



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISCELLANEOUS APPLICATION NUMBER 208 OF 2015 (JR)
F W NJOROGE T/A F W
NJOROGE & CO. ADVOCATES.....APPLICANT
VERSUS
COUNTY SECRETARY, OLKEJUADO COUNTY
GOVERNMENT(Sued as the successor of
OLKEJUADO COUNTY COUNCIL).....RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated 6th August, 2015, the applicant herein, **F W Njoroge T/A F W Njoroge & Co. Advocates**, substantially seeks an order of mandamus compelling the Respondent to pay to the Applicant the sum of Kshs 5,073,269.00 being the decretal amount together with interest thereon at 14% per annum from 22nd April, 2012 until payment in full in Nairobi HCCC Milimani Miscellaneous Application Number 281 of 2012 between the Applicant and Olkejuado County Council. The applicant also seeks the costs of these proceedings.

Applicant's Case

2. The history in this matter according to the Applicant is that, the Applicant was instructed by the Respondent to handle Nairobi HCCC No. 72 of 2003 between **The Church Commissioners for Kenya vs. Kisaju Development Trust and Olkejuado County Council** which he handled from 4th August 2003 to 20th March 2012 being a period of close to 9 years during which period the Respondent only paid a fee deposit of Kshs 20,000/= despite requests.

3. Following a breakdown in relationship between the Applicant and the Respondent, the Applicant ceased acting for the Respondent, tendered her final fee note and filed her bill of costs which after the objection on retainer was disallowed, was taxed in the sum of Kshs 5,073,269 as advocate/client costs. Thereafter the applicant extracted a certificate of costs, served it on the Respondent's advocates and following the failure to settle the same, requested for judgement which judgement was entered on 7th July, 2014 followed by a decree which was duly served on the Respondent.

4. However, the Respondent is yet to settle the decree a failure which in the Applicant's view has wrongly deprived the applicant from the fruits of her labour yet the Respondent has not appealed the decision which has not been stayed.

5. It was therefore contended that the County Secretary to Olkejuado County Council, as the accounting officer of the County Council, is under a public obligation to make the said payment but has wrongly refused to do so.

Respondent's Case

6. The Respondent opposed the application. According to it, which whereas the claim is against the defunct Olkejuado County Council, the County Government of Kajiado has never been a party to the suit. It was averred that the party in this suit, Olkejuado County Council, which was established under the repealed Local Government Act, is a distinct legal entity from the County Government of hence it is erroneous and premature and a contravention of statutes to state that the County Secretary and County Government of Kajiado is the successor of the defunct Olkejuado County Council and hence to inherit its assets and liabilities. To the Respondent, the applicant has failed to provide legal nexus between the two hence the decree by the Applicant cannot be satisfied by the Respondent.

7. Based on the provisions of the Constitution, it was averred that upon the promulgation of the Constitution of Kenya, 2010 a new system of governance came into existence under the County Governments which took most of the functions previously undertaken by the department of Local Authority but not the assets and liabilities who transfer is still underway hence the instant application is premature. Based on the provisions of the Sixth Schedule to the Constitution entitled "Transitional and Consequential provisions", it was contended that there is an elaborate and robust procedure presently being undertaken to establish the assets and liabilities to determine the manner of transfer of the same from the defunct Local authorities including Olkejuado County Government.

8. It was therefore averred that Parliament has enacted five legislation to deal with matters of transition and transfer of assets and liabilities held by the former local authorities – from the National Governments to the County Governments which legislation are ***The County Government Act of 2012, Cap 265, The Transition to Devolved Government Act, Cap 256A, The Inter Governmental Relations Act of 2012, The National Government Coordination Act of 2012*** and the ***Public Finances Management Transition Act, 2012***.

9. It was contended that since it is the Transitional Authority (hereinafter referred to as "the Authority") that deals with the said transfer; it is the appropriate body that the Applicant ought to have sued. Based on section 18 of the Sixth Schedule, it was contended that Olkejuado County Council is still in existence legally speaking but under the care of the Transitional Authority hence the claims against it ought to be directed to the said Authority as there is no law that has been enacted which states that the County Government of Kajiado is the successor of the Olkejuado County Council.

