



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. JUDICIAL REVIEW APPLICATION NO. 2 OF 2020

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATE COURT EMBU.....RESPONDENT

AND

DAVID MUIGAI KINYANJUI.....INTERESTED PARTY

AND

JOHNSON N. NYAGA.....1ST EX-PARTE APPLICANT

JOHN NJAGI.....2ND EX-PARTE APPLICANT

RUTH WAMBUI NDIRANGU.....3RD EX-PARTE APPLICANT

THE COUNTY GOVERNMENT OF EMBU.....4TH EX-PARTE APPLICANT

RULING

1. The ex-parte applicant herein moved this court vide the application dated 17.08.2020 wherein he has sought for an order of certiorari to issue to bring into this court for purposes of quashing of the decision of the respondent made on 20.07.2020 of issuing an order of notice to show cause on 27.07.2020 as against **Johnson N. Nyaga, John Njagi, and Ruth Wambui Ndirangu** in Embu Chief Magistrate's Civil Case No. 53 of 2018. The applicants also prayed for costs of the application.

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the 1st ex-parte applicant. The applicant's case is that the respondent's decision to issue an order of Notice to Show Cause as herein above stated was made in error of law and in doing so, the respondent acted irrationally as under Section 21(4) and (5) as read together with Section 2 of the Government Proceedings Act, officers of the government (to wit the 1st- 3rd ex-parte applicants) cannot be held liable for debts of the government.

3. It was their case, further, that the respondent acted unreasonably by failing to accord the 4th applicant an opportunity to defend and/or oppose the interested party's application leading to the issuance of the orders. Further that the issuance of the said orders can only be issued upon the failure to comply with an order of mandamus issued to compel payment contained in a decree and thus the respondent's issuance of the order of Notice to Show Cause was made in excess of jurisdiction and that the respondent acted unreasonably and in an arbitrary manner and contrary to the legitimate expectations of the 1st-3rd applicants and therefore the same is unlawful and ought to be quashed.

4. The interested party filed a statement of grounds of opposition and wherein he averred that the applicants herein have not exhausted all the mechanisms of challenging the respondent's order issued on 20.07.2020 as provided under the mandatory terms of section 9(2) of the Fair Administrations Act, 2015 and thus the application is premature, misconceived, incompetent, frivolous, and/or vexatious as the applicants ought to have appealed as provided for under Order 42, 43 and 45 of the Civil Procedure Rules, 2010.

5. Further that, the 1st-3rd ex-parte applicants are accounting officers for the 4th applicant under section 21 of the Government Proceedings Act and therefore they are under the responsibility to settle the decretal sum and by them being accounting officers, they are deemed to be parties to the suit on behalf of the 4th ex-parte applicant and as such they have a duty to assist the court in furtherance of the overriding principles by complying with court orders. As such, in issuing the notice to show cause, the subordinate court acted lawfully and within its discretion. Further that, the issue raised in the application is an issue of technicality and which is curable under article 159(d) of the Constitution of Kenya 2010.

6. At the hearing of the application, the applicant erected to canvass the same by way of written submissions while the interested party relied on the grounds of opposition on record. The ex-parte applicants reiterated that the execution proceedings culminating to the orders impugned herein was in breach of the law for the reasons that county governments are governments and execution of decrees against the 4th ex-parte applicant ought to have been in accordance with section 21(4) and 21(5) of the Government Proceedings Act and Order 29 Rule 2 and Order 22 of the Civil Procedure Rules. Reliance was made on **Kennedy Wainaina Ngenga –vs- County Government of Nairobi & Co-operative Bank of Kenya Limited (2019) eKLR**, **Kilimanjaro Safari Club Limited –vs- Governor- Kajiado County (in place of County Council of OI Kejuado (2014) eKLR** and **Josephat Gatheo Kibuchi –vs- Kirinyaga County Council (2015) eKLR**. The applicants further submitted that the execution proceedings were not conducted fairly as they were never allowed audience in regards to their application dated 30.06.2020 and which was in breach of principles of rules of natural justice and was procedurally unfair.

7. I have considered the application herein, the grounds of opposition and the submission by the interested party.

8. The grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli –vs- Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus: -

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service [1985] AC 2*; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club [1963] EA 478* at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876*).”

9. Further, judicial review remedies (such as certiorari- the ones sought herein) *are only available against public bodies (See Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996)*.

10. In **Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji & 9 Others (supra)**, the court held that an order of *certiorari* can quash a decision already made as it will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or such like reasons.

11. So can the acts and/ or decision by the respondent be subject to judicial review and can an order of *certiorari* issue? In other words, ***have ex-parte applicants met the grounds for granting of judicial review order of certiorari.*** In my view this is the issue which this court ought to decide.

12. As I have already noted, the applicants’ grounds of this application are that the decision by the respondent was made in error of law, irrationally, the respondent acted unreasonably, in excess of jurisdiction and thus the decision is unlawful and ought to be quashed.

13. It is not in dispute that the interested party holds a decree against the 4th interested party. It is also clear from the court record that the interested party filed an application dated 9.12.2019 wherein he sought for orders that the 4th respondent’s county secretary, its County Executive Member Finance and/or its County Chief Accountant be personally summoned to show cause why they should not be committed to civil jail and/or otherwise be punished for disobedience of the court’s judgment dated 26.08.2019. It is therefore clear that it is this application which led to the impugned order. It is the propriety or otherwise of this order which is the subject of the instant application.

14. It is trite that execution against the government should be through judicial review proceedings, mounted under Order 53 of the Civil Procedure Rules, after a certificate of order against government is served upon the government in compliance with section 21 of the Government Proceedings Act. Section 21(5) extends the application of the said section, with necessary modifications, to any civil proceedings by or against a county government. It therefore means that the process of execution against the 4th ex-parte applicant must be made within the provisions of section 21 of the Government Proceedings Act.

15. Under the said section, in executing money decrees against government, one is required to obtain a certificate of order against government and then serve on the accounting officer of the government. The duty to pay only arises after such service, and execution proceedings, by way of *mandamus*, can only be undertaken thereafter. As such the respondent in issuing the notice to show cause against the 1st -3rd ex-parte applicants acted outside the express provisions of the law. The interested party having applied for notice to show cause against the 4th respondent’s county secretary, its County Executive Member Finance and/ or its County Chief Accountant, moved the court unprocedurally and the court did not have jurisdiction to issue such orders without being properly moved. The application before the court was not one seeking *mandamus* as the law requires and thus the proceedings leading to the impugned orders were unprocedural.

16. It is my considered view that the execution proceedings contravened the express provisions of the law. An execution process against the government or its officials which side steps Section 21 of the Government Proceedings Act and Order 53 of the Civil Procedure Rules is deficient and irregular and the same cannot stand. As such, the Notice to Show Cause why the 1st – 3rd ex-parte applicants should not be committed to civil jail and/or otherwise be punished for disobedience of the court's judgment dated 26.08.2019, that was ordered by the respondent is and contrary to the Government Proceedings Act.

17. In view of the foregoing, the application has merits and the same is allowed as prayed.

18. The applicant is awarded costs of the application.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondent**

.....**for Interested Party**

.....**for Exparte Applicant**