



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 17 OF 2014**

**IN THE MATTER OF AN APPLICATION BY JACKSON ONYANGO MUSUNGU FOR  
ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE DECREE IN BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL  
SUIT NO. 436 OF 2008**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES**

**AND IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF KENYA**

**AND**

**IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENT ACT 2013**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**.....REPUBLIC.....**

**THE COUNTY SECRETARY, COUNTY GOVERNMENT OF TRANS-  
NZOIA.....RESPONDENT**

**VERSUS**

**JACKSON ONYANGO MUSUNGU..... EX-  
PARTE APPLICANT**

**R U L I N G**

1. The Notice of Motion dated 11th April, 2014 is said to have been filed pursuant to leave granted on 25th March, 2014. However, the record does not show evidence of such grant or the number of the cause/file in which the application for leave was made. It was therefore be assumed unless the contrary is shown that this application was made without the pre-requisite leave as provided by under **Order 53 Rule [1] [1]** of the Civil Procedure Rules, 2010. To that extent, the application may be deemed to be totally

defective for reason that the requirement for leave is mandatory.

2. Going further, the purpose for leave as explained in the English case of **Inland Revenue Commissioners -vs- National Federation of Self Employed and Small Business Ltd [1982] AC 617**, is to enable the court to prevent abuse of its process and also to consider at the leave stage whether the applicant has sufficient interest in the matter to which the application relates so as to form a “prima facie” view on the matter on the basis of the material availed at that stage.

In the case of **Bivac International SA (Bureau Veritas )(2006) IEA 26**, the High Court in Kenya observed that, if on a quick perusal of the material availed under a certificate of urgency as is usually the case, the court is of the view that a matter discloses what might on further consideration turn out to be an arguable case in favour of granting the relief claimed, it ought in exercise of its judicial discretion give the applicant leave to apply for that relief. (see also, **Njuguna -vs- Ministry of Agriculture [2000] 1 EA 184**).

3. What clearly came out from the decisions aforementioned is that the first stage or otherwise known as the “threshold” stage is a very important stage without which, the court cannot proceed to the second stage of fully hearing the application for judicial review itself. Herein the applicant appears to have jumped into the second stage without passing through the first stage. By doing so, he filed this substantive application without leave of the court and therefore, abused the court process.

In the circumstances the application is incompetent and fatally defective for want of pre-requisite leave.

4. Assuming that leave was indeed granted as indicated in the notice of motion and that due to human error evidence in respect thereof was omitted from this file, the issue falling for determination is whether the applicant is entitled to an order of mandamus against the respondent who did not file any response to the application nor did he attend court to orally argue his objection if any.

As it were the application was unopposed and remained unopposed up to the time of its hearing inter-parties.

5. Nevertheless, the applicant retained the obligation to establish his case for the exercise of the court's discretion in his favour. In that regard, he has shown by extensively several documents that he filed a civil suit against the then Municipal Council of Kitale at the Chief Magistrate's Court at Bungoma being CMCC No. 436 of 2008 and obtained a favourable judgment. The court proceedings leading to the judgment were not annexed to the verifying affidavit dated 11th April, 2014. What is annexed is a decree dated 16th January, 2013 and a notice of motion for a Garnishee Order together with a supporting affidavit dated 8th April, 2013 and an extract of its Garnishee Order dated 24th April, 2013. These documents clearly show that there was an attempt by the applicant to execute the decree against the Municipal Council of Kitale but without any success.

This application was therefore brought to this court as a way of enforcing the decree against the County Secretary of the County Government of Trans-Nzoia which is deemed to be the legal successor of the defunct Municipal Council Kitale. It is in that regard that applicant relied in the High Court decision in the case of **Abdi Ali Sureikh -vs- The County Secretary, County Government of Kakamega, Bungoma Misc. App. No. 10 of 2014**.

6. All political bodies created by statute are amenable to the supervisory jurisdiction of the High Court otherwise known as “Judicial Review”. The scope and efficacy of an order of mandamus is clearly captured in **Halsburys Law of England 4a edition Vol.1 19111**, in the following terms:- ***“The order of mandamus is of a 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 enforcement 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”.***

7. Being a command, the order of mandamus must command no more than the party against whom the application is made is legally bound to perform. In this case, the command would be directed to the respondent County Government of Trans-Nzoia as the legal successor of the former Municipal Council of Kitale and whose duty it is to satisfy the decree issued in favour of the applicant having taken over all the assets and liabilities of the said Municipal Council of Kitale. One such liability is the decree subject of this application.

8. However, it is incumbent upon the applicant, to show that the respondent has refused to perform its duty of satisfying the decree. An order of mandamus can only issue when the person concerned has refused to perform the public duty required upon him. In the case of **Kenya Examination Council -vs- Republic Ex -parte Geoffrey Njoroge & Others Civil Appeal NO. 266 of 1996 the Court of Appeal** stated that:-

**“.....an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a state 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”**

9. A public officer cannot be compelled or commanded to do something when there was no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal has been shown it must also be shown to be unlawful (see, **Wamwere -vs- Attorney General [2004] 1KLR 166**). Herein, the applicant has not demonstrated any refusal or apparent refusal by the respondent to satisfy the decree. There is no document to show that a request to satisfy the decree was made to the respondent and was met with a refusal which was unlawful.

In the circumstances, it cannot be said that the applicant has established a good case for the issuance of an order of mandamus against the respondent. In the end result, this application apart from being incompetent is also devoid of merit. It is accordingly dismissed with each party bearing own costs.

**J.R. KARANJA**

**JUDGE**

**28/5/2015**

(Read and signed this 28th day of May, 2015).

In the presence of Mr. Chebii for Ocharo for applicant and Mr. Khisa for respondent.