



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTION AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E001 OF 2021

IN THE MATTER OF: UNSATISFIED JUDGEMENT DEBT ARISING

FROM [MOMBASA] CMCC NO.2542 OF 2015: EAST AFRICA GLASSWARE MART LIMITED VS COUNTY GOVERNMENT OF MOMBASA

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW

ORDERS OF MANDAMUS

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF: CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA AND CIVIL PROCEDURE RULES, 2010(ORDER 53)

BETWEEN

REPUBLIC.....APPLICANT

AND

1. THE COUNTY EXECUTIVE MEMBER IN CHARGE

OF FINANCE & ECONOMIC PLANNING, COUNTY GOVERNMENT OF MOMBASA

2. THE CHIEF OFFICER FINANCE COUNTY GOVERNMENT OF MOMBASA

3. COUNTY GOVERNMENT OF MOMBASA.....RESPONDENTS

AND

EAST AFRICA GLASSWARE MART LIMITED.....EX-PARTE APPLICANT

RULING

1. The amended notice of motion application before this Court is dated 28th April, 2021. The application seeks the following orders:

a) An order of mandamus directed to the respondents be issued compelling them jointly and /or severally to pay to the applicant, as the decree and certificate of costs issued on 20 August 2019 in [MSA] CMCC NO.2542 OF 2015, the following;

i. Kshs 2,677,579.72

ii. Interest on the sum of Kshs 2,677,579.72 at 12% per annum from December 2014 until payment in full; and

iii. The costs of Kshs 292,981/-

b) The respondents to meet the applicant's costs of this application.

2. The application is premised on the grounds stated in the Statutory Statement and Verifying Affidavit of Sanjay Pravinlal Prabudhas Chandi dated 8th January, 2021 and sworn on the same date.

3. The applicant's case is that the decree issued on 20 August, 2019 was served on the 3rd respondent's erstwhile advocates –M/S Robson Harris & Company Advocates as well as on the 3rd respondent's County Secretary and the Certificate of Order for Costs against the Government and Certificate for Costs against the Government both issued on 11th September, 2020 were served upon the respondents as well as the 3rd respondent's County Attorney and the Attorney General, but to date the judgement debt remains unpaid. That the only way to enforce the decree issued on 20 August 2019 is seeking an order for mandamus, and the Court is urged to allow the application.

The Response

4. The respondent filed a Notice of Preliminary Objection dated 7th June 2021 and states that the application is inconsistent with Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya.

5. The respondent further states that this court in MOMBASA JUDICIAL REVIEW APPLICATION NUMBER 23 OF 2020 which is the same claim herein dismissed the matter on 17th December 2020, as such litigation must come to an end.

6. I have considered the application, the response and the rival submissions for both counsel and the issue that emerge for determination are:

a. Whether this matter is res judicata

b. Whether the applicant has met the requirements for the order of mandamus.

c. Whether the applicant should be granted the orders sought

7. On whether the application is res judicata the court in the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR** stated:

“the doctrine of res judicata as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

The Court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

8. In the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR (above)** the court further stated that:

“My understanding of the res judicata principle is that it is meant to lock out from the court system a party who has had his

day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the courts' valuable time if there was no tool for arresting such mischief. This is the tool the Applicant has deployed through the instant application.

9. The matter that is being referred by the respondent herein is **JUDICIAL REVIEW NO. 23 OF 2020** seeking similar orders and between the same parties. The same was filed before this Court which held,

“I have said enough to show that the application herein is premature and has no merit. The same is dismissed with costs.”

10. The applicant submits that it's not re-litigating the issues raised in that concluded suit, rather, the applicant is simply invoking the special jurisdiction conferred upon this court to enforce its decree against the 3rd respondent. That it is a fundamental condition precedent to the plea of res judicata under section 7 of the Civil Procedure Act that there be a final determination by a court and that this court has not rendered any decision setting aside the subject decree or absolving the 3rd respondent from having to pay the amounts in subject decree. Further the ruling of this Court dated 17 December 2020 in **[MSA] JR APPLICATION NO.23 OF 2020** now reported as **EAST AFRICA GLASSWARE MART LIMITED VS THE COUNTY SECRETARY COUNTY GOVERNMENT OF MOMBASA & 3 OTHERS [2020] eKLR**, the Court found that the proceedings in that matter were premature and dismissed the application on the basis that certain statutory steps had not been fulfilled prior to institution the proceedings.

11. In dismissing the matter the court held that:

“it is the finding hereof, and this Court accepts this submission from the respondent, that the ex parte applicant when filing the current application did not serve the respondent with the Certificate of Order against the Government, or Certificate of Costs against the Government. Further, the ex parte applicant did not serve the decree or Certificate of Taxation upon the accounting officer of the respondent, and finally that the ex parte applicant did not serve a copy of any certificate issued or required herein upon the Attorney General.”

12. It is my view that these are enforcement proceedings meant to enforce the court decree herein against the 3rd respondent and if the same are struck out and or dismissed then the applicant will be left without a remedy. Therefore the claim for res judicata fails. This leads me to the question whether the applicant has now met the requirements of section 21 of the Government Proceedings Act.

Section 21 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, 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. The Court in the case of **Republic v County Secretary Kiambu County & 2 others Ex parte Daniel K Mwaura t/a Karuru Mwaura & Company Advocates [2021] eKLR** stated:

“the requirements for an order of mandamus to issue were further explained by Mativo J. in Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney

General), [23] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[24] The eight factors that must be present for the writ to issue are:-

- (i) *There must be a public legal duty to act;*
- (ii) *The duty must be owed to the Applicants;*
- (iii) *There must be a clear right to the performance of that duty, meaning that:*
 - a. *The Applicants have satisfied all conditions precedent; and*
 - b. *There must have been:*
 - i. *A prior demand for performance;*
 - ii. *A reasonable time to comply with the demand, unless there was outright refusal; and*
 - iii. *An express refusal, or an implied refusal through unreasonable delay;*
 - iv. *No other adequate remedy is available to the Applicants;*
 - v. *The Order sought must be of some practical value or effect;*
 - vi. *There is no equitable bar to the relief sought;*
 - vii. *On a balance of convenience, mandamus should lie*

14. The applicant herein submitted that the Decree together with the Certificate of Order against the Government and Certificate of Order for Costs against the Government were served on the 1st and 2nd respondents as well as the Attorney General on 18 December, 2020. The applicant has annexed the said documents in its verifying affidavit filed on 12th January, 2021. The said documents were served through email and registered post. Annexed was the forwarding letter and the postage receipt.

15. Accordingly, it's my finding that the applicant has met the requirements of section 21 of the Government Proceedings Act and for the order of mandamus.

16. On whether the applicant should be granted the orders sought the Court in the case of **Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others [2018] eKLR** stated:

“In this case, the Applicants herein have moved this Court to compel the satisfaction of a judgement already decreed in their favour by a competent Court of law. The Respondents have not given any reason why the decree has not been satisfied more than three years down the line. If the Court were to decline to grant mandamus, applicants would be left without an effective remedy despite holding a decree.

I associate myself with the position adopted by Majanja, J in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** that:

“...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution.”

17. Similarly, the decree in this matter has not been satisfied for two years. The respondents have not provided any reasons for such failure. It is my finding that the applicant has met all requirements to warrant granting of an order for mandamus.

18. Accordingly, the applicant's amended notice of motion dated 28th April, 2021 is allowed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Ongeso for Applicant

Mr. Tajbhai for Respondents

Ms. Peris Court Assistant