



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.1 OF 2013

DISNEY INSURANCE BROKERS.....PLAINTIFF/RESPONDENT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT/APPLICANT

AND

KAMETA ENTERPRISES AUCTIONEERS....INTERESTED PARTY/RESPONDENT

RULING

1. The Defendant, **Mombasa County Government** brought a **Notice of Motion** application dated **11th November, 2020**, under Certificate of Urgency in which it sought for the following orders:-

a) Spent;

b) Spent;

c) Spent;

d) That this Honourable Court be pleased to and do hereby declare the execution proceedings to enforce the Judgment and Decree herein be declared a nullity and warrants of attachment and sale of attached property in execution of a decree for money dated 5th November, 2020 be declared irregular.

e) The Respondent to bear costs of the auctioneer together with the costs of and incidental to this application.

2. The application is premised on **Sixteen (16) grounds** whereby the first **three (3)** complaints refer to failure to comply with mandatory provisions of the law and procedure. The next complaint is about what the Firm of **M/S Gikandi & Co. Advocates** have done in the past and lastly, that **M/S Ahmednassir, Abdikandir & Co. Advocates** are improperly on record and should be removed and all documents filed by the said firm struck out from the record. .

3. The application is further supported by a **Twenty(20) paragraph affidavit** which has replicated the grounds save for adding documentary evidence. The main grounds urged are that the **Firm of M/S Ahmednassir, Abdilkadir & Co. Advocates** are improperly on record and that the documents filed by the said firm are invalid, a nullity and should be struck out of record. It is also averred that the execution procedure against Government was not followed and consequently, it ought to be nullified, set aside and halted with the costs being borne by the Decree Holder.

4. The application is opposed by the Decree-holder through the **Notice of Preliminary Objection** dated **26th November, 2020** and the **Replying Affidavit** sworn by one **Charles Kanyi Kuyuka**, a Director of the Respondent. The same is predicated on **Three (3) grounds** which are as follows:-

a) That in Mombasa High Court Miscellaneous Application No.63 of 2018, the Defendant herein was held to be in contempt of court for its failure to settle the decretal sum granted in this suit. As such, the Defendant does not have any right of audience to pursue the application dated 11th November, 2020.

b) That the Defendants' reliance on Section 21 of the Government Proceedings Act and Order 22 of the Civil Procedure Rules,

2010 cannot be allowed to defeat the Constitution of Kenya, 2010.

c) In the Judgment delivered herein by the Hon. Justice P. J. Otieno, the Defendant was found to have obtained insurance services from the Plaintiff whereby the Defendant failed to pay for the said services as agreed with the Plaintiff. It is thus a case of obtaining services by false pretenses which is a crime under Section 313 of the Penal Code. Consequently, the Defendant cannot be allowed to use another statute to perpetrate its criminal act.

5. At **Paragraph 18** of the **Replying Affidavit** sworn by the Respondents' Director, a new ground has been raised to the effect that the tax payer will lose a whopping Kshs.51,000,000/= in terms of interest as the matter continues dragging on. He further complains of the frustration the Company has undergone at the behest of the Defendant. On **10th December, 2020**, Counsel for the parties were directed to regularize their status with regard to filing of submissions and a **Ruling** date fixed for **18th March 2021**.

6. From the record, the Applicants filed their written submissions and a bundle of authorities on **8th December, 2020** but there is no evidence that the Respondent filed theirs.

ANALYSIS AND DETERMINATION

7. In consideration of the application **Notice** dated **11th November, 2020**, I have read through the **Supporting Affidavit**, the **Replying Affidavit** together with all the respective annexures attached thereto.

8. The thrust of the Applicant's pleadings and submissions is; *firstly*, that the law does not permit a successful litigant against the Government to attach its property as a means of enforcement of a Judgment against it save through a mode provided for by the law. *Secondly*, that the firm which gave instructions to the auctioneers is not properly on record. The court has been asked to strike out the document filed by the said firm from the record and order them to pay costs of the Auctioneers.

9. The law on the enforcement of the Judgments against the Government is set out in the **Government Proceedings Act (Cap 40, Laws of Kenya)** and **Order 29 Rule 3** of the **Civil Procedure Rules, 2010**. The preamble of the Act states as follows:-

“An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and civil proceedings by and against the Government, to state the law relating to the civil liabilities of persons other than the Government in certain cases involving affairs or property of the Government, and for purposes incidental to and connected with these matters.”

Further, at **Section 3** of the Act provides as follows:-

“...subject to the provisions of this Act, the claim may be enforced as of right by proceedings taken against the Government for that purpose in accordance with the provisions of this Act”.

10. Read closely, the two Sections establish a certain pattern which tends to suggest that the procedure to be followed in enforcing Judgments against Government Institutions is the one provided for by the Act and no other procedure or system is permitted. It extends to prevent a party from seeking Orders of Mandamus. The reason this narrow approach is taken is to protect the public interest by enabling certainty in enforcement of Judgments against Government Institutions.

