



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO E004 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

SAMUEL MUTEMI t/a TUDOR PARADISE.....APPLICANT

AND

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. By Notice of Motion dated and filed on 8/2/2020, the Applicant seeks the following orders:

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 1861 of 2008.

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

2. The application is premised on the grounds set out therein and the supporting affidavit of **SAMUEL MUTEMI** sworn on the 8/2/2020.

Applicant's case

3. It is the Applicant's case that pursuant to the judgement of the court in **Mombasa CMCC no 1861 of 2008** filed by him against the County Government of Mombasa in which he was awarded a sum of kshs 6,824,470/- special damages plus costs and interest, a decree was issued and the same has not been honoured to date by the Respondents prompting the application before court. The Applicant further depones that the failure to honour the decree and or give any indications on settling the same prompted him to instruct the firm of Kanyi J & Company Advocates to institute legal proceedings for orders of mandamus against the respondents. Leave was granted by this court on 21st January 2021 with respect to the judicial review application herein.

4. The Applicant averred that the Certificate of Order against the Government dated and issued on 30/9/2020, together with a copy of the decree and certificate of costs was served upon the county government of Mombasa on its own behalf and on behalf of the Respondents herein on 5/10/2020.

Respondents' case

5. The Respondents opposed the application vide the grounds of opposition dated 23/3/2021 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.

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

7. The Respondents asserted that the application further 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 decisions earlier on made by the court. That the duties of the 1st respondent are provided for in The County Governments Act 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. The Respondent states 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.

8. The Respondents pray for the application to be dismissed with costs as the same was unfounded, frivolous and vexatious and that it was a waste of the courts time.

Submissions

9. The application was disposed of by way of oral submissions. Mr. Maindu learned counsel for the Applicant submitted that he relied on the application entirely. Mr. Tajbhai for the Respondents on his part relied on the replying affidavit and the grounds of opposition. It was urged by Mr. Tajbhai that judicial review proceedings are guided by Section 21 of the Government Proceedings Act and that the Applicant had not fulfilled the requirements set out therein.

10. Counsel submitted that the decree was not served upon the county government. He referred to **Misc JR No 306/2017 Republic v County Secretary Nairobi City Council & Others**. Further, counsel submitted that the 1st Respondent was not the accounting officer with regard to authorization and the making of payments on behalf of the county government.

Determination

11. Upon considering the application, affidavits in support and in opposition, grounds of opposition and the oral submissions I consider the following issues necessary for determination;

a. Whether the applicant has complied with the legal requirements for an issuance of an order of mandamus

b. Whether the 1st respondent is under the duty and obligation to satisfy the decree issued in favour of the applicant.

On whether the applicant has complied with the legal requirements for an issuance of an order of mandamus

12. Section 21 of the Government Proceedings Act states as follows:

“(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, or against a Government department, or against an officer of 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:

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.

(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.”

13. Githua, J in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR expressed herself as follows with regard to the above cited provisions of the government proceedings act:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that 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 Hon Attorney General. The certificate of order against the Government 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 Hon Attorney General, 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.

14. The Court of Appeal *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others* Civil Appeal No. 266 of 1996 [1997] eKLR outlined the circumstances under which the judicial review order of mandamus can be issued thus: “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 or 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. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

15. Similar position was adopted in *Shah v Attorney General* (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, *inter alia*, as follows:

“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory... The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.”

16. Article 6 of the constitution of Kenya 2010 establishes county governments, which include the Mombasa county government. The court in *Republic v Attorney General & Another Ex Parte Stephen Wanyee Roki* [2016] eKLR observed the following with regard to the application of the Government Proceedings Act to the county governments.

