



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

JUDICIAL REVIEW MISC APPLICATION NO. 10 OF 2019

IN THE MATTER OF AN APPLICATION BY GALEXON KENYA LIMITED FOR AN ORDER OF MANDAMUS COMPELLING THE CHIEF OFFICER DEPARTMENT OF TRADE, INDUSTRY, TOURISM & ENTERPRENEURSHIP, COUNTY GOVERNMENT OF VIHIGA AND COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE, COUNTY GOVERNMENT OF VIHIGA TO PAY DECRETAL SUM TOGETHER WITH COSTS PURSUANT TO KISUMU HCCC 18 OF 2017

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF THE PUBLIC FINANCE ACT, 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

REPUBLIC.....APPLICANT

AND

**CHIEF OFFICER DEPARTMENT OF TRADE, INDUSTRY, TOURISM &
ENTERPRENEURSHIP COUNTY GOVERNMENT OF VIHIGA.....1ST RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE COUNTY
GOVERNMENT OF VIHIGA.....2ND RESPONDENT**

EXPARTE APPLICANT: GALEXON KENYA LIMITED

RULING

1. By a Notice of Motion dated 24th September, 2019 and filed on 27th September, 2019, the ex parte applicant herein, seeks the following orders:

1) An order of Mandamus commanding the Chief Officer Department of Trade, Industry, Tourism & Entrepreneurship, County Government of Vihiga and County Executive Committee Member for Finance, County Government of Vihiga to settle the decretal sum together with costs interest and costs as awarded in KISUMU HCCC 18 OF 2017 as follows:

a. Kshs. 20,798,450/- being the contract sum

b. Kshs. 6,190,330/- being interest at 14% as at 22nd July, 2019

c. Kshs. 2,396,554.99 as taxed by the Taxing Master

2) Costs

3) Any other relief

Applicant's case

2. According to the Applicant, it obtained a decree in **KISUMU HCCC 18 OF 2017** requiring the County Government of Vihiga to pay it Kshs. 20,798,450/- together with interest and costs.

3. Cyril Mukhunji Makatiani, the Applicant's manager in his verifying affidavit sworn on 24th September, 2019 avers that the decree was served upon the County Government of Vihiga on 27th June, 2019 but remains unsettled to date.

Respondents' case

4. By an affidavit sworn by Stella Orengo, the 2nd Respondent's Director of Legal Affairs, it has been averred that this application is defective for having been filed out of time and for not disclosing the grounds upon which it is premised.

5. The Respondents fault the ruling of the court dated 28th March, 2019 and argue that the orders sought involve a colossal sum of money and that the Respondents stands to be highly prejudiced.

6. I have carefully considered the application in the light of the replying affidavit and the submission filed by counsel for the parties and I have deduced the following issues for determination.

1) Whether this application is defective

2) Whether the Respondents are entitled to challenge the Deed of Settlement dated 10th December, 2018

3) Whether the decree was served on the Respondents

4) Whether the Applicant is entitled to an order of mandamus

Whether this application is defective

7. Order 53 rule 3(1) of the Civil Procedure Rules provides as follows

When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing. (emphasis added)

8. By a consent dated 18.09.19, the parties agreed that the substantive motion for judicial review be filed and served within 7 days. There is evidence that the motion was filed 2 days outside the 7 days.

9. I have considered the provisions of Sections 1A and 1B of the Civil Procedure Act and I find that just and fair administration of justice can still be attained since there is no evidence that the Respondents have been prejudiced by the 2 days' delay.

Whether the Respondents are entitled to challenge the Deed of Settlement dated 10th December, 2018

10. This court's ruling dated 03rd October, 2019 in which the issue of the Deed of Settlement was determined has not been varied, set aside or appealed against.

11. The Respondents' attempt to reintroduce an issue that has already been determined is in my considered view an abuse of the court process and is hence rejected.

Whether the decree was served on the Respondents

12. Cyril Mukhunji Makatiani, the Applicant's manager has to his verifying affidavit sworn on 24th July, 2019 annexed demand letters, decree, certificate of costs duly stamped on 27.06.19 with the Respondents' stamps and an affidavit of service sworn by KANIARU KAMANDU on 22nd July, 2019.

13. Evidently, I am persuaded that the Respondents were on 27.06.19 duly served with demand letters, decree, certificate of costs and receipt

thereof was acknowledged and the holding in Republic v County Secretary Nairobi City County Ex parte Tom Ojienda (2019) eKLR clearly supports this position.

Whether the Applicant is entitled to an order of mandamus

14. The Applicant's case is that the decree in issue is not denied and that the Respondents who are the Accounting Officer of the Department of Trade and Head of Treasurer respectively have a duty to comply with the decree.

15. In support of its contention, the Applicant placed reliance on Republic v County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR where it was held:

“.....the law as it stands presently is that no execution can be levied against the property of a Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for *mandamus* against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of *mandamus* is not complied with.”

16. The Applicant also relied in Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi [2017] eKLR where where it was held:

‘It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer.’

17. The Applicant likewise relied on Republic v Attorney General & another ex-parte Stephen Wanyee Roki (2016) KLR where it was held:

‘...that being the position, execution under the Civil Procedure Rules is barred in so far as the County Governments are concerned. What then is the option available to a party in whose favour judgement has been decreed" ...It follows that the only remedy available to such a person is to institute judicial review proceedings and seek an order of mandamus compelling the County Government to settle the decree in question...’

18. The Applicant equally relied on Republic v Attorney General & another Ex parte James Alfred Koroso [2013] eKLR where it was held:

” In the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society.”

19. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein (See Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi (above).

20. In seeking an order for *mandamus* the Applicant is seeking, not relief against the County Government of Vihiga, but to compel its officials, and in particular the Respondents who the Chief Officer Department of Trade, Industry, Tourism & Entrepreneurship, County Government of Vihiga and Head of Treasurer respectively to do what the County Government, through Parliament, has directed him to do the fact that he was not a party to **JUDICIAL REVIEW APPLICATION NO. 10 OF 2019 notwithstanding.**

21. The fact that the sum in issue is colossal is not a reasonable defence for the reason that Respondents had both satisfy the decree issued by a competent court. The Respondents have failed a statutory and public duty to and/or neglected to fulfill their aforesaid duty to the detriment of the Applicant despite the fact that no appeal was lodged against the judgment entered in Applicant's favour.

22. In view of the foregoing, I am satisfied that the Applicant has demonstrated that he is deserving of the relief sought. Consequently, the Notice of Motion dated 24th September, 2019 and filed on 27th September, 2019 is allowed as against the Respondents as prayed. Each party to bear its own costs.

DELIVERED AND SIGNED IN KISUMU THIS 27th DAY OF February, 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

For Petitioner/Applicant - Mr. Kaniaru

1st & 2nd Respondents - N/A