



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 23 OF 2020

**IN THE MATTER OF: AN UNSATISFIED JUDGMENT DEBT ARISING FROM (MOMBASA) CMCC NO. 2542 OF 2015:
EAST AFRICA GLASSWARE MART LIMITED VS. COUNTY GOVERNMENT OF MOMBASA**

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA AND CIVIL PROCEDURE RULES, 2010
(ORDER 53)**

BETWEEN

EAST AFRICA GLASSWARE MART LIMITED.....EX PARTE APPLICANT

AND

- 1. THE COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA**
- 2. THE COUNTY EXECUTIVE MEMBER IN CHARGE OF FINANCE &
ECONOMIC PLANNING, COUNTY GOVERNMENT OF MOMBASA**
- 3. THE CHIEF OFFICER FINANCE COUNTY GOVERNMENT OF MOMBASA**
- 4. COUNTY GOVERNMENT OF MOMBASA.....RESPONDENTS**

RULING

1. Pursuant to leave granted by this court on 25/8/2020, the Ex parte Applicant filed a Notice of Motion herein dated 31/8/2020 praying for the following orders:

1) An order of mandamus directed to the Respondents be issued compelling them jointly and/or severally to pay to the Applicant, as per the decree and certificate of costs issued on 20 August 2019 in [MSA] CMCC NO.2542 OF 2015, the following:

a) Kshs.2,677,579.72.

b) interest on the sum of Kshs. 2,677,579.72 at 12% per annum from 23 December 2014 until payment in full; and

c) the costs of Kshs 292,981/-.

2) The Respondents to meet the Applicant's costs of this application.

2. The motion is premised on the grounds set out therein, and is supported by a Statutory Statement dated 19/8/2020 under Order 53 (2) of the Civil Procedure rules 2010, and a Verifying Affidavit sworn by Sanjay Pravinlal Prabudhas Chandi on 21/8/2020, and a Supplementary Affidavit sworn on 22/9/2020 by the same person.

3. The Ex parte Applicant's case, as deponed to in the Supporting Affidavit, is that on or about 20/8/2019, a decree was issued in [MOMBASA] CMCC NO. 2542 OF 2015: EAST AFRICA GLASSWAREMART LIMITED vs COUNTY GOVERNMENT OF MOMBASA in favour of the Applicant and requiring the 4th Respondent to pay:

i. Kshs.2,677,579.72;

ii. interest on the sum of Kshs.2,677,579.72 at 12% per annum from 23 December 2014 until payment in full; and

iii. the costs of KShs. 292,981/-, (hereinafter all together referred to as the "Judgment Debt")

4. The decree issued on 20/8/2019 was served on the 4th Respondent's advocates – M/s Robson Harris & Company Advocates as well as on the 1st Respondent directly but to date the Judgment Debt remains unpaid. The Applicant annexed copies of the Decree issued on 20/8/2019; the letter dated 23/8/2019 forwarding the decree to M/s Robson Harris & Company Advocates and copied to the 1st Respondent and duly received by the addressees; the statutory notice of intention to institute these proceedings dated 20/9/2019 duly received by the 1st Respondent; and the letter dated 16/7/2020 notifying the 1st Respondent of the amount due as at that date and providing a final opportunity for payment.

5. The Applicant avers that the 4th Respondent enjoys legal immunity from attachment and sale of its property, leaving the Applicant with no other means, other than seeking an order of mandamus, to enforce the decree issued on 20/8/2019, and that it is in the interest of justice that the orders sought herein be granted. If this Court does not intervene and issue the orders sought, the 4th Respondent's officers cited herein (1st to 3rd Respondents) will never take the decree seriously or act on it, consequently the 4th Respondent will never settle the Judgment Debt, and the Applicant will continue to suffer a wrong without a remedy.

The Response

4. The motion is opposed by the Respondent through Grounds of Opposition filed in court on 15/9/2020. The Respondent's case is that the Application offends Section 21 of the Government Proceedings Act Chapter 40 Laws of Kenya; that the Application is inconsistent with Order 29 of the Civil Procedure Rules 2010; that these proceedings are special in nature and are more so procedural in nature and that the Applicant has failed to fulfil the requirements of Section 21 of the Government Proceedings Act; that the Application offends Section 103 of the Public Finance Management Act No. 18 of 2012 more particularly in relation to the 1st Respondent herein; that the 1st Respondent has been severally discharged from proceedings relating to matters to do with Finance; that this Application is unfounded, frivolous and vexatious and is a waste of this Court's time and that this Application be dismissed with costs to the Respondent.

