



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. E02 OF 2020**

**ANDREW WACHIRA.....APPLICANT**

**VERSUS**

**COUNTY SECRETARY COUNTY**

**GOVERNMENT OF MERU.....1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER, FINANCE, ECONOMIC**

**PLANNING & ICT COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. On 18<sup>th</sup> October 2018, Judgment was delivered in favour of the Applicant against the Respondents in Meru CMCC No. 67 of 2011. The substance of the same was a money decree requiring the payment of Ksh 4,217,509/= to the Applicant. This decretal amount is yet to be settled and the Applicant is frustrated that the Respondents have not taken any steps to honour this decretal amount. The Applicant previously sought leave of Court to file an application as required under the Rules and this was granted on 4<sup>th</sup> February 2021. By his application by notice of motion dated 5<sup>th</sup> February 2021, the Applicant seeks an order of mandamus to compel the Respondent to settle the said amount.

**Applicant’s Application**

2. The Applicant filed a supplementary affidavit sworn on 28<sup>th</sup> April 2021. Therein, he states that it is dishonest for the Respondents to raise the matter of interests on the computation of the decree and certificate of costs and that the Court in the lower Court pronounced itself on the issue through the Ruling delivered via email dated 30<sup>th</sup> April 2019 and thus the issue of computation of interests is *res judicata*. He also urges the Court to look at the certificate of order that was served against the Government and he urges that the Respondents are bound by the decree just as any other subject of the law.

**Applicant’s Submissions**

3. The matter was canvassed by way of written submissions. The Applicant filed submissions dated 29<sup>th</sup> March 2021. He submits that upon successful litigation in the lower Court, he was awarded damages and costs of the suit; That the litigation between him and the Respondents has been in Court for over fourteen (14) years as the initial suit was filed in 2007 (Meru HCCC No. 33 of 2007) and an *ex parte* Judgment was delivered on 18<sup>th</sup> February 2008, which *ex parte* judgment however came to be set aside and the suit was transferred to the Chief Magistrates’ Court where it was heard on merits and Judgment entered in his favour; That he annexed a decree and a certificate of order against the Government and that according to the decree, the principal amount and interest as at 28<sup>th</sup> July 2020, the date of the decree was Ksh 3,924,795/= while the taxed costs was Ksh 237,475/= totaling Ksh 4,162,270; That the principal amount continues to accrue interests at the conventional court rates; That through a demand dated 17<sup>th</sup> August 2020, his Advocates demanded payment of the decretal amount; That the Respondents have not challenged the Judgment either by way of review or appeal and yet they have not offered any explanation for failure to settle the decretal sum; That the Respondents have a statutory obligation to settle the sum pursuant to Section 21 of the Government Proceedings Act which applies both to the County and National Governments and that Section 7 of the 6<sup>th</sup> Schedule of the Constitution of Kenya provides that all law in force immediately before the effective date continues in force and shall be construed with the necessary alterations, adaptations, qualifications and expectations as necessary to bring it into conformity with the Constitution. He relied on the case of *R V County Secretary Nairobi City County & Others (2020) eKLR*.

4. He submits that the 4<sup>th</sup> Respondent is the County Government of Meru which was the successor of County Council of Meru which was the

Defendant in the lower Court; That the 1<sup>st</sup> Respondent is the County Secretary and under Section 44 of the County Government Act, the County Secretary is answerable for operations of the County Executive as the head of County Public Service; That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the accounting officers of their respective departments and the 2<sup>nd</sup> Respondent is the accounting officer of the treasury department, and that he is a key member of the County Treasury under Section 103 of the Public Finance Management Act, and is therefore the person responsible for making the payment. He relies on the cases of *Republic v County Secretary, Nairobi City County & 3 Others; Koceyo & Co. Advocates (Ex Parte) (2020) eKLR*; *Republic v County Secretary, Machakos County Government & Another Ex Parte Veteran Pharmaceuticals Limited (2019) eKLR*.

### **Respondent's Replying Affidavit**

5. The Respondents opposed the application by the replying affidavit sworn on 21<sup>st</sup> April 2021 by Irah K. Nkuubi a legal officer with the County Government of Meru. She states that the proceedings against the Respondent are manifestly irregular and wanting in procedure; That the Certificate of Order against the Government has never been served upon the Respondents and that what was served was a letter dated 17<sup>th</sup> August 2020 and that there is no stamped Certificate of Order before the Court; That the Judgment by Hon. M K N N Maroro PM dated 18<sup>th</sup> October 2018 did not specify the date when interest would be calculated from; That the Applicant calculated the interest at 12% and 14% on the same decretal amount which calculation has no basis in law and that the same is not in tandem with the trial Court judgment; That the execution process cannot be concluded until and unless the issue of computation of interests is addressed.

### **Respondents' Submissions**

6. The Respondent filed their submissions dated 5<sup>th</sup> May 2021. They submit that the Applicant has failed to demonstrate that they have refused to execute their official duties and pay the *ex parte* Applicant the decretal sum due; That they cannot spend any public money without it being budgeted for as per the provisions of the Public Finance and Management Act; That the Applicant has not demonstrated any willful refusal and/or neglect to budget for the payment of the decretal sum herein; That County Governments operate in financial years that run from 1<sup>st</sup> July of every year up to 30<sup>th</sup> June of the subsequent year; That the decree was served upon the Respondents on 18<sup>th</sup> August 2020 after the financial year of 2020/2021 was passed, before 30<sup>th</sup> June 2020 and that the Applicant's debt can therefore only be budgeted for the financial year 2021/2022. They submit that the writ of mandamus is not one to be issued as a matter of course and that the decretal sum can only be paid after the same has been budgeted for as per the provisions of the County Governments Act and the Public Finance Management Act. They submit that the motion should be dismissed because there is no willful refusal to take steps towards budgeting for the payment of the decretal sum; there is no willful refusal to pay and that no money has been set aside to pay the decretal sum; that the orders sought, would result in the Respondents being forced to spend money not budgeted for which is against the Constitution and the Public Finance Management Act.

