



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 102 OF 2008

FORMERLY NAIROBI HCCC NO. 711 OF 1997

1. MARIAM MUENI MUSEMBI

2. TIMOTHY MUCHINA CHEGE.....PLAINTIFFS

VERSUS

1. COMMISSIONER OF LANDS.....1ST DEFENDANT

2. LAND REGISTRAR, KILIFI.....2ND DEFENDANT

3. ATTORNEY GENERAL.....3RD DEFENDANT

4. WILSON GACHANJA.....4TH DEFENDANT

5. ALFRED CHERWON.....5TH DEFENDANT

RULING

1. By this Notice of Motion dated and filed herein on 15th December 2020 Rose Kavita Mwivithi and Timothy M. Chege (the Plaintiffs/Applicants) pray for orders: -

1. That this Honourable Court be pleased to issue a warrant of arrest and/or summons to Dr. Nicholas Muraguri in person to appear before this Honourable Court and show cause why he should not be punished by way of imprisonment for a term not exceeding six (6) months and/or be punished in such other manner as this Honourable Court could be pleased to order for failing to pay the Judgment Creditor for the sums adjudged by this Court in a decree issued on 17th November 2015 and adjusted by the consent of the parties by an adjusted consent decree issued on 17th January 2019 on or before November 2019 as agreed by consent and failing to comply with the orders of mandamus issued by Honourable Justice Korir against the Respondent Dr. Nicholas Muraguri on the 11th July 2017.

2. That this Honourable Court be pleased to order that the warrants of arrest and/or summons issued herein be served and effected by the Inspector General of the National Police Service, Mr. Hillary Mutyambai or such other suitable officer in rank and position as the Inspector General of the National Police Service may nominate to arrest and/or summon Dr. Nicholas Muraguri, the Principal Secretary, Ministry of Lands, Housing and Urban Development to bring him before this Court to show cause why he should not be punished for failing to pay the Judgment creditor for the sums adjudged by this Court in the decree issued by the consent of the parties by an adjusted consent decree issued on 17th January 2019 on or before November 2019 as agreed by consent and failing to comply with the orders of Mandamus issued by the Honourable Justice Korir against the Respondent Dr. Nicholas Muraguri on 11th July, 2017;

3. That an order do issue that the firm of Susan Kahoya & Company Advocates do not represent the decree holder/Judgment Debtor (sic) herein and its participation in the adjusted decree is a conduit and agency for corruption and corrupt practices by the Office of the Principal Secretary, Ministry of Lands, Housing and Urban Development which is contrary to the provisions of Chapter Six of the Constitution of Kenya and (the) Leadership and Integrity Act, 2015;

4. That the Honourable Court do order that the decretal sums in favour of the decree holders/Judgment Creditors be paid to the decree-holder/Judgment Debtors(sic) within fourteen (14) days of the date this Court shall order failing which the Principal

Secretary, Ministry of Lands, Housing and Urban Development be committed to civil jail for a term of six months or such other terms and sentences as this Honourable Court may order and pass for failing to pay the decree holders/Judgment Debtors the sums adjudged by the Decree of this Court on the 17th November 2015 as adjusted by the consent of the parties by an adjusted decree on the 17th January 2019 payable on or before November 2019 and failing to obey the orders of mandamus issued by Honourable Justice Korir on the 11th July 2017;

5. That this Honourable Court order that any warrant of arrest and sentence issued herein be enforced by the Inspector General of Police, Mr. Hillary Mutyambai or such other officer of senior rank as the Inspector General of the National Police Service may in his discretion nominate to arrest and apprehend and bring before this Honourable Court Dr. Nicholas Muraguri., the Principal Secretary Ministry of Lands, Housing and Urban Development to be committed to civil jail for failing to comply with the Court's orders issued herein by paying the decree-holders/Judgment Creditors the sums adjudged by this Court on the 17th November 2015 and adjusted by a consent decree on 17th January 2019 and orders of mandamus issued by Justice Korir on 17th July 2017;

6. That this Honourable Court do issue a further order that should the Principal Secretary, Ministry of Lands, Housing and Urban Development fail to comply with the orders issued herein, the said Principal Secretary Dr. Nicholas Muraguri be declared to have violated provisions of Chapter Six of the Constitution of Kenya and the Leadership and Integrity Act 2015 and thus unsuitable to hold any Public Office in the Republic of Kenya; and

7. That the costs of this application be paid by the Principal Secretary, Ministry of Lands, Housing and Urban Development.

