



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**JUDICIAL REVIEW NO.19 OF 2019**

**IN THE MATTER FOR APPLICATION FOR THE ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENT OF MERU**

**EXPARTE APPLICANT (KARIENE TRADERS).....APPLICANT**

**VERSUS**

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR**

**FINANCE ECONOMIC PLANNING & ICT.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The ex-parte applicant has moved this court by a notice of motion dated 16<sup>th</sup> January 2020 seeking, **an order of Mandamus to compel the respondents to satisfy a decree of the court in ELC (HC) No.169/2011 amounting to Kshs 2,953,293 plus all other incidental costs.**
2. The application is supported by a statement of facts dated 17<sup>th</sup> December 2019, and a verifying affidavit sworn on the same date by Joseph Muthamia. The applicant states therein that it instituted a suit against the 2<sup>nd</sup> respondent on 28/7/20114 and sought the recovery of damages for compensation on alleged destruction of his built upon Plot No. 31 Kariene Market. The suit was subsequently heard and judgement entered in favour of applicant against the 2<sup>nd</sup> respondent in the sum of Kshs 1,500,000 plus costs of the suit which were eventually taxed in the sum of Kshs 373,293. A decree and certificate of costs were then issued but the decree remain unsettled. The application exhibits the plaint, the judgment, decree, certificate of costs as well as correspondence between the advocates for the parties to show that indeed the decree outstands settlement. The applicant thus contends that since the decree and all subsequent orders have not been appealed against, the applicant urges the court to issue the orders sought as the only way to enforce the judgment.
3. Rufus Joseph Mriti, the County Secretary of the 2<sup>nd</sup> respondent swore a replying affidavit on 16/9/2020 in opposition to the application in which he disputes ever being served with any decree requiring payment of the sum claimed by the applicant then ambivalently asserts that the 2<sup>nd</sup> respondent would promptly settle the sum of Kshs 1,873,293 as ordered by the trial court once funds were availed. He expresses by being puzzled by the applicant's prayer to have the respondents compelled to satisfy a non-existent decree.
4. The parties filed their respective submissions on 22/6/2020 and 9/11/2020 respectively. The applicant's submissions were to the extent and effect that since it was barred by dint of section 21(4) of the Government Proceedings Act from commencing any execution proceedings against the respondents, its only avenue was through the instant application. He was firm that the respondents had blatantly neglected to perform their public duty to its detriment. It concluded that the respondents ought to be compelled to settle the sum of Kshs 2,953,293 plus costs of the application. The applicant cited the cases of **R v County Secretary, Nairobi City County & 3 others; Koceyo & Co. Advocates(Ex-parte) (2020) eKLR, Jaribu Credit v Nairobi County Government (2018) eKLR and R v Kenya National Examinations Council ex parte Gathenji & others civil appeal No.234 of 1996** to buttress its submissions that its only by way of mandamus that a decree against the government can be enforced.
5. The respondents took the position that the only sum legally due to the applicant was Ksh. 1,873,293, which they would settle immediately funds were availed. They urged the court to dismiss the applicant's application because, in their view, the orders sought cannot issue.

## **Analysis and Determination**

7. Having analysed the application and arguments as well as submissions made by the parties herein, I have isolated the only issue for determination to be whether the applicant has satisfactorily established being entitled to the orders sought by the application.

8. There cannot be a genuine denial that there was issued a judgment followed by a lawfully obtained decree both of which have not been challenged in any way. It is also indubitable that the judgment is yet to be satisfied by payment. In fact, the respondent wholly admits the existence of the unsatisfied decree but asserts that it is not in the sum claimed but in the sum of Kshs 1,873,293 and that it has not refused to pay but will pay when funds become available because it has been budgeted for.

9. How to enforce a decree against the Government was elucidated in **R v Permanent Secretary Ministry of State for Provincial Ministry of State for Provincial Administration and Internal Security & Anor ex parte Fredrick Manoah Egungza (2012) eKLR** as follows:

**“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. (Emphasis provided)**

10. The Court of Appeal in **Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** set the parameters of when the order of mandamus can issue:

**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... 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.**

11. In this matter I have read the judgment and it is clear that the court awarded a specific sum plus costs and no more. That informs the respondents position that it is only bound to pay the sum of 1,873,293 being the principal plus costs. Even with such a vehement assertion, the applicant made no attempt to clarify how his claim of Kshs 2,953,293 is made up. Interest is awarded at the discretion of the court and subject to the pleading filed. In the matter yielding the subject decree, there was never a prayer for interest on the judgment sum and in the judgment entered in his favour, no award was made on interests. That scenario commands therefore that the only sum the applicant can lawfully demand to recover from the respondent by way of mandamus is the sum of Kshs 1,873,293.

12. It is a basic learning that only a decree is capable of execution and I appreciate the application before me to be one for execution. The decree exhibited to be due for satisfaction is the one dated the 22/05/2019 which is explicit that the sum due is Kshs 1,500,000 plus costs. I find that to be the only the sum due to the ex-parte applicant for which it is entitled to the order of mandamus sought.

13. While I find that on the basis of the decree exhibited the ex-parte applicant merit the order of mandamus, which I have granted, it is important to comment on the assertion by the ex-parte applicant that it has never been served with a decree. That assertion is difficult to understand and believe because the documents filed show that there was a correspondence from Ms Kiautha Arithi & Company Advocates dated 13.9.2019 in response to the demand by counsel for the applicant for settlement of the sum due. The respondent's counsel takes no issue about the decree and only seeks indulgence to enable them get instruction. I find that letter to be unequivocal acknowledgment of the judgment debt and it is thus not true that the respondents were not aware of the obligations in the decree.

14. The upshot is that the application by way of Notice of motion dated 16.01.2020 is allowed. An order of judicial review in the nature of mandamus is issued and directed at the respondents and compelling them to satisfy the decree in favour of the ex-parte applicant issued in Meru ELC No. 169 of 2011 in the sum of Kshs 1,873,293.

15. The costs of the application is awarded to the ex-parte applicant.

**DATED SIGNED AND DELIVERED AT MERU VIRTUALLY BY MS TEAMS THIS 23RD DAY OF SEPTEMBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**IN PRESENCE OF MISS NDEGWA FOR THE EXPARTE APPLICANT**

**MR. GICHUKI FOR THE RESPONDENT**

**PATRICK J.O OTIENO**

**JUDGE**