



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.16 OF 2018

BETWEEN

THE COUNTY SECRETARY COUNTY GOVERNMENT OF BUSIA....APPELLANT/RESPONDENT

AND

MANWARI & COMPANY ADVOCATES.....RESPONDENT/APPLICANT

RULING

1. The respondent/applicant moved the court by way of Notice of Motion under section 80 (a) of the civil Procedure Act, Order 45 Rule 1(1) and Order 51 of the Civil Procedure Rules. He is seeking the following orders:

- a. That the ruling made by this honourable court on 15th March 2019 be reviewed.
- b. That costs of this review application be provided for

2. The application was premised on the following grounds:

- a. That it is apparent from the wording of the court's ruling that both the earlier Judicial Review orders of Mandamus and the recorded consent Order between the parties read together with accompanying documents in Judicial Review No.15 of 2011, being the basis of the warrants of arrest issued, had not been taken into account.
- b. That both the Orders of Mandamus and the recorded consent between the parties have not been set aside or varied.

3. The respondent herein obtained a judgment against the appellant /applicant and a decree dated 22nd June 2017 was issued and sought to execute the said decree. A warrant of arrest against Nicodemus Mulaku the Busia County Secretary was applied for and issued.

4. When the application dated 7th November 2018 was argued before me I said:

It would appear on the face of the warrant that execution by way of a warrant arrest was erroneous. It is improper to execute against an individual for liabilities of a Government. This can only be done in exceptional circumstances for instance where it is shown that the government has funds to pay but the accounting officer is deliberately refusing to pay.

I therefore held that the order for warrant of arrest against the applicant be set aside.

5. This ruling has given rise to the present application which has been opposed on the following grounds:

- a. That this honourable court found as a fact that a warrant of arrest cannot be issued against an individual compelling him to shoulder the liabilities of the Government.
- b. That this honourable court faulted the route taken by the applicant hereof in seeking to enforce a warrant of arrest against Government Officers even before serving them with any execution Orders and or seeking for alternative mode of execution.

c. That if the consent alluded to by the applicant in Judicial review No.15 of 2011 is the subject of a protracted contest in that file, as the County Government contends in an affidavit dated 29th day of June, 2018 that the said County Secretary was not consulted, nor was any other senior Government Officer, consulted and gave consent.

d. That the consent was thereafter entered into without the approval of the County Government of Busia.

e. That the County Government of Busia can therefore not be bound by the terms of such consent.

f. That the application seeking to set aside the consent is still pending in BUSIA HC JR NO.15 OF 2011.

g. That no good grounds abound for the application and the same ought to be dismissed with costs.

6. In Miscellaneous Civil Application (JR) NO. 15 of 2011, a matter involving the parties herein over the same subject matter Kimaru J. ruled:

In the premises therefore this court allows the Exparte [sic] Applicant's application to be granted the judicial Review orders of Mandamus. The Respondents are ordered to pay the Exparte [sic] Applicant the sum of Kshs.7, 804,294/= within thirty (30) days of this court's rulings. The Respondents are hereby compelled by order of Mandamus to the pay the above sum in performance of their statutory duty. The Exparte [sic] Applicant shall have the costs of this application and costs for the application which sought to be granted leave to file the present application for Judicial Review. It is so ordered.

7. By a letter dated 8th February 2018 by the County Government of Busia addressed to its advocate Mr. Joseph Paul Makokha this is what the letter read:

Dear Sir,

RE: BUSIA HIGH COURT JUDICIAL REVIEW NUMBER 15 OF 2011

REPUBLIC –VS- MUNICIPAL COUNCIL & ANOTHER

JULIUS ORINA MANWARI

The subject aforementioned refers.

We acknowledge receipt of the High Court ruling on the subject matter. Due to the unconcluded (sic) exercise on verification of Assets and Liabilities belonging to the former defunct Local Authorities, by the Intergovernmental Relations Technical Committee, we were not able to budge for the same.

However, owing to prudence and in conformity with the due provisions of Sections 6 and 196 of the Public Finance Management Act No.18 of 2012, we have initiated the preparation of an urgent Supplementary/Budget for approval by the County Assembly, in a bid to satisfy the decree.

Nicodemus O. Mulaku Lenard W. Obimbira

COUNTY SECRETARY CECM – FINANCE & ICT

This letter gave rise to the consent that was subsequently entered. It is erroneous therefore to intimate that the county Government was not in the picture.

8. On 13th February 2018, a consent was entered by Manwari & Company advocates for the ex parte applicant and J.P. Makokha & Company Advocates for Busia County Government in the following terms:

“By consent:

1. The County Government of Busia acknowledges indebtedness to Julius Orina Manwari the Ex Parte Applicant herein in the sum of Kshs.15, 261, 588/-.

2. The said amount of Kshs.15, 261,588/= to be paid in lump sum and in full within 90 days of the date of this consent namely on or before 13th May 2018.

3. In default of payment on the due date, warrants of arrest to issue against (1) The Busia County Finance Executive and (2) The Busia County Secretary for their arrest and committal to civil jail.”

9. It has been argued for the respondent that the County Government intends to appeal against the said consent. This court cannot be held back by a mere intention to appeal. It is trite law that even in instances where there is an appeal, this alone cannot act as a stay for execution. In **Wasike vs. Wamboko EA [1976-1985] 625** it was held:

That a consent judgment or order whether final or interlocutory, deliberately made with full knowledge, with the full consent, of the parties or advocates on both sides, is regarded as having a full binding contractual effect on which the other party is perfectly entitled to insist and normally it cannot be set aside or varied; if, however, a consent judgement or order is to be set aside or varied, it can really only be set aside or varied grounds which would justify the setting aside or variation of a contract entered into with full knowledge of the material matters by legally competent persons such as fraud mistake, misrepresentation collusion duress undue influence, agreement contrary to the policy of the court, lack of capacity of parties, misapprehension or ignorance of material facts, or if certain conditions remain to be fulfilled which are not carried out; and there is very little distinction between interlocutory orders and final decrees in this respect; in the instant case no valid reasons could be detected on the record for saying that there existed grounds which would justify the setting aside of the judgement as a contract.

The parties herein were bound by their consent, the intention to appeal notwithstanding.

10. The court was urged to find that there were no new facts in favour of the applicant. The Court of Appeal in the case of Wangechi Kimita & Another vs Mutahi Wakabiru (C.A No.80 of 1985) (unreported) it was held that:

Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act. The court further went to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason.

11. In the instant application, I am satisfied that there are sufficient reasons to review my orders of 25th March 2019 in terms of the consent the parties had entered. The respondent/ applicant is therefore at liberty to execute.

DELIVERED and SIGNED at BUSIA this 12th day of March, 2020

KIARIE WAWERU KIARIE

JUDGE