



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1156 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PERMANENT SECRETARY,

MINISTRY OF EDUCATION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

THE CABINET SECRETARY,

NATIONAL TREASURY.....3RD RESPONDENT

EX PARTE APPLICANT:

MESHACK OCHIENG'

RULING

Introduction

1. There are two applications that are the subject of this ruling, that have been filed by the *ex parte* Applicant herein, Meshack Ochieng. The first is a Chamber Summons dated 14th December 2020 seeking leave to commence judicial review proceedings as follows:

1. The application be certified as urgent and be heard ex-parte in the first instance and be served upon Respondents pending commencement within thirty (30) days date hereof.

2. The Ex-parte Applicant be and is hereby granted leave to commence proceedings in the nature of judicial Review against the Respondents for an order of Mandamus to issue compelling the Respondents to jointly and severally pay to the Ex-parte Applicant the Judgement debt herein in the sum of Kshs.222,502,447.33 as awarded in the Judgement of this Court in the High Court Civil Application No. 445 of 2013, Mecko Enterprises vs. the Permanent secretary Ministry of Education and others delivered on 18th March 2014 together with all accrued interest on the decretal sum at rate of 20.50% per annum arising from the Decree issued on 12th November 2020 until payment in full, and to compel the Respondents to jointly and severally pay the Ex-parte Applicant Kshs. 222,502,447.33 being the interest of late payment awarded to the Applicant in the Certificate of Order against the Government issued in High Court Civil Case No. 445 of 2013 Meshack Ochieng' t/a Mecko Enterprises vs. the Permanent Secretary Ministry of Education and others on the 18th March 2014 together with Interest thereon with effect from 12th November 2020 until payment in full and be served upon the Respondents pending commencement within thirty (30) days date hereof.

3. The costs of the Application be borne by the Respondents.

2. The said application is supported by a statutory statement dated 14th December 2020, and a verifying affidavit sworn on the same date by the *ex parte* Applicant. The main ground for the application is that judgement was delivered in the *ex parte* Applicant's favour on 12th

November 2020 for a sum of Kshs. 222,502,447.33, and that despite several pleas and requests to have the decretal sum paid, the 2nd Respondent has failed or ignored to settle the said sum.

3. The *ex parte* Applicant's application for leave has its basis on an award made by a single arbitrator on 30th September 2013, the award recognition and enforcement proceedings in the High Court in **NRB H.C Comm. Misc. Application No. 445 of 2013** and ruling delivered therein on 27th February 2014, and the subsequent appeal in Court of Appeal in **NRB CA Appeal No. 54 of 2015** and consent order entered therein on 10th June 2016. The *ex parte* Applicant states that a Certificate of Order against the Government dated 12th November 2020 was subsequently issued in **NRB H.C Comm. Misc Application No.445 of 2013** for the sum of Kshs 222,502,447.33 .

4. Upon perusal of the *ex parte* Applicant's pleadings, and upon noting the history of the proceedings giving rise to the said application, the Court directed that the application be canvassed *inter partes* by way of affidavit evidence and written submissions. The *ex parte* Applicant thereupon filed further affidavits, and various sets of submissions, while the Respondent filed a Notice of Preliminary Objection dated 29th January 2021, on the following grounds:

1. THAT pursuant to a Ruling delivered on the 20th May 2019 by Hon. Justice M. W. Muigai in Nairobi High Court Commercial & Tax Division Miscellaneous Application No. 167 of 2018 declaring the Exparte' Applicant a vexatious litigant, the Exparte' Applicant was barred from filing any suit without leave of Court;

2. THAT the Exparte' Applicant did not disclose to this Honourable Court about the existence of Hon. Justice M. W. Muigai's Ruling of 20th May 2019 prior to instituting this suit;

3. THAT since the Exparte' Applicant was declared a vexatious litigant, he has since instituted another suit i.e. Nairobi High Court Constitutional and Human Rights Division in Miscellaneous Petition No. E315 of 2020 where he has raised facts and issues that are similar to those raised in the numerous suits instituted by him, including the present suit;

4. THAT the Exparte' Applicant has deliberately failed to disclose to this Court about the existence of the suit pending hearing and determination before the Constitutional and Human Rights Division;

5. THAT the Exparte' Applicant's decision to institute the present suit and Miscellaneous Petition No. E315 of 2020, without requisite leave of Court as required by the Vexatious Proceedings Act, is an abuse of due process of this Honourable Court. Accordingly, all pleadings and documents filed by the Exparte' Applicant in the two matters should be struck out;

6. THAT the Exparte' Applicant has failed, neglected and/ or refused to file all requisite documents required to be filed in Court at the Leave stage in Judicial Review Proceedings as per the provisions of the Civil Procedure Rules, 2010;

7. THAT the Exparte' Applicant has failed, neglected and/ or refused to file all requisite documents required to be filed in Court at the Substantive Application stage in Judicial Review Proceedings as per the provisions of the Civil Procedure Rules, 2010;

8. THAT the Exparte' Applicant is seeking similar prayers, revolving around the same facts and legal issues that were heard and determined in a Ruling delivered by Hon. Justice Odunga on the 23rd March 2017 in Nairobi High Court Judicial Review Division Miscellaneous Civil Application No. 414 of 2014.

