



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2020

IN THE MATTER OF AN APPLICATION BY THE NATIONAL HOSPITAL INSURANCE FUND, BOARD OF MANAGEMENT

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF MANDAMUS

AND

IN THE MATTER OF SECTIONS 2, 103, 147 & 148 OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF SECTION 44 & 45 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CHAPTER 40, LAWS OF KENYA

NATIONAL HOSPITAL INSURANCE FUND

BOARD OF MANAGEMENT..... EX PARTE APPLICANT

VERSUS

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF KISII 1ST RESPONDENT

THE COUNTY EXECUTIVE MEMBER FOR FINANCE,

COUNTY GOVERNMENT OF KISII 2ND RESPONDENT

THE COUNTY GOVERNMENT OF KISII 3RD RESPONDENT

RULING

1. The *ex-parte* applicant has moved this court by an application dated 27th February 2020 for judicial review orders of mandamus to compel the respondents to pay a sum of Kshs. 187,888/= being the costs of the suit in ***Kisii JR Misc Civil Application No. 38 of 2011 Republic vs The Accounting Officer, Ministry of Local Government, The Local Government Transfer Fund and the National Hospital Insurance Fund Board of Management.***

2. The application is based on the grounds set out in the application and the Statement of Facts and the affidavit of Jude Ragot filed on 23rd January 2020.

3. The *ex-parte* applicant claims that the 3rd respondent had sued it and the Accounting Officer, Ministry of Local Government, Local Government Transfer Fund vide ***Kisii JR Misc Civil Application No. 38 of 2011*** seeking for an order of certiorari to quash the decision made by the Accounting Officer, Ministry of Local Government, Local Government Transfer Fund denying it the statutory benefit of the Local Authority Transfer Fund Monies. The parties agreed to withdraw the suit with costs to the *ex-parte* applicant and judgment was entered in

terms of the consent on 2nd April 2012.

4. Thereafter, the ex-parte applicant filed its bill of costs which was taxed for the sum of Kshs. 187,888/= and a Certificate of Costs dated 24th March 2014 was issued against the 3rd respondent. The ex-parte applicant served Notices to Show Cause on the then County Council of Kisii to show cause why its Accounting Officer should not be committed to civil jail for failure to comply with the court's orders to pay the decretal sum but there was no response. As a result, warrants of arrest were issued against the Accounting Officer. The applicant claims that he sent reminders to the respondents but they did not settle the debt, hence the application before the court.
5. No response was filed by the respondents despite service.
6. The applicant filed written submissions in support of his claim which I have duly considered.
7. The application before this court is intended to compel the respondents to satisfy an order for payment of costs to the *ex-parte* applicant. Normal rules of procedure for execution of a decree do not apply to the government, which includes county governments. The elaborate procedure for satisfaction of orders against the government is laid out in **section 21** of the **Government Proceedings Act** thus;

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.

8. In as much as the application dated 27th February 2020 is unopposed, this court must confirm that the statutory conditions outlined in the foregoing provision have been followed and the conditions necessary for issuance of a writ of mandamus have been satisfied.
9. The applicant has annexed a copy of the decree issued in **Kisii JR Misc Civil Application No. 38 of 2011** which had been instituted by the 3rd respondents' predecessor, to demonstrate that the suit was withdrawn with costs to the Applicant. A certificate of costs evincing that costs were taxed and allowed at a sum of Kshs. 187,888/= against the respondents has also been presented by the applicant. There is adequate proof that the Applicant has notified the respondents of the decree of the court but they have failed to pay the decretal sum.
10. The applicant has demonstrated the conditions to be met for judicial review orders of mandamus to issue against the respondents. He has satisfied that there was a public legal duty to act owed to him by the respondents. He has demonstrated prior demand for performance of the duty owed to him as seen in the various Notices to Show Cause, one as early as 2014. It is also clear that there is an implied refusal by the respondents through unreasonable delay to perform their legal duty to pay costs. (See **Republic c County Secretary – Nairobi City County & Another exparte Tom Ojienda & Associates Misc Application No. 306 of 2017 [2019]eKLR**)
11. However, there is one condition that the applicant has not met for the orders sought to issue. I have not come across a Certificate of Order against the respondents as provided in **section 21** of the **Government Proceedings Act**. An application for a Certificate of Order is made in accordance with **Order 29 Rule 3** of the **Civil Procedure Rules** which stipulates as follows;

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.

12. The Applicant has not obtained a Certificate of Order against the respondent in the manner prescribed above. The application dated 27th February 2020 is therefore premature. It is hereby struck out with no orders as to costs.

Dated, signed and delivered at Kisii this 16th day of December, 2020.

A. K. NDUNG'U

JUDGE