11. **Section 21** of the **Government Proceedings Act (Cap 40, Laws of Kenya)** spells out the steps that a party ought to follow in order to comply with the law. **Sub-section 21(1)** of the **Government Proceedings Act** is one which provides;

“that a certificate of the order and costs be signed by a competent officer of the court upon application by a party after expiration of 21 days from the date of the order or after certification of the costs or whichever happens first. Separate certificates of costs and order may be issued if so directed”.

Sub-section 2 provides for service upon the Attorney General. This requirement applies to proceedings where the Attorney General was a party and does not apply to independent institutions that have capacity to sue and be sued.

Sub-section 3 provides as follows:-

“if an order provides for payment of any money by way of damages or otherwise or if any costs, the certificate shall state the amount so payable and the Accounting Officer for the Government Department concerned shall, subject as hereinafter provides, pay to the person entitled or to the advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon”.

12. The officer directed to pay is required to do so in compliance with the law.

The law assumes that the officer holding the Accounting position is one who has the highest integrity and respect to the law of the land and would act.

13. It is for that reason that **Sub-section 4** was enacted and it provides as follows:-

“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, any no person shall individually be 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”.

14. The procedural law is found under **Order 29 Rule 2(1)** of the **Civil Procedure Rules**, which states that:-

“Except as provided by the Government Proceedings Act or by these Rules;-

a) These rules shall apply to all civil proceedings by or against the Government; and

Sub-Rule (2) thereof states;-

“No order against the Government may be made under;-

a) Order 14 rule 4 (impounding of documents).

b) Order 22 (extention of Decrees and Orders)

c) Order 23 (Attachment of Debts)

d) Order 40 (Injunctions)

e) Order 41 (Appointments of Retainer)

15. The rules also forbid execution against the Government in any form, be it Garnishee and/or appointment of a receiver to manage the department concerned and pay the debts.

Sub-rule 3 provides as follows;-

“Any applications for certificate under Section 21 of the Government proceedings Act (which relates to the satisfaction of orders against the Government) shall be made to the Registrar or in the case of a subordinate court to the court; and any application under that direction that a separate certificate be issued with respect to costs be made ex parte without a summons, and such certificate shall be in one Form 22 and 23 of Appendix A with such variations as circumstances may require”.

16. A close reading of the substantive law under the Government Proceedings Act and the procedural law as set out herein, show that the primary compliance by a party is to first obtain a certificate for the order and costs and serve it upon the Attorney General or Legal Department of the autonomous bodies created by law to sue and be sued for compliance.

17. I have read through the record herein but been unable to find a certificate which complies with the law and procedure. The affidavit sworn by the Plaintiff’s officer does not demonstrate that they complied with the primary requirement of obtaining a certificate pursuant to **Section 21** of the **Government Proceedings Act** and **Order 29** of the **Civil Procedure Rules, 2010**. What I have noted as having been done is applying the mode adopted in Mandamus and Petition proceedings. With due respect, that is not in compliance with the law in the instant proceedings.

18. It is even made worse after trying the other modes to resort to attachment which the law expressly forbids. The law is such that only a court can help a party obtain payment from the Government. It is the court which asks an official of Government to pay.

19. In my view, where a party disobeys a Court Order or directive, the correct procedure of enforcement is by way of institution of contempt proceedings against the party to show cause why the Accounting Officer cannot be punished by either imposition of a fine or imprisonment or both. This is because it is that officer who is disobeying the order and not the Government. It is also because the court is part of Government and it has ordered payment to be made and someone has ignored the order.

20. I find that ground two of the **Preliminary Objection** which states that *“the Defendants’ reliance on Section 21 of the Government Proceedings Act and Order 22 of the Civil Procedure Rules, 2010 cannot be allowed to defeat the Constitution of Kenya”* deserves a comment.

21. I wish to state that from the outset, the Constitution is implemented through Acts of Parliament and therefore they ought to be read together. **Article 10** of the **Constitution** deals with National Values and Principles of Governments. Under these Article, State Officers are called upon to uphold the highest standards in discharging their duties.

22. **Article 10(2)** of the **Constitution** is relevant only to the extend that an officer must be accountable. Where he fails to do so, the procedure is set out elsewhere. For example, under the Ethics and Anti-Corruption Act, the Ethics

and Anti-Corruption Commission is charged with the duty of punishing moral deviations. The same way negligent officers on disobedience of court orders can only be punished with contempt proceedings, and hence an officer will serve an individual lesson for failure to perform his/her duties. There is nowhere under **Article 10** of the **Constitution** which suggests that the accepted procedure under the Act and Rules has been substituted.

23. **Articles 27** of the **Constitution** is concerned with equality and freedom from discrimination. With respect, this has been quoted out of context. There is nothing from the material placed before this Court that suggests that there was discrimination where similar Judgments were paid to what the Plaintiff/Respondent stood in equal preference in law and it was left out.

24. **Article 47** of the **Constitution** deals with Fair Administrative Action. Nothing has been tabled before this Court to show or demonstrate that the officers informed the Respondents of their decision not to pay so as to invoke the operation of **Article 47** of the **Constitution**. Again, in my view, the same has been quoted out of context.

