



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**IN THE JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS APPLICATION NO. 76 OF 2018**  
**IN THE MATTER OF: AN APPLICATION BY PROF. TOM OJIENDA & ASSOCIATES**  
**TO APPLY FOR AN ORDER OF MANDAMUS**  
  
**AND**  
  
**IN THE MATTER OF: THE HIGH COURT MISC. CAUSE NO. 5 OF 2017**  
**PROF TOM OJIENDA VERSUS NAIROBI CITY COUNTY ARISING FROM**  
**(PETITION NO. 525 OF 2013 OUTDOOR ADVERTISING ASSOCIATION OF**  
**KENYA VERSUS NAIROBI CITY COUNTY)**  
  
**BETWEEN**  
  
**PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT**  
  
**VERSUS**  
  
**THE COUNTY SECRETARY**  
  
**NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT**  
  
**CHIEF OFFICER, FINANCE/COUNTY**  
  
**TREASURER, NAIROBI COUNTY.....2<sup>ND</sup> RESPONDENT**  
  
**RULING**

**Introduction**

1. The Applicant instituted this suit by way of ex parte Chamber Summons dated 26<sup>th</sup> February, 2018, brought pursuant to the Provisions of Order 53 Rule 1(1) and (2) of the Civil Procedure Rules. The Ex-parte Applicant through that application sought the leave of court to commence Judicial Review proceedings. The leave was granted pursuant to which the ex-parte applicant filed the substantive motion on 28<sup>th</sup> February, 2018 praying for the following orders:-

- a) An order of Mandamus now be issued and the same be directed to the County Secretary, Nairobi City Council and the Chief Officer, Finance/County Treasurer.
- b) That the County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County shall comply by paying the Applicant within 7 days the sum of Kshs.12,716,181.00 being the decretal sum in respect of Misc. Application No. 5 of 2017.

c) That the County Secretary Nairobi City County and the Chief Officer, Finance /County Treasurer, Nairobi County shall in addition pay to the Applicant further interest on the said sum of Kshs. 12,716,181 at the rate of 9% from 4<sup>th</sup> October, 2017 until payment in full.

d) That in default, notice to show cause do issue against the County Secretary, Nairobi City County and the Chief Officer, Finance /County Treasurer, Nairobi City County for them to show cause why they should not be cited for contempt of court.

e) That the costs of this Application be provided for.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents responded by filing a Notice of Preliminary Objection dated 7<sup>th</sup> March, 2018 which was later abandoned by the Respondents. Who then filed Grounds of Opposition dated 26<sup>th</sup> September, 2018 on the following grounds:

a) The Respondents were never served with any pleadings, entry of Judgment, Certificate of costs or decree issued in various matters stated in the said Notice of Motion dated 27<sup>th</sup> February, 2018 and the same is contrary to provisions of Article 47 and 48 of the Constitution of Kenya.

b) The certificate of costs and decree of the court arising from matter stated in prayers 2 and 3 of the said notice of motion were never served upon the Attorney General and the same is contrary to Provisions of Section 21(1) and (2) of the Government Proceedings Act.

c) No demand from payment by the Applicant of the decree of certificate of costs to the Respondents and the same is contrary to provisions Section 21(3) of the Government Proceedings Act.

d) The Notice of Motion dated 27<sup>th</sup> February, 2018 should be dismissed with costs.

3. The Applicants Application is supported by Affidavit sworn by Prof. Tom Ojienda sworn on 27<sup>th</sup> February 2018.

4. The gist of the Application is that this Court entered Judgment against the Respondents on 10<sup>th</sup> April, 2017 for a decretal sum of Kshs. 12,716, 181.00 and that the same remains unpaid. The Deputy Registrar of the High Court of Kenya at Nairobi taxed the Bill of Costs and issued a certificate of costs for the same amount. The Applicant further states that he has tried and had several formal meetings with the Respondent who promised to pay each time but have since not honoured their promise.

