



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 184 OF 2009

JOSEPHAT GATHEE KIBUCHI.....PLAINTIFF/RESPONDENT

VERSUS

KIRINYAGA COUNTY GOVERNMENT.....DEFENDANT/APPLICANT

RULING

This is a ruling on the application dated 15/05/2018 seeking for Orders that this Honourable Court be pleased to set aside the warrant of arrest in execution of the decree issued on 03/04/2017 against the County Secretary of the defendant/applicant plus all consequential orders.

The grounds supporting the application are contained in the affidavit of **JOE NGATIA MURIUKI** the County Secretary of Embu County Government. Other grounds are on the face of the application.

It is deposed that the respondent obtained a decree in this case on 09/10/2012 pursuant of the execution of the decree, the respondent obtained a warrant of arrest against the deponent in his capacity as the County Secretary.

It is further stated that another warrant of arrest issued in the year 2015 had been set aside by the court whereas the respondent was advised to apply for orders of *Mandamus*. The respondent seem not to have filed an application for the said orders but proceeded to obtain another warrant of arrest against the County Secretary. It is further deposed that the said warrants are a violation of the applicant's rights and freedoms and ought to be set aside.

The grounds of opposition are to the effect that the application is misconceived. Further that the applicant is bound by the consent order of the parties of 04/10/2012. The respondent states that this was before the Government proceedings was amended to include County Government. It is further stated that the applicant has made part of the payment pursuant to the consent.

The parties filed submissions in support of their arguments in the application. The issue for determination into his application is whether the warrant of arrest issued against the County Secretary Kirinyaga was procedurally issued.

The facts of this case are as stated by the applicant in his application and in the supporting affidavit. I need not restate them in this ruling.

In its ruling delivered on a similar application, the court pronounced itself on the procedure of executing judgment against the Government or against the County Government. The ruling is based on Section 21(4) of the Government Proceedings Act. The section provides:-

***“I have already pointed out that the Government Proceedings Act is applicable to County Governments. The respondent cannot execute the judgment against the County Government otherwise than in accordance with the law. The law does not allow execution against the government unless an order of mandamus is obtained. The respondent has no other option of realizing the fruits of his judgment apart from applying for the relevant order against the right officer of the County Government”.***

Several other courts have held that a decree holder wishing to execute the judgment against the Government must first apply for an order of *mandamus* in Judicial Review Proceedings.

In the case of **REPUBLIC VS PERMANENT SECRETARY OFFICE OF THE PRESIDENT MINISTRY OF INTERNAL SECURITY & ANO EXPARTE NASSIR MWANDIKI(2014) eKLR**. It was held in a case with similar facts:-

***“It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of***

***the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule.”***

The respondent argued that the parties entered a consent on 04/10/2012 On how the decretal amount of Ksh.4,511,283/- should be cleared by payment of monthly installments of Kshs.800,000/-.

In the event that the judgment debtor defaults on the consent order, the procedure laid down under Section 21(4) of the Government Proceedings Act must be followed before execution can be carried out.

It was also argued that the consent was entered into before the Government Proceedings Act was amended to include County Governments. It is my considered opinion that the time that matters is the time of execution.

If execution is being carried out today, the law of the day ought to be applied. The respondent did not follow the law in obtaining the warrant of arrest. It follows that the warrant of arrest is null and void and cannot stand.

For the foregoing reasons, I allow the application on the following terms:-

***1. That the warrant of arrest issued on 03/04/2017 against the County Secretary Kirinyaga County Government is hereby declared null and void for all intents and purposes.***

Each party to meet its own costs.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of Ms. Mutegi for Nyamondi for defendant.**