



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 184 OF 2009

JOSPHAT GATHEE KIBUCHI.....PLAINTIFF

VERSUS

KIRINYAGA COUNTY COUNCIL.....DEFENDANT

RULING

This is a ruling on the Amended application dated 25/2/2015 seeking for orders that this honourable court be pleased to stay execution of the decree. It also seeks for orders to set aside the warrant of arrest dated 22/1/2015.

The supporting affidavit was sworn by the counsel for the defendant Ceasar Ngige Wanjau who depones that he is competent to swear the affidavit. He states that on 24/2/2015 he appeared before the duty judge for the hearing of the application dated 24/2/2015 whereas he was allowed to amend the said application. The affidavit sworn by Joe N. Muriuki in the said application was fully adopted in support of the amended application.

Mr. Joe Muriuki states that he is the County Secretary of the County Government of Kirinyaga as has full knowledge concerning the suit. A warrant of arrest was issued against him in his capacity as the defendant's county secretary pursuant to a consent recorded in court on 9/12/2012 prior to the coming into force of the county government.

The basis upon which the said warrant was obtained was illegal, unlawful and a blatant violation of the law and in particular government proceedings. As much as the decree holder is entitled to enjoy the fruits of his judgment he has treated the defendant as any other ordinary party against whom execution of a decree can issue.

It is further stated that the law governing execution against the government is provided for under Order 29 Rule 2(2)(b) of the Civil Procedure Rules 2010. The county government is a devolved unit of the National Government and the proper procedure for execution would have been under the provisions of Order 53 of the Civil Procedure Rules. Under Section 7(2) (e), (g) and (h) (ii) of the Transition to Devolved Government Act, it is incumbent on the transitional authority to first prepare and validate all existing assets and liabilities after which a status report would be handed over to the county government as a basis for which claims would lie. The exercise in respect of the county government of Kirinyaga is yet to be finalized and therefore the decretal amount cannot be paid until the transitional authority gives a report.

According to Section 134 of the County Government Act, 2012 as read with Section 129 of the Public Finance Management Act, 2012 there has to be county plans which are the basis for budgeting and spending within the county and which have to be approved by the County Assembly. In the instant case

the monies sought in the decree had not been planned for and paying the same from other sources of public funds would amount to breach of the law. The plaintiff is yet to substitute the defendant with the County Government of Kirinyaga. The execution of warrants of arrests should therefore be stayed.

The plaintiff/respondent in the replying affidavit state that the application is fatally defective. Judgement was entered by consent in his favour on the 9/10/2012 and the applicant was given 8 months to organize himself and satisfy the decree. The court issued warrants of arrest for failure to pay the said amount followed by grant of stay orders issued on 19/3/2014. The parties were directed by the court to agree on the mode of payment. On 28/5/2014 the court ordered that the applicant clears the decretal amount of KShs.4,511,283/= by monthly instalments of KShs.800,000/= with effect from 18/8/2014. In September 2014 the applicant paid the first instalment and has never paid any other instalment. The applicant has deliberately refused to obey the court order with the full knowledge that it is under the legal obligation to pay all its lawful debts.

The respondent further states that the warrants of arrest are lawful and procedural and there is no breach of law occasioned by the execution of the same. The applicant is out to frustrate the respondent and any stay of orders issued and more specifically the order of 24/2/2015 should be lifted.

The parties filed written submissions in support of the arguments. The applicant/defendant was represented by Wanjao & Wanjau Advocates while the plaintiffs were represented by Kiguru Kahigah & Company Advocates.

The applicant argues that a county government is established under Section 176(1) of the Constitution. Article 6 of the Constitution enshrines the county government as part of the government of Kenya. In support of this argument the applicant cited the following cases:-

1. *JOHN MINING TEMOI & ANOTHER VS GOVERNOR OF BUNGOMA COUNTY & 17 OTHERS [2014] eKLR* where the court explained that the two levels of government are at the county level and the national level.
2. *SBI INTERNATIONAL HOLDING AG (KENYA) VS REUBEN KIPKORIR J.T. BORE [2014] eKLR* where the court defined the state under Article 260 as collectivity of offices, organs and other entities comprising of government of the republic of Kenya.
3. *REPUBLIC VS ATTORNEY GENERAL & ANOTHER EX PARTE JAMES ALFRED KOROSO* where the court held thatpublic officers are held in trust for the people of Kenya and must carry out their duties for the benefit of the people of Kenya.....to deny a citizen his lawful rights which have been decreed by a court of competent jurisdiction is unacceptable. *Mandamus cannot be equated with execution proceedings as in seeking an order for mandamus, the applicant is seeking not a relief against the government, but to compel a government official to do what the government through the parliament has directed him to do. The relief is not sought to make a person individually liable...*

The respondent argues that the applicant has filed two separate applications contrary to the orders of the court made on 22/1/2015 directing the applicant to amend his application. The original and the amended application amount to an abuse of the due process of the court and should be dismissed.

