



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. JUDICIAL REVIEW NO. E002 OF 2021

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

THE SECRETARY EMBU COUNTY GOVERNMENT

PUBLIC SERVICE BOARD.....2ND RESPONDENT

THE SECRETARY

EMBU COUNTY GOVERNMENT.....3RD RESPONDENT

THE COUNTY EXECUTIVE (FINANCE)

COUNTY GOVERNMENT OF EMBU.....4TH RESPONDENT

EX-PARTE

MARTIN MURIITHI MUNYI.....APPLICANT

RULING

1. The application herein is dated 8.02.2021 and the applicant seeks leave to institute judicial review proceedings for orders of mandamus directed to the respondents and ordering the 2nd and 4th respondents to pay to the applicant within 14 days the sum of Kshs. 1,357,200/- due and owing as at 18.09.2020 on account of a consent judgment entered against the respondents in Embu Magistrate's Court E&LRC No. 2A of 2028. The applicant prayed for costs as well.
2. The application is premised on the grounds on the face of the application and on the supporting affidavit. The applicant's case is that there was entered a consent judgment in Embu Magistrate's Court E&LRC No. 2A of 2018 on 18.09.2020 and notified the 1st, 2nd and 3rd respondents through the office of the 2nd respondent the fact of the decree and issued requisite notice demanding payment but the respondents have failed to pay the same without any justification and which failure has caused him further prejudice. He now seeks leave to file judicial review proceedings for orders of mandamus.
3. I have considered the ex-parte application herein, and the verifying affidavit together with the annexures thereto and it is my view that the main issue for determination is whether the said application is merited.
4. It is not in dispute that the ex-parte applicant sued the 1st to 3rd respondents in Embu E&LRC No. 2A of 2018 and a consent judgment was entered on 18.09.2020. From the decree given on 21.09.2020 by the trial court, it is clear that the dispute involved unfair termination of the ex-parte applicant by the 1st to 3rd respondents. The 2nd, 3rd and 4th respondents were sued as representatives of the 1st respondent. It is trite law that execution against officials of the government must be in accordance with section 21 of the Government Proceedings Act. Section 21(5) extends the application of the said section to County Governments. As such, execution by the ex-parte applicant herein must be in compliance with the said section. The said execution should be through judicial review proceedings mounted under Order 53 of the Civil Procedure Rules.
5. However, before a decree holder can apply for the said judicial review orders, it is a prerequisite that he obtains 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. Under section 21(1) and (2) of the Act, 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 accounting officer. The certificate of order 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 accounting officer (and in the case of County governments, to the County Secretary - County Public Service Board), 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.

6. From the reading of section 21 above, it is clear that an application for orders of mandamus can only be made after the litigant has obtained the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree and served upon the party named in the certificate. The decree holder must then satisfy the court as to the service of these documents upon the party named in the Certificates.

7. However, I have perused the court record and I note that the applicant's advocates on record wrote a letter dated 20.12.2020 to the County Secretary and wherein it is indicated that the advocates attached a copy of the decree. The said letter bears a stamp by the Office of the County Secretary evidencing receipt of the same. There is however no evidence as to the ex-parte applicant having obtained Certificate of Order and the Certificate of Costs and/ or service of the same upon any of the respondents herein. There is no such certificate of order and/ or certificate of costs which was annexed to the application herein so as to evidence acquisition of the same from the court issuing the decree.

8. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof, the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued. There is no such document on record nor evidence of the same having been obtained or evidence of service of the same. How then can the ex-parte applicant claim that the respondents have failed to satisfy the decree and thus the instant application.

9. The reasons for the leave were 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** and they include; to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; and to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration amongst others.

10. The Learned Judge (as he then was) further opined that leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being, whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review and that the granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judicially.

11. It is my considered view that the applicant herein has not satisfied that there is a case fit for further consideration. A case worth further consideration can only arise where the applicant has served the certificate of orders, certificate of costs and the decree upon a party named therein and payment remains unpaid. The applicant herein ought to comply with the above requirements and service of the decree alone is not sufficient. The application herein, therefore, is an abuse of the court process and the same is hereby struck out with costs.

12. It is so ordered.

Delivered, dated and signed at Embu this 17th day of March, 2021.

L. NJUGUNA

JUDGE

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

.....**for the Respondents**

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