Mombasa Fresh Water Supply Company v Kenya Ports Authority & another (Judicial Review Application E005 of 2024) [2024] KEHC 7551 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E005 OF 2024

OA SEWE, J

JUNE 20, 2024

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

AND

IN THE MATTER OF EXECUTION OF DECREE ARISING FROM THE PROCEEDINGS IN MOMBASA HIGH COURT CIVIL CASE NO. 75 OF 2018

BETWEEN

MOMBASA FRESH WATER SUPPLY COMPANY ..... APPLICANT

AND

KENYA PORTS AUTHORITY ..... 1ST RESPONDENT

THE MANAGING DIRECTOR, KENYA PORTS AUTHORITY .... 2ND RESPONDENT

RULING

1. Before the Court for determination is the Chamber Summons dated 6th March 2024. It was filed by the applicant, Mombasa Fresh Water Supply Company, under Order 53Rule 1 of the *Civil Procedure Rules*, 2010 for the following orders:

   (a) That leave be granted to the applicant to file an application for the issuance of an order of Mandamus against the respondents herein to compel the payment of the decretal sum of Kshs 32,197,106/= awarded in Mombasa High Court Civil Case No. 75 of 2018.

   (b) That the costs of the application be provided for.

2. The application was accompanied by the Verifying Affidavit sworn on 6th March 2024 and a Statutory Statement of even date. The facts are fairly straightforward, namely, that in the year 2018, the deponent, Peterson Mitau t/a Mombasa Fresh Water Supply Company filed Mombasa High Court Civil Suit No.

75 of 2018 claiming Kshs 35,178,030 for fresh water supplied to the 1st respondent but not paid for. The matter was concluded on 30th May 2023 in favour of the applicant. The Deputy Registrar of the Court thereafter taxed the costs payable and thereupon issued a Decree in the sum of Kshs 28,833,230/= inclusive of interest.

3. The applicant further averred that, upon the issuance of the Decree and Certificate of Costs, the 1st respondent moved the Court in the primary suit for stay pending appeal; which application was allowed on condition that a Guarantee be deposited by the 1st respondent within 30 days from the date of the ruling. The applicant averred that the 1st respondent did not comply within the stipulated time and has not, to date, sought the variation of the condition for stay.

4. Accordingly, the applicant deposed that it is at liberty to enforce the decree and realize the fruits of its judgment; and that the only way of doing so is by way of a judicial review order of Mandamus directed at the Managing Director (the 2nd respondent) as the Accounting Officer, granted that the 1st respondent is a public body.

5. The respondents opposed the application. They relied on the Replying Affidavit sworn by its Senor Legal Officer, Mr. Amos Cheruiyot. He confirmed that this suit arises from the claim by the applicant in Mombasa HCCC No. 75 of 2018 in which the applicant was awarded a sum of Kshs 28,833,230/=. Mr. Cheruiyot further conceded that the 1st respondent applied for stay of execution of the decree; which application was allowed on condition that a Bank Guarantee be furnished by the 1st respondent as a condition for stay. According to the respondents, the Bank Guarantee was duly furnished. A copy thereof was annexed to their Replying Affidavit as Annexure "AC-1".

6. The respondents further averred that no prejudice has been caused to the applicant and therefore the application is simply intended to steal a march on the respondents. They deposed that the Bank Guarantee was furnished within 30 days of the respondent's counsel hearing from the applicant's vide the letter dated 20th November 2023; and that the lapse of 5 days is excusable and is not attributable to the respondents. They prayed for the dismissal of the application.

7. Upon directions being given on the 13th May 2024 that the application be canvassed by way of written submissions, the applicant filed written submissions dated 23rd May 2024. Reliance was placed on Order 53 Rule 1 and the case of *Republic v County Council of Kwale & Another, Ex Parte Kondo & 57 others* [1998] 1 KLR for the submission that, at this stage, the Court need not go into the matter in-depth; the test being whether there is a case fit for further investigations at the full hearing of the substantive application.

8. The applicant further submitted that, at paragraph 8 of the Replying Affidavit, the respondent is merely seeking to litigate the extension of time in regard to the orders for stay made in Mombasa HCCC No. 75 of 2016, which in his submission cannot fly. The applicant reiterated his stance that the order of stay of conditional; and that the respondent having failed to comply with the terms of stay, he is at liberty to pursue the realization of his decree. He relied on *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others* [2017] eKLR to buttress his argument that a party in contempt of the orders of the Court cannot be allowed to approach it to subvert a litigant pursuing rights in another valid claim.

