



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

MISCELLANEOUS APPLICATION NO. 5 OF 2021

TAKAFUL INSURANCE OF AFRICA LTD[KENYA]....DECREE HOLDER/APPLICANT

AND

THE COUNTY GOVERNMENT OF GARISSA.....1<sup>ST</sup> RESPONDENT

THE COUNTY SECRETARY GARISSA COUNTY.....2<sup>ND</sup> RESPONDENT

CHIEF OFFICER FINANCE AND ECONOMIC PLANNING GARISSA

COUNTY.....3<sup>RD</sup> RESPONDENT

RULING

1. The Application subject of this ruling is a Notice of Motion dated 9<sup>th</sup> June, 2021 seeking the following Orders;

**a. The Court be pleased to grant an Order of Mandamus to compel the Secretary to the Garissa County Service Board to facilitate the payment to the Decree Holder of the decretal sum of Kshs. 221, 365,643.00/=.**

**b. Cost of the application be provided for.**

2. The application is supported by the grounds on the face of it; that a default judgement for the sum of of Kshs. 221, 365, 643.00/= was entered on the 28/10/2019. The default judgement has not been set aside as the Respondent failed to meet the conditions set by the trial court on 12/2/2020, to file a defence and deposit the decretal sum in a joint account; an application by the Respondents for stay of execution of the said order was denied; and the Respondents moved to the Court of Appeal and failed to obtain an order of stay.

3. Further the judgement debtor is morally and legally obligated to pay the decretal sum as failure to do so is unlawful, unfair oppressive and bad in law.

4. In her affidavit in support of the Application **Safiya Karua**, the legal and compliance officer of the applicant reiterates the grounds in support of the application.

5. In response to the Application the Respondents filed a Preliminary objection and simultaneously a Replying affidavit of even date sworn by **Ismail Aden Dabarn** the 1<sup>st</sup> Respondent's County Attorney Wherein the deponent referred to yet another suit whose subject matter was similar but was irregularly withdrawn without leave of court or consent of the parties.

6. He further averred that the applicant has move the court prematurely as the Respondents have filed an appeal against the decision of Kariukii J being *Civil Application Number 170 of 2020* in the Court of Appeal at Nairobi and at the time of hearing this application the Application before the Court of Appeal had not been determined and therefore this Honorable Court should allow the Respondents to exhaustively apply their right to appeal which they have already commenced before the Court of appeal, to avoid giving contradicting decision with the Court of Appeal and to safeguard the Respondents application therein so as not to render the same nugatory.

7. Further he deponed that the Respondents have a valid defence as the subject contract was breached by the applicants and services therein never rendered, whilst the Applicant is well aware of the ongoing investigation of the said contracts by the Ethics and Anti-Corruption Commission for issues of fraud, the Application is an unprocedural attempts to compel payment so as to forestall ongoing investigations by the Ethics and Anti- Corruption Commission.

8. Further the applicant will suffer no prejudice in allowing the Respondents' appeal to be heard and determined before commencing proceedings seeking Orders of Mandamus. On the other hand the Respondents stand to suffer greater prejudice because their appeal will have been overtaken by events should the applicant's application succeed.

9. On 14<sup>th</sup> July 2021 the Applicant filed ground of opposition in reply to the Preliminary Objection and a Replying affidavit sworn by **Safiya Karua** rehashing the grounds of opposition and the nature of the proceedings before the High Court and the Court of Appeal.

10. The Notice of Motion was canvassed by way submissions. Nothing much was said of the Preliminary objection. It appears to have fallen by the wayside.

11. On its part the applicant submitted two sets of submissions summarized as follows;

The decree holder has a judgement of Kshs 221,365,643/- in its favor a default judgement having been entered and the judgement debtor having failed to set aside the same. Neither this Court nor the Court of Appeal has issued a stay. The application for stay at the court of appeal is still pending, further a Notice of Appeal that triggers an Appeal in the Court of Appeal has not been filed and hence there is no pending appeal. The judgment debtor has an obligation under the law to comply and respect the rule of law.

Further in the enforcement of the Bill of Rights, the court, while observing the rules of Natural Justice shall not be unreasonably restricted by procedural technicalities.

In support of its submission that the only Order that obtains in this case is for the issuance of an Order of mandamus the applicant cited the case of **Commission of Administrative Justice v Kenya Vision 2030 Delivery Board & 2 Others [2019] eKLR**

12. On the other hand, the Respondent submitted that substantial loss is evident as what is at stake is tax payer's money and the overwhelming public interest effect that it possesses, pending fraud investigations and the appeal pending in the Court of Appeal should suggest to the court that this matter is prematurely before it. In this regard the Respondent cited the case of **Kenya Shell Limited v Kibiru [1986] KLR 410, Machira T/A Machira & Co. Advocates vs East African Standard (No2) [2002] KLR 63.**

13. The Respondents equally took issue with the procedure adopted by the Applicant and submitted that the same was not proper and is unknown in the Civil Procedure Rules. They relied on **Sec & M Company Limited v County Secretary, County Government of Narok & Another [2017] eKLR, Mohamed Ahmed vs R (1957) E.A, 523, Jotham Mulati Welamondi vs The Electoral Commission of Kenya, Bungoma, H.C.Misc. Appl. No. 81 of (2002) 1 KLR 486**

14. Further, the applicant is seeking orders against Garissa County Public Service Board, a party who has not been awarded a chance to defend itself in these proceedings nor in the suit that led to these proceedings.