9. THAT in view of the foregoing, the issues raised by the *ex parte*' Applicant for hearing and determination in the present application are *res judicata*;

5. The Respondent annexed a copy of Gazette Notice No. 9483 of 2019 which published the orders granted on 14th April 2019 in **Nairobi High Court Miscellaneous Application No. 167 of 2018**, declaring the *ex parte* Applicant a vexatious litigant, and accordingly contended that the suit herein was in abuse of the court process and should be struck out. In the circumstances, this Court on 4th February 2021 directed that the *ex parte* Applicant's the Chamber Summons dated 14th December 2020 and Respondent's Notice of Preliminary Objection dated 29th January 2021 be heard and determined together.

6. The *ex parte* Applicant subsequently filed another application by way of a Notice of Motion dated 16th February 2021 seeking the following orders:

1. That this Honourable Court be pleased to have the directions dated the 4th day of February, 2021 before Honourable Lady Justice PAULINE NYAMWEYA J. be set aside as the same were reviewed by the Honourable (Mr.) G.V. ODUNGA J. on the 23rd day of March, 2017.

2. That this Honourable Court be pleased to rely on the SUMMARY JUDGEMENT dated the 15th day of February 2021 (filed by Ex-parte Applicant) UPON fourteen (14) days NOTICE served upon the Attorney General on 4th February, 2021.

3. That the Respondents be compelled to pay as per Certificate of Order Against the Government dated the 12th day of November, 2020 within thirty (30) days with effect from 14th December, 2020 of Chamber Summons.

4. Any other or further orders that this Honourable may deem fair and just to grant.

5. That costs of this application be provided for.

7. The *ex parte* Applicant also filed further submissions dated 18th and 22nd February 2021. The Court once again on 22nd February 2021 directed that the *ex parte* Applicant's Notice of Motion dated 16th February 2021 shall be heard and determined together with his Chamber Summons dated 14th December 2020 and the Respondent's Notice of Preliminary Objection dated 29th January 2021.

8. The *ex parte* Applicant thereafter proceeded to file numerous certificates of urgency, affidavits and submissions after this matter had been reserved for ruling, and without leave of the Court. This explanation on the circumstances surrounding the two applications and preliminary objection pending ruling before the Court is essential at the outset, as it became necessary for this Court to delineate the subject of this ruling, which is as per the directions given herein on 22nd February 2021. Otherwise the Court would have had to wait *ad infinitum* for pleadings to close in this matter, given the *ex parte* Applicant's proclivity to file new pleadings almost on a daily basis.

The Determination

9. The preliminary objection by the Respondent that the *ex parte* Applicant's application is *res judicata* and in abuse of process of Court needs to be addressed first, before considering the question whether leave ought to be granted to commence judicial proceedings. The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, are as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of Oraro vs Mbaja, (2005) 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in Mukisa Biscuit Company vs West End Distributors Ltd (supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

11. Section 7 of the Civil Procedure Act specifically bars a court from hearing a suit which is *res judicata* as follows:

“ No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

12. The question whether a suit is *res judicata* is thus a pure question of law, and the test to be applied was explained in Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR, by the Court of Appeal as follows:

- i There must be] a previous suit in which the matter was in issue;
- ii. the parties were the same or litigating under the same title;
- iii. a competent Court heard the matter in issue;
- iv. the issue has been raised once again in a fresh suit.

13. It is in this regard evident from the Respondent's Preliminary Objection and the *ex parte* Applicant's own pleadings and submissions that there have been various suits filed by the parties herein on the issue of the award made to the *ex parte* Applicant, including judicial review proceedings seeking to enforce the same. The fact of previous suits between the parties on the issue of enforcement of the arbitral award is therefore not contested.

14. It is necessary therefore to examine the issues in the previous suits, and the starting point are the orders that were initially granted by the Court in Board of Governors Ng'iya Girls High School v Meshack Ochieng' t/a Mecko Enterprises NRB H.C Comm. Misc Application No.445 of 2013 [2014] eKLR, in which the Attorney General had brought an application seeking to set aside the subject arbitral award that had been adopted as a judgment of the court. The Court noted in its ruling therein that the *ex parte* Applicant herein had not claimed for compound interest, and therefore allowed the prayer for the setting aside of the arbitrator's award on compound interest of 17.5% per annum on the amount of Kshs 30,571,250.10. The Court however did not interfere with the other awards made by the arbitrator.

