



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION/ JUDICIAL REVIEW CASE

NO. 1 OF 2019

IN THE MATTER OF APPLICATION FOR ORDERS OF MANDUMUS AGAINST KISII COUNTY GOVERNMENT, IN EXECUTION OF AN ORDER OF COURT IN KISII CMCC MISC APPL. NO. 80 OF 2018 THE MATTER OF BENARD ONKOBA (T/A BETICO AUCTIONEERS) VS. KISII COUNTY GOVERNMENT

REPUBLICAPPLICANT

VERSUS

KISII COUNTY GOVERNMENT..... RESPONDENT

BENARD ONKOBA T/A

BETICO AUCTIONEERS EX-PARTE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 30th April 2019, the ex-parte applicant seeks the following orders;
 - a) That there be an order of mandamus directing the Kisii County Government to ;
 - i) Settle and/ or satisfy the order in Kisii Mis. Appl. CMCC No. 80 of 201 in full;
 - ii) That in default of (a) above, a warrant of arrest do issue against the current County Executive Committee Member for Finance and Economic Planning and Accounting Officer of the Kisii County Government (or his successor, if any) for committal to civil jail for a period of 6 months at the ex-parte applicant's expense on subsistence.
 - b) In the alternative to (b) above, the ex-parte applicant be at liberty to attach the Respondent's movable property(ies) through BETICO AUCTIONEERS in execution of said order to recover the full decretal sum with all costs and interests from 30/10/2018 being the date of the order;
 - c) Any such further and/or other order that this court may deem fit to grant
 - d) That costs be provided for.
2. The application is based on the grounds set out on the face of the application and is supported by the verifying affidavit and statement of the ex-parte applicant.
3. The respondent opposed the application by the replying affidavit of its Chief Officer, Finance and Accounting Services, Samuel Auma which was sworn on 11th June 2019. To counter the averments made in that affidavit, the ex-parte applicant swore a supplementary affidavit on 19th July 2019.
4. The genesis of this matter as gathered from the aforementioned affidavits is Kisii CMCC No. 198 of 2016. In that matter, judgment was entered against the respondent for a sum of Kshs. 1,531,398/=. Based on instructions given by the firm of T.O. Nyangosi, the ex-parte applicant proceeded to proclaim and attach the respondent's movable properties to recover the judgment debt from the respondent. He then filed Kisii CMCC Misc. App. No. 80 of 2018 for assessment of auctioneer's costs and his bill was taxed at Kshs. 193,430/=.
5. When the respondent failed to pay the amount indicated in the Certificate of Costs issued in Kisii CMCC Misc No. 80 of 2018, the ex-

parte applicant engaged the services of M/s Minimax Auctioneers to execute warrants of attachment and sale against the respondent. M/s Minimax Auctioneers proceeded to proclaim several vehicles belonging to the respondent and even issued a notification to sell one of the attached vehicles before the respondent successfully applied to lift the warrants of attachment and sale of the vehicle.

6. The respondent claims that it was aggrieved by some aspects of the ruling dated 30th October 2018 on its application to lift the warrants of attachment and sale and has filed an application to set aside that ruling. It also claims that it has sought orders to strike out the ex-parte applicant's bill of costs and therefore the instant proceedings are premature since the lower court has not made a determination on its application.

7. In response, the ex-parte applicant avers that the respondent participated in the taxation of the bill of costs and no appeal has been preferred against the Certificate of Costs issued in Kisii CMCC Misc App. No. 80 of 2018 in line with **Rule 55 (5) of the Auctioneers Rules**. He also deposes that the respondent has not satisfied the decretal amount and only rushed back to the lower court seeking to set aside the assessed bill of costs on 14th May 2019 upon service of the Judicial Review Application.

8. The court directed the parties to dispose of the matter by way of written submissions. The ex-parte applicant complied but the respondent did not file its written submissions.

9. Two issues were raised by the applicant in his written submissions;

a) Whether the respondent is under a public duty and obligation to satisfy the decree and orders issued in favour of the applicant; and

b) Whether the applicant is entitled to the relief sought.

10. The ex-parte applicant has moved this court to compel the respondent to satisfy the order of the court in Kisii CMCC Misc App. No. 80 of 2018. Much was said about the respondent's dissatisfaction with the order of the court in Kisii CMCC Misc App. No. 80 of 2018 but nothing has been placed before this court to demonstrate that the order has been reviewed or set aside. Therefore, the order of the court in Kisii CMCC Misc App. No. 80 of 2018 still stands and is enforceable against the respondent.

11. Whereas the law forbids execution against the government, the government does not enjoy any immunity against the settlement of court orders. The importance of judicial review proceedings in enforcement of decrees issued against the government was discussed by Odunga J. in **Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso** thus;

"...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 babysitting 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."

12. **Section 21 of the Government Proceedings Act** provides;

21(1) 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.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) 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.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for

the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

13. The satisfaction of orders against the County Government is governed by **Section 21** of the **Government Proceedings Act** which provides that payment of any money will be based on a Certificate of Costs. A Certificate of Order against the Government should also be issued by the court after taxation of costs. The application for a Certificate of Order against the government is made under **Order 29 Rule 3** of the **Civil Procedure Rules** which provides;

3. Any application for a certificate under section 21 of the Government Proceedings Act (Cap. 40) (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.

14. I have perused the applicant's affidavits and I have not come across a Certificate of Order against the respondent. Once the Certificate of Costs was issued, the applicant was required to apply for a Certificate of Order in the manner provided under Order 29 Rule 3 above but he failed to do so. Without it, the applicant fails to meet a crucial component of the procedure set out under Section 21 of the Government Proceedings Act.

15. For this reason, I find that the application dated 30th April 2019 is premature and bad in law. I hereby strike it out with no orders as to costs.

Dated and Delivered at Kisii this 30th day of September, 2020.

A. K NDUNG'U

JUDGE