



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1147 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF REGISTRAR OF THE JUDICIARY.....1ST RESPONDENT

THE CABINET SECRETARY NATIONAL TREASURY.....2ND RESPONDENT

THE PRINCIPAL SECRETARY NATIONAL TREASURY...3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE APPLICANT:

NK BROTHERS LTD

RULING NO 3

1. NK Brothers, the *ex parte* Applicant herein, has moved this Court in an application brought by way of Chamber Summons dated 2nd December 2020, wherein it is seeking the following orders:

A. THAT leave be granted to the Ex-parte Applicant to apply for an order of mandamus to compel the Respondents to pay to the Ex-parte Applicant the sum of Kshs. 532,590,842.74/=, being the principal amount of Kshs. 380,000,000/= plus interest at the applicable rate and the administration cost from the 30th June, 2018 when the 1st installment became due and owing up to the date of the determination of this proceedings as per the order in Nairobi Commercial and Tax Division Misc. Application No. E010 of 2018 - N.K Brothers Limited vs The Chief Registrar of the Judiciary.

B. THAT this Court be pleased to give such further Orders and directions as it may deem fit and just to grant.

C. THAT the costs of this application be provided for.

2. The said application is supported by a statutory statement dated 2nd December 2020, and a verifying affidavit sworn on the same date by the Pravinchandra Mavji Khoda, the *ex parte* Applicant's Managing Director. Given the history of this matter as set out in the said pleadings, this Court was of the view that the Respondent needed to be given an opportunity to respond, and directed that the said application be canvassed *inter partes* by way of written submissions by the parties.

3. The main ground for the application is that on 21st October 2004 the Applicant and the 1st Respondent entered into a written agreement for the conversion of the Income Tax House to Law Courts at the Nairobi Milimani. A dispute subsequently arose between the *ex parte* Applicant and the 1st Respondent, which was referred for arbitration. After the arbitration proceedings commenced, parties entered into negotiations and eventually a consent to settle the dispute before the said Arbitrator. The same was duly recorded by the Arbitrator as the Arbitrator's Final Award on 20th February 2018.

4. Thereafter, that the *ex parte* Applicant being the beneficiary of the Final Award in the arbitration, moved to the High Court and sought recognition of the Arbitral award, and a decree was issued on 24th October 2018. However, that the 1st Respondent has to date not honoured

payment of the first installment of Kshs.50,000,000/= being part of the total decretal sum, and the principal sum has already attracted interest of Kshs. 152,590,842.74/- The *ex parte* Applicant in this regard annexed copies of several correspondences between it and the 1st Respondent on payment of the decretal sum.

The Response

5. The 1st Respondent filed a Replying affidavit sworn on 26th April 2021 by Anne A. Amadi, the Chief Registrar of the Judiciary, wherein it was averred that the proceedings herein are predicated upon a decree issued on 24th October 2018 in **Miscellaneous Cause E010 of 2018 - N. K. Brothers Ltd vs The Chief Registrar of the Judiciary**. Further, that in the said decree, the 1st Respondent entered into a consent to pay the *ex parte* Applicant as all-inclusive sum of Kenya Shillings three hundred and eighty million (Kshs 380,000,000/=) in full and final settlement of the claim.

6. However, that the contract was thereafter the subject of investigations by the Directorate of Criminal Investigation (DCI) arising from allegations of irregular variation of the contract by members of the Judiciary Tender Committee, and that during this intervening period of investigations no payment could be made. Subsequently, that the Director of the Public Prosecution by a letter dated 25th November 2019 to the DCI advised that there was no basis for criminal charges against the Judiciary Tender Committee, and that the Judiciary consequently wrote to the Principal Secretary, National Treasury requesting for funds of Kshs 380,000,000/= to settle the claim in a letter dated 18th February 2020. The Judiciary further engaged the office of the Attorney General to request for advice on how to satisfy the decretal amount.

7. Despite the Judiciary's pursuit for resource commitment, the 1st Respondent avers that it has been unable to settle the decretal sum due to lack of budgetary allocations. Nevertheless, that the Judiciary is committed to pursuing the said allocation in line with the constitutional and statutory legal regime that governs the appropriation and utilization of funds from the Exchequer. Therefore, that the Judiciary had not wilfully and deliberately failed to settle the decretal sum, but rather the delay in paying the same has been occasioned by the budgeting cycle and financial constraints, and that they were in the process of budgeting for the payment.

The Determination

8. AGN Kamau Advocates, the *ex parte* Applicant's counsel, filed submissions dated 25th February 2021, and drew the Court's attention to Order 53 Rule 1 and the case of **Republic vs County Council of Kwale & another Ex parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996** on the reason for leave as explained by Waki J. The counsel also made reference to Section 21 (1) and (2) of the Government Proceedings Act, and submitted that the Respondents had failed to honour the Certificate of Order against Government despite various demands. Therefore, that the *ex parte* Applicant has met the threshold of an arguable case and is entitled to the leave to commence judicial Review.

9. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

10. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

11. In the present application, I note that note that the *ex parte* Applicant annexed copies of letters exchanged with the 1st Respondent on payment of the decretal sum, and that the 1st Respondent does not dispute that a decree was issued against it in favour of the *ex parte* Applicant, and the funds owed. The 1st Respondent has also brought evidence of the Certificate of Order Against the Government issued on 15th February 2021 that was served upon it in this respect. In addition, the detailed explanation the 1st Respondent has provided as regards the delay in payment is best urged at the substantive stage and not at this stage. In the circumstances, this Court finds that the *ex parte* Applicant has demonstrated an arguable case.

The Disposition

12. Arising from the foregoing reasons, the *ex parte* Applicant's Chamber Summons dated 2nd December 2020 is found to be merited, and I accordingly order as follows:

I. The *ex parte* Applicant is granted leave to apply for an order of mandamus to compel the Respondents to pay to the *ex parte* Applicant the sum of Kshs. 532,590,842.74/=, being the principal amount of Kshs. 380,000,000/= plus interest at the applicable rate and the administration cost from the 30th June, 2018 when the 1st installment became due and owing up to the date of the determination of this proceedings as per the order in Nairobi Commercial and Tax Division Misc. Application No. E010 of 2018 - N.K Brothers Limited vs The Chief Registrar of the Judiciary.

II. The costs of the Chamber Summons dated 2nd December 2020 shall be in the cause.

III. The *ex parte* Applicant shall file and serve the substantive Notice of Motion within twenty-one (21) days of today's date.

IV. A mention date of the *ex parte* Applicant's substantive Notice of Motion shall be given by the Judge seized of this matter.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

J. NGAAH

JUDGE