#### **Submissions**

5. Parties filed written submissions and sought to rely on them.

#### **Applicants Submissions**

6. The Applicant's Submissions were filed on 24<sup>th</sup> October, 2018. The Applicant submitted that Section 21(4) of the Government proceedings Act prohibits execution against the government and that whereas Execution proceeding are known to law, they are not available against the Government and that the Accounting Officer for the Government Department concerned is under statutory duty to satisfy Judgment made by the Court against a department.

7. The Applicant further submitted that he has no alternative method to realize the fruits of his Judgment other than by way of Mandamus and that the orders sought were merely to oblige the Government Officer responsible to pay the money owed and that the only way in which the Respondents can avoid Payment where there is judgment due is to show that a judgment has been set aside on appeal or review and that is not the case presently.

8. The Applicant submitted that he has a specific legal right but no specific legal remedy available for enforcing his rights since execution cannot issue against the Government in the ordinary way.

#### **Respondents' Submission**

9. The Respondents filed their Submissions on 26<sup>th</sup> September, 2018. The Respondents submitted that they are state officers within the meaning of Article 260 of the Constitution of Kenya and that they are established under Article 176 (1) of the Constitution. The Respondents submitted that under Article 6 of the Constitution the County Government is considered as part of the Government of Kenya and that therefore the provisions of Section 21 of the Government Proceedings Act are Applicable to this instant application.

10. The Respondents submitted that the Certificate of costs and decree arising from the notice of motion were never served upon the Attorney General and subsequently to the Respondents. According to the Respondents, Section 21(1) and (2) of the Government Proceedings Act 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 upon 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 and that imposes a statutory duty upon the accounting officer concerned to pay sums specified to the person entitled to or to his advocate together with the interest lawfully accruing thereon.

11. The Respondents submitted that the Ex-parte Applicant's Application should have adhered to the provisions of Section 21 of the Government Proceedings Act and ought to be dismissed.

## The Determination

12. Having gone through the Application, the Supporting Affidavit sworn by the Ex-parte Applicant as well as the supporting documents thereon, I am inclined to agree with the submissions of the Respondents. Guided by the provisions of the Government Proceedings Act which provides the procedure to be observed when it comes to civil proceedings against or by the Government, it is evident that the condition precedent to the satisfaction of monetary decrees against the government is to get a certificate of order against the government in the prescribed form and serve it upon the Attorney General. In ***Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 Others***[28] it was held that:-

*“It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it.”*

13. The Ex-parte Applicant in this case has not proved to court whether the Certificate of Costs was served upon the Attorney General and subsequently the Respondents. In his supporting affidavit, it is stated that the Applicant *“has tried and had several formal meetings with the Respondent who promised to pay each time but has since refused to honour their promise”* It is unclear as to whether the consultation is between the Respondents and the Applicant without the involvement of the Hon. Attorney General.

14. It is the finding of this court that the Applicants have not obtained the Certificate of Order Against the Government for the decretal amount. Instead, all that has been attached is a decree and a Certificate of Taxation. To reiterate, the Certificate required under Section 21(1) of the Government Proceedings Act is a Certificate of Order Against the Government not a Certificate of Taxation as has been annexed here. Under section 21(3), the Accounting Officer in a Ministry can only pay ***“the amounts indicated in the Certificate of Order Against the Government”***

15. For the above reasons I find that the orders sought cannot be granted because the condition precedent stipulated in section 21(1) of the Government Proceedings Act has not been satisfied. Consequently, the Application dated 28<sup>th</sup> February, 2018 is premature and is dismissed. Parties to bear own costs.

16. Orders Accordingly.

**Dated, Signed and Delivered in Nairobi this 11<sup>th</sup> day of April, 2019.**

**E. OGOLA**

**JUDGE**

In the presence of:

Mr. Ochieng h/b Prof. Ojienda for Applicant

Mr. Ibrahim Court Assistant