



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA PETITION CASE NO. 09 OF 2017

IN THE MATTER OF CHAPTER FOUR – THE BILL OF RIGHTS

IN THE MATTER OF ARTICLE 19, 20, 21, 22 AND 23 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ENFORCEMENT OF BILLS OF RIGHTS

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 28, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

KAIMBA MANGAARA.....PETITIONER

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....RESPONDENT

RULING

1. The applicant states that this application has been brought to court under order 45 Rule 1 and Order 51 Rules 1 to 3 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.

2. The application seeks the following orders:

1. That this honourable court be pleased to review and vary the order made herein on 24th September, 2018 and 9th October, 2018.
2. That this honourable court be pleased to substitute the words “within 14 days of approval of the budget of the applicant” for “within 30 days from 9th October, 2018”.
3. That costs of this application be provided for.

3. The application has the following grounds:

- a) The respondent is required by the Public Finance Management Act to only spend money provided by the National Government in accordance with the approved budget of the respondent.
- b) As the liability of the respondent under the decree was not anticipated when the 2018 – 2019 budget was prepared, it was not provided for and therefore, there is no budget line from which the deposit can be made as of now;
- c) Article 10 of the Constitution makes adherence to rule of law one of the national values; the only way which the respondent can make deposit is to have the same provided for in a budget;
- d) The respondent expects its budget to be approved in May, 2019;
- e) At the time the application for the stay was made, the respondent had not appreciated the constraints it is under;

- f) The variation sought retains all the obligations imposed by this honourable court save that pertaining to the timing of the deposit;
- g) It is in the interest of justice for this honourable court to grant the orders sought so as to preserve the subject matter of the appeal.

4. The application is supported by the affidavit of the applicant's County Secretary sworn on **9th November, 2018** which states:-

I, **DR. FREDRICK NJERU KAMUNDE**, a resident of Tharaka Nithi County and of P.O Box 10 - 60406, Kathwana, in the Republic of Kenya make oath and state as follows:-

1. **That** I am the County Secretary of the Tharaka Nithi County Government.
2. **That** I have been serving as the County Secretary since 2013.
3. **That** I have the authority of the Respondent to make this affidavit.
4. **That** I crave the court's leave to refer to the proceedings and pleadings herein including the orders made on **24th September** and **9th October, 2018**, respectively on the application of the Respondent. Annexed hereto marked **FNK – 1** are copies of these.
5. **That** after judgment herein was delivered, the Respondent applied for a stay of execution and the same was granted on terms set out in the order made herein on **24th September, 2018**.
6. **That** in addition to applying for a stay of execution, the Applicant lodged an appeal on **17th September, 2018**. Annexed hereto marked **FNK – 2** is a copy of the Memorandum of Appeal.
7. **That** the said appeal is pending.
8. **That** on **9th October, 2018**, the Respondent sought an extension of time within which it was to deposit **Kshs. 4.5 Million** in an interest bearing account and it was granted 30 days.
9. **That** the advocates for the parties filed account opening forms with the Koinange Branch of the Standard Chartered Branch in the anticipation of the release by the Applicant of the said **Kshs. 4.5 Million**.
10. **That** it was in the course of arranging for the said **Kshs. 4.5 Million** to be availed that the Respondent became aware of the fact that the Public Finance Management Act requires that the Respondent spends funds supplied to it in accordance with the approved budget and that because the liability created by the judgment herein was not anticipated when the **2018 – 2019 budget** was being prepared, no provision was made and consequently, there is no budget line from which **Kshs. 4.5 Million** can be obtained.
11. **That** the County Chief Officer, Finance & Economic Planning, Mr. Zephaniah Mbaka, who is in charge of disbursements has explained the position in a memorandum dated **7th November, 2018**. Annexed hereto marked **FNK - 3** is a copy of that internal memorandum.
12. **That** I am further advised by the Respondent's advocates, Messrs. Kamau Kuria & Company Advocates, and I verily believe the same to be true that:-
 - a. the jurisdiction to grant stays of executions on such conditions as the courts deem fit aims at protection of institutions, like the Respondent, and commercial enterprises which would otherwise suffer from destruction if the suitable conditions were not imposed;
 - b. as held by the Court of Appeal in **Reliance Bank vs. Norlake Investments Ltd (2002) 1 EACA, 227**, the means of the judgment debtor are a factor to be considered in applications for both extension of time and stay of execution; in that case, the court reasoned that it would be too onerous to require the liquidator of the bank to deposit the money in court or to comply with any of the orders by the learned judge and that to refuse to grant an order of stay to the Applicant would cause to it such hardship as would be out of proportion to any suffering the respondent might undergo while waiting for the Applicant's appeal to be heard and determined and granted the stay sought.
13. **That** I swear this affidavit in support of the application for review of the orders made herein on **24th September, 2018**, and **9th October, 2018**.
14. **That** what is stated herein is true to the best of my knowledge information and belief save wherein otherwise stated.