2. The application which is supported by an affidavit sworn by Maurice Muteti Kilonzo, the Learned Advocate acting for the Applicants is premised on the grounds that: -

i) A decree was issued by this Court in favour of Decree- holder/Judgment Creditor on 17th May 2015 and the same was served upon the Judgment Debtors on 14th February 2017;

ii) An order of Mandamus against the Principal Secretary, Ministry of Lands, Planning and Urban Development compelling him to satisfy the decretal sum was issued by Honourable Justice Korir on 11th July 2017 and was served upon the said Principal Secretary on 13th July 2017;

iii) After the said service, the Respondent engaged the decree holders with a view to adjusting the decree which negotiations culminated to the adjusted decree by consent which was issued by the Court on 25th January 2019 and which provided at Order (f) that the Respondents shall fully settle the agreed/negotiated amount herein within one year i.e on or before November 2019;

iv) That the Plaintiff was only paid a paltry sum of Kshs 23,740,000/- by the Respondents out of which a sum of Kshs 5,934,175/- was retained by Susan Kahoya & Company Advocates claiming that it was facilitation fees for the said payment to unnamed officers in the Ministry of Lands. The letter partly making the payments was dated 14th January 2020;

v) That despite numerous letters to the Respondent he has refused to pay the balance of the decretal sums due to the decree holder of Kshs 183,294,178.70/- and has insisted that if any payment has to be done, it has to be solely the firm of Susan Kahoya & Company Advocates which is the conduit through which facilitation monies to the Respondent shall be channeled as previously done in the part payment and not as ordered in the adjusted decree;

vi) The firm of Susan Kahoya & Company Advocates does not represent the decree holder in the matter and has no lien whatsoever or any costs and legal fees payable to the Advocates of the decree holder and its participation in the adjusted decree was through coercion to act as a conduit through which corrupt payments to unnamed officers of the Ministry of Lands, Housing and Urban Development will misappropriate the decretal sum due to the decree holder; and

vii) This Honourable Court as the custodian of the rule of law, justice and equality has the necessary powers to grant all the orders sought herein.

3. The application is opposed by the 1st, 2nd and 3rd Respondents. In a Replying Affidavit sworn on their behalf by the Deputy Chief State Counsel in the Ministry of Lands John W. Njogu and filed herein on 18th February 2021, the Respondents urge the Court to dismiss the application terming it vexatious, intended to embarrass non-parties to the suit and for failing to comply with the mandatory procedure of the law.

4. The Respondents aver that the application fails to name the applicant and that the facts deponed to by Counsel purportedly on record are misconceived, frivolous, vexatious and an abuse of the process of the Court. The 1st, 2nd and 3rd Respondents assert that the Counsel who has sworn the Supporting Affidavit has failed to disclose that there exists an amended decree in this suit after he and other advocates on record for the other parties held various meeting for purposes of settlement of the dispute herein.

5. The Respondents aver that while there was consent between them, time unfortunately lapsed before the consent was fully honoured by the Ministry of Lands and the Honourable Attorney General- who nevertheless remain fully committed to settling the unpaid balance in the existing adjusted decree soonest. In this respect, the Respondent assert that the Ministry and the Attorney General have settled part of the decree and the Ministry has budgeted to settle the remaining amount soonest.

6. The 1st, 2nd and 3rd Respondents further aver that the remaining unpaid decretal amount in this and the related decrees is colossal and that it requires budgeting and further approval by the National Assembly. The Respondents further aver that the availability of funds for payment is not dependent on the Ministry of Lands and that in any event, the Permanent Secretary in the Ministry is not a party to this suit and is therefore not liable to be pursued for contempt in the matter.

7. The Respondents assert that the applicant has not demonstrated that he served a Penal Notice and/or the order of mandamus upon the said Principal Secretary and hence the application is non-starter for failure to comply with the procedure relating to contempt of Court applications.

8. The Respondents assert that they do not dictate Counsels for parties and aver that it is not them that chose Messrs Susan Kahoya & Company Advocates to act for the parties. It is further their case that it is the parties in the litigation that chose to enter into negotiations collectively with the Attorney General and the Applicants herein had the option of negotiating separately if they so wished.

9. The Respondents further aver that it is the Counsel who received the funds who chose how to settle the claims and that the Ministry was not involved in any way in the distribution of the funds. They assert that the allegations of corruption are misplaced and a fabrication created by the Counsel for the Applicants as no official from the Ministry of Lands has demanded or been paid any ex-gratia payments in relation to the settlement of the dispute herein.

10. I have carefully perused and considered the application and the response thereto. I have similarly considered the rival oral submissions made before me by the Learned Advocates for the parties.

11. Section 21(4) of the Government Proceedings Act, Cap 40 of the Laws of Kenya provides as follows: -

“Save as provided in this Section, no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Government of any money or costs, 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”.

12. On the other hand, Section 21 (1) of the said Cap 40 provides thus: -

“Where in any civil proceedings by or against the Government, or in any 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.”