### **Determination**

7. The only issue for determination in this matter concerns the question whether or not to grant the order of mandamus. It is not in dispute that there is a Judgment in force against the Respondents. It is trite that every litigant is entitled to enjoy the fruits of their Judgment. The essence of the application before the Court is enforcement of a Judgment. The matter in the lower Court commenced in 2007 and it is now 14 years since then. The Judgment was delivered on 18<sup>th</sup> October 2018 and the same has not been challenged either by way of review or appeal. It therefore remain valid and there is no reason why the same should not be honoured. Obedience of court orders is the hallmark of the Rule of Law.

8. Despite the Respondents pleading that they were not served with the Certificate of Order, they have not urged this issue in their submissions. Additionally, despite them pleading that they contest the computation of interests, they have not urged these in their submissions. This Court is nonetheless satisfied by the explanation given by the Applicant that the issue of interests was dealt with by the lower Court as the Ruling issued by Hon. D. Nyambu on 30<sup>th</sup> April 2020 which he has annexed to his affidavit confirms as much. The Applicant has also annexed a Certificate of Order dated 30<sup>th</sup> July 2020 which was has various stamps by the Respondents indicating that it was received by the Respondents on 18<sup>th</sup> August 2020.

9. The Applicant, despite having a valid and enforceable Judgment against the Respondents has no way of enforcing the same as the Civil Procedure Rules do not allow for execution against the Government. Section 21(4) of the Government Proceedings Act Cap 40 Laws of Kenya provides as follows: -

#### **Satisfaction of orders against the Government**

***4. Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.***

Order 29 Rule 2 of the Civil Procedure Rules, 2010 provides as follows: -

#### **Rules to apply to proceedings by or against the Government; and Cap. 40**

***(2) No order against the Government may be made under—***

***(a) Order 14, rule 4 (Impounding of documents);***

(b) Order 22 (Execution of decrees and orders);

(c) Order 23 (Attachment of debts);

(d) Order 40 (Injunctions); and

(e) Order 41 (Appointment of receiver).

10. From the foregoing, the civil procedure rules both under the Government Proceedings Act and the Civil Procedure Rules do not envisage a situation where a decree holder would be entitled to execute against the Government in the normal way of among others instructing auctioneers. Indeed, the only way by which the Applicant can get his Judgment settled is by way of Judicial Review as Judicial Review proceedings are neither criminal nor civil in nature. See the case of **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4**. In this Court's view, Judicial Review is therefore the only alternative way to get the Government to settle the decretal amount. In the Court of Appeal case of **Republic vs. Kenya National Examinations Council ex parte Gathenji Njoroge & 9 Others [1997] eKLR**, R. S. C. Omolo, P. K. Tunoi and A B Shah JJA cited the following passage with approval, from Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 1 at page 111 from paragraph 89 –

***“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”***

11. This matter was again dealt with in the case of **Republic v Attorney General & another ex parte James Alfred Koroso JR Misc Application No. 44 of 2012 [2013] eKLR** where G V Odunga J held as follows in a similar application: -

***“...In the present case the ex parte applicant has no other option of realising the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realised. Unless something is done he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit....”***

12. This Court therefore finds that the jurisdiction of this Court has properly been invoked it being that the Applicant has no alternative or specific legal remedy for enforcing his rights, in this case, his Judgment.

13. In their submissions, the Respondents' main argument is that the money to be used to settle the decretal amount has not been budgeted for and can only be budgeted for in the budget for the financial year 2021/2022. To this Court's mind, their argument does not absolve them from the requirement to perform their duty, but can only be a persuasive argument as to why they should be given more time to settle the decretal amount. In any event, from the time of delivery of Judgment in October 2018, 2 financial years have lapsed and this Court is not therefore convinced that the constraints in payment have been due to budgetary concerns. As at today, the budget for the financial year 2021/2022 has already been read and there is therefore no reason why the Respondents should not be ordered to settle the decretal amount either using funds in the main budget and/or supplementary budget. The source of the money is not the Applicant's concern and this Court will hereby order that the sums be paid.

## **ORDERS**

14. Accordingly, for the reasons set out above, this Court makes the following orders: -

***i. An order of mandamus is hereby issued compelling the Respondents to implement the Judgment in Meru Chief Magistrate's Court Civil Case No. 67 of 2011 (Formerly Meru High Court Civil Case No. 33 of 2007) by payment of the sum of Ksh 4,217,509/= being the decretal sum as at the date of the application together with such other further interests that shall have accrued at Court rates at the time of payment pursuant to the Certificate of Order against the Government dated 30<sup>th</sup> July 2020.***

***ii. The Respondents shall bear the costs of the application.***

Order accordingly.

**DATED AND DELIVERED ON THIS 24<sup>TH</sup> DAY OF JUNE, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**M/S J. M. Mwangi & Co. Advocates for the Applicant**

**M/S Mwirigi Kaburu & Co. Advocates for the Respondents.**