5. The application is opposed through the replying affidavit of the respondent which states:

I, **KAIMBA MANGAARA of C/O P. O. Box 1568-60200 MERU** do hereby make oath and state as follows:

1. That I am the petitioner well versed with the facts of this matter and therefore competent to make and swear this affidavit.
2. That the application dated 12.11.2018 has been read to me by my counsel on record and I must state hereunder in reply thereto.

3. That the applicants applied to this court for stay of execution under certificate of urgency way back on 30.7.2018.
4. That the applicant stated they were ready and willing to furnish security in the affidavit in support of their application.
5. That the applicant did request for my advocate to furnish details of his firm for purposes of opening an Account at Standard Chattered Bank which he complied.
6. That the applicants moved court further on 9.10.2018 for extension of time to deposit the security in 30 days.
7. That twice the applicant has made an appeal for extension of time and I have gracefully allowed it to enable me pursue my appeal.
8. That the applicant has now overstretched his gimmick and has turned a serious court process into a negotiatory platform.
9. That court orders are to be obeyed at all times. Courts cannot wait for county governments to comply with the law. Anarchy shall result.
10. That so that the applicant can comply, I am applying for a Notice to Show Cause against the County Secretary as to why he cannot deposit such a sum.
11. That this shall go along way to ensure that justice is served and we move to the Court of Appeal.
12. That I want the County Secretary, the deponent herein one Dr. Fredrick Njeru Kamunde to be in attendance on 3.12.2018 for him to show cause why he has not complied with court orders and in default a warrant of arrest do issue. I am sure the money shall be deposited within minutes.
13. That what is deponed hereinabove is true to the best of my knowledge, belief and sources of information wherefore I have disclosed.

DATED AT MERU THIS 26TH DAY OF NOVEMBER, 2018

6. The respondent's replying affidavit has been responded to through a further affidavit sworn by the respondent's County Secretary on **30th November, 2018** which states:

I, **DR. FREDRICK NJERU KAMUNDE**, a resident of Tharaka Nithi County and of P.O Box 10 - 60406, Kathwana, in the Republic of Kenya make oath and state as follows:-

1. **That** I am the County Secretary of the Tharaka Nithi County Government.
2. **That** I have been serving as the County Secretary since 2013.
3. **That** I have the authority of the Respondent to make this affidavit.
4. **That** I crave the court's leave to refer to the Respondent's notice of motion herein dated 12th November, 2018, and my supporting affidavit.
5. **That** the contents of the same are true and I reiterate them.
6. **That** I have read the Petitioner's Replying Affidavit sworn on 26th November, 2018, in opposition to the said application. Hereinafter, it is referred to as the said affidavit.
7. **That** I verily believe that the Petitioner has misunderstood the said application.
8. **That** I am advised by the Respondent's advocates, Messrs. Kamau Kuria & Company Advocates, and I verily believe the same to be true that:-
 - a. the said Replying Affidavit is based on misapprehensions of both law and the nature of the application before the court;
 - b. Article 10 of the Constitution names upholding of rule of law as one of the country's national values;
 - c. the Public Finance Management Act mandates the Respondent to spend the money released to it by the national government for the purposes indicated in its budget;
 - d. the said Replying Affidavit is based on the view that the Respondent should violate the said Public Finance Management Act;
 - e. this Honorable Court has jurisdiction under Section 95 of the Civil Procedure Act read together Order 50 Rule 6 of the Civil

Procedure Rules to extend the time within which an act is to be done;

f. paragraph 9 of the said affidavit is based on a misapprehension of the exception to compliance with court orders as stated in **Spokes –v- Banbury Board of Health** by Wood V.C as follows:

....the simple and only view is that an order must be obeyed, that those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists, it must be obeyed and obeyed to the letter.

g. under the Civil Procedure Rules, those who wish to get rid of an order can either appeal against it or seek a review of the same as the Respondent has done; the Petitioner wants the Respondent to break the law;

h. in addition to the exception referred to in paragraph (f) above, there is another exception to compliance with consent orders; as held by the Court of Appeal in **Okoyana -v- Musi & Another (1987) KLR 103**, a consent judgment whose objective is to achieve unlawful purposes is illegal, null and void; the court lacks jurisdiction to enforce an order whose object is to break the law;

i. the Petitioner is ignoring the rule of law doctrine which requires that a public authority, like the Respondent, identifies the law on which it is acting; it has been described as follows in the **10th Edition of Administrative Law, Professors H. W. Wade and C. F. Forsyth at page 17.**