15. The Chairman of the Board of Governors of Ng'iya Girls High School appealed against the said decision in the Court of Appeal, which appeal was marked as settled and withdrawn by a filed consent of the parties which was adopted as a court order by the Court of Appeal in NAI Civil Appeal No 45 of 2015 as follows:

“By Consent:

1. The award made and published on 30th September 2013 and adopted as a judgment and decree of the High Court in Nairobi High Court Miscellaneous Civil Application No. 445 of 2013 on 19th March 2014 as well as the consent recorded in

the said suit on 18th March 2014 shall not be construed as requiring the appellant herein being the 2nd respondent in the suit to make any payment directly to the 1st respondent in respect of the works that were the subject matter of the award, the appellant having fully discharged its obligations to the 1st respondent.

2. The 1st respondent as applicant in the said suit hereby gives an irrevocable undertaking not to execute or enforce as against the appellant in any manner whatsoever the decree given by the High Court in the said suit on 19th March 2014 or on any other date or to initiate proceedings of any kind to recover the decretal sum from the appellant.

3. The 1st respondent be at liberty to pursue the settlement of the award and the decree against and from the 2nd, 3rd, 4th and 5th respondents.

4. This consent be filed in the Superior Court and upon the such filing, the entire dispute between the appellant and the 1st respondent in respect of the matters the subject of the arbitration giving rise to the award made and published on 30th September 2013 and the subsequent decree given by the Superior Court in the said suit on 19th March 2014 be marked as fully settled.

5. This appeal be marked as settled and each part shall bear its own costs of both this appeal and of the suit in the Supreme Court.”

16. The *ex parte* Applicant then filed judicial review proceedings in Republic vs Attorney General & Another ex-parte Meshack Ochieng, NRB JR Misc. Civil Application No. 414 of 2014 [2017] eKLR, wherein Odunga J. noted as follows in the judgment as regards the orders sought therein:

“1. What provoked these proceedings was the decree entered in Nairobi HC Misc. Cause No. 445 of 2013 in which judgement was entered for the *ex parte* applicant herein against the 2nd Respondent in the sum of Kshs 31,873,133.80. That decree was entered by consent and by it the award of the arbitrator was adopted as judgement of the Court. According to the said consent the said sum was made up of Kshs 30,571,250.10 being the principle award and Kshs 1,301,883.70 being the arbitrator’s costs. The decree was however silent on costs. Following the delay in settling the said decree the applicant herein instituted these proceedings in which he sought the following orders:

a. That an order for mandamus do issue directing the respondents herein to satisfy the decree issued in Nairobi HCC Misc 445 of 2013 whereby Dr. Belio Kipsang was ordered to pay the decretal sum amounting to Kshs.31,873,133.80 together with further interest from the 1st day of April 2014.

b. Costs of the application to be provided;

c. Such further and any relief that the honourable court may deem just and expedient to grant.

17. The Court went further to note as follows:

4. It is agreed by the parties herein that the principle sum has been paid in full. The *ex parte* Applicant however contends that the Respondents have withheld the applicant’s commercial award from 30th October, 2013 to 10th January, 2017. According to the *ex parte* applicant, the Arbitrator through his wisdom and the circumstances of the matter herein, in his award dated 20th September, 2013 spelled out in paragraph 5 that ‘any portion of the debt/amount awarded, that is not settled within the time frame stipulated under 4 above, will attract compound interest at the prevailing commercial bank lending rate of 17.50% per annum until it is fully settled’. The *ex parte* applicant submitted that the said award was confirmed on the 18th March of 2014 by the Honourable Lady Justice Kamau...”

18. After considering the arguments made by the parties on the issue of interest payable, the learned Judge declined to award any interest, and his reasoning for this finding was follows:

“21. Whereas this Court appreciates that the *ex parte* applicant’s claim for the award of interest may not be farfetched, this Court exercising its judicial review jurisdiction in these kind of matters on compels the payment of what is decreed as due and not what ought to have been due since the Court does not deal with merits. Therefore, without pinpointing to a specific order that expressly awarded interest to the *ex parte* applicant after the decree was entered, for this Court to direct the Respondents to pay interest to the *ex parte* applicant, this Court would in effect be varying the decree, a jurisdiction this Court does not have. If the *ex parte* applicant feels that interests ought to be paid to him as a result of the delay in settling the sum due to him, he must first seek to have the decree varied to reflect the same before this Court may compel the Respondents to pay.”