5. In the Ex parte Applicant's Supplementary Affidavit aforesaid, the Ex parte Applicant denies that they have not complied with Section 21 of the Government Proceedings Act. The Ex parte Applicant states that as regards compliance with Section 21 of the Government Proceedings Act by obtaining a certificate of order against the government and a certificate of order for costs against the government, they had already prepared and forwarded the said certificates to the lower court for purposes of assessment and signing and that the same were signed on 11 September 2020 before the Respondents herein filed their grounds of opposition. The same were annexed and marked as exhibit **SPPC-1(a) and (b)**. The Applicant avers the Respondents herein have since been served with the certificate of order against the government and certificate of order for costs against the government both issued on 11 September 2020 and they have acknowledged receipt thereof, albeit under protest, on 18 September 2020. The Applicant therefore believes that the Respondents have no substantive legal reasons whatsoever to continue disobeying the decree aforesaid.

Submissions

6. Parties were directed to file submissions. The Ex parte Applicant filed their submissions on 1/10/2020, while the Respondents filed their submissions on 13/10/2020.

7. I have carefully considered the application and submissions. Mandamus is the only remedy through which a body owed money by a government or its agency can be paid, if the government or agency refuses to act. The mandamus remedy compels a positive action from such government or its agency. So the first thing to establish is the existence of a duty or obligation to pay the debt. In this case, the obligation would be established by showing that there is a legal judgment entered against the Respondent and whose notice has been brought to the attention of the Respondent. The government Proceedings Act at Section 21 of Civil Procedure Rules give the requirements to be fulfilled before government agency can be said to have the legal duty to pay the debt.

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.”

8. By the above Act, the grant of mandamus as an order is made contingent to the performance of certain procedures. The processes however, are not technical. They have substance, in that a legal duty against the Respondent can only accrue upon the satisfactory performance of those processes.

9. It is clear that at the time of filing the application for mandamus herein, the Ex parte Applicant had not exhausted the process required under the said Section 21. And the Ex parte Applicant does not deny this. The Ex parte Applicant admits this fact in the Supplementary Affidavit as follows:

1. As regards compliance with section 21 of the Government Proceedings Act by obtaining a certificate of order against the government and a certificate of order for costs against the government, the Ex-parte Applicant's advocates on record inform me, which I verily believe to be true, that they had already prepared and forwarded the said certificates to the lower court for purposes of assessment and signing and the same were signed on 11/9/2020 before the Respondents herein filed their grounds of opposition. Annexed hereto and marked as exhibit SPPC-1(a) and (b) are copies of the said certificates.

2. I am informed by the Ex-parte Applicant's advocates on record, which I verily believe to be true, that the Respondents herein have since been served with the certificate of order against the government and certificate of order for costs against the government both issued on 11/9/2020 and they have acknowledged receipt thereof, albeit under protest, on 18/9/2020.

3. I verily believe therefore, that the Respondents have no substantive legal reasons whatsoever to continue blatantly disobeying the orders of the Honourable Magistrate's Court as contained in the Lower Court Decree from which no appeal has ever been preferred.

10. However, the Ex parte Applicant submits that such failure is a mere technicality which this court should ignore for purposes of rendering substantive justice. The Ex parte Applicant further states that Section 21 (1) of the Government Proceedings Act does not create any limitation on when an application for the certificates stated therein can be issued, and that the same can be issued at any time after 21 days have lapsed from the date of the order and upon an application being made. In this regard, the Ex parte Applicant states that they served the Certificate of Order against the government and Certificate of Order for costs against the Government on 11/9/2020, and that the same should suffice for the purposes of Section 21 of the Government Proceedings Act.

11. This Court has a different view. If the mandamus remedy is to compel payment of a debt where the Respondent has an obligation to pay, then that obligation must first be established. That obligation is established, *inter-a-lia*, by bringing to the notice of the obligation holder the claim against it, which is contained in the Certificate of Order and Certificate of Cost, against the Government. Without these two documents the process remains inchoate, and any action taken without these is premature. The process must be complete before the Ex parte Applicant files for a remedy for mandamus. It therefore does not help that while the proceedings are already in court, the Ex parte Applicant attempts to or indeed serves the Respondent with some of the outstanding documents. The legal logic here is this, that the Respondent must have within its grasp all the documents and material and instruments establishing its obligation to pay a debt at the time the suit is commenced. It is the fact of having all those documents, materials and instruments establishing its obligation to pay the debt, and failing to pay the debt, that triggers from the Court the compelling order of mandamus.

12. It is the finding hereof, and this Court accepts this submission from the Respondent, that the Ex parte Applicant when filing the current application did not serve the Respondent with the Certificate of Order against the Government, or Certificate of Costs against the Government. Further, the Ex parte Applicant did not serve the decree or certificate of taxation upon the accounting officer of the Respondent, and finally that the Ex parte Applicant did not serve a copy of any certificate issued or required herein upon the Attorney General.

13. I have said enough to show that the application herein is premature and has no merit. The same is dismissed with costs.

Dated, Signed and Delivered at Mombasa this 17th day of December, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

M/S Mohamed for Exparte Applicant

Mr. Tojbhai for Respondents

Ms. Peris Court Assistant

Note:

In view of the declaration of measures restricting court operations due to

the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.