



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 65 OF 2019

IN THE MATTER OF: ORDERS 53 OF THE CIVIL PROCEDURE RULES AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

ONYANGO MALOMBO ROBINSON

T/A O.M. ROBINSON & COMPANY ADVOCATES.....APPLICANT

VERSUS

1. COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE &

ECONOMIC PLANNING (COUNTY GOVERNMENT OF MOMBASA)

2. CHIEF OFFICER FINANCE (COUNTY GOVERNMENT OF MOMBASA)

3. COUNTY ATTORNEY (COUNTY GOVERNMENT OF MOMBASA)

4. COUNTY GOVERNMENT OF MOMBASA..... RESPONDENTS

RULING

1. Pursuant to the leave granted by this court on 13/12/2019 the Ex parte Applicant filed the motion dated 17/12/2019 praying for the following orders: -

(i) **THAT** this application be certified as urgent

(ii) **THAT** the Ex parte Applicant be granted leave to apply for an order of mandamus to issue against the Respondents – the County Executive Committee Member Finance and Economic Planning (County Government of Mombasa), the Chief Officer Finance (County Government of Mombasa), the County Attorney (County Government of Mombasa), and the County Government of Mombasa, the 1st, 2nd, 3rd and 4th Respondents herein respectively compelling them to forthwith and without delay perform their duty by causing to be paid to the Ex parte Applicant out of the revenue of the County Government of Mombasa the sum of Kshs. 25,266,754.90 together with further accrued and accruing interest at court rates (14% per annum) from the 29th of October, 2019 until payment in full.

2. The motion is premised on grounds set out therein, and is supported by affidavit of Onyango Malombo Robinson sworn on 13/12/2019.

3. The Applicant's case is that on 29/10/2019 the High Court of Kenya sitting in Mombasa entered Judgment for the Applicant against the County Government of Mombasa in HC Comm. Misc. Application No. 549 of 2016 between Robinson Onyango Malombo t/a O. M. Robinson & Company Advocates vs. County Government of Mombasa in the sum of Kshs. 25,266,754.90. A copy of the Decree was annexed as "OMR1"; that thereafter a certificate of order against the Government was issued. A copy was annexed as "OMR2"; that the County Government of Mombasa and the 1st, 2nd and 3rd Respondents all of the County Government of Mombasa were served with a Notice requiring them to satisfy the Decree; A copy was annexed as "OMR3"; that they did not respond to the said Notice at all and have refused to pay the decretal sum; that despite several visits to all the Respondents offices no payment has been forthcoming save for promises that payment will be made as soon as enough revenue is collected; that the 1st, 2nd, 3rd and 4th Respondents have failed in their public duty conferred by statute to make the aforesaid payment in satisfaction of the decree and that the only option open to the Applicant is for this court to compel the 1st, 2nd, 3rd and 4th Respondents to satisfy the said Judgment by way of an order of mandamus.

Response

4. The application is opposed by the Respondents vide a Replying Affidavit sworn by Jimmy Waliaula on 29/1/2020.

5. The Respondents' case is that the 3rd Respondent is not properly enjoined in the suit, since it is alleged that the Public Finance Management Act, Cap 412C of the Laws of Kenya provides that the statutory duty to pay out funds from the County treasury vests on the County Executive Committee members in charge of Finance and not on the 3rd Respondent.

Determination

6. I have carefully considered the application. Essentially the application is not opposed by all the other Respondents except the 3rd Respondent. Even then, it is the duty of this court to ensure that the application is merited.

7. To the application was annexed the following documents:

(a) Certificate of order against Government in Misc. Application No. 513 of 2016 issued on 29/10/2019 in the sum of Kshs. 25,266,754.90.

(b) A decree on the same cause (above) issued on 10/12/2019 in the sum of Kshs. 25,266,754.90.

(c) Certificate of taxation issued on 23/5/2017 in the sum of Kshs. 25,266,754.90.

(d) A notice of entry of Judgment dated 29/10/2019.

(e) 2 affidavits of service sworn on 11/11/2019 and 11/12/2019

confirming that the said documents were duly served upon the Respondents. The affidavits are sworn by Onyango Malombo Robinson and Paul Odhiambo Outa respectively.

8. Despite the above documents being availed to the Respondents, they have refused or declined to settle the debt. The Applicant has no other way of having the Respondents pay the debt. The remedy of mandamus, is a judicial review mechanism through which an executive agency can be forced to pay out of its revenues, the debts owed to the Applicant. In this matter, there is no submission from the Respondents, or for that matter a defence, why I should not issue the prerogative remedy of mandamus to compel the Respondents to pay the debt due to the Applicant. Besides, I am satisfied that the Applicant has proved that he deserves the remedy of mandamus.

9. This court, however, accepts the response by the 3rd Respondent that he is not properly enjoined hereto because the responsibility to pay County debt does not lie with the 3rd Respondent.

10. In the upshot the application is allowed as prayed with costs to the Ex parte Applicant against 1st, 2nd and 4th Respondents.

Dated, Signed and Delivered at Mombasa this 18th day of June, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Gomba for Applicant

Ms. Omboga for Respondents

Mr. Kaunda Court Assistant