



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. E001 OF 2021**

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

**AND**

**IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF: EXECUTION OF A COURT DECREE**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

**BETWEEN**

**DKN (suing as the father and the next friend of the minor DK)...APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF BOMET.....RESPONDENT**

**RULING**

1. The ex-parte applicant herein filed a Judicial Review Application dated 24<sup>th</sup> June 2021 against the County Government of Bomet where he sought:

i. THAT this court be pleased to issue an Order of Mandamus compelling the Respondent to satisfy the Decretal amount of Kshs.652,828 as per the Judgment delivered on the 12<sup>th</sup> day of September 2019 by Hon. P. J. Aduke, Civil Suit No. 76 of 2019 at Bomet Resident Magistrate's Court.

2. The Application was premised on the grounds set out in the supporting affidavit of DKN dated 24<sup>th</sup> June 2021.

3. It was the Ex-parte applicant's case that he obtained Judgment in Bomet CMCC No. 76 of 2019 for Kshs.455,100 and Costs assessed at Kshs.89,680. A Decree and a Certificate of Costs was then extracted and served upon the Respondent. It appears that the same has not been satisfied by the Respondent.

4. On 22<sup>nd</sup> July 2021, counsel for the Respondent, Mr. Cosmas Koech informed the court that the parties had a Consent to record. The Consent was that the ex-parte applicant would be paid the Decretal sum within thirty days from that day. The matter was to be mentioned on 12<sup>th</sup> October 2021 to confirm compliance. This Consent was adopted as an Order of the Court on the same day.

5. On 12<sup>th</sup> October 2021, counsel for the Exparte applicant informed the court that they had not received any payment from the Respondent. The court ruled that the file remain at the registry for a period of 7 days to enable parties honour the Consent, failure to which the court would deliver a Ruling to the application, which it now does.

6. It is salient to note that the Respondents have not filed a response to the application. There is an Affidavit of Service on record dated 15<sup>th</sup> July 2021 and sworn by Wycliffe Kiprono Kadet that indicated that the Respondent had been served with the Judicial Review Application and a Hearing Notice.

7. I have considered the application and I note that the Respondent is Bomet County Government. County Governments are established under the First Schedule of the Constitution of Kenya, 2010.

8. Execution of Decrees against the National and County Governments have a special procedure. Proceedings against the Government are governed by the Government Proceedings Act (Cap 40). Although the Act does not specifically recognize the County Governments, it is common knowledge that in the current constitutional dispensation, there exist two levels of Government i.e. National and County Governments.

9. In the case of **Republic Vs A.G & Another Ex-Parte Stephen Wanyee Roki (2016) eKLR**, Odunga J stated:-

**“Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, Section 7 of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) provides that; all law in force immediately before the effective date continues in force and shall be construed with alteration, adaptation, qualification and exceptions necessary to bring into conformity with this Constitution. It follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring conformity with the Constitution. One such construction would be the reality that the Government is now at two levels and Article 189 (1) (a) of the Constitution requires that the Constitutional status and institutions of Government both at the National and County levels be respected.**

**In my view, such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”**

It follows therefore that the Government Proceedings Act applies in execution of Decrees against the County Government.

10. It is settled law that before a Mandamus Order is issued, the applicant must satisfy the procedure set out in Section 21 of Government Proceedings Act and Order 29 of the Civil Procedure Rules. Section 21 of the Government Proceedings Act 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 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 21 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 latter, 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 such direction to be inserted therein.”**

11. It is not in doubt that Section 21(4) of the Government Proceedings Act prohibits execution against the Government. Section 21(4) of the Government Proceedings Act Cap 40 Laws of Kenya provides:-

**“Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.”**

12. However the preamble to the Government Proceedings Act provides that it is:-

**“An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government and for purposes incidental to and connected with those matters.”**

It follows that the Act only applies to civil proceedings by and against the Government. With regard to Judicial Review proceedings, it has been held that such proceedings are neither criminal nor civil. In the case of **Jotham Mulati Welamondi Vs. The Electoral Commission of Kenya [2002] 1 KLR 4**, Ringera J. (as he was then) stated:-

**“So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word.”**

13. It therefore follows then that the rules applicable to normal execution proceedings are not applicable to the Government. It must be remembered that an application that seeks to compel the Government to satisfy a Decree is subjected to a very elaborate procedure. Before the Court issues such an Order, there must be proof that the provisions of the Section 21 of the Government Proceedings Act have been complied with. In the case of **Permanent Secretary Office of The President, Ministry of Internal Security & Another Ex-parte Nassir Mwandihhi (2014) eKLR**, Odunga J held that:-

**“The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.”**

See also **Kisya Investments Ltd Vs AG (2005) 1 KLR**.

14. It is clear that Judgment in Bomet CMCC Number 76 of 2019 was delivered on 12<sup>th</sup> September 2019. A Decree and a Certificate of Costs were served upon and received by the Respondent on 4<sup>th</sup> August 2020, which was roughly more than a year later. As earlier stated, the Exparte Applicant's advocate filed an Affidavit of Service dated 15<sup>th</sup> July 2021 stating that this Judicial Review Application and a Hearing Notice had been served upon the Respondent. The advocate for the Respondent attended court on 22<sup>nd</sup> July 2021 where he indicated that he wished to record a Consent with the Exparte applicant regarding payment of the Decretal sum.

15. It is my finding that the Respondent was well aware of the proceedings and none of it was an ambush to them. Equally, the Exparte applicant has followed the elaborate procedure as required by the Government Proceedings Act and Order 29 of the Civil Procedure Rules.

16. The scope of an Order of Mandamus was discussed in the Court of Appeal case of **Republic Vs Kenya National Examination Council Ex-Parte Gatheni & Others (1997) eKLR**, where it stated that:-

**“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. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

17. In the instant case, the Exparte applicant has demonstrated that he has a Judgment against the Respondent, the County Government of Bomet which has failed to honour its obligation to pay the Decretal sum. It is only fair that it is compelled to perform their duty and pay the ex-parte applicant.

18. In the final analysis, I am satisfied that the ex-parte applicant has demonstrated his case for the grant of the Order of Mandamus and accordingly prayer 1 of the Notice of Motion Application dated 24<sup>th</sup> June 2021 is granted. I make no order on costs of this application.

19. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered electronically to the parties as per their consent at the following email addresses:-**

**M/s Kiprono Kadet & Co. Advocates for the Ex-parte Applicant**

**M/s Cosmas Koech & Company Advocates for the Respondent**