



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW NO. 10 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF OFFICER,

MINISTRY OF TRANSPORT AND INFRASTRUCTURE,

VIHIGA COUNTY GOVERNMENT.....1ST RESPONDENT

THE CHIEF OFFICER, FINANCE.....2ND RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER,

MINISTRY OF TRANSPORT AND INFRASTRUCTURE,

VIHIGA COUNTY GOVERNMENT.....3RD RESPONDENT

AND

ATTORNEY-GENERAL..... INTERESTED PARTY

EX PARTE: AFUMA LIMITED

JUDGMENT

1. The *ex parte* applicant has moved the court by a Motion dated 7th July 2020, seeking one principal order, to the effect that the *mandamus* order issues to compel the respondents and the interested party to pay a sum of Kshs. 2, 175, 272.60, inclusive of interest accrued, plus costs, as at 3rd July 2020, arising from the decree in Vihiga RMCCC No. 74 of 2017, passed on 23rd August 2018.
2. The factual background to the application is set out in the statement of facts, dated 7th July 2020, and the affidavit sworn in support of the application, on even date by one Johnstone George Ombasyi, whose relationship with the *ex parte* applicant is not disclosed. The *ex parte* applicant had successfully prosecuted a suit in Vihiga RMCCC No. 74 of 2017, and obtained the money decree against the County Government of Vihiga, which he now seeking to enforce. The deponent avers that the *ex parte* applicant notified the respondents of the decree, but the same has not been settled to date, hence the initiation of the judicial review proceedings herein.
3. The Motion was served on the interested party, according to the affidavit of service on record, sworn on 21st July 2020. The same had also been served on the respondents, according to the affidavit of service sworn on 23rd July 2020.
4. The documents exhibited to the application are:
 - (a) An order, made on 30th June 2020 and issued on 16th July 2020, in Kakamega HC Miscellaneous Civil Application Number 14 of 2020, granting leave to the *ex parte* applicant to bring the instant proceedings;
 - (b) A decree, passed on 23rd August 2018 and issued on 21st May 2018, in Vihiga SRMCCC No. 74 of 2017, awarding the *ex parte* applicant a sum of Kshs. 1, 477, 876.00, plus costs and interests;

(c) A certificate of costs issued, in Vihiga SRMCCC No. 74 of 2017, dated 21st May 2019, awarding costs of Kshs. 180, 240.00 to the *ex parte* applicant;

(d) A demand letter from the *ex parte* applicant's advocates, dated 4th June 2019, addressed to the Governor of Vihiga County; and

(e) A letter from the *ex parte* applicant's advocates, dated 2nd July 2019, being a reminder addressed to the Governor of Vihiga County;

5. I have scrupulously pored through the application, the affidavit sworn in support and the documents annexed to that affidavit, and I have not seen any reference to or a document headed certificate of order against the government.

6. The document that I am referring to, as certificate of order against the government, is provided for in the Government Proceedings Act, Cap 40, Laws of Kenya. Section 21 of the Government Proceedings Act provides as follows:

“21. Satisfaction of orders against the Government

(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.”

7. From the above, it should be clear that a party wishing to realize the fruits of a judgment or decree against the government must start by getting themselves issued with a certificate of costs and a certificate of order against the government. These are two different certificates. The government pays against the certificate of order against the government. It is a critical accounting instrument for the purpose of government finances and accounts.

8. The courts have had occasion to pronounce themselves on the import of the certificate of order against government, and its centrality, with respect to enforcement of money decrees against the government, whether at the national or at the county level.

9. The court, in *Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi* (2014) eKLR, said as follows:

“33. It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government ...

34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court...”

10. In *Republic vs. County Secretary Migori County Government & another* [2019] eKLR, the court said:

“11. I need not re-emphasize the need for strict compliance with Section 21 of the Act being the law of the land. In this matter I can gather from the record that a Decree and a Certificate of Costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.

12. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.

