



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO 9 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT OF VIHIGA**

**AND**

**IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF OFFICER FINANCE-**

**VIHIGA COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER,**

**TRANSPORT AND INFRASTRUCTURE**

**VIHIGA COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**TRANS AFRICA MOTORS LTD.....EX PARTE**

**RULING**

1. On 20<sup>th</sup> May 2020, Ochieng J granted the Ex parte Applicant leave to apply for an order for mandamus directed at the Respondent the Chief Officer Finance- Vihiga to pay the Ex parte Applicant the sum of Kshs 10,006,817.43 being the decretal amount in **Kisumu CMCC No 32 of 2017 Trans Africa Motors Ltd vs County Government of Vihiga** together with Kshs 550,160/= being the certified costs and interests thereon until payment in full.
2. On 26<sup>th</sup> May 2020, the Ex parte Applicant filed a Notice of Motion application dated 21<sup>st</sup> May 2020 seeking the said orders. It filed an amended Notice of Motion application dated 13<sup>th</sup> July 2020 on even date and filed a Further Amended Notice of Motion application dated 11<sup>th</sup> January 2021 on 19<sup>th</sup> January 2021. The prayers in amended Notice of Motion applications remained the same as in the initial Notice of Motion application.
3. The Further Amended Notice of Motion application was supported by an affidavit sworn on 11<sup>th</sup> January 2021 by Martin Marshal Ramoya, a Manager at the Applicant's company.
4. The Ex parte Applicant averred that it filed a suit against the County Government of Vihiga for the payment of the Kshs 15,040,014/= for the supply and delivery of a Prime mover with hydraulic winch vide a tender number RFQ/VCG/527/2014-2015, in **Kisumu CMCC No 32 of 2017 Trans Africa Motors Ltd vs County Government of Vihiga**.

5. It added that the said suit proceeded to full hearing and finally Judgement was delivered in its favor on 20<sup>th</sup> September 2017 and a Certificate of Order against the County Government of Vihiga was issued on 5<sup>th</sup> February 2019 for the sum of Kshs 19,274,977.43/=. It asserted that the County Government of Vihiga partially settled the Decree herein to the tune of Kshs 8,718,000/= leaving a balance of Kshs 10, 556,977.43, Kshs 10,006,817.43 being the decretal sum and Kshs 550,160/= being the certified costs.

6. It pointed out that it served the County Government of Vihiga with all the relevant documents, which included a Certificate of Order against the Government in accordance with the Provisions of Section 21 of the Government Proceedings Act Cap 40 (Laws of Kenya) but that despite clearing with the County Government Offices and issuing several reminders for payment, the Respondents had failed to fully settle the decretal sum and was apprehensive that the Respondents had no intention of settling the decretal sum.

7. In response to the said application, on 15<sup>th</sup> April 2021, the Chief Officer for the 2<sup>nd</sup> Respondent and the Accounting Officer, Etale Tunya, filed a Replying Affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein. He swore the same on 8<sup>th</sup> of April 2021.

8. The Respondents averred that the County Government of Vihiga was required to comply with the Constitution, Public Procurement and Asset Disposal Act, Public Finance Management Act and the Regulations there under. They pointed out that the County Government was only bound to pay eligible pending bills as had been audited by the Auditor General as it would be against the law to effect payment for funds that had not been budgeted for and approved. They were emphatic that the Ex parte Applicant never appeared in audit report covering period as at 30<sup>th</sup> June 2018 so as to have been entitled to be paid the sum it had claimed against the County Government of Vihiga.

9. Despite having been given an opportunity to file Written Submissions, the Respondents did not file the same. Only the Ex parte Applicant filed Written Submissions which it relied upon in its entirety.

10. The Ex parte Applicant pointed out that the Respondents had not challenged and/or contested the decretal sum that was given by the court. It added that the Respondents had partially honoured their claim leaving a balance of Kshs 10,006,817.43 necessitating the issuance of an order of *mandamus* to compel the Respondents pay.

11. In this respect, it relied on the case of **Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji Njuguna & 9 Others [1997] e KLR** where the Court of Appeal observed that an order of *mandamus* is issued to 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.

