



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO E003 OF 2020

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT NO 17 OF 2012

AND

IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT 2012

BETWEEN

MWINYI SWALEH MWARIKA.....APPLICANT

VERSUS

1. THE COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA

2. THE COUNTY EXECUTIVE MEMBER FOR FINANCE

3. THE CHIEF OFFICER FINANCE.....RESPONDENTS

RULING

The Application

1. The Notice of Motion before court dated 3rd February 2021 was filed pursuant to the leave granted on 25th January 2021. The application prays:

a. **THAT** this honourable court be pleased to issue a writ of Mandamus against the County Secretary, The County Executive Committee Member For Finance and the Chief Officer The County Government of Mombasa compelling them forthwith to satisfy the decree of the honourable court in Mombasa CMCC no 5416 of 2004.

b. **THAT** the costs of this application be borne by the respondent.

2. The application is premised on the grounds set out therein and is supported by an affidavit sworn on 3rd February 2021 by Mwinyi Swaleh Mwarika.

Applicant's Case

3. The Applicant's case is that a judgement was issued in his favour by the court on 20th June 2017 in the sum of Kshs 239,706/-. The decree and certificate of costs had been extracted and further a certificate of order against the government which had been served upon the County Government of Mombasa. The Applicant urged this court to compel the Respondents to obey the decree and pay the amount as was indicated on the decree as the same continued to accrue interest at 12% per annum. The applicant annexed copies of the decree and certificate of costs as exhibit "B", a certificate of order against the government as exhibit "C" and an affidavit of service in evidence of the said documents having been served upon the respondents as exhibit "D".

Respondents' Case

4. The Respondents opposed the application through grounds of opposition dated 23rd March 2021 and a Replying Affidavit dated 23rd April

2021 sworn by Joab Tumbo the acting County Secretary to the County Government of Mombasa. In the grounds of opposition, the Respondents stated that the application offended the provisions of section 21 of the Government Proceedings Act CAP 40 laws of Kenya and further that it was inconsistent with Order 29 of the Civil Procedure Rules 2010.

5. The Respondents further averred that Order 29 of the Civil Procedure Rules provided for a special procedure in which judicial review applications are to be dealt with and that the procedures outlined had not been complied with.

6. The Respondents asserted that the application also offended Section 103 of the Public Finance Management Act No 18 of 2012 as the 1st Respondent had severally been discharged from proceedings relating to the financial obligations of a county government and its officials in numerous court decisions. That the duties of the 1st Respondent are provided for in The County Governments Act No 2012 under Section 44(3) and that the said office did not process, identify and/or effect any payments on behalf of the county government.

7. That the Applicant had not proved that the Respondents had failed to or denied to pay the judgement debt and the requirements under section 21 of the Government Proceedings Act CAP 40 laws of Kenya and Order 29 of the Civil Procedure Rules had not been fulfilled. They prayed for the application to be dismissed with costs to the Respondents.

8. The parties agreed to have the application canvassed by oral submissions.

Determination

9. I have carefully considered the application before court and the provisions of law relied upon by the Respondents and I am of the view that it is not disputed that the Applicant filed suit vide Mombasa CMCC no 5416 of 2004 and obtained judgement in his favour. That consequently a decree was issued for execution against the Respondents who have to date failed to honour the same.

10. The present application is as a result of the said failure and is brought under the writ of mandamus which is a prerogative and imperative order issued by the court to compel a party to perform their duties which are normally specified in an application. Compliance with the said orders is not optional.

11. Section 21 of the Government Proceedings Act outlines strict procedures to be adhered to in relation to execution of money decrees against the government. It is settled law that an Applicant must abide by the said procedures as provided for in the Act and in Order 29 Civil Procedure Rules. Section 21 of the Government Proceedings Act provides: -

“(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 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:

a. 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.

b. (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.”

12. The reason why the above stated procedure is strictly followed was expounded by the Court of Appeal in **Kisya Investments Ltd v AG [2005] 1 KLR 74**. The court said: -

“Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice, the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of

the court however much its effect is harsh or even undesirable.... History and rationale of Government's immunity from execution arises from the following: - Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. SEE HALSBURY'S LAWS OF ENGLAND 4TH EDN VOL. 11 PARA 970, 971 AND 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. SEE AUCKLAND HARBOUR BOARD VS. R (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property."

13. The need for strict compliance with **Section 21** of the **Act** being the law of the land as stated above is to ensure that justice is effectively served on parties involved in any proceedings against the government which in itself requires time to settle its debts in observance of the rule of law. The Respondents need to be served in order to comply with the orders that have been issued against them, failure to effect service simply means that they will not be aware of what is expected of them and hence the decree obtained serves no purpose. On the other hand, an Applicant needs to enjoy the fruits of their judgement and the same can only be achieved by following the laid down procedures.

14. The procedure contained in **Order 29** of the **Civil Procedure Rules** under **Rule 3** outlines that the application is made to the Deputy Registrar in the High Court or to a 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. It is clearly stipulated that once a party obtains the Certificate of Order against the government and the Certificate of Costs, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates.

15. In the instant case I can gather from the record that a Decree and a Certificate of Costs in the suit were drawn and issued. Further a certificate of order against the government was also drawn and served upon the Respondents, a copy of which was attached in the supporting affidavit to the application. From the evidence filed the Applicant fully complied with the law.

16. The issue of the County Secretary having no financial obligations in relation to the County was raised by the Respondents. Indeed, the County Secretary is not listed under Section 103 of the Public Finance Management Act as among members of the County Treasury. Section 104 of the said Act further discusses the powers of the County treasury, its duties and responsibilities and from it, it is clear that a County Secretary has no role and or obligation in matters relating to county finances.

17. However, the enjoining of the County Secretary in these proceedings is not fatal as the orders made against a party in proceedings of this nature are directed towards an office and its capacity to comply with them and not to an individual person. The orders only direct that a person as a bearer of an office should carry out the duties and functions expected of them as the office bearer. It is never a personal liability.

18. I therefore have no difficulty in finding that the Applicant has fully complied with the legal requirements for an order of mandamus to be availed. The upshot is that the Notice of Motion dated 03/02/2021 is hereby allowed with costs to the Applicant.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

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Mr. Achoka for Ex parte Applicant

Mr. Makuto holding brief Tajbhai for Respondent

Ms. Peris Court Assistant