There is no issue of legality or violation of fundamental rights which has been demonstrated against the court orders that issued the warrant of arrest. The provisions of the law cited in the applications are not relevant to the issues raised in this application. A county government is not a government within the meaning of the government proceedings. Section 2(1) of the Act defines an officer in relation to a government to include the president, the vice president, minister, assistant minister and any servant of the government. The Act is restricted to only the national government. The authorities cited by the applicant are not relevant. The applicant has a legal obligation to pay the decretal amount and to comply with the consent order dated 28/5/2014.

The applicant argued that execution of the decree should be done against the county government in accordance with the provisions of Section 21 of the Government Proceedings Act. The respondent was of

the opinion that

Section 21 of the Act is not applicable to proceedings relating to a county government.

Section 21 provides:-

(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

“County government” is defined under Section 2 of the Count Government Act as follows:-

“County government” means the county government provided under Article 176 of the Constitution;

Section 167 of the constitution provides that:-

- 1. There shall be a county government for each county, consisting of a county assembly and a county executive.*
- 2. Every county government shall decentralize its functions and he provisions of its services to the extent that it is efficient and practicable to do so.*

Black Law Dictionary, 8th Edition defines the term “government” as being:-

- 1. The structure of principles and rules determining how a State or organization is regulated.*
- 2. The sovereign power in a Nation or State.*
- 3. An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.*

Article 260 of the Constitution defines a State officer. The definition includes “*member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government*”.

In view of the foregoing definitions, a county government is part of the state or government. The constitution of Kenya establishes two levels of government being the national and the county government. The provisions of Section 21 of the Government Proceedings Act are therefore applicable to proceedings relating to a county government.

The issue of substitution of the defendant from Kirinyaga County Council to Kirinyaga County Government was raised. In this case judgment was entered against the defendant on 4/10/2012. With the repeal of the Local Government Act under which the Council was established, the respondent is duty bound to substitute the defendant with Kirinyaga County Government. It does not matter that the case is at execution stage but the right legal entity has to be pursued to meet the legal obligation conferred on it under the law. The act of substitution will facilitate the execution of the decree.

The applicant argues that the transition authority requires to prepare and validate all existing assets and liabilities for the county government before execution can be carried out. It was also argued that the county assembly has to plan and approve the budget for execution of the decree. In my opinion, these are details which should not prevent the respondent from enjoying the fruits of his judgment. It is upon the county assembly to do what it takes in order to satisfy the decree.

The respondent argued that the application was defective in that the applicant did not comply with the directions of the court to amend his application. Instead of filing an amended application the applicant filed a fresh application. Under Article 159 of the Constitution, the court is required to decide all matters without undue regard to technicalities. What matters is the substance of the application and not the form. The court is dealing with the application filed on 24/2/2015 and not the earlier application filed on 22/2/2015. The filing of the second application did away with the first application. The applicant made it clear that the only thing he was adopting from the earlier application was the affidavit of one Joe N. Muriuki. The application is therefore properly before the court.

The parties recorded consent judgment on the 9/10/2012 which was partly executed leaving quite a substantial balance uncleared. This judgment is still binding on the parties and will continue to bind the County Government of Kirinyaga in accordance with Section 58 of the Urban Areas and City Act.

It is clear that the first step in the matter is for the plaintiff to substitute the defendant and thereafter follow-up execution of the judgment. I have already pointed out that the Government Proceedings Act is applicable to county governments. The respondent cannot execute the judgment against the county government otherwise than in accordance with the law. The law does not allow execution against the government unless an order of mandamus is obtained. The respondent has no other option of realizing the fruits of his judgment apart from applying for the relevant order against the right officer of the county government.

I come to a conclusion that the warrants of arrest issued against Joe N. Muriuki on 22/1/2015 in his capacity as the County Secretary of the defendant should be lifted. The respondent should proceed to substitute the parties without delay.

I find the application merited and allow it as prayed. Costs to be in the cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF SEPTEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr Mungai for Wanjau for applicant/defendant

Mr Ithiga for Kahiga for respondent/plaintiff.