13. As to who takes responsibility for making the payments, Section 21(3) of the Act provides as follows: -

“If the order provides for the payment of any money by way of damages or otherwise, or of any cost, the certificate shall state the amount 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 or any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.”

14. Arising from the foregoing, it was clear to me that even though one may not pursue execution proceedings against the Government *per se*, a party wishing to realise the fruits of a Judgment against the Government must follow certain procedures. For a start, such a person must get himself issued with a Certificate of costs and a Certificate of Order against the Government. The second step is for the affected party to seek a writ of mandamus compelling the relevant Government department to honour the decree.

15. As Githua J observed in ***Republic –vs- Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex-parte Fredrick Manoah Egunza (2012) e KLR:***

“In ordinary circumstances, once a Judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a Judgment has been entered against the Government and a monetary decree is issued against it, it does not enjoy any special privileges with regard to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant Ministry to pay the decretal amount as the Government is protected and given immunity from execution and

attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21 (1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a Certificate of costs obtained by the successful litigant from the Court issuing the decree which should be served upon the Hon. Attorney General. The Certificate should be issued by the Court after expiration of 21 days after entry of Judgment. Once the Certificate of Order against the Government is served on the Hon. Attorney General, Section 21 (3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and Parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

16. From the material placed before me, it is evident that this suit was instituted against the Government way back in 1997 as **Nairobi HCCC No. 711 of 1997** before it was transferred to Malindi in the year 2008 and given its present reference. After hearing the parties to the dispute that includes various departments of the Government, falling under what is now known as the Ministry of Lands, Housing and Urban Development, the Honourable Justice Angote rendered a Judgment herein in favour of the Plaintiffs on 25th September 2015 in which he decreed that: -

a) The Defendants or their successors in office do pay to the Plaintiffs compensation in respect of parcels of land number Chembe/Kibabamshe/396 and 401 Kshs 178,500,000/- being the Market Value of the said parcels of land;

b) The Defendants or their successors in office do pay to the 1st Plaintiff exemplary damages of Kshs 8,925,000/- being 5% of Kshs 178,500,000/-;

c) The Defendants or their Successors in office do pay to the 1st Plaintiff costs of the suit amounting to Kshs 28,113,750/- being 15% of the quantified damages; and

d) The Defendants to pay to the 1st Plaintiff interest on (a) (b) and (c) above at the rate of 14% per annum from the date of this Judgment until payment in full.

17. It is apparent that the Defendants who are the Respondents in the application before me neither settled the decree nor appealed against it. Subsequently and in accordance with the requirements of Sections 21 (1) and (2) of the Government Proceedings Act above-cited, the Plaintiffs secured a Certificate of Order for Costs against the Government on 27th January 2017. That Certificate was served upon the Accounting Officer in the Ministry of Lands on 15th February 2017 and upon the Honourable the Attorney General on 16th February 2017.

18. That Certificate was not honoured and the Plaintiffs were thereby compelled to file **Malindi High Court Judicial Review Application No. 5 of 2017** seeking an order of mandamus to compel the Principal Secretary, Ministry of Lands, Housing and Urban Development to settle the decree. In a Judgment delivered on 29th June 2017, the Honourable Justice Weldon Korir directed the said Principal Secretary as the Accounting Officer in the Ministry to settle the decree. Those orders of mandamus were again formally served upon the said Principal Secretary and the Honourable the Attorney General on 14th July 2017.

19. Some two months after service of the orders, the Plaintiffs wrote to the Principal Secretary Ministry of Lands on 14th September 2017 giving their intention to take out contempt proceedings and summons to show cause why he should not be committed to civil jail. That letter appears to have triggered some action as the Respondents held a series of meetings with the Plaintiffs Advocates at the Honourable Attorney General Chambers Boardroom in Nairobi to negotiate payments.

20. Those meetings resulted in an agreement on 18th October 2018 in which the Plaintiffs agreed to forego part of their settlements on the decree as was captured in the minutes of the day recorded in the Attorney General's Letter -head as follows: -

“Date: 18th October 2018

RE: Final Agreed Terms of Negotiations in the Above Matters.

Negotiations were held on diverse dates of 15th March 2018, 25th September 2018 and 5th October 2018 to negotiate terms on the payment of sums entered in the Judgments delivered by the Hon. Justice Angote on 25th September 2015. The Judgments are in respect of (4) matters and are as follows: -

ELC Civil Case No. 119 of 2011 Kenneth K Bort –vs- the Attorney General

ELC Civil Case No. 120 of 2011 Joyce Nyokabi –vs- Attorney General

ELC Civil Case No. 120 of 2018 Marian N Musembi –vs- Attorney General

ELC Civil Case No. 107 of 2008 Rose Kavita Mwivithi –vs- Attorney General.

