



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. The Notice of Motion application before the Court is dated 1st August, 2019 filed by the Respondent. The Applicant prays for the following surviving orders:

1. That after inter partes hearing this Honourable Court be pleased to stay, vary, set aside and/or discharge the Arrest Warrants dated 29th July, 2019.

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

2. The motion is supported by affidavit of Jimmy Waliaula sworn on 1st August, 2019.

3. The application is opposed by the Respondent vide grounds of opposition filed herein on 7th August, 2019 on the grounds that as the Applicants/Respondents have not sought a review and/or preferred any appeal against the Ruling and order issued by Hon. Justice E. Ogola on 11th March, 2019 and 25th July, 2019 respectively, the application dated 1st August, 2019 cannot lie as the warrants of arrest were issued on the basis of the aforesaid Rulings and Orders made by the court; that the County Government of Mombasa and the Applicants/Respondents were duly served with the application dated 18th April, 2019 and appointed Ms. Elizabeth Kisingo Advocate to act for them. The Respondents never raised the issue of their not being in control of the finance account of the County Government of Mombasa; that in the said application the Applicants/Respondents were served in their capacity as County Secretary, Cabinet Secretary Finance and County Executive Finance Department, County Government of Mombasa respectively. Neither the County Government of Mombasa nor the Applicants/Respondents disputed, that under Section 60 of the Law of Evidence Act the Court is required to take notice of the fact that the County Government of Mombasa is an artificial person and acts through human persons in control of the departments. As such, the orders and consequential warrants of arrest against the Applicants/Respondents were properly issued; that bearing in mind the supporting affidavit in the application dated 18th April, 2019 there was no dispute raised as to the said officers' power to control finances in the County Government of Mombasa and that the application dated 1st August, 2019 is an abuse of the process of the Court as its only purpose is to deny the Respondent/Applicants the right to benefit from the fruits of its Judgment and/or decree issued on 28th February, 2018.

4. The counsel representing the parties being **Mr. Gikandi**, learned counsel for the Respondent, and **Mr. Tajbhai** learned counsel for the Applicant relied fully on their documents and prayed for a Ruling on the application.

The Determination

5. I have considered the application. The order being sought is that:

“... this court be pleased to stay, vary, set aside and/or discharge the Arrest Warrants dated 29th July, 2019.”

6. The application does not state why the arrest warrants should be lifted, except that the Applicant has no funds to satisfy the decree. The Applicant does not challenge the decree; the Applicant has not filed an appeal; neither is the Applicant seeking a review of the orders of this court which resulted into the aforesaid arrest warrants being issued. In the circumstances, since the warrant of arrest are issued on the basis of the Ruling of this Court on 11th March, 2019, the application is superfluous since it does not attack that Ruling.

7. To grant the application, set aside and or discharge the arrest warrants issued on 29th July, 2019 without stating the result intended to be achieved by that action does not make any judicial sense. Warrants would ordinarily be lifted or set aside pending a review or an appeal. In certain cases, warrants can be lifted at the request of parties pending a negotiation on settlement. That is however, not a factor herein. There is no affirmative submission by the Applicant that they are engaging the Respondent in some negotiations on the said warrant or on the decree. In these circumstances, a Court of law would not lift arrest warrants, provided that the arrest warrants remain, as in this case, the most viable way for the decree holder to enforce the decree.

8. For the foregoing reasons the application before the Court dated 1st August, 2019 is dismissed with costs.

Dated, Signed and Delivered at Mombasa this 25th day of September, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Tajbhai for Respondent

Ms. Kamau holding brief Mr. Gikandi for Applicant

Mr. Kaunda Court Assistant