



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E045 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE

FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KITUI.....RESPONDENT

EX PARTE APPLICANT: FAIRPLAN SYSTEMS LIMITED

RULING

Fairplan Systems Limited, the *ex parte* Applicant herein, has moved this Court by way of two Chamber Summons applications dated 29th March 2021, wherein it is seeking leave to be heard during the Court vacation, and to commence proceedings in the nature of judicial review against the Respondents for an order of mandamus to compel the Respondent to pay it Kshs.63,301,586.40 and Kshs.93,455/= being the amounts payable to the Applicant under the Certificate of Order against the Government dated 10th March 2021 with respect to **Nairobi High Court Miscellaneous Civil Application No. 289 of 2017: Fairplan Systems Limited -vs- County Government of Kitui**. The *ex parte* Applicant also seeks an order that the costs of this application be in the cause.

The said application is supported by a statutory statement dated 29th March 2021, and a verifying affidavit and supporting affidavit both sworn on the 19th March 2021 by Arch. Julius M.F. Mutunga, the *ex parte* Applicant's Managing Director. The grounds for the application are that the *ex parte* Applicant filed an application seeking recognition and enforcement of the Arbitral Award against the Respondent in Miscellaneous Civil Application No. 289 of 2017, which was not opposed and the same was allowed. Subsequently, an Amended decree dated 3rd March 2020 was extracted and a Certificate of Order against the Government for the sums of Kshs.63,301,586.40 and Kshs.93,455 was issued on 10th March 2021, which were served on the Respondent together with a demand letter for payment.

However, that the Respondent has neglected and refused to pay the Applicant the amounts due, and the assets of the Respondent, being a County Government, cannot be attached in execution of the decree/ Certificate of Order against the Government leaving the Applicant with no other way of realizing the fruits of the Arbitral award other than by way of this application for order of Mandamus.

The *ex parte* Applicant annexed a copy of the said Amended decree, Certificate of Order against the Government land demand letter.

The applicable law on leave to commence judicial review proceedings 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 was sought and granted. The main reason for the leave as 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**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

In the present application, I note that while the *ex parte* Applicant annexed of the Amended decree and the Certificate of Order against

Government issued in **Nairobi High Court Miscellaneous Civil Application No. 289 of 2017: Fairplan Systems Limited -vs- County Government of Kitui**, it has not annexed a copy of the arbitral award and ruling delivered thereon in the said case, which are the basis for the said decree and certificate.

In the premises, I find that the threshold of an arguable case has not been met by the *ex parte* Applicant for the grant of leave, and I hereby order as follows:

The *ex parte* Applicant's Chamber Summons applications dated 29th March 2021 are hereby admitted to hearing during the court recess.

The *ex parte* Applicant is granted leave to file and serve a supplementary affidavit annexing the certified copy of the arbitral award and ruling thereon delivered in Nairobi High Court Miscellaneous Civil Application No. 289 of 2017: Fairplan Systems Limited -vs- County Government of Kitui within fourteen (14) days of today's date.

The Chamber Summons dated 29th March 2021 shall be heard by email on 14th April 2021.

In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Applicant's Chamber Summons dated 29th March 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

The parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing by email on 14th April 2021.

The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Wednesday, 31st March 2021.

Parties shall be at liberty to apply.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MARCH 2021

P. NYAMWEYA

JUDGE