The British Constitution is founded on the rule of law and administrative law is the area where this principle is to be seen in its most active operation. The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that, every government authority which does some act which would otherwise be a wrong (such as taking a man's land) or which infringes a man's liberty (as like refusing him planning permission) must be able to justify it as authorized by law-and in every case, it will mean authorize directly by act of Parliament. Every act of governmental power i.e., every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order, the court will invalidate the act, which he can then safely disregard.

j. paragraphs 10 and 12 of the said Replying Affidavit is based on the Contempt of Court Act, 2016, which was held to be unconstitutional, null and void in **Petition No. 87 of 2017: Kenya Human Rights Commission –v- The Attorney General & another;**

k. this Honorable Court cannot be moved as sought to be done by the Petitioner through a paragraph in a Replying Affidavit;

l. the Petitioner is entitled to move to the Court of Appeal as indicated by him in paragraph 11 of the said affidavit.

9. That I admit paragraphs 1 to 7 of the said affidavit.

10. That I deny paragraphs 8 and 13 of the said affidavit.

11. That I swear this affidavit in support of the application for review.

12. That what is stated herein is true to the best of my knowledge information and belief save wherein otherwise stated.

7. When the application was heard interpartes on **3rd December, 2012**, Mr. Karanja Munyori, the defendant's advocate told the court that the applicant was praying for substitution of the court's order to read ***"within 14 days of approval of the budget of the applicant"*** instead of ***"within 30 days from 9th October, 2018"***. He told the court that the applicant had discovered a new fact which was not in its knowledge when it had made the application for stay of execution and for extension of the stay. He told the court that the Public Finance Management Act only allows spending of money provided by the National Government in accordance with the approved budget. He said that the budget will be approved in May, 2019.

8. Mr. Muia Mwanzia opposed the application and felt that the applicant was seeking to involve the court in its internal management processes. He lamented that the applicant had been indulged several times by the court through several extensions of the time within which the court's order had to be implemented. He pointed out that the applicant had indicated to the court that the applicant's advocate and the respondent's advocate were to open a joint account in their names for the sum of KShs.4.5 million as ordered by the court.

9. Mr. Mwanzia submitted that: "To put it mildly it is like asking a litigant to comment on a judgment and say if or if not she is comfortable with it". He submitted that no new discovery had been discovered which was not in the applicant's knowledge. He pointed out that the applicant vide its application dated **30th July, 2018** had said that it was ready to abide by any terms issued by the court and added that it was on this understanding that the court had allowed the applicant's application. He added that 5 months down the line, it was unreasonable for the applicant to come up with this application. He said that County Governments, just like the central government, ought to have contingency funds to handle a situation like the present one.

10. I have considered the pleadings and the oral submissions proffered by the parties. The applicant has demonstrated that it has already filed an appeal. It has already unequivocally stated that it is willing to abide by this court's orders.

11. I, however, agree with the respondent's submissions that implementation of courts' orders cannot be held captive by the internal

processes of the litigants. Embracing such scenarios will spawn confusion and indecision in as far as implementation of court orders are concerned. I unequivocally find that the applicant had not discovered any new fact. When it made its application for stay of execution of this court's judgment the provisions of the Public Finance Management Act were within its grasp. In any case, I refuse to indulge the court in a situation akin to allowing a litigant to make a court of law a negotiating centre. I however ask: ***“what happens if the envisaged budget is not approved?”***

12. I am inclined to disallow this application. However, since it is unlikely that execution of the judgment concerned is likely to be done before the end of May, 2019, when the applicant says its budget will be approved, and in the interest of justice, I issue the following orders:

(1) This court allows prayer 2 to read “within 14 days of the approval of the budget of the Applicant latest by 31st May, 2019 meaning that the order for the applicant/appellant to deposit the sum of Kshs.4,500,000/- (Four and a half million shillings) in an interest earning account in the names of the parties advocates is varied to read that the said deposit will be made on or before 15th June, 2019”.

(2) Should the applicant/appellant not implement order (a) above, this application will stand dismissed with effect from 16th June, 2019 and any extant orders for stay will become vacated.

13. Costs of this application are **awarded** to **KAIMBA MANGAARA**, the plaintiff/respondent.

14. It is so ordered.

Delivered in open Court at Chuka this **19th day of December, 2019** in the presence of:

CA: Ndegwa

Linus Ndungu for the Respondent/Applicant

Miss Njenga present for the petitioner

P. M. NJOROGE

JUDGE