9. The applicant further submitted that he has made full disclosure of facts in issue in Mombasa HCCC No. 75 of 2018. He added that to deny leave would be tantamount to denying him access to the seat

of justice in pursuing the fruits of his judgment. He relied on *Republic v Attorney General & Another, Ex Parte James Alfred Koroso* [3013] eKLR in which it was held:

> "...Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers...To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society..."

10. The respondents, on the other hand, reiterated their stance that, upon the order of stay being granted, the parties embarked on compliance by engaging each other on the formation and wording of the Bank Guarantee. In proof thereof, they relied on the various correspondence exchanged between the parties and annexed to the Replying Affidavit as Exhibit 'AC-3' and urged the Court to find that the Guarantee was provided within the 30-day timeframe. The respondents therefore submitted that, if there was any delay then same was solely caused by the applicant in taking long to comment on the draft Guarantee.

11. The respondents further submitted that, stay of execution having been granted after balancing the interests of the both parties, the application for leave amounts to abuse of process. They added that they are within their constitutional rights to appeal and in the process apply for a stay order to protect that right. They accordingly prayed for the dismissal of the instant application with costs. They similarly relied on *Republic v County Council of Kwale & Another, Ex Parte Kondo & 57 others* (*supra*) to back up their submissions.

12. Needless to mention that judicial review proceedings now have a constitutional underpinning, such that it is optional for a party to seek leave or not before approaching the Court with a substantive application. Hence, in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR by a 5-judge bench of the Court of Appeal held:

> " In our considered view presently, judicial review in Kenya has Constitutional underpinning in *articles 22 and 23 as read with article 47 of the Constitution* and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. *Order 53 of the Civil Procedure Act* and rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under *article 23(3)(c) and (f) of the Constitution*. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both...We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches."

13. In the premises, it is only where a party approaches the Court under the Law Reform Act that the Court is obliged, in appropriate instances, to ascertain whether the requisite threshold provided for in Order 53 of the *Civil Procedure Rules* has been met before granting leave. The rationale for leave

was well expressed in *Republic v County Council of Kwale & Another, Ex Parte Kondo and 57 others*, as follows:

> " The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexations or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with the administrative action while proceedings for Judicial Review of it were actually pending even though misconceived...Leave may only be granted therefore if on the material available before the court 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 of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised Judicially".

14. The instant application has been brought under Order 53 Rule 1 of the *Civil Procedure Rules* provides:

    (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

    (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

    (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

    (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise..."

15. In the premises, the single issue for determination is whether the applicant has met the threshold for the grant of leave to commence judicial review proceedings for an order of Mandamus against the respondents.

16. I have considered the application for leave, the accompanying Statutory Statement and Verifying Affidavit sworn by the applicant from the prism of Order 53 of the *Civil Procedure Rules* with a view of ascertaining that the applicant has complied with the strictures of Order 53 Rules 1 and 2 of the *Civil Procedure Rules*. There is no dispute that the applicant has obtained a decree in Mombasa HCCC No. 75 of 2018; or that an order of Mandamus would be the most efficacious way of realizing the fruits of that judgment and decree. I am therefore satisfied that the application is compliant. The only question to pose, then, is whether these proceedings ought to be entertained in the light of the stay orders issued in Mombasa HCCC No. 75 of 2018.

17. Since the validity or otherwise of the Bank Guarantee can only be considered and determined in Mombasa HCCC No. 75 of 2018, it is my considered view that it was inappropriate for the

respondents to raise the issue herein in opposition to the application for leave. At any rate, the applicant is yet to obtain an order of Mandamus and cannot be said to be on the verge of execution. Indeed, a substantive suit for judicial review is yet to commence. In *Republic v Communications Commission of Kenya, Ex Parte East Africa Television Network Limited* [2001] eKLR the Court of Appeal held:

> "In our view, the fallacy in Dr. Kiplagat's contention lies principally in his assuming that it is the chamber summons application for leave to apply for the orders which originates the proceedings under *Order 53*. The proceedings under that order can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted."

18. It is my considered view, therefore, that the position taken by the respondents in opposition to the application for leave is untenable.

19. The upshot is that I find merit in the application dated 6th March 2024. The same is hereby allowed and orders granted as hereunder:

    (a) That leave be and is hereby granted to the applicant to file an application for the issuance of an order of Mandamus against the respondents herein to compel the payment of the decretal sum of Kshs 32,197,106/= awarded in Mombasa High Court Civil Case No. 75 of 2018.

    (b) That the substantive application be filed and served within 21 days from the date hereof.

    (c) That costs of the application be costs in the cause.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JUNE 2024

OLGA SEWE

JUDGE