“20. Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, section 7 of the Sixth Schedule to the Constitution (Transitional And Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

21. It follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”

17. It is trite law that an elaborate procedure has to be followed in execution of decree involving money against the government. Section 21 of the Government Proceedings Act as quoted above herein outlines the procedure. Further, Order 29 of the Civil Procedure Rules has to be complied with. This court is guided by the wordings of Odunga J in **Permanent Secretary Office of the President Ministry of Internal Security & Another Ex Parte Nassir Mwadhidi** [2014] eKLR where he stated:

“33. It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs The Brecknock and Abergavenny Canal Co. 111 ER and R vs. The Bristol and Exeter Railway Co 114 ER 859.

34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.....”

18. In the instant application, a decree and certificate of costs in Mombasa CMCC No 1861 of 2008 was drawn and issued. A certificate of order against the government was also drawn and issued on the 30/9/2020. An affidavit of service sworn by Kioko Maundu Advocate on 9/11/2020 indicates at paragraph 2 of the same that service of the certificate of order against the government was served upon the County Government of Mombasa on 5/10/2020.

19. This court is satisfied that service of the relevant documents as per the provisions of Section 21 of the Government Proceedings Act was effected upon the Respondents. Evidence in support of the same has been tendered by the Applicants. I therefore find and hold that indeed the Applicant fully complied with the legal requirements for an order of mandamus to be issued.

On whether or not the 1st Respondent is under the duty and obligation to satisfy the decree issued in favour of the Applicant

20. The question as to who is the accounting officer of a county government was dealt with in **Council of Governors & Others v The Senate Petition No 413 Of 2014 [2015] eKLR** where the court expressed itself as follows:

“The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of the Constitution provides:

(1) Act of Parliament shall provide for -

(a)

(b) The designation of an accounting officer in every public entity at the national and county level of government

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is

specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

As regards the accounting officer for the County Assembly, Section 148(4) of the Public Finance Management Act provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”

21. Section 44 of the County Governments Act No 17 of 2012 pronounces itself on appointment of the County Secretary. Sub section 3 of the same outlines the duties of a County Secretary as follows:

- a) **Be the head of the county public service;**
- b) **Be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of executive committee;**
- c) **Convey the decision of the county executive committee to the appropriate persons or authorities; and**
- d) **Perform any other functions as directed by the county executive committee.”**

22. Section 103 of the Public Finance Management Act No 18 of 2012 establishes the County Treasury comprising of the County Executive Member of Finance, the Chief Officer and the department of the County Treasury responsible for finance and fiscal matters.

23. From the foregoing it is clear that the inclusion of the 1st Respondent in these proceedings is a misjoinder as judicial review applications are mainly brought against the person who is bound by the law to comply with the orders sought. In the instant case the 2nd and 3rd Respondents are rightfully sued. The issue of misjoinder of a party in judicial review proceedings was conclusively dealt with by the court in **Republic Ex parte The Minister For Finance & Commissioner of Insurance As Licencing And Regulating Officers v Charles Lutta Kasamani T/A Kasamani & Co Advocates & Another Civil Appeal (Application) No 281 Of 2005** where the court of appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

24. The issue of misjoinder is not fatal to the application before court. The Respondents will suffer no harm and neither will any form of injustice be carried out against them through the misjoinder of the 1st Respondent. If anything the decree is being enforced against the office and not personally upon the holder of the said office, no personal liability is to be suffered by any individual person. The Respondents have not disputed the fact that judgement was entered against them in the lower court matter and no appeal of review is pending before court over the same. The court notes that no effort has also been made to settle the decree. Further in **Microsoft Corporation v Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460**, it was observed that:

“Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its calling to do justice by saving the proceedings in issue.”

Order

25. For the foregoing reasons the Notice of Motion dated 8/2/2020 is allowed as follows:

- a. THAT this honourable Court be and is hereby pleased to issue a writ of Mandamus against 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 1861 of 2008.

The Applicant will have the costs of this application.

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:

Mr. Achoka holding brief Maundu for Ex parte Applicant

Mr. Makuto holding brief Tajbhai for Respondent

Ms. Peris Court Assistant