express provision in the 2010 Constitution or the County Governments Act to the effect that the County Governments were successors of local authorities. For her part, **Murgor JA** having examined the provisions of Section 33 of the Sixth Schedule to the Constitution concluded that:

"Since offices or institutions as defined by the Constitution are limited to those within the national or county governments or public service, it clearly was not intended that county governments were to be construed to be the offices or institutions contemplated by Section 33. To the contrary county governments were established under Article 176 of the Constitution as a new created tier of self-government with a different structure and orientation for the defunct local authorities. Without any express provision to designate them as the legal successors of the defunct local authorities, it cannot be inferred that County Government should be included within the definition of legal successors as provided by Section 33... In view of the foregoing, I find that it was not intended that county governments would be the direct legal successors."

11. This court is bound by the majority decision of the Court of Appeal in the above case. The present suit was brought after the decree issued in the primary suit in 2016. The mandate of the Transition Authority created under the Transition to Devolved Governments Act whose object was **"to provide a framework for the transition to devolved government pursuant to section 25 of the sixth schedule to the Constitution and for connected purposes"** had expired by the date of the decree in the primary suit.

12. The key mandate of the Transition Authority as stipulated in Section 7 of the Transition to Devolved Governments Act was **"to prepare and validate an inventory of all existing assets and liabilities of government and other public entities and local authorities and to provide a mechanism to secure the assets and liabilities of the local authorities, and to develop a criteria for the transfer of functions, assets and liabilities previously shared between the national government and local authorities"**.

13. The period anticipated in Section 7(3) of the Transition to Devolved Governments Act expired before the Transition Authority could complete its work. Evidently, the outstanding work of the Authority has now been subsumed in the Inter-Governmental Relations Technical Committee established under the Intergovernmental Relations Act. This is the committee that the Respondent has referred to its affidavit in opposition to the instant motion, stating that until the committee completes the verification of assets and liabilities of County Governments, no payment can be made to the claimants herein. In his judgment in the **(Interim) County Secretary County Government of Kakamega case, Musinga JA** posed and answered the question:

"What then becomes of the statutory duties that were being undertaken by the Transition Authority?"

14. The learned Judge of Appeal then proceeded to state that:

"The Intergovernmental Relations Act, 2012 establishes the Intergovernmental Relations Technical Committee. Under Section 12(b) of the said Act, the Technical Committee took over the residual functions of the Transition Authority after expiry of the term of the authority. It was therefore this committee that was required to finalize the audit and verification of the assets and liabilities of the defunct local authorities. It is not clear whether that has been done. In view of the foregoing, I do not think that the trial court was right in taking the view that the County Government of Kakamega was duty bound to settle the decretal sum irrespective of whether the audit that was required to be undertaken by the Transition Authority has

been done or not.

Pursuant to Section 15 of the Sixth Schedule to the Constitution, Parliament enacted an appropriate law that spelt out how assets and liabilities of defunct local authorities were to be dealt with and in my view the statutory path, however long-winded and convoluted it may appear, is always the safest route”.

15. Similarly, in this case, the court has been informed by the Respondent that the Applicants’ claim has been remitted to the Intergovernmental Relations Technical Committee through the Kiambu County Assets and Liability Committee established under the Intergovernmental Relations Act *vide* Gazette Notice No. 2791 of 24th March, 2017. In the circumstances, the court considers the application for an order of mandamus to compel payment of the decretal sum by the Respondent to the Applicants to be premature. The Applicants must wait for the Intergovernmental Relations Technical Committee to complete its work. In the result, the motion filed on 2nd November 2018 being premature is hereby struck out. Parties will bear own costs.

Dated, signed, and delivered electronically this 19th Day of February 2021.

C. MEOLI

JUDGE