



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. JUDICIAL REVIEW APPLICATION NO. 24 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF THE HIGH COURT OF KENYA AT EMBU HCCC NO. 2 OF 2017**

**AND**

**IN THE MATTER OF THE ARBITRATION ACT NO. 1995 (AS AMENDED) AND THE AWARD GIVEN ON 29/05/2017**

**AND**

**IN THE MATTER OF THE HIGH COURT OF KENYA AT EMBU MISC. APPLICATION NO. 67 OF 2017**

**AND**

**IN THE MATTER OF THE CONSENT JUDGEMENT DATED 27<sup>TH</sup> JULY 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**COUNTY GOVERNMENT OF EMBU.....1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER, FINANCE/COUNTY TREASURER**

**COUNTY GOVERNMENT OF EMBU.....2<sup>ND</sup> RESPONDENT**

**UNION TECHNOLOGY KENYA LIMITED.....EX PARTE APPLICANT**

**J U D G M E N T**

**A. Introduction**

1. Pursuant to leave granted by this court on the 14/05/2018, the ex parte applicant commenced judicial review proceedings on the 18/05/2018, under certificate of urgency against the respondents herein for orders;

*a) That an order of mandamus be issued and the same be directed to the Respondents, the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay to the ex-parte applicant the sum of Kshs. 64,098,156/= being the principal/decretal amount plus interest accrued thereon as at 31/05/2018.*

*b) That in default of compliance, notice to show cause do issue against the Respondents herein for them to show cause why they should not be cited for contempt of court and be committed to civil jail for a period of six (6) months.*

*c) That the honourable court do issue any other order that it may deem fit and just to grant in the interest of justice.*

2. The application was cited on the grounds on the face of the application as well as the supporting affidavit of Peter Munene Kimani, a director of the ex parte applicant herein.

3. The respondent filed their replying affidavit on 20/09/2018 and subsequently the ex parte applicant filed a supplementary affidavit on the 3/10/2018.

#### **B. Ex-Parte Applicant's Submission**

4. Through his counsel Mr. Kimondo, the ex-parte applicant submitted that the applicant sought orders of mandamus compelling the respondents to pay **Kshs. 64,980,156/=** owed to them as a result of a consent judgement entered between the ex-parte applicant and the respondents in **Embu High Court Miscellaneous No. 67 of 2017**.

5. The counsel further submitted that it was part of the consent judgement that the decretal sum would be paid in three equal instalments starting on the 31/08/2017 until payment in full, a period during which no interest would accrue on the decretal sum.

6. Mr Kimondo further submitted that he had issued several demands on behalf of his clients from the date the first instalment became due but received no positive response from the respondents and that in the meantime his clients continued to suffer great loss and humiliation due to closure of its business.

7. It was further submitted that the officers concerned were cited in the application as the respondents and that they are in contempt of court and ought to be ordered to pay or be committed to civil jail

8. The applicant further submitted that the replying affidavit filed by the respondents provided no serious opposition as it merely lamented of high interest which had arisen as result of the failure to pay.

9. The applicant further stated that the respondents had no good reason for failing to settle the decretal sum owed to the ex-parte applicant as it was evident that its other programmes were proceeding.

#### **C. Respondents' Submissions**

10. Mr. Ileri for the respondents submitted that the application was premature as the parties had not explored other options of payment.

11. The counsel further submitted that the issue of the respondents being in contempt did not arise. He referred to the Contempt of Court Act that provides for the words "wilful disobedience" which was not the case with the respondents as "*the County Assembly has to authorise payments.*"

12. The respondent relied on the case of **CECIL MILLER VS JACKSON NJERU [2017] eKLR** which provided 4 elements for contempt of court. He further submitted that the respondents had explained its case this being it relies on public funds to pay debts.

13. The case of **R VS AHMAD ABOLFATHI MOHAMMED & ANOTHER [2018] eKLR** which provided in paragraph 29 in page 5 that committing a person to court must be the last resort and care must be exercised before such orders are made was cited.

14. Mr. Ileri further submitted that the applicant must show that the respondents were personally served with the orders and he sought to rely on the case of **TEACHERS SERVICE COMMISSION VS KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS [2013] eKLR**.

15. In conclusion, Mr. Ileri submitted that it was only fair and just to accommodate the respondents to obtain and process the county budget so as to clear the debt and consequently he sought dismissal of the application.

#### **D. Ex-Parte Applicant's Submissions in Response**

16. Mr. Kimondo submitted that the only way to enforce payment by government was by seeking prerogative orders of mandamus as the County was wilfully disobeying the consent orders as it's affairs that require budget are still running.

17. With regards to the issue of personal service as raised by Mr. Ileri, Mr. Kimondo submitted that the ex-parte applicants had issued notice under the Government Proceedings Act and it was received. He submitted that this amounted to sufficient service on the respondents.

18. It was further submitted that there was nothing wrong in combining the orders of mandamus and contempt as these were orders which could be granted together.

19. In conclusion, the counsel submitted that despite the respondents stating that they required more time, they had given no indication of the same and that the respondents had had 1½ years to settle the decretal sum and had failed to do so.

#### **E. Determination**

20. **This court is tasked with determining the following issues: -**

a) Whether the ex-parte applicant is entitled to the orders of mandamus; and

b) Whether there has been contempt of court.