Final Agreed Terms

The final agreed terms in these matters are as follows: -

1. *Concessions of 20% on the awarded values of the respective suit properties;*
2. *Costs be at 15% of the negotiated values of the respective suit properties;*
3. *Interests on both value for the land and costs was agreed at 13% but it be capped and computed for a period of two years from the date of Judgment (from 25th September 2015- 26th September 2017);*
4. *Total waiver of the award on exemplary damages; and*
5. *Payment to be completed within one year from the date of agreement ie on or before November 2019.*

21. That agreement was signed by some ten people including representatives of the Attorney General’s Office, the deponent of the Supporting Affidavit herein as well as one Susan Kahoya and Philip Michira described therein as Plaintiff’s Counsel.” The Agreement resulted in a consent filed in Court on 17th January 2019. A perusal of the consent reveals at Clauses 6 and 7 thereof that the Defendants/Respondents herein were required to settle the newly negotiated amount on or before November 2019 and that the Settlement Sums were to be paid to a joint account of Susan Kahoya, Maurice Kilonzo and Philip Michira Advocates.

22. The consent was executed on 15th January 2019 by four parties described therein as follows: -

“

Mrs Susan Kahoya ID No.....

Susan Kahoya & Company Advocates

.....

Maurice Kilonzo ID No.....

Kilonzo & Aziz Company Advocates

Advocates for the Plaintiffs

.....

Mr. Philip Michira ID No.....

Michira Messah & Company Advocates

Advocates for the Plaintiffs

.....

Mr. Charles Mutinda

For: The Hon. Attorney General

Advocate for the Defendants”

23. From the material placed before me it is evident that the negotiated sums was not paid as agreed and within the timelines agreed. Indeed, the Respondents did not deny that they only paid the sum of Kshs 100,000,000/- in January 2020 and that there is a balance due and owing of Kshs 183,294,178.70/ to the Plaintiffs. The Respondents did not also deny that contrary to Clause 7 of the Consent, the only payment made was to the account in the sole name of Susan Kahoya & Company Advocates and not the Joint account cited in the consent.

24. As can be seen from the description of the parties herein above the said Law Firm –Susan Kahoya & Company is not shown in the consent to represent any of the parties herein. The claim by the Applicants herein that they were representing other interests in the negotiations may therefore not be far-fetched. Given however that I did not find any evidence of service upon the said Law Firm, I will say no more, save to state that the Applicants should be at liberty if they so desire to make a relevant complaint about the involvement of the Law Firm in the negotiations and payments made so far to the relevant agencies charged with investigations of corruption and other corrupt practices.

25. Having said so, this Court takes note of the fact that all that the Respondents appear to be saying herein is that they have no budget for payment. The claim that they do not know the Applicants herein is nothing but a big joke. Their own response clearly demonstrates that they are clear in their minds as to whom the Applicants are. Having been served with a Certificate of Order of Costs, I did not find any basis for the purport that given the concessions made by the Plaintiffs in the consents, they could not proceed with execution unless and until they

served a new Certificate of Order of Costs and sought another order of mandamus against the Principal Secretary.

26. As I have stated herein above, the Government does not enjoy any special privileges with regard to its liabilities once a Judgment is entered against it. The provisions of Section 21 of the Government Proceedings Act as stated do not condition payment of decretal sums due to budgetary allocation or Parliamentary approval of Government expenditure. Even if that were so, the Government through the Principal Secretary in the Ministry of Lands has had notice of this matter at least since 25th September 2015 when Judgment was entered against them. It has only itself to blame if some six years after Judgment was delivered against it, it has failed to budget and allocate funds in settlement of the decretal sum.

27. The Principal Secretary against whom the orders are sought herein is the Accounting Officer of the Ministry under the Public Finance Management Act. The Applicants herein have moved the Court to compel the satisfaction of a Judgment already duly decreed in their favour by a competent Court of law. The Respondents have not given any cogent or sufficient reason why the decree has not been satisfied six years down the line. As was stated by Majanja J in **Republic –vs- Town Clerk of Webuye County Council & Another HCCC 448 of 2006**: -

“... a decree holder’s right to enjoy the 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.”

28. In the premises, I am satisfied that there is merit in the application before me. Accordingly, I hereby grant Prayer No. 1 of the application and order that Summons do issue to Dr. Nicholas Muraguri in person to appear before this Court and show cause why he should not be punished by way of imprisonment for failing to comply with the Orders of this Court.

29. This Court shall make other orders as appropriate once the Summons are effected and the Principal Secretary responds thereto.

30. The Applicants shall have the costs of this application in any event.

31. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.

J.O. OLOLA

JUDGE