15. The applicant has equally failed to satisfy the conditions precedent to Section 21 and 26 of the Government Proceedings Act on the issuance of Certificate of Order against the Government. In this regard reference was made to **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR, Kisya Investments Ltd v AG (2005) 1 KLR 74. Republic v County Secretary Migori County Government & Another [2019] eKLR.**

### **Analysis and Determination**

16. Having considered the application, affidavit in support, the replying affidavit and submissions by both parties, the court discerns the issues for determination as follows;

**I. Whether the Application as filed is defective in form?**

**II. Whether the Notice of Motion was filed prematurely?**

**III. Whether the applicant warrants the Orders sought?**

**A. Whether the Application as filed is Defective in Form?**

17. The application lists the same parties as those listed in the initial suit that preceded these proceedings. The Republic is not listed as the mover of the motion.

In **SEC & M Company Limited v County Secretary, County Government of Narok & another [2017] eKLR** where the decree holder was described as the applicant the court had this to say;

**“(2) The reason why I say the Applicant was wrongly described is because Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic....”**

**“(3) In judicial Review application, it must therefore always be remembered that the Applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned.”**

18. Faced with a similar issue of title, the Court in **SEC & M Company Limited (supra)** did not dismiss the application. It agreed with the holding in the Court of Appeal decision in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** where the Court of Appeal stated:

**“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.**

19. Similarly, this court guided by Article 159 of the Constitution agrees and adopts the decision in **SEC & M Company Limited (supra)** that the improper intitlement is not necessarily fatal to the application for judicial review.

**b. Was the Notice of Motion was filed prematurely?**

20. Whether the motion is premature has been argued is two faceted. *Firstly*, there being an appeal in the Court of Appeal and the likelihood of it being rendered nugatory and *secondly*, failure of the applicant to adhere to the conditions precedent as set out in the Government Proceedings Act.

21. On there being an appeal and the likelihood of it being rendered nugatory. The parent case dealt with an application filed by the Respondents seeking stay Orders. The Court of Appeal has equally been moved in Civil Application No. 170 of 2020. In its Ruling dated 20<sup>th</sup> November 2020, while the Court of Appeal did not issue stay Orders it directed the file be placed before a single judge under Rule 4 of the Rules of the Court. The Respondent has not addressed this Court on the steps taken since the Court of Appeal gave the said directions.

22. In **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR** the Court opined as follows;

**“This Court cannot exercise appellate jurisdiction of a decision rendered by a Court of co-ordinate jurisdiction. Besides, Judicial Review is not an appeal and the law governing Judicial Review jurisdiction is limited in scope and application.**

**10. There is a long-established and fundamental distinction between an Appeal and Review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.**

**11. Judicial review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. As stated above, this Court cannot in exercise of its Judicial Review powers purport to Review or upset the decision rendered by Court of co-ordinate jurisdiction. The grounds cited by the Respondents and the submissions advanced by the Respondents counsel are an open invitation to this Court to venture into a merit review of the decision or exercise appellate jurisdiction. I decline the invitation to venture into the forbidden sphere.”**

23. The Respondent in this case seeks to take the option of recanvassing his case for stay orders. This court cannot take this approach. The Proper channel is through the Court of Appeal where there still awaits the determination of an application between the parties. To assume stay, this Court will be sitting on appeal of its own decision and/or on review if it takes the approach proposed by the respondent.

24. The second ground is the failure of the applicant to adhere to the conditions precedent as set out in the Government Proceedings Act. Section 21(1) of the **Government Proceedings Act** provides:

**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.**

25. Section 21 (3) of the said Act on the other hand provides:

**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.

26. The Applicant had neither obtained the Certificate of the order nor had it served the same on the Applicant prior to filing of these proceedings. It moved to extract the Certificate of Order against the Respondent on Costs and the decretal sum on 21<sup>st</sup> October 2021. He served the same upon the Respondent on same date the 21<sup>st</sup> October 2021 and copies irregularly placed on the court file. All this was after the institution of these proceedings.

27. Githua, J **in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] Eklr** stated that:

**“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. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”**

28. In **SEC & M Company Limited (supra)** the Court held further as follows;

**“... Being a condition precedent for the issuance of an order of mandamus, it follows that the Court can only issue the said relief when satisfied that the said certificate was issued and served. In other words where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a genuine dispute as to whether the right to apply for an order of mandamus has matured, the Court must deal with the issue. In this case there is no averment and much less evidence of the existence of the statutory certificate under section 21 aforesaid. No such copy has been exhibited either....”**

29. The proceedings under the Government Proceedings Act is mandatory in nature. The Conditions set out in the Government Proceedings Act imposes a condition that the same ought to be served prior to filing Judicial Review proceedings in the nature of *mandamus*. The applicant in this matter purported to comply after filing the application herein and quietly and sheepishly filed a copy purportedly served. The action clearly shows that the application was filed prematurely.

30. The justification for the strict procedure set out in the Government Proceedings Act was explained and elaborated by the Court of Appeal in **Kisya International Ltd vs AG (2005) 1 KLR 74** as follows; -

**“Order 28, rules 2(1)(a), (2), and (4) of the civil Procedure rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice, the courts are bound to apply the law as it exists. Many a times such applications may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of court however much its effect is harsh or even undesirable.... History and rationale of Government’s immunity from execution arises from .....**”

31. The above quoted authority in detail explains the rationale and the need to follow laid down processes to allow adequate notice and process that would otherwise allow a government institution or Agency to comply with payment of a claim, interest and costs, as government expenditure is budgeted for and audited. Payment of decrees or judgement are deemed to be an expenditure. This justification equally applies to the County Governments as they too expend public funds.

32. Having found fault on the part of the applicant for failing to serve the requisite certificate as by law required, the court finds that the application was thus prematurely filed and dismisses the same with costs.

**DATED SIGNED AND DELIVERED IN GARISSA THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021**

**ALI-ARONI**

**JUDGE**