



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPL. NO. 448 OF 2006

BETWEEN

REPUBLIC

AND

TOWN CLERK OF WEBUYE

COUNTY COUNCIL RESPONDENT

EX PARTE

AYUB MURUMBA KAKAI

SUING AS THE LEGAL REPRESENTATIVE

**OF THE ESTATE OF WILLINGTON WELAKHASIA KAKAI
(DECEASED))**

Ruling

1. The subject of this ruling is an application for contempt of court brought by the applicant through the Notice of Motion dated 21st March 2011 in which the applicant seeks, inter alia, that, “*the Town Clerk of Webuye County Council, be committed to civil jail for six months.*”
2. The contempt proceedings seek to enforce an order of mandamus issued on 26th March 2009 where the court directed that the Webuye Town Council give vacant possession of **LR NDIVISI/MUCHI/1265** situated in Webuye Township (“the suit property”) to the applicant and pay him the sum of Kshs. 100,000.00 together with interest thereon arising from a judgment and decree in **NAIROBI HCCC No. 1149 of 1987** which was given on 2nd May 2002.
3. Since this is an old matter and in view of the orders I intend to make, it is necessary to recapitulate briefly the history of the matter.

Background

4. Wellington Kakai (“deceased”) was the registered owner of the suit property. In 1972, the government acquired part of this land and duly compensated the deceased for part of the land

while he was left with 0.76 hectares. Sometime in the year 1973, the respondent wrongfully entered onto the deceased's land and evicted him. He instituted **Nairobi HCCC No. 1145 of 1987, Wellington Welakhasia Kakai v Webuye Town Council** claiming compensation and vacant possession. Upon his death his legal representative, the applicant herein took his place.

5. The matter was determined and by a preliminary decree entered on 2nd May 2002 and issued on 23rd April 2004, the Court ordered as follows;
 1. *THAT the judgment be and is hereby entered for the Plaintiff against the Defendant on liability*
 2. *THAT the defendant do give vacant possession of L.R. No. Ndivisi/Muchi 1265 in Webuye Township to the plaintiff on a date to be agreed upon.*
 3. *THAT the defendant do pay the Plaintiff sum of Kshs. 100,000/= being general damages together with interest with effect from 1/7/91 until payment in full.*
 4. *THAT the Defendant do pay the Plaintiff costs of this suit to be taxed and certified by the taxing officer of this court."*
6. The applicant was unsuccessful in enforcing the decree against the Town Council prompting the filing an application seeking an order of mandamus. In response to the application, the Town Clerk argued that the judgment was issued in default of filing a defence and that the respondent had a defence that raised triable issues as the land in question had been acquired under **section 75** of the former Constitution and that therefore the orders issued in **HCCC No. 1145 of 1987** were illegal and unenforceable. He further argued that the suit property had been acquired from 266 residents who had been fully compensated. He urged that the applicant had failed to disclose the fact that the deceased had been fully compensated and that the judgment, which was obtained by consent, was vitiated by failure to disclose material facts.
7. After hearing the parties, Wendoh J., issued a judgment on 26th March 2009 granting the order of mandamus. She observed that the High Court proceedings were settled by a consent judgment which had been in existence since 1991 and the decree issued on 23rd April 2004 and which the respondent never challenged by way of review or appeal and could not purport to do so in judicial review proceedings. She noted that, *"It would behove the Respondents to have sought to review the consent several years ago soon after the consent was recorded. They did not act and are therefore bound by the consent judgment and cannot be heard to challenge it in their reply in a judicial review application."* The learned Judge concluded that, *"The Respondent is the Town Clerk of Webuye Town Council, which is a public body. The Town Clerk is the Chief Executive Officer in charge of administration or the day to day running of the Council. His duties are provided for under S. 129 of the Local Government Act Cap 265 and the 3rd Schedule to the Act. There is a judgment against that Town Council which has not been satisfied and it is the duty of the Town Clerk to satisfy such judgment against the Council. In my view if the land in question has been used by the Council for other purposes, it is up to them to know how to compensate the Applicant with an alternative plot or as will be agreed. I find that the Applicant is entitled to an order of mandamus as prayed, the Notice of Motion dated 19th June 2008 is allowed with the Respondents bearing the costs."*
8. The decision was condensed in an order dated 12th March 2010 which read, *"THAT an order of Mandamus be and is hereby issued against the Town Clerk, Webuye Town Council to forthwith give vacant possession of L.R. NO. NDIVISI/MUCHI/1265 in Webuye Township to the estate of the deceased and to pay to the Applicant Kshs. 100,000/= plus interest at Court rates from 11th July 1991 till payment in full pursuant to the judgment of the Court of 2nd May, 2002 in High Court Civil Suit No. 1149 of 1987."*
9. On 21st March 2011, the applicant filed a Notice of Motion seeking an order that the Town Clerk of Webuye Town Council be committed to civil jail for six months. It is these proceedings that are the subject of this ruling. The applicant contends that despite service of the court's order of 26th

March 2009, the respondent has not taken steps to settle the judgment. He also avers that several meetings with the parties' legal representatives have not yielded any result that would lead to satisfaction of the judgment.

