



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO.14 OF 2013

**IN THE MATTER OF: APPLICATION BY MASOSA CONSTRUCTION COMPANY LIMITED
FOR JUDICIAL REVIEW (MANDAMUS)**

AND

IN THE MATTER OF: COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF: THE URBAN AREAS AND CITIES ACT, NO.13 OF 2011

AND

IN THE MATTER OF: MUNICIPAL COUNCIL OF KISII (NOW DEFUNCT)

AND

IN THE MATTER OF: KISII HCCC NO.67 OF 2007

AND

IN THE MATTER OF THE DECREE DATED 23rd MARCH 2010

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE EXECUTIVE COMMITTEE, KISII COUNTY

THE GOVERNOR, KISII COUNTY

COUNTY GOVERNMENT, KISII..... RESPONDENTS

THE TRANSITIONAL AUTHORITY

AND

EX-PARTE

MASOSA CONSTRUCTION COMPANY LIMITED

JUDGMENT

1. On 19th November 2013 the Ex-parte Applicant took out Chamber Summons under Certificate of Urgency under **Order 53 Rules 3, 5 and 7** of the **Civil Procedure Rules** for an order that:-

a. *The Honourable Court be pleased to grant leave to the applicant to apply for an order of Judicial Review in the nature of mandamus to issue against the respondents herein to compel the same to satisfy and or settle the decree of this honourable court made on the 23rd day of March 2010 in favour of the applicant vide **Kisii HCCC No.67 of 2007** for the sum of **Kshs.8,464,699.05**.*

1. On 20th November 2013 R.N. Sitati, J granted leave to the applicant to apply for an order of Judicial Review in the nature of mandamus with substantive motion being filed within 21 days from the date thereof.

2. At the time of writing this judgment it is not clear to my mind whether the ex-parte applicant filed any substantive motion as ordered by Justice Sitati while granting leave on 20th November 2013 as none is in the court file. I have however noted that on 9th October 2014 Justice Sitati made the following order by consent:-

1. *The respondents be and hereby granted leave to file and serve a further affidavit together with their written submissions within the next 14 days.*

2. *The applicant are granted leave to file and serve a supplementary affidavit if necessary together with further submissions within 14 days of service.*

3. *Mention on 11th November 2014 for highlighting of submissions.*

1. It is based on that consent order that the matter was placed before me for submissions.

2. The ex-parte applicant's claim from the statement of facts filed on 19th November 2013 are that the applicant was retained by the then Municipal Council of Kisii to widen grade and gravel various roads within the municipality of Kisii and that the applicant took up the work and performed her responsibilities in line with the contract until the same was terminated.

3. Upon termination of the contract, the applicant filed Kisii HCCC No.67 of 2007 which was determined in her favour and pursuant to the failure and or neglect by the then Municipal council of Kisii to settle the decree the applicant commenced Judicial Review proceedings in Kisii HCCC Misc. Application No.10 of 2011 upon whose determination the then Municipal Council of Kisii paid substantial amount of monies to settle the decree leaving a balance of Kshs.7, 173,473.95 which continue to attract interest.

4. Subsequently upon promulgation of the **Kenyan Constitution 2010** Municipal Council of Kisii was phased out and the respondents herein was confined with the rights, assets and liabilities of the same and therefore the respondents are obliged to pay the debt vide provisions of **Sections 43, 51 and 55** of the **Urban Areas and Cities Act No.73 of 2011**.

5. These facts were supported by the affidavit of MAXWEL OKEMWA MOGERE and in response to the said application the respondents filed a replying affidavit sworn by one GIDEON N. OYANGI wherein the same deponed that the suit was prematurely filed in view of **Section 35** of the **Transition to Devolved Government Act 2012**.

Submissions

6. On behalf of the applicant it was submitted that the Transition to Devolution Act, the Urban Areas and Cities Act, the County Government Act and the Public Finance Management Act provided the mechanism and machinery for settling debts and liabilities which had accrued by the previous Local Authorities which were to be assumed and settled by the respective County Governments in Consultation and advise of the Transitional Authority.

7. It was submitted that the provisions of **Section 35** of the **Transition to Devolved Government Act, 2012** deals with transfer of assets and liabilities between various public entities and that

- payment of the debt herein does not amount to transfer of liability.
8. The fact of the debt herein has not been disputed by the respondent. Their only contention is that it was premature since **Section 35** of the **Transition to Devolved Government Act 2012** placed a *moratorium* on transfer of assets and liabilities during the transition period.
 9. It is also not a disputed fact that the respondents assumed all the functions and liabilities of the then Municipal Council of Kisii who was the judgment debtor in **Kisii High Court Civil Case No.67 of 2007** and that by the time the same ceased to exist upon the promulgation of the Constitution of Kenya 2010 and order of mandamus had been issued against the same in **Kisii HCC Misc. Application No.10 of 2010**.
 10. For the applicant to enjoy the fruits of the decree herein and noting that the respondents are Government bodies, it is only through the application of this nature that the applicant can realize the fruits of his judgment. In this I agree with the holding of Justice G.V. Odunga in **Nairobi Judicial Review Misc. Application No.44 of 2012 between Republic -vs- The Attorney General & another Ex-parte James Alfred Kosoro.**
 11. I would therefore allow the application herein and an order of mandamus is hereby issued against the respondents herein to satisfy the decree of the court issued herein and to pay to the applicant a sum of **Kshs.8,464,699.05** being the amount due and outstanding as ordered in **Kisii HCC Misc. Application NO.10 of 2011** with cost to the applicant.

Signed and dated this 9th day of December, 2014

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Otieno for Oguttu for Applicant

Miss Nyaega for Respondents

Dated this 9th day of December, 2014