



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**JUDICIAL REVIEW NO. 1 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF VIHIGA.....RESPONDENT**

***EX PARTE: GLOBAL EXHIBITIONS INCORPORATED LTD***

**JUDGMENT**

1. The *ex parte* applicant has moved the court by a Motion dated 15<sup>th</sup> January 2019, seeking one principal order, *mandamus*, to compel the respondent to pay a sum of Kshs. 6, 011, 233.00 arising from a decree in Kakamega CMCCC No. 51 of 2017, dated 12<sup>th</sup> April 2017. The factual background to the application is set out in the statement of facts, dated 9<sup>th</sup> January 201, and the affidavit sworn in support of the application, on even date by one Edwin Masivo, a director of the *ex parte* applicant. The *ex parte* applicant had successfully prosecuted a suit in Kakamega CMCCC No. 51 of 2017, and obtained the money decree against the respondent, which it is now seeking to enforce. The deponent avers that the *ex parte* applicant notified the respondent of the decree, but the same has not been settled to date, hence the initiation of the judicial review proceedings herein.

2. The documents exhibited to the application are:

- (a) The pleadings lodged in Kakamega CMCCC No. 51 of 2017 by the *ex parte* applicant;
- (b) An affidavit of service sworn on 15<sup>th</sup> February 2017, filed in Kakamega CMCCC No. 51 of 2017, showing that the respondent was served with the pleadings and summons to enter appearance on 15<sup>th</sup> February 2017;
- (c) A request for judgment in Kakamega CMCCC No. 51 of 2017 dated 7<sup>th</sup> March 2016, and received in court on 12<sup>th</sup> April 2017;
- (d) A decree, passed on 7<sup>th</sup> March 2017 and issued on 12<sup>th</sup> March 2017, in Kakamega CMCCC No. 51 of 2017, awarding the *ex parte* applicant a sum of Kshs. 5, 690, 000.00, plus costs and interests;
- (e) A certificate of costs issued, in Kakamega CMCCC No. 51 of 2017, dated 12<sup>th</sup> April 2017, awarding costs of Kshs. 254, 850.00 to the *ex parte* applicant;
- (f) A certificate of order against the government dated 5<sup>th</sup> October 2017; and
- (g) An affidavit of service sworn on 13<sup>th</sup> April 2017, with respect to service on the respondent on 13<sup>th</sup> April 2017 with copies of a decree and certificate of stated costs.

3. The Motion was served on the respondent, who has responded to the same vide an affidavit sworn in reply, on 24<sup>th</sup> September 2019, by Stella Orenge Amisi, a legal officer of the respondent. She avers that the respondent was unaware of the proceedings in Kakamega CMCCC No. 51 of 2017 until it was served with the court papers in respect of the instant judicial review proceedings. She states that upon being made aware of the said suit, Kakamega CMCCC No. 51 of 2017, the respondent established that the judgment against it had been obtained irregularly, and it moved the trial court in Kakamega CMCCC No. 51 of 2017 to have the said judgment set aside, and on 12<sup>th</sup> September 2019, it had obtained orders staying execution of the said judgment. It is averred that the judgment sought to be enforced through these judicial review proceedings was under challenge and was likely to be set aside by the trial court, and as such a *mandamus* order could not issue. The deponent then goes on to detail the grounds upon which the respondent was moving the trial court.

4. The documents attached to the replying affidavit are a Motion, under certificate of urgency, dated 10<sup>th</sup> September 2019, filed in Kakamega

CMCCC No. 51 of 2017, on 11<sup>th</sup> September 2019, where the respondent had sought stay and setting aside of the judgment made previously in that suit. There is a formal order, dated 18<sup>th</sup> September 2019, extracted from the order made on 10<sup>th</sup> September 2019 in Kakamega CMCCC No. 51 of 2017 by Hon. H. Wandere, Senior principal Magistrate, which certified the said Motion urgent, and stayed the judgment and decree of 7<sup>th</sup> March 2017.

5. The *ex parte* applicant filed a further affidavit on 18<sup>th</sup> September 2010, lodged herein on 13<sup>th</sup> October 2020, averring that the respondent's application dated 10<sup>th</sup> September 2019 was marked as withdrawn on 19<sup>th</sup> August 2020 before Hon. E. Malesi. An order extracted on 10<sup>th</sup> September 2020 from the order of 19<sup>th</sup> August 2020 in Kakamega CMCCC No. 51 of 2017, is attached to the affidavit.

6. The primary document when it comes to grant of *mandamus* orders against the government, with respect to enforcement of money decrees against the government, is the certificate of order against the government. That certificate is provided for under the Government Proceedings Act, Cap 40, Laws of Kenya. Section 21 of the Government Proceedings Act provides 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.”*

7. A party wishing to realize the fruits of a judgment or decree against the government must obtain a certificate of order against the government. The government pays against the certificate of order against it. It is a critical accounting instrument for the purpose of government finances and accounts. The centrality of the certificate of order against government, with respect to enforcement of money decrees against the government, whether at the national or at the county level, has been the subject of pronouncement by the courts.

8. In *Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi* (2014) eKLR, the court said:

*“33. ... the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government ...*

*34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court...”*

9. In *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR, the court stated:

*“The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which*

*provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”*

10. The statutory duty on the part of government to settle a judgment or decree of a court arises only after the government has been served with the certificate of order against it. Without being served with the said certificate, government does not incur the duty to pay or satisfy the judgment or decree, and, as a consequence, a *mandamus* order would not be available, since *mandamus* is meant to compel performance of a statutory or legal duty. That is the purport and effect of section 21(3)(4) of the Government Proceedings Act.

11. It was said, in *Republic vs. County Secretary Migori County Government & another* [2019] eKLR, that:

*“12. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.*

*13. I therefore have no difficulty in finding that the Ex parte Applicant has not fully complied with the legal requirements for an order of mandamus to be availed. The application is premature and cannot stand.”*

12. The *ex parte* applicant has exhibited a copy of a certificate of order against the government dated 5<sup>th</sup> October 2017. However, there is no evidence that the said certificate was ever served on or forwarded to the respondent. There is no letter exhibited purporting to have forwarded the same to the respondent, neither is there an affidavit of service averring to the fact of service of the said certificate. The affidavit of service dated 13<sup>th</sup> April 2017 was about service of the copies of a decree and certificate of costs; it is silent on certificate of order against government. In any case, the certificate of order against government, exhibited in the application, was obtained in October 2017, long after the other documents were served. There is, therefore, no evidence that the certificate of order against the government herein was served as required by the law.

13. I would reiterate that the statutory duty on the government to settle any money decree against it only arises when it is served with the certificate of order against it. As there is no proof that a certificate of order against government in this case was served, it would be my finding that it has not been demonstrated that the duty on the part of the respondent to settle the decree has accrued, and the respondent cannot be said to have refused or neglected to settle the decree.

14. The effect of the foregoing is that the *ex parte* applicant herein has not fully complied with the relevant law, and process, to warrant a *mandamus* order being made in its favour. The Motion before me, dated 15<sup>th</sup> January 2019, is not for granting, in view of my finding and holding in paragraph 13 of this judgment. Consequently, the said Motion is hereby dismissed. There shall be no order on costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH, 2021**

**W. MUSYOKA**

**JUDGE**