21. It is noteworthy that this application is a result of failure by the respondents to comply with a consent judgement duly filed by the parties herein. In **WASIKE VS WAMBOKO** The High Court at Kakamega (Gicheru J, as he then was) held -

*“1. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.*

*2. The Civil Procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying the decree.*

*3. In this case, there were no grounds which would justify the setting aside of the consent judgment.*

*Appeal dismissed.”*

22. The position was clearly set out in **KENYA COMMERCIAL BANK LTD V SPECIALISED ENGINEERING CO. LTD [1982] KLR 485**, Harris J correctly held *inter alia*, that –

*“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.*

*A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”*

23. The Court of Appeal in the case of **SAMUELWAMBUGU MWANGI VS OTHAYA BOYS’ HIGH SCHOOL** Civil Appeal No. 7 Of 2014 [2014] eKLR set out the circumstances under which a consent order can be set aside. The court observed that:

*“Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”*

24. The respondents did not place any evidence to show illegality in the consent giving rise to the judgment and why it should not be implemented as drafted and as such it is my opinion that the parties herein cannot deviate in any way from the strict provisions of the judgement.

#### **I. Whether the respondent is guilty of contempt of court**

25. It is important to revisit the current position with respect to contempt of Court. Parliament vide Act No. 46 of 2016 enacted the **Contempt of Court Act, 2016** which was assented to on 23<sup>rd</sup> December, 2016 and commenced on 13<sup>th</sup> January, 2017.

26. According to the law, contempt includes civil contempt which means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court. It is therefore clear that the wilful disobedience of a judgement, decree or order properly constitutes contempt of Court.

27. Section 30 of the said Act provides that:

*(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.*

*(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.*

*(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.*

*(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the*

*receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.*

*(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.*

*(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.*

28. According to the foregoing provisions, before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer.

29. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned.

30. It is my opinion that the ex-parte applicant failed to satisfy the requirements of the law in this regard. Mr. Kimondo submitted that he gave the notice in accordance with the Government Proceedings Act. This in my opinion is not the notice contemplated by Contempt of Court Act 2016. In his application subject of this ruling, Mr. Kimondo does seek that a notice to show cause issue against the respondents herein for them to show cause why they should not be cited for contempt of court and be committed to civil jail for a period of six (6) months.

## **II. Whether the Ex-Parte Applicant through their Applications are entitled to the Orders of Mandamus**

31. I now turn to the issue of grant of orders of mandamus by the ex-parte applicant. Githua, J in **REPUBLIC VS PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EXPARTE FREDRICK MANOAH EGUNZA [2012] eKLR** expressed herself as follows: -

*“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.” [Emphasis mine].*

32. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **REPUBLIC VS. THE ATTORNEY GENERAL & ANOTHER EX PARTE JAMES ALFRED KOROSO**, this Court expressed itself as hereunder:

*“...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya.”*

33. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **REPUBLIC VS KENYA NATIONAL EXAMINATIONS COUNCIL EXPARTE GATHENJI & 8 OTHERS Civil Appeal No. 234 of 1996**, the Court of Appeal cited, with approval, *Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89* thus:

*"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.".....These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."*

34. In this case, the ex parte applicants herein have moved this Court to compel the satisfaction of a consent judgement already decreed in their favour by a competent Court of law. The respondents have not given any reason why the decree has not been satisfied more than 1½ years down the line.

35. The respondent has not shown that it has made any efforts to settle the decretal amount for the last financial year. It was not indicated that the respondent needed some limited time to settle the decree. A blanket request of time does not portray seriousness on the part of the respondent.

36. I associate myself with the position adopted by **Majanja, J** in **REPUBLIC VS TOWN CLERK OF WEBUYE COUNTY COUNCIL & ANOTHER HCCC 448 of 2006** that:

*"...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."*

37. The record shows that this suit between the parties was referred for arbitration and an award of Kshs. 59,258,696.50cts was made on 29/05/2017. Subsequently, this award was filed in court and consent judgment entered for the said sum on 27/07/2017.

38. The respondent was to liquidate the decretal amount in three equal monthly instalments of Kshs. 19,752,898.70cts with effect from 31/08/2017 until payment in full.

39. It is not in dispute that the respondent has not satisfied the decree as agreed by the parties. Not a single instalment has been paid for more than one year since the judgment was given.

40. The respondent says that the budget of the respondent has to be authorised by the County Assembly and this is what is causing the problem of the payment. Even if the respondent had difficulties budgeting the amount and obtaining authority for payment last financial year, there is no explanation what action has been taken this year.

41. The interest on the decretal amount was not to run during the period of payment in instalments. I believe the interest has been accruing since the time for repayment expired on 01/11/2017 and increasing the amount to the ex parte applicant.

42. I am satisfied that the ex parte applicant has shown that it is owed more than Kshs. 60,000,000/= by the respondent for over one year since judgment was entered. The ex parte applicant has a right to enjoy the fruits of its judgment and has approached this court for justice.

43. From the decisions I have relied on in this case, this court is enjoined to facilitate the enforcement of the decree by granting the orders sought. This is purposed to ensure that justice is administered without delay to the parties.

44. It is my finding that the applicant is entitled to the orders sought.

45. I find main prayer in this application is partly successful and grant orders as follows: -

*a) That an order of mandamus do and is hereby issued compelling the respondents to pay the ex parte applicants Kshs. 64,098,156/= being the principal/decretal amount plus interest accrued thereon as at 31/05/2018 within sixty (60) days.*

*b) That the respondent meets the costs of these proceedings.*

46. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

