



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC JR NO. E001 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF THE ORDER OF MANDAMUS

AND

IN THE MATTER OF SECTIONS 7 & 9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE COUNTY GOVERNMENT OF NYERI.... 1<sup>ST</sup> RESPONDENT

THE COUNTY EXECUTIVE MEMBER OF FINANCE COUNTY

GOVERNMENT OF NYERI.....2<sup>ND</sup> RESPONDENT

MANYONGE WANYAMA & ASSOCIATES LLP.....EX-PARTE

RULING

**A. THE APPLICANT'S APPLICATION**

1. By a chamber summons dated 28<sup>th</sup> September, 2020 based upon **Order 53 rules 1, 2 & 4 of the Civil Procedure Rules, 2010 (the Rules)** and **Sections 8 and 9 of the Law Reform (Cap. 26)**, the *ex parte* Applicant sought leave to apply for the judicial review order of mandamus to compel the Respondents to settle the Applicant's advocate-client costs in the sum of Kshs.401,450/= which had been taxed and duly certified by the taxing officer in *Nyeri ELC Misc. Cause No. 10 of 2019 – Manyoge Wanyama & Associates LLP v the County Government of Nyeri & Another*.

2. The said application was grounded upon the statutory statement and verifying affidavit by Peter Wanyama Manyonge Advocate dated 28<sup>th</sup> September, 2020 and the exhibits thereto. It was contended that the Applicant had acted for the Respondents in *Nyeri ELC JR No. 18 of 2017 - The Registered Trustee of the Agricultural Society of Kenya v Sports Kenya and Another* in consequence whereof the Applicant's Advocate – client bill of costs was taxed at Kshs.401,450/= on 2<sup>nd</sup> October, 2019 and a certificate of taxation issued by the Deputy Registrar on 22<sup>nd</sup> October, 2019. It was contended that despite demand the Respondents had failed to settle the said amount hence the application. It was contended that there was no other means of realizing the payment of the said amount except through judicial review proceedings.

**B. THE RESPONDENTS' RESPONSE**

3. The Respondents did not file any affidavit disputing the *ex parte* Applicant's averments in the application for leave to apply for judicial

review. The contents of the Applicant's verifying affidavit and statutory statement were not controverted. However, the Respondents filed a notice of preliminary objection dated 20<sup>th</sup> February, 2021 asserting that the application for leave to apply for judicial review was misconceived, bad in law and incompetent for non-compliance with the law. It later emerged that the objection was based on alleged non-compliance with **Section 21** of the **Government Proceedings Act (Cap. 40)** and **Order 29 rule 3** of the **Rules** on the issuance of a *certificate* of order against the Government.

### **C. DIRECTIONS ON SUBMISSIONS**

4. When the matter was listed for directions on 23<sup>rd</sup> February, 2021 it was directed that the Applicant's chamber summons for leave shall be canvassed together with the Respondents' preliminary objection through written submissions. The parties were granted timelessness within which to file and exchange their respective submissions. The record shows that the Applicant filed its submissions on the application for leave on 9<sup>th</sup> March, 2021 whereas it filed submissions on the preliminary objection on 3<sup>rd</sup> March, 2021. On the other hand, the Respondents filed their submissions on 19<sup>th</sup> April, 2021.

### **E. THE ISSUES FOR DETERMINATION**

5. The court has considered the *ex parte* Applicant's application for leave to apply for judicial review as well as the Respondent's grounds of opposition dated 12<sup>th</sup> October, 2020 and the notice of preliminary objection dated 20<sup>th</sup> February, 2021. The court is of the opinion that the following issues arise for determination herein:

- (a) Whether there is merit in the Respondents' preliminary objection dated 20<sup>th</sup> February, 2021.
- (b) Whether the Applicant has made out a case for the grant of leave to apply for judicial review.
- (c) Who shall bear costs of the application.

### **F. ANALYSIS AND DETERMINATION**

#### **(a) Whether there is merit in the Respondents' preliminary objection dated 20<sup>th</sup> February, 2021**

6. The court has considered the material and submissions on record on the preliminary objection. The gist of the Respondents' preliminary objection was that the Applicant had failed to obtain a certificate of order against the government as required under **Section 21** of the **Government Proceedings Act (Cap. 40)** and **Order 29 rule 3 of the Rules**. The Respondents cited the cases of **Jamleck Waweru Karanja v County Government of Nakuru [2020] eKLR** and **Republic v Permanent Secretary Office of the President Ministry of Internal Security and Another ex-parte Nassir Mwandihhi [2014] eKLR** in support of their submissions.

7. The Applicant submitted that there was no substance in the preliminary objection and that it had complied with all the legal requirements before seeking leave to apply for judicial review. The Applicant contended that the costs due had been duly taxed and a certificate of taxation issued for the assessed amount but it did not specifically address the issue of absence of certificate of order against the government which was raised by the Respondents. The Applicant relied upon the case of **Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another ex-parte Nassir Mwandihhi** (*supra*) which was also cited by the Respondents.

8. The court has considered the case of **Jamleck Waweru Karanja** (*supra*) in relation to the instant application. In that case the claimant had purported to directly execute the decree against the Respondent by seeking warrants of attachment and sale of the Respondent's properties in contravention of **Section 21(5) of the Government Proceedings Act**. The Respondent successfully applied to set aside the execution proceedings since they were patently unlawful. The court is thus of the opinion that the *ratio decidendi* of the case had nothing to do with a certificate of order against the government and the reference thereto in the said ruling was merely *obiter*. Accordingly, that authority is not directly relevant to the issue for decision in the instant preliminary objection.

