



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 63 OF 2018

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS FOR MANDAMUS BY DISNEY INSURANCE BROKERS LIMITED

AND

IN THE MATTER OF: IN ACCORDANCE WITH ORDER 53 RULES 1, 2, 3 AND 4 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT AND THE COUNTY GOVERNMENT ACT

BETWEEN

DISNEY INSURANCE BROKERS LIMITED.....APPLICANT

VERSUS

1. FRANCIS THOYA, COUNTY SECRETARY MOMBASA COUNTY GOVERNMENT

2. ASHA ABDI, CABINET SECRETARY, FINANCE MOMBASA COUNTY GOVERNMENT

3. MARIAM MBARUK, COUNTY EXECUTIVE

FINANCE DEPARTMENT MOMBASA COUNTY GOVERNMENT.....RESPONDENTS

RULING

1. By a Notice of Motion dated 18th April, 2019 the Ex parte Applicant herein prays for the following orders:

1. That this application be certified as urgent.

2. That Francis Thoya, County Secretary, Mombasa County Government, Asha Abdi, Cabinet Secretary, Finance Department, Mombasa County Government be punished by way of committal to civil jail for such a period of time as the court may deem reasonable for their failure to comply with an order issued herein on 11th March, 2019 for the payment of the sum of Kenya Shillings One Hundred and Two Million Three Hundred Seventy Two Thousand Nine Hundred Forty One (Kshs. 102,372,941/=) issued in Mombasa High Court Civil Case No. 1 of 2013 Disney Insurance Brokers Limited vs. Mombasa County Government.

3. That costs of this application be costs in the cause.

2. The application is premised on the grounds that pursuant to an order of mandamus issued herein on 11th March, 2019, the County Government of Mombasa, through Francis Thoya, County Secretary, Asha Abdi, Cabinet Secretary, Finance, and Mariam Mbaruk, County Executive, Finance Department was obliged to settle the decretal sum of Kenya Shillings One Hundred and Two Million Three Hundred Seventy Two Thousand Nine Hundred Forty One (Kshs. 102,372,941/=) decreed in favour of Disney Insurance Brokers Limited in Mombasa High Court Civil Case No. 1 of 2013 Disney Insurance Brokers Limited vs. Mombasa County Government; that the said payment has not been effected and neither the County Government of Mombasa nor the aforesaid principal officers Francis Thoya, County Secretary, Asha Abdi, Cabinet Secretary, Finance, and Mariam Mbaruk, County Executive, Finance Department have shown any interest to settle the said claim; that Court orders are not issued in vain, and must be obeyed otherwise it will result in a general disrespect and contempt for the

processes issued by the Court; that the said County Government and the said principal officers were represented by an advocate, therefore they are aware of the said orders; that the order of the Court has been served upon the Respondents but the Respondents have not shown any interest to obey the said Court order; that as the Court has inherent powers to make sure its orders are obeyed, the Court has jurisdiction to enforce the orders it issued on 11th March, 2019 without the necessity of opening any fresh legal process; That in the circumstances, it is appropriate for orders to be made for the three (3) Respondents to be punished for their failure to comply with the said Court order and that it is in the interests of justice that the application herein be granted.

3. The application was amended by consent on 10th June, 2019 with the result that the amount of money now claimed under prayer No. 2 reduced to Kshs. 94,197,536 from Kshs. 102,372,941.

4. The application is supported by affidavit of Mr. Gikandi Ngibuini sworn on 18th April, 2019.

5. The Applicant's case is that the court issued an order requiring the Mombasa County Government to pay the sum of Kenya Shillings Ninety Four Million One Hundred Ninety Seven Five Hundred Thirty Six (Kshs. 94,197,536/=) to the Applicant herein. The said order was duly served on the said County and the three aforesaid principal officials namely; **Francis Thoya**, County Secretary, **Asha Abdi**, Cabinet Secretary, Finance and **Mariam Mbaruk**, County Executive, Finance Department through service upon the County Executive in the Finance Department, **Mariam Mbaruk**. After the said service, the Applicant unsuccessfully persistently followed up with the said Mombasa County Government so as to know when the said County intended to effect payment in order to comply with the order of the Court. However, this was not to be and it became apparent that the Mombasa County Government and its aforesaid principal officers Francis Thoya, County Secretary, Asha Abdi, Cabinet Secretary, Finance and Mariam Mbaruk, County Executive, Finance Department appear to have absolutely no regard to the said order of the Court. The Applicant states that indeed, considering that Hon. Justice P. J. Otieno entered Judgment for the plaintiff in **Mombasa High Court Civil Case No 1 of 2013 Disney Insurance Brokers Limited vs. Mombasa County Government** against the Mombasa County Government in the sum of Kenya Shillings Fifty Eight Million Nine Hundred Fifty Eight Thousand Two Hundred Sixty Three (Kshs. 58,958,263/=), interest at 12% per annum from 1st January, 2013 on the said sum of Kenya Shillings Fifty Eight Million Nine Hundred Fifty Eight Thousand Two Hundred Sixty Three (Kshs. 58,958,263/=) until payment in full and costs way back on 28th February, 2018 yet up to now the Mombasa County Government has not even paid a single cent to the Applicant which means that the Respondent and its officers will only take this matter seriously when the court flexes its muscle by punishing the three (3) named principal officers of the Mombasa County Government for their said contemptuous acts and that there is indeed no other way of enforcing recovery herein except through the court exercising its inherent jurisdiction so as to ensure that court orders are not issued in vain.

The Response

6. The application is opposed by the Respondents vide grounds of Opposition filed on 15th May, 2019.

7. The Respondents' case is that the application does not show willful disobedience of the orders of the court on the part of the Respondents; that the application is premature as the interest on the amount awarded by Court has not been verified by the Deputy Registrar; that the application is premature because the Applicant has to tax costs relating to the application pursuant to which the application herein is filed; that not all the Respondents were served with the application herein and therefore the said Respondents risk being condemned unheard and the application is fatally defective and should be struck out with costs.

Submissions

8. Parties made oral submissions on 10th June, 2019 which I have considered.

The Determination

9. The issues I raise for determination is whether or not there is a willful disobedience of court orders herein and whether the application before the Court is premature.

10. It is not in doubt that this Court issued an order of mandamus in favour of the Ex parte Applicant on 11th March, 2019 compelling the payment of the sum of Kshs. 94,197,536. It is also not disputed that the Respondent has not complied with that order hence this application seeking to jail the Respondent's officers for contempt of Court.

11. The only defence to the application is that the application is premature as the interest on the amount to be awarded by Court has not been verified by the Registrar, and that again, the Applicant has not taxed his cost.

12. However, in response to these issues Mr. Gikandi counsel for the Ex parte Applicant had submitted on 10th June, 2019 that the Kshs. 94,197,536 demanded was inclusive of interests upto 26th June, 2018. Counsel submitted that they had waived the interest in the remaining period, and further that they had waived the issue of costs hence there is no need for taxation. Further, Mr. Gikandi waived even the costs for the motion in the hope that this matter would then be concluded.

13. This Court is satisfied that the application before the Court is merited. The Respondents are merely interested in delaying the conclusion of the matter. Deliberate delay amounts to a denial of justice.

14. Accordingly, the application before the Court dated 18th April, 2019 is allowed as prayed with costs in the cause.

That is the Ruling of the Court.

E. O. OGOLA

JUDGE

Dated, Signed and Delivered at Mombasa this 25th day of July,

2019.

P. J. O. OTIENO

JUDGE

In the presence of:

Mr. Gikandi for Applicant

Ms. Kisingo for Respondent