13. I therefore have no difficulty in finding that the Ex parte Applicant has not fully complied with the legal requirements for an order of mandamus to be availed. The application is premature and cannot stand.”

11. In *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR, the court stated:

“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.”

12. My contemporaries have ably stated the law on the matter, and I need not say much about it. The only thing that I may add is that the statutory duty on the part of government to settle a judgment or decree of a court arises only after the government has been served with the certificate of order against it. Without being served with the said certificate, the government does not incur the duty to pay or satisfy the order or decree, and, as a consequence, a *mandamus* order would not be available, since *mandamus* is meant to compel performance of a statutory or legal duty. That is the purport and effect of section 21(3)(4) of the Government Proceedings Act. The effect of the foregoing would then be that the *ex parte* applicant herein has not fully complied with the relevant law, and process, to warrant a *mandamus* order being made in its favour.

13. The final thing is about the process in judicial review proceedings. The *ex parte* applicant appears to have filed two causes to achieve its goal, there is Kakamega HC Miscellaneous Civil Application Number 14 of 2020, where leave was sought and given; and the instant cause, Kakamega HCJR No. 10 of 2020, where the substantive Motion was filed. The *ex parte* applicant should not have filed two separate causes. The entire process is carried out in one cause. The process has two stages, the first one being the leave stage, and the second, after obtaining leave, being the filing of the substantive Motion. The fact that there are two stages in the proceedings does not mean that the *ex parte* applicant should commence separate causes, one for leave and the other for the substantive Motion. There should be only one cause. Leave is sought through an *ex parte* summons in chambers, and once leave is granted on the basis of the *ex parte* chamber summons, the substantive Motion is filed in the same cause.

14. The reference to substantive Motion should not be confused with a substantive suit. There are no parallels between the leave obtained to commence judicial review proceedings and the leave given to file a suit or appeal out of time. In the latter, where leave is required to initiate a suit or appeal out of time, leave is sought in a miscellaneous cause limited to the prayer for leave, and the cause is exhausted once leave is granted or declined. After that, the party, to whom leave to file suit or appeal out of time has been granted, files the substantive suit or appeal in a separate substantive cause. That is not so in judicial review proceedings, where there is only one cause, within which leave is sought, and, once obtained, the substantive Motion is filed.

15. The other procedural issue is that the Motion should not be filed contemporaneously with any other document. It is unnecessary to file a statement and a verifying affidavit; these are requirements for the leave stage. The statement and its verifying affidavit should be filed simultaneously with the *ex parte* chamber summons, but there is no requirement that similar statement and verifying affidavit be filed together with the substantive Motion. Indeed, it would be duplicitous to file the same set of documents. According to Order 53 rule 4 of the Civil Procedure Rules, the statement filed at the leave stage, and its verifying affidavit, are the documents to be relied upon for the purpose of the substantive Motion. There is no need to file the two processes afresh. Instead, copies of the statement and affidavit, filed at leave stage, should be served together with the substantive Motion. The statutory statement is the principal pleading in judicial review proceedings. Once the same is filed, contemporaneously with the chamber summons for leave, there would be absolutely no need to file the said pleading again simultaneously with the substantive Motion. The affidavit verifies the statement, so there is no need to file a fresh affidavit to support the substantive Motion, since the Motion is founded on the statement, which is verified by the affidavit filed simultaneously with it. So, the *ex parte* applicant should not file any affidavit to support the substantive Motion. Indeed, the substantive affidavits filed in judicial review proceedings do not relate to the chamber summons or the Motion, but to the statutory statement.

16. For avoidance of doubt, Order 53 rule 4(1) reads:

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

17. I believe I have said enough. The Motion before me, dated 7th July 2020, is not for granting, in view of my finding and holding in paragraph 12 of this judgment. Consequently, the said Motion is hereby struck out. It was not opposed, so there shall be no order on costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16TH DAY OF OCTOBER 2020

W. MUSYOKA

JUDGE