12. It was categorical that having averred that he was the Accounting Officer, the 2<sup>nd</sup> Respondent was thus properly placed to be compelled by way of *mandamus* to honour the decree in **Kisumu CMCC No 32 of 2017** by virtue of Article 226 of the Constitution of Kenya, 2010 as read with Section 148 of the Public Finance Management Act.

13. It relied on the case of **Solo Worldwide Inter-Enterprises vs County Secretary Nairobi County & Another [2016] e KLR** and the case of **Council of Governors & Others vs The Senate Petition No. 413 of 2014 [2015] e KLR** where the court therein held that the accounting officer of a County Government 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 as provided in Article 226 of the Constitution of Kenya.

14. It further submitted that costs follow the event and should therefore be condemned to pay costs as provided in Section 27 of the Civil Procedure Act.

15. Section 21(1) of the Government Proceedings Act Cap 40 (Laws of Kenya) provides that:-

**“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.”**

16. Section 21 (3) of the said Government Proceedings Act further stipulates that:-

**“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.”**

17. In a similar matter like in the instant case, in the case of **Republic vs. Permanent Secretary, Ministry of State for Provincial**

**Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR**, Githua J held that once a government is sued in a civil matter, it becomes a party just like any other person and does not enjoy any special privileges.

18. She further expressed herself as follows:-

**“...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. This provision does not condition payment to budgetary allocation and Auditor General’s approval of Government expenditure in the financial year subsequent to which Government liability accrues.” (emphasis court).**

19. In the present case, the court noted that the Ex parte Applicant served the Respondents with copies of the Decree dated 20<sup>th</sup> September 2017, Certificate of Order against the Government under Order 29 Rule 3 of the Civil Procedure Rules, 2010 dated 20<sup>th</sup> September 2019, demand letters dated 13<sup>th</sup> December 2017 and 5<sup>th</sup> March 2019.

20. The Respondents were not truthful in their averments that the Ex parte Applicant did not serve them with the necessary documents. Indeed, copies of the said Decree, Certificate of Order against the Government and demand letters were duly acknowledged by the County Government of Vihiga as was evidenced by its official stamp on all documents. The court also saw Affidavits of Service of James Otieno Okudo that were sworn on 8<sup>th</sup> June 2018 and 12<sup>th</sup> March 2019 evidencing service of the documents upon the 1<sup>st</sup> Respondent herein. There could not have been any other better proof than the duly filed Affidavits of Service evidencing proof of service of the requisite documents to enable the 2<sup>nd</sup> Respondent herein effect payment to the Ex parte Applicant herein.

21. Further, the Respondents’ contentions that they were not aware of the Ex parte Applicant’s claim and/or that it had not been budgeted for and approved was not persuasive as they did not deny having effected part payment as the Ex parte Applicant had asserted. In fact, they only averred that the Ex Parte Applicant did not appear in an audit report.

22. Notably, failure by an entity to carry out its constitutional and statutory mandate does so at its detriment and cannot defeat a lawful claim that has been made against the government. In any event, the fact that the claim did not appear in the audit report did not negate the fact that the Ex parte Applicant’s claim was payable.

23. The Respondents did not give any cogent reason why the decree had not been satisfied more than three (3) years since it was issued. As the Ex parte Applicant was barred from executing against the government to recover its monies without first complying with the law, it had no option but to apply for an order for *mandamus*. Indeed, unless the order herein was granted, it would be left with an unexecuted decree.

## **DISPOSITION**

24. For the foregoing reasons, the upshot of this court’s decision was that the Ex parte Applicant’s Further Amended Notice of Motion application dated 11<sup>th</sup> January 2021 and filed on 19<sup>th</sup> January 2021 was merited and the same be and is hereby allowed in terms of Prayer No (1) therein.

25. As the Trial Court did not expressly pronounce itself from when interest would accrue, for the avoidance of doubt, interest on the sum of Kshs 10, 556,977.43 and Kshs 550,160/= awarded in **CMCC No 32 of 2017 Trans Africa Motors Ltd vs County Government of Vihiga** will accrue from the date of filing of suit until payment in full.

26. The Respondents will bear the Ex parte Applicant’s costs of the proceedings herein.

27. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2021.**

**J. KAMAU**

**JUDGE**