10. To the Respondent, the ***Transition to Devolved Government Act*** provides for a two phased transition while section 35(1) of the same Act provides for a moratorium which bars a state organ, public office or public entity or authority from transferring assets and liabilities during the transition period. This process of identification, auditing and verification of assets and liabilities, it was contended was ongoing and was to be completed within three years of the Constitution hence was due for completion by 4th March, 2016 hence it is premature to attribute the local authority pre-existing liability to the county Government thereto.

11. According to the Respondent, all payments for whatever claims arising from the defunct Local Authorities must be effected within the context of the ***Public Finance Management Transition Act***, No. 8 of 2011 under which the alleged debt must first of all be known, the amount ascertained and the included in the budgetary estimates and the Finance Bill which process has not been undertaken as far as the subject matter of this case is concerned.

12. In the Respondent's view that this application ought to be dismissed with costs.

Determinations

13. The issues which are the subject of these proceedings are not moot. They are issues which have been dealt with by this Court before in JR 366 of 2014 – **Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others** in which the Court dealt extensively with the issues raised by the Respondent herein.

14. In that case the Court analysed section 15(1) of the Sixth Schedule of the Constitution which obliges Parliament to legislate for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185 of the Constitution and found that Article 185 deals with legislative authority of county assemblies. Accordingly, the Court held that the legislation contemplated under the said section 15 deals only with the phased transfer of the legislative functions of the county assemblies.

15. It is true that section 6 of the Sixth Schedule to the Constitution provides that all rights and obligations however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under the Constitution. However, those rights and obligations are expressly stated to be subject to contrary provisions in the Constitution. Section 33 of the sixth schedule, on the other hand provides:

An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.

16. According to **Kasango, J** in **Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008**, in which the learned Judge cited with approval the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006**:

“Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities.”

17. **Majanja, J** who delivered the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** pronounced himself on the provisions of section 59 of the ***Urban Areas and Cities Act*** No. 13 of 2011 as read with Section 33 of the Sixth Schedule of the Constitution. The former provides:

Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force or any defence appeal or reference howsoever field by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.

18. The learned Judge accordingly found that:

“the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgement. The court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See Republic vs. Minister for Land & 2 Others ex parte Kimeo Stores Ltd (2011) eKLR, Kenya National Examination Council vs. Republic exparte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996).”

19. It follows that section 33 of the 6th Schedule is an exception to section 6 thereof hence legal rights and liabilities of the defunct local authorities are to accrue in favour of and be sustained against their successors which in this case are the respective County Governments and not the National Government. Whereas the Transitional Authority is empowered to develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, there was an exception provided by section 33 of the Sixth Schedule hence the settlement of decrees against the defunct local authorities is not a function of the national government.

20. The Respondent also relied on section 35 of the *Transition to Devolved Government Act, 2012* which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the Authority. Such a moratorium was the subject of the decision in Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 in which the Court expressed itself as follows:

“In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is no longer a question of verifying the liabilities which seems to have been the Authority’s concern in the said notice.”

21. Whereas the Court in Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others (supra) appreciated that the said section forbids the transfer by a State organ, public office, public entity or local authority of assets and liabilities during the transition period, the Court was not prepared to interpret that section to mean that payment of debts accrued by the defunct local authorities which devolve or are transmitted to the relevant County Governments amount to transfer of assets and or liabilities and associated itself with the holding of Majanja, J in Republic vs. Town Clerk of Webuye County Council & Another (supra) 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.”

22. Similarly, in this case we are dealing with the duty to pay a debt already decreed by a competent Court of law to be due and payable by the defunct local authority which liability has been statutorily and constitutionally inherited by the County Government.

23. This Court dealt with this duty robustly in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between Republic vs. The Attorney General & Another ex parte James Alfred Koroso as follows:

“...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 baby-sitting 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. To deny a citizen his/her lawful rights which have been decreed by

a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

24. Having considered the issues raised herein, I have no reason to decline to grant the orders sought herein

Order

25. Accordingly an order of *mandamus* is hereby issued compelling the Respondent to pay to the Applicant the sum of Kshs 5,073,269.00 being the decretal amount together with interest thereon at 14% per annum from 22nd April, 2012 until payment in full in Nairobi HC Milimani Miscellaneous Application Number 281 of 2012 between F W Njoroge & Co. Advocates vs. Olkejuado County Council.

26. Costs of this application are awarded to the Applicant.

Dated at Nairobi this 25th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwaniki for the exp applicant

Cc Patricia