



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**JUDICIAL REVIEW NO. 3 OF 2021**

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

**AND**

**IN THE MATTER OF ENFORCEMENT OF COURT ORDERS**

**AND DECREE AGAINST THE COUNTY GOVERNMENT**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, GOVERNMENT**

**PROCEEDINGS ACT AND THE COUNTY GOVERNMENT ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**COUNTY SECRETARY COUNTY GOVERNMENT OF MIGORI.....1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER - FINANCE COUNTY GOVERNMENT OF MIGORI.....2<sup>ND</sup> RESPONDENT**

**COUNTY EXECUTIVE MEMBER IN CHARGE OF FINANCE,**

**COUNTY GOVERNMENT OF MIGORI.....3<sup>RD</sup> RESPONDENT**

**AND**

**OKONGO WANDAGO & COMPANY ADVOCATES.....EX - PARTE APPLICANT**

**JUDGMENT**

By a Notice of Motion Application dated 28/7/2021 filed evenly, the ex-parte applicant seeks the following orders: -

**a.Spent.**

**b.That the Court be pleased to issue the Judicial Review Order of Mandamus to compel:**

**i.County Secretary, County Government of Migori, as the Head of County Public Service**

**ii.Chief Officer, Finance and Planning, County Government of Migori**

iii. County Executive Committee Member in charge of Finance, County Government of Migori

For and on behalf of the County Government of Migori, to jointly and or severally to pay to the Applicant, Okongo Wandago & Company Advocates, the sum of Kshs. 525,704.53/= plus an additional sum of Kshs. 203 per day with effect from 13<sup>th</sup> July 2021 until payment shall be made in full, being the taxed costs in terms of the Certificate of Order against the Government issued on 12<sup>th</sup> July 2021 in Migori High Court Miscellaneous Civil Application No. 32 of 2019.

c. Costs of this application be provided for.

The application is based on grounds found in the statement of facts and is also supported by the Verifying Affidavit of Marvin Onyango Odero dated 15/7/2021 together with the annexures.

According to the ex-parte applicant, it obtained judgment in its favour and costs of the proceedings in **Migori High Court Misc Civil Application No. 32 of 2019** in terms of the decree of the court dated 30/6/2021, the applicant versus County Government of Migori (1<sup>st</sup> Respondent).

A Certificate of Costs had been issued on 4/9/2019 which has never been challenged. Thereafter, a Certificate of Order against the Government was applied for and issued on 12/7/2021.

The County Government of Migori is thus indebted to the ex-parte applicant in the sum of **Kshs. 527,704.53/=** as at 12/7/2021 and the same continues to attract and accrue interest daily in the sum of **Kshs. 203/=** with effect from 12/7/2021 until payment shall be made in full as decreed by the court in **Migori High Court Misc. Civil Application No. 32 of 2019**.

The ex-parte applicant averred that the County Government of Migori is constitutionally recognized government level and thus subject to the provisions of **Section 21 (4) of the Government Proceedings Act**; that the respondents are jointly being sued as statutory office holders and accounting officers of the County Government of Migori responsible for handling finances and processing payments for and on behalf of the County and are thus sued in these proceedings in their official capacities pursuant to **Section 44 of the County Government Act and Section 103 of the Public Finance Management Act**.

I have duly considered the application dated 28/7/2021, the Statement of Facts dated 15/7/2021, Verifying Affidavit of Marvin Onyango Odero, together with the annexures thereto.

The ex-parte applicant is simply seeking an order of mandamus to compel the respondents to do their public duty and satisfy the decree which they have failed to do, to the detriment of the ex-parte applicant.

By an order dated 19/7/2021, leave was granted to the ex-parte applicant to commence Judicial Review proceedings against the respondents. Pursuant to the leave, the ex-parte applicant filed the instant Notice of Motion application. There is an affidavit of service by Peter Ochara Anam dated 19/11/2021 which shows that the order to grant leave to commence these proceedings and the instant application, were served upon and received by the office of the 1<sup>st</sup> respondent on 11/8/2021 and the copy was duly stamped by the Respondents. I am satisfied the issue of service was properly dispensed with. Though duly served, the respondents did not bother to file any responses or appear.

**Of the scope of an order of mandamus:**

In the case of **Republic vs Kenya National Examination Counsel ex parte Gathenji & Others, (1997) eKLR**, the court considered the scope and efficacy of an order of mandamus: -

**“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.”**

In the case of **REPUBLIC VS. ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] eKLR** Odunga J referred to the case of **R (REGINA) VS. DUDSHEATH, EX PARTE, MEREDITH [1950] 2 ALL E.R. 741, AT 743**, where Lord Goddard C. J. held as follows:

**"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy... "**

The applicant has demonstrated that it has a judgment issued by this court against the 1<sup>st</sup> Respondent which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed to satisfy. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed to perform their statutory duties.

Before an order of Mandamus can issue, the ex-parte applicant must comply with Section 21 of the Government Proceedings Act. In **Kisya Investments Ltd vs The A. G. (2005) 1KLR 74**, the Court explained why the strict and elaborate procedure under that section has to be followed, that is to allow the Government time to enable it to make arrangements to satisfy the decree.

In this case, the ex-parte applicant has proved that they duly complied with the requirements under Section 21 of the Government Proceedings Act. To support this, it has annexed and marked it as “**MOO4**” to the Verifying Affidavit of Marvin Onyango Odera the decree of the court (M003), the Certificate of Order against the County Government of Migori dated and issued on 12/7/2021 in terms of Order 29 Rule 3 of the Civil Procedure Rules. It was duly served on the Migori County Government on 12/7/2021 and was duly stamped by them. I am satisfied that the ex-parte applicant is fully compliant with the requirements under Section 21 of the Government Proceedings Act.

**Whether the ex-parte applicant is deserving of the order of Mandamus:** Having found that the ex-parte applicant has fully complied with the legal requirements, and the Respondent have refused or ignored to perform their statutory duties which is to pay the applicant, the applicant is entitled to the order of mandamus before the issuance of the order of mandamus, the court finds that the instant application is merited. The application dated 28/7/2021 is allowed with costs.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF NOVEMBER, 2021.**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

Mr. Odera for the Ex-Parte Applicant.

No appearance for the Respondents.

**Nyauke** Court Assistant.