19. Subsequently, the Attorney General sought to have the *ex parte* Applicant declared a vexatious litigant in Attorney General vs Meshack Ochieng t/a Mecko Enterprises, NRB HC Comm Misc Civil Application No. 167 Of 2018 [2019] eKLR, pursuant to which the *ex parte* Applicant’s filed a preliminary objection thereon. Muigai J. in her ruling detailed the chronology of events leading to the application as follows:

“The above chronology of events reveals that the Respondent in application of 5th April 2018 has canvassed the same issue on payment of interest of the claim as awarded in arbitral award of 30th September 2013. Subsequent proceedings confirm that Lady Justice Kamau set aside the award of compound interest on 26th February 2013. This is a valid regular and legal order

of the Court that was/is not set aside, varied reviewed or successfully appealed against. The Respondent has since filed numerous applications as outlined above before various Courts of the High Court;

Misc. Civil Application File 445 of 2013- Civil Division High Court;

Misc. Application Civil Application 414 of 2014-Judicial Review High Court;

Misc. Application 167 of 2018- Commercial Division of High Court;

Misc. Application 161 of 2018 – Commercial Division of High Court.

All the Applications filed in the various Divisions of High Court have orders by Courts of equal and competent jurisdiction, none of these Courts can sit on appeal of another Court with equal jurisdiction. Therefore, prolonged hearing and rehearing of the same issue is a futile exercise, the Respondent ought to appeal these decisions and/or enforce final order of Court of Appeal.

I note from the content of the instant Court file, that the Respondent/Applicant filed appeal in Court of Appeal but there is no evidence of hearing of appeal and determination of the matter in Court of Appeal. There is a consent which ought to have been enforced as an order of the Court of Appeal. It cannot be the subject of hearing in the High Court but enforced as it is an order of Court order from Court Appeal. There cannot be any legal proceedings to amend, vary or review orders of Court of Appeal in the High Court. The High Court is bound by Court of Appeal orders.

I note that the Applicant was paid the principal sum of Ksh 30,571,250.10 and costs of Ksh 1,301,883.70 a fact which he admitted to in Court. The only issue the Respondent is pursuing is interest which the various Courts in High Court have ruled upon. The issue is *res judicata* unless appealed against in Court of Appeal.”

20. The learned Judge upon considering the law and authorities on vexatious litigants proceeded to dismiss the *ex parte* Applicant’s preliminary objection and allowed the application to declare the *ex parte* Applicant a vexatious litigant under the Vexatious Proceedings Act.

21. From the above cases it is evident that the issue of enforcement of the judgement in **High Court Civil Application No. 445 of 2013 - Mecko Enterprises vs. the Permanent Secretary Ministry of Education**, including the issue of interest awarded on the arbitral award enforced therein, has been flogged by the parties in many courts, including in this Court. To this extent the *ex parte* Applicant’s applications dated 14th December 2020 and 16th February 2021 are *res judicata* and in abuse of the process of Court, and the *ex parte* Applicant has thereby also not demonstrated an arguable case for leave to commence judicial review proceedings.

22. In conclusion, section 3 of the Vexatious Proceedings Act in this respect also provides as follows:

“No suit shall, except with leave of the High Court or of a judge thereof, be instituted by or on behalf of a vexatious litigant in any court, and any suit instituted by him in any court before the making of an order under section 2(1) of this Act shall not be continued by him without such leave; and such leave shall not be given unless the Court or the judge is satisfied that the suit is not an abuse of the process of the court and that there is a prima facie ground for the suit.”

23. It is thus not evident in light of the said section and the decisions cited in the foregoing, how the Certificate of Order against Government relied upon by the *ex parte* Applicant dated 12th November 2020 was prepared and issued. The said Certificate of Order against Government needs to be brought to the attention of the Presiding Judge of the Commercial and Admiralty Division of the High Court at Nairobi for confirmation of the circumstances of its issue.

24. In the premise, the Respondent’s Notice of Preliminary Objection dated 29th January 2021 is accordingly found to be merited to the extent of the following orders:

i. The *ex parte* Applicant’s Chamber Summons application dated 14th December 2020 and Notice of Motion application dated 16th February 2021 are hereby struck out with no order as to costs.

ii. The *ex parte* Applicant is hereby restrained from instituting any further judicial review proceedings on the enforcement of the judgment in High Court Civil Application No. 445 of 2013 - Mecko Enterprises vs. the Permanent Secretary Ministry of Education, without leave of the Court.

iii. The Deputy Registrar of the Judicial Review Division of the High Court at Nairobi shall forward a copy of this ruling to the Presiding Judge of the Commercial and Admiralty Division of the High Court at Nairobi for noting and any further action that may be necessary.

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF JULY 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2021

J. NGAAH

JUDGE