25. Similarly, **Article 48** of the **Constitution** has been misquoted or misapplied or is being stretched to apply where it cannot. There is no demonstration to show that the Respondent has been prevented from accessing justice. Infact, it has been demonstrated that it was given orders under **Judicial Review No.63 of 2018** and that there is a pending Petition in its regard. The sum total effect is that the provision of the Constitution have been quoted or cited out of context.

26. I have also read through the authorities that have been relied upon by the Applicant and find the same really useful. I agree with the decision in the case of **R –VS- PS, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EXPARTE MANOA EGUNZA[2012]eKLR**, that a conditional precedent to enforcement is in strict compliance with **Section 21** of the **Government Proceedings Act (Cap 40)** and **Order 29 rule 3** of the **Civil Procedure Rules, 2010**.

27. However, because of what I have said on the enforcement of Court Orders and penalties for the parties who disobey Court Orders being by institution of contempt proceedings, any other mode of enforcement, either by Judicial Review Proceedings or Constitutional Petitions is not appropriate. I say so because there is no limit to filing of contempt proceedings. They can be filed as many times as there are contemptuous acts by the same contemnor. Where a party disobeys an order made by a court pursuant to Judicial Review proceedings, he or she will still have contempt proceedings instituted against him/her to show cause why he or she cannot be committed to prison or fined for contempt arising from such proceedings.

28. I wish to respectively depart from the views expressed in the **HIGH COURT MISCELLANEOUS APPLICATION NO.44 OF 2012, R –vs- AG & ANOTHER, EX-PARTE JAMES ALFRED KIROSO** and **R –vs- COUNTY SECRETARY, NAIROBI CITY COUNCIL & ANOTHER EX-PARTE WACHIRA NDERITU NGUGI & CO. ADVOCATES[2016] eKLR**. My view is that the ultimate enforcement for compliance remains contempt proceedings to enforce satisfaction of certificate and no other mode.

29. I therefore find and hold that the **Warrants of Attachment and Sale** of the property of the Applicants issued by the court on **5th November, 2020** and execution proceedings dated **5th November, 2020** commenced by **M/S KAMETA ENTERPRISES AUCTIONEERS** are in violation of **Section 21** of the **Government Proceedings Act** and **Order 29 rule 3** of the **Civil Procedure Rules, 2020**.

30. The last issue for determination is whether the **Firm of M/S AHMEDNASSIR, ABDIKADIR & CO. ADVOCATES** is properly on record. On **3rd November, 2020**, the said Firm of Advocates filed a **Notice of Appointment of Advocates** dated **14th October, 2020**. The law recognizes agents for parties acting through them.

31. **Order 9 Rule 1** of the **Civil Procedure Rules** states as follows:-

“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf....:”

In my view, the rule is complemented by **Rule 2** which provides that actions to be undertaken, such as appearances, applications and acts may be made or done in some instances with the approval of court.

32. The action the **Firm of M/S Ahmednassir, Abdikadir & Co. Advocates** took after it was appointed was to act by applying for extension of the Decree of court. In my view, the next action after their appointment would have been to seek leave of court to act in the place of **M/S Gikandi & Co. Advocates** as there was a Judgment on record.

33. **Order 9 Rule 9** of the **Civil Procedure Rules, 2010** provides that:-

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the court;-

a) Upon an application with notice to all the parties; or

b) Upon cost filed between the outgoing advocate and the proposed incoming advocate or party as the case may be.”

It is only after such compliance with this order, that an incoming advocate can take over a matter that already has a Judgment.

34. Further, I have read through the record and find that there is no application or a valid **Notice of Change of Advocate** by the Respondents' Firm of Advocates pursuant to **Order 9 Rule 9** of the **Civil Procedure Rules**, for them to take over the matter and perform any lawful actions thereon.

35. I thus find and hold that the **Notice of Appointment** of Advocate dated **14th October, 2020** did not confer capacity on the Firm of M/S Ahmed-Nassir, Abdikadir & Co. Advocates to perform lawful actions on behalf of the Respondent.

36. In the upshot, the **Notice of Motion** application dated **11th November, 2020** is hereby allowed in terms of **prayers No.(4)** and **(5)**, that is to say:-

a) The execution proceedings to enforce the Judgment and Decree of court herein be and are hereby declared a nullity and the warrants of attachment and sale of the property in execution of a Decree for money dated 5th November, 2020 be and is hereby declared irregular.

b) The warrants of Attachment and sale of property dated 5th November, 2020 be and are hereby set aside.

c) All the documents including the Notice of Appointment dated 14th October, 2020 filed by the Firm of M/S Ahmednassir, Abdikadir & Co. Advocates be and are hereby struck out from the record.

d) The Respondent shall bear the costs of the auctioneer and the Applicant incidental to this application.

It is so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 27th DAY OF APRIL, 2021.

D. O. CHEPKWONY

JUDGE