Determination

10. Since the application was filed, the legal landscape concerning the liability of local authorities and their officers under the **Local Government Act (Repealed)** has changed. The Constitution has introduced devolved government through Counties to replace local authorities. The issue that I need to address is that of liability to satisfy the court order.
11. Under **section 18** of the **Sixth Schedule** to the Constitution, all local authorities established under the **Local Government Act** existing immediately before the effective date shall continue to exist subject to any law that might be enacted. Pursuant to **section 134** of the **County Government Act, No. 17 of 2012**, the **Local Government Act**, stood repealed after the General Elections of 4th March 2014. The section states that, *"The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution."* A study of the **County Government Act** reveals that it does not have transitional provisions for dealing with pending actions and judgment against local authorities.
12. **Section 134 (2)** of the **County Government Act**, provides that, *"All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition."* The body dealing with transition referred to in this section is the Transition Authority established under the **Transition to Devolved Governments Act, No. 1 of 2012** which likewise does not have a specific provision vesting causes of action and judgments against local authorities. I therefore agree with the sentiments of Okong'o J., in **Dr J. A. S. Kumenda and Another v The Clerk, Municipal Council of Kisii and Others**, Kisii HC ELC Misc. App. No. 3 of 2013 [2013]eKLR where he stated that, *"I don't think that it was the intention of Parliament having regard to the temporary nature of the life of the Transition Authority as an institution to give it power to continue with or defend suits pending by or against local authorities that were constituted under the repealed Local Government Act. If that was the intention of the legislature, it would have been stated expressly in the said section of the County Governments Act."*
13. Another piece of legislation, the **Urban Areas and Cities Act, Act No. 13 of 2011** which was passed before the **County Government Act** provides that **Part VII**, which contains the Transitional Provisions, shall come into force upon repeal of the **Local Government Act**. **Section 59** of thereof provides that, *"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 filed 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."* This section vests the power to proceed with and to defend actions and legal proceedings pending against defunct local authorities upon **"a body established by law"** which is neither defined nor constituted under this Act. What is clear though is that proceedings commenced against or in existence are not extinguished by operation of law but continue to exist. This position is fortified by **section 23(3)(e)** of the **Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** which provides that, *"Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not-(e) affect investigations, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy may be instituted, continued or enforced....."*
14. Despite the statutory lacuna's in the **County Government Act** and the **Urban Areas and Cities Act**, the rights accrued as a result of the litigation are preserved upon repeal of the **Local Government Act** by the Constitution. **Section 33** of the **Sixth Schedule** to the Constitution provides for succession of institutions upon promulgation. It states that, *"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.”

15. In my view and taking into account the legal provisions I have cited, 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 judgment.

16. The Court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See **Republic Vs Minister for Lands & 2 Others ex parte Kimeo Stores Limited [2011] eKLR, Kenya National Examination Council vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 others CA Civil Appeal No. 266 of 1996**). On the other hand, 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 particularised under **Article 10**, the obligation of the court to do justice to the parties and to do so without delay under **Article 159(2)(a)** and **(b)** and the applicant's right of access to justice protected under **Article 48** of the Constitution.

17. In order to give efficacy to the orders of the Court, I hereby make the following Orders;

- i. ***THAT, BUNGOMA COUNTY do give vacant possession of L.R. No. Ndivisi/Muchi 1265 in Webuye Township to the plaintiff on a date to be agreed upon.***
- ii. ***THAT, BUNGOMA COUNTY do pay the applicant sum of Kshs. 100,000/= being general damages together with interest with effect from 1/7/91 until payment in full.***
- iii. ***This Ruling and Order shall be served on Bungoma County for compliance within 30 days from the date of service the order.***
- iv. ***The matter shall be mentioned on 5th March 2014 to confirm compliance and for further and other orders.***

DATED and DELIVERED at NAIROBI this 31st day of January 2014

D.S. MAJANJA

JUDGE

Ms Gathaara instructed by F. E. Jamal, Advocate for the applicant.