



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 06 OF 2019

IN THE MATTER OF: ORDERS 53 OF THE CIVIL PROCEDURE RULES AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

ONYANGO MALOMBO ROBINSON T/A O.M. ROBINSON & COMPANY ADVOCATES...APPLICANT

VERSUS

- 1. COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE & ECONOMIC PLANNING (COUNTY GOVERNMENT OF MOMBASA)**
- 2. CHIEF OFFICER FINANCE (COUNTY GOVERNMENT OF MOMBASA)**
- 3. COUNTY ATTORNEY (COUNTY GOVERNMENT OF MOMBASA)**
- 4. COUNTY GOVERNMENT OF MOMBASA.....RESPONDENTS**

RULING

The Application

1. The application before the Court is a Notice of Motion dated 11th February, 2019 filed by the Ex parte Applicant who prays for the following orders:

1. An order of mandamus to issue against the Respondents – the County Executive Committee Member Finance and Economic Planning (County Government of Mombasa), the Chief Officer Finance (County Government of Mombasa), the County Attorney (County Government of Mombasa) and the County Government of Mombasa, the 1st, 2nd, 3rd and 4th Respondents herein respectively compelling them to forthwith and without delay perform their duty by causing to be paid to the Ex parte Applicant out of the revenue of the County Government of Mombasa the sum of Kshs. 14,111,709.00/= together with further accrued and accruing interest at court rates (14% per annum) from the 14th of July, 2017 until payment in full.

2. The costs hereof be provided for.

2. The application is premised on grounds set out therein and Supporting Affidavit of Onyango Malombo Robinson sworn on 4th February, 2019. It is also supported by a Supplementary Affidavit of the said Onyango Malombo Robinson sworn on 19th March, 2019. It is also supported by a Statutory Statement dated 4th February, 2019.

3. The Ex parte Applicant's case is that on 14th day of July, 2017 the High Court of Kenya sitting in Mombasa entered Judgment for the applicant against the County Government of Mombasa in **HC Comm. Misc. Application No. 492 of 2016 between Robinson Onyango Malombo t/a O. M. Robinson & Company Advocates vs. County Government of Mombasa** in the sum of Kshs. 14,111,709.00/=; that thereafter a **Certificate of Order Against the Government** was issued; that the County Government of Mombasa and the 1st, 2nd and 3rd Respondents all of the county Government of Mombasa were served with a Notice requiring them to satisfy the Decree; that they did not respond to the said Notice at all and have refused to pay the decretal sum; that despite several visits to all the Respondents offices no payment has been forthcoming save for promises that payment will be made as soon as enough revenue is collected; that the 1st, 2nd, 3rd and 4th Respondents have failed in their public duty conferred by statute to make the aforesaid payment in satisfaction of the decree and that the only option open to the Applicant is for this Court to compel the 1st, 2nd, 3rd and 4th Respondents to satisfy the said Judgment by way of an order of mandamus.

The Response

4. The application is opposed by the Respondent vide a Replying Affidavit sworn by Jimmy Waliaula on 5th March, 2019.

5. The Respondent's case is that the Judgment relates to legal fees incurred to the now defunct **Municipal Council of Mombasa** arising from **Mombasa Misc. Civil Application No. 103 of 2012 – Republic vs. Municipal Council of Mombasa (Ex-parte Bronson Hara Chogo & 4 others)**. That following the establishment of the County government and dissolution of local authorities established under the repealed Local Government Act (chapter 265 of the Laws of Kenya), the Intergovernmental Relations Technical Committee under the Intergovernmental Relations Act, 2012 established institutional structures by way of Statute to facilitate the verification and transfer of assets and liabilities belonging to the now defunct local authorities vide Gazette Notice Nos. 858, 2701 and 4370 of 27th January, 2017, 24th March, 2017 and 11th May, 2018 respectively. The Respondent states that the Applicant was required to submit its alleged contractual debt to the Transitional Authority what was established to ensure smooth transition to the devolved system of government for verification there having been no Judgment as at the time of the cause of action. The Respondents aver that prior to 2013 the decree and certificate of costs would have been enough verification and therefore, since what was there as at the time the cause of action arose was but a debt in the form of legal fees incurred by the now defunct Municipal Council of Mombasa, it ought to have been presented before the Transitional Authority for verification as required by law. The Respondents aver that the order of mandamus should not be issued if there is an alternative and specific remedy, which has already been provided by law, that is through statute. The Respondents aver that the Applicant is aware of the above procedures and is trying to circumvent the law by deliberately acquiring a decree and certificate of order against the County Government of Mombasa to defeat the sole purpose of the statutory procedures laid out in law. The failure by the Applicant to forward its then debt to the Transitional Authority contravened Section 35 of the Transition to Devolved Government Act, 2012 which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the authority. The Respondents aver that although the County Government of Mombasa was sued on behalf of the now defunct Municipal Council of Mombasa, in the absence of clear directions by the Transitional Authority regarding the debt, it will not be proper for the Applicant to assume that the responsibility to settle the said debt lies with the County Government of Mombasa and that in line with Section 35 of the Transition of Devolved Government Act, 2012 the debt, having accrued prior to the devolved system of Government and it not having been verified by the then Transitional Authority under the law, is time barred.

Submissions

6. Parties made oral submissions in Court which I have considered. In my view, the following issues are due for determination:

- (i) Who are the parties to the primary suit from which the current claim arises?
- (ii) Whether the debt herein was to be verified by the Intergovernmental Relations Technical Committee.
- (iii) Whether there is a moratorium on payments of debts by the County Government.
- (iv) Whether the County Government of Mombasa has been paying debts incurred by the defunct Municipal Council of Mombasa.

