



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

JUDICIAL REVIEW NO.1 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF GARISSA.....1ST RESPONDENT

COUNTY GOVERNMENT OF GARISSA.....2ND RESPONDENT

EXPARTE---SIMON NGIGI KAMAU T/A MOSSEMUIR

MACHINERY SERVICES

JUDGEMENT

1. Before me is a Notice of Motion dated 20th February, 2018 filed by the Exparte Applicant through L. Wahome & Co. Advocates seeking the following orders –

(1) The Honourable Court do grant to the applicant Simon Ngigi Kamau T/A Mossemuir Machinery Services an order of Mandamus directed to the 1st and 2nd respondents to pay to the said Simon Ngigi Kamau T/A Mossemuir Machinery Services through their advocates the sum of Ksh.1,476,752/= together with interest at the rate of 12% p.a. w.e.f. 25th day of April 2017 until payment in full the same being the decretal amount awarded to the applicant against the 2nd defendant in Garissa CMCC No. 31 of 2016.

(2) That the Honourable Court do grant to the applicant Simon Ngigi Kamau T/A Mossemuir Machinery Services an order of Mandamus directing the 1st respondent compelling the said respondent to pay the applicant Simon Ngigi Kamau T/A Mossemuir Machinery Services through their advocates Ksh.160,600/= together with interest at 12% p.a. w.e.f. 25th April 2017 until payment in full such amount being the cost of suit awarded to the applicant against the 2nd respondent in Garissa CMCC No. 31 of 2016.

(3) That the costs of the application be paid by the 1st and 2nd respondents in any event.

2. The application was filed after leave was granted by this court to file Judicial Review proceedings on 1st February 2018 and is grounded on the applicant's Statement dated 15th December 2017 and Verifying Affidavit sworn by him on the same date.

3. Though the application was served, the respondents did not file a replying affidavit to the same, but when it came up for hearing on 27th September 2018, Mr. Farouq counsel for the respondents filed grounds of opposition on the same date raising the following grounds –

(1) That the application is incompetent, incurably defective and unsustainable.

(2) That the applicant is purporting to seek to enforce private rights using public law remedies.

(3) That the applicant has not met the threshold for grant of the remedy they are seeking.

4. At the hearing of the application, Mr. Wahome for the ex parte applicant submitted that the 2nd respondent was fully represented by counsel at the hearing of the case in the Magistrate's Court where judgement was delivered in favour of the applicant and a decree issued but the decretal amount had not been paid to date. He stated also that though the application had been served, the respondents did not file any affidavit to challenge the allegations against them, but instead served grounds of opposition on the hearing date. Counsel emphasized that since the applicant was entitled to enjoy the fruits of his judgement the grounds of opposition had no merits, and relied on **Nairobi High Court Miscellaneous Civil Application No. 350 of 2015 – Republic vs 1. County Secretary, Nairobi City County, 2. Chief Officer Finance/County Treasurer Nairobi City County - Ex parte Wachira Nderitu Ngugi & Co. Advocates**, and urged this court to allow the application and grant the prayers sought.

5. In response, Mr. Farouq Kyalo for the respondents relied on the three grounds of opposition, and stated that the Statement accompanying the application for leave merely stated that the Ex parte applicant was seeking orders for leave to apply for Mandamus which was not a substantive prayer and as such the Statement was defective. Secondly, the Verifying Affidavit filed with the application for leave did not contain the evidence relied upon as required. Thirdly, the applicant was seeking to enforce private rights through a public law remedy which was wrong. As such, according to counsel, the application was fatally defective, and should be struck out or dismissed.

6. This is an application for Judicial Review Orders of Mandamus. Such orders of Mandamus are issued by the High Court against public authorities to compel them to comply with the requirements of the law.

7. In this application, the respondents did not substantively challenge the application through filing of a replying affidavit, but have instead challenged the application through three grounds of opposition, which I have highlighted above.

8. The respondents do not say in the said grounds of opposition that judgement was not delivered in favour of the Ex parte applicant for the amount claimed, nor do they state that the costs claimed were not awarded against the respondents in favour of the applicant as stated. They rely on the three grounds of opposition, which are firstly that the application is defective and unsustainable. This ground of opposition in my view, is very amorphous, is not clear as to its nature, and such drafting of grounds of opposition should be avoided. In submissions, counsel for the respondents has said two things about this ground. First that the Statement merely stated that the applicant was asking for leave to apply for orders of Mandamus, which he thinks was a mistake. In my view, even if such was a mistake it was a minor mistake, as leave was granted by the court to apply for an order of Mandamus, thus such clerical mistake is curable under Article 159 (2) of the Constitution of Kenya 2010, which calls upon courts to administer justice without undue regard to technicalities. I dismiss that objection.

9. The second oral contention on this ground of opposition is that the Verifying Affidavit filed did not contain the evidence in its body. I think this objection is misplaced, as an affidavit is read together with all its annexures. An affidavit does not have to reproduce the contents of all its annexures in its main body. In our present case, the verifying affidavit annexed a plaint, a Verifying Affidavit, and defence filed by the 2nd respondent in CMCC No. 31 of 2016 at Garissa, and a Notice of Motion dated 20th January 2017, as well as a Decree and Certificate of Costs. Lastly, the Verifying Affidavit annexed a Notice of Intention to file court proceedings dated 19th June 2017.

10. In my view, all the above documents formed part and parcel of the Verifying Affidavit, and formed the evidence relied upon by the Ex parte applicant in compliance with the law in these Judicial Review proceedings. I thus dismiss that objection.

11. With regard to the objection to the Ex parte applicant seeking to enforce private rights using public law remedies, the case of **Republic vs County Secretary, Nairobi City County & Another – Nairobi High Court Miscellaneous Civil Application No. 350 of 2015 (Supra)** dealt with and clarified the issue of enforcement of judgements against the Government and Government Institutions such as County Governments. Since there exists a legal restriction on attachment of their assets, the only avenue available for enforcing court decrees against the National Government and County Governments, is through the Judicial Review Orders of Mandamus. It cannot be said therefore that the Ex parte applicant was wrong in invoking Judicial Review remedies herein.

12. I thus find no basis for the contention that the Ex parte applicant cannot enforce the decree herein through the Mandamus orders sought, even if Mandamus be a public law remedy.

13. The last ground of opposition of the respondents is that the application did not meet the threshold for the orders sought. In my view, that objection cannot stand, as the respondents have not said for example that the decree was not issued for the principal amount claimed, nor that the costs were not determined, nor that they were not served with a Decree and Notice of Intention to commence Judicial Review proceedings. They have also not said that they were not served with this application as required by law, nor have they pointed at any legal step which was not complied with by the Ex parte applicant or their advocates. In those circumstances, I find the objection not sustainable and I dismiss the same.

14. From the pleadings herein, and after considering the submissions on both sides and the law, I am of the view that there is merit in allowing the application. I thus allow the Notice of Motion dated 20th February 2018 and grant prayer 1 and 2 therein. I award the costs of the application to the Ex parte applicant against the respondents jointly and severally.

Dated and delivered at Garissa this 23rd day of October, 2018.

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George Dulu

JUDGE