9. The court has also considered the case of **Ex-parte Nassir Mwandihhi** (*supra*) which was relied upon by both parties. It is evident from the authority that it concerned an application for committal of the 1<sup>st</sup> Respondent to civil jail for contempt of court for allegedly failing to comply with an order of mandamus for the payment of the decretal sum to the Applicant. The Respondents had objected to the application, *inter alia*, on the grounds that committal to civil jail was unconstitutional and a violation of the bill of rights; that it was a violation of the International Convention of Civil and Political Rights which Kenya had ratified and was part of Kenyan law; that the 1<sup>st</sup> Respondent could not be held personally liable for acts of government; and that personal service of the suit documents and order of mandamus had not been effected.

10. The High Court overruled the 1<sup>st</sup> Respondent's objection to the process of execution and held that the Applicant was entitled to proceed with enforcement of the order of mandamus since he had no other means of securing the fruits of his judgment. Accordingly, the 1<sup>st</sup> Respondent was directed to appear in court personally to show cause why he should not be arrested and committed to civil jail. Again, it is evident that the absence of a certificate of order against the government was not in issue. The application was not decided on the basis of the presence or absence of the certificate of order against the government, hence the *ratio decidendi* of the case had nothing to do with the certificate. The remarks making reference to the certificate in paragraph 33 of the ruling were *obiter* and not necessary for the purpose of the contempt of court application.

11. **Section 21(1) of the Government Proceedings Act** state as follows:

**“(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.”**

12. On the other hand **Order 29 rule 3 of the Rules** stipulates as follows:

**“3. Any application for a certificate under Section 21 of the Government Proceedings Act (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made *ex parte* without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.”**

13. The court is of the opinion that there is a distinction between a certificate of taxation issued by a taxing officer and a certificate of order against the government. The court is further of the opinion that the Applicant has not demonstrated that the latter certificate was issued. What the Applicant has exhibited is the normal certificate of taxation which is issued by a taxing officer upon taxation of costs in any civil matter as between advocate and client.

14. The court is, however, of the opinion that the Applicant’s omission to obtain the certificate of order against government is not fatal to the application for leave to apply for judicial review. The Applicant may have missed the procedural step but the procedural flaw is curable under **Article 59 2(d) of the Constitution of Kenya, 2010**. Similarly, **Section 19(2) of the Environment and Land Court Act** obligates the court to dispense justice expeditiously and without undue regard to procedural technicalities. The Applicant can still obtain and file the certificate after filing the substantive notice of motion. In any event, the Respondents have not demonstrated that they have suffered any prejudice due to the absence of the certificate. Accordingly, the court is inclined to overrule and hereby overrules the Respondents’ notice of preliminary objection dated 20<sup>th</sup> February, 2021.

#### **(b) Whether the Applicant has made out a case for the grant of leave to apply for judicial review**

15. The court has considered the material and submissions on record on this issue. Apart from the preliminary objection the Respondents also opposed the application for leave on the basis of the general grounds of opposition set out in the grounds of opposition dated 12<sup>th</sup> October, 2020. It was contended that the application was bad in law, fatally defective, frivolous, vexatious and otherwise an abuse of the court process. However, in their written submissions filed on 19<sup>th</sup> April, 2021 the Respondents did not argue those grounds of opposition save for the issue of law raised in the preliminary objection.

16. The factors to be considered in an application for leave to apply for judicial review were summarized by Waki J (as he then was) in the case of **Republic v County Council of Kwale & Another ex-parte Kondo & 57 Others [1998] I KLR (E&L)** as follows:

**“Leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing on the substantive application for judicial review. It is an exercise of the courts’ discretion but as always has to be exercised judicially...”**

17. From the material on record, there is *prima facie* evidence that the Applicant acted for the Respondents in Nyeri ELC JR No. 18 of 2017; there is *prima facie* evidence that the Advocate-Client costs were taxed in the sum of Kshs.401,450; there is *prima facie* evidence that payment has never been effected since 2019 despite demand. There is no evidence on record to demonstrate that the Respondents ever challenged the said taxation through either review or a reference to a higher court. In the premises, the court is satisfied that the Applicant has met the threshold for granting leave to apply for judicial review. Accordingly, the court is inclined to grant leave to the Applicant since it has no other means of lawfully enforcing payment of the taxed costs.

#### **(c) Who shall hear costs of the application**

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since the instant application was merely seeking leave to apply for judicial review, the court is of the opinion that costs should abide the outcome of the substantive application for judicial review.

### **G. CONCLUSION AND DISPOSAL**

19. The upshot of the foregoing is that the court finds no merit in the Respondents’ notice of preliminary objection dated 20<sup>th</sup> February, 2021. The court further finds that the Applicant has satisfied the requirements for the grant of leave to apply for judicial review. Accordingly, the court makes the following orders for disposal of the application:

(a) The Respondents’ notice of preliminary objection dated 20<sup>th</sup> February, 2021 is hereby overruled.

(b) Leave be and is hereby granted to the Applicant to apply for judicial review in terms of order No. 1 of the chamber summons dated 28<sup>th</sup> September, 2020.

(c) The Applicant shall file the notice of motion for judicial review within 21 days and serve the Respondents.

(d) The Respondents shall be at liberty to file a response to the application within 21 days upon service.

(e) The Applicant is hereby granted leave to file a certificate of order against the government within 45 days upon filing the notice of motion.

(f) Costs of the application and the preliminary objection shall abide the outcome of the substantive application for judicial review.

(g) The matter shall be mentioned on 22<sup>nd</sup> September, 2021 to confirm compliance and give directions on the hearing of the substantive motion.

Orders accordingly.

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 16<sup>TH</sup> DAY OF JUNE 2021**

In the presence of:

Ms Muriungi for the *ex parte* Applicant

Mr. Wahome Gikonyo for the Respondent

Court assistant – Wario

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**Y. M. ANGIMA**

**ELC JUDGE**