I will address all above issues together.

7. The starting point is the primary suit herein the subject of the outstanding decree. The Respondent thereto is County Government of Mombasa. The case is **HC Comm. Misc. No. 492 of 2016**. The suit gave rise to a claim herein of Kshs. 14,111,709. This alone means that the suit was defended by the County Government of Mombasa. Any allegation intended to deny the debt was to be made in the process of that suit. A party to a suit cannot wait until the Judgment is made to deny the claim. There is an allegation by the Respondent that the liability giving rise to the debt was incurred by the defunct Municipal Council of Mombasa. However, this Court cannot go into that issue because that is a trial issue, and the trial is over. The issue cannot now be opened in this Court at execution stage. It is paramount to state that the Respondent in **HC Comm. Misc. No. 492 of 2016 is County Government of Mombasa** against which a decree has been issued of Kshs. 14,111,709. That being so, the debt herein is not one to be verified by the Intergovernmental Relations Technical Committee as alleged by the Respondent, and the allegation that there is a moratorium on payment of debts by the County Government is not supported by the evidence.

8. The Respondent's position is that based on the provisions of the Intergovernmental Relations Act and the Transition to Devolved Government Act, there is a moratorium on any settlement of liabilities belonging to the defunct local authorities in light of the verification

and validation provisions. This argument is not true. Section 55 of the Urban Areas and Cities Act (UACA) deals with vesting of assets and liabilities as provided by law. This law is what is provided for under the Transition to Devolved Government Act and the Intergovernmental Relations Act. However, cases pending in court are clearly provided for in Section 59 of the UACA and are therefore excluded from the operation of the provisions for identification, verification and validation of pending liabilities. That section states as follows:

Section 59

“Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.”

9. In **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 [2015] eKLR** the Court dealt with whether judgment debts were subject to the Transition to Devolved Government Act and expressed the view that:

[20] In this case not only has a Judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is no longer a question of verifying the liabilities which seems to have been the Authority’s concern in the said notice.

10. The above case clearly recognizes that at the end of the day, it is the unconditional duty of a state organ to pay a debt decreed by a court of law. The fact of the Judgment constitutes identification, verification and validation and to put a judgment through another process not contemplated by the Constitution would be an affront to the independence of the Judiciary and the doctrine of separation of powers. In other words, a body not contemplated by the Constitution would be sitting on appeal from valid Judgments and decisions of the court. Justice Majanja commenting on the same issue in **Republic vs. Town Clerk of Webuye County Council & Another** states thus:

[16] A decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of the Constitution.

11. Having found that the Judgment debt is due and payable, the next question is whether the officers named in the application are proper persons against whom the order of mandamus may be enforced. In my view, and as supported by the law now, the County Government responsibility of management and control of public finance under the Public Finance Management Act and in particular the statutory duty to pay out funds from the County Treasury vests in the County Executive Committee members in charge of Finance. The office of County Secretary is established under Section 44(3) of the County Governments Act which provides that he or she shall be the head of the public service, be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee, convey the decisions of the county executive committee to the appropriate persons or authorities; and perform any other functions as directed by the county executive committee. In **Council of Governors & Others vs. The Senate Petition No. 413 of 2014 [2015] eKLR** the Court considered the meaning of accounting officer in relation to the County government under the Constitution, the County Governments Act and the Public Finance Management Act. It observed as follows:

[134] The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of the Constitution provides;

(1) Act of Parliament shall provide for -

(a) ...

(b) The designation of an accounting officer in every public entity at the national and county level of government.

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

[136] As regards the accounting officer for the County Assembly, Section 148(4) of the Public Finance Management Act provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

12. The application before the Court is supported by copies of the following documents:

(i) Certificate of Order Against the Government for a sum of Kshs. 14,111,709 - ‘A’.

(ii) Decree for a sum of Kshs. 14,111,709 – ‘B’.

(iii) Certificate of Taxation dated 28th September, 2016 – ‘C’.

13. The Court finds the said decree is authentic and has been served and notices given pursuant to Section 21 of the Government Proceedings Act.

14. In this matter, it is also true that the Respondent has through a now well-developed system been entering into consents to settle legal fees debts. The Applicant attached copies of consents entered into by the Respondent as follows:

(i) J/R No. 43 of 2017

(ii) Misc. Civil Application No. 6 of 2018

15. The Respondent cannot therefore deny that it has been paying its legal fees debts. At the same time the Respondent must not be seen to be acting in a discriminatory manner, whereby it is willing to enter into consents of paying legal fees of some applicants, while at the same time demanding that other claimants of legal fees wait for the Intergovernmental Relations Technical Committee decision on the same.

16. It however, suffices herein that this Court is satisfied that the debt which is sought to be satisfied herein is one in which the Respondent is liable to as a defendant, and not as a carry-over from defunct Municipal Council of Mombasa.

17. In conclusion I find and hold that the County Government of Mombasa either by itself or as legal successor of Municipal Council of Mombasa is liable to settle the Judgment debt in HC Comm. Misc. No. 492 of 2016.

18. Accordingly, I allow the Ex parte Applicant’s motion herein as prayed with costs.

E. K. OGOLA

JUDGE

Dated, Signed and Delivered at Mombasa this 31st day of July, 2019.

P. J. O. OTIENO

JUDGE

In the presence of:

Mr. Gomba for Applicant

Mr. Tajbhai for Respondent