Gituria & 2 others v County Government of Kiambu (Judicial Review E007 of 2022) [2023] KEHC 27403 (KLR) (16 January 2023) (Ruling)

Neutral citation: [2023] KEHC 27403 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

JUDICIAL REVIEW E007 OF 2022

DO CHEPKWONY, J

JANUARY 16, 2023

BETWEEN

SIMON KIMANI GITURIA ..... 1ST APPLICANT

BOAZ MWANZI OSOTSI ..... 2ND APPLICANT

SOLOMON CHEGE ..... 3RD APPLICANT

AND

THE COUNTY GOVERNMENT OF KIAMBU ..... RESPONDENT

RULING

1. Before this court for determination is the notice of motion application dated May 12, 2023 filed pursuant to sections 8 and 9, both of the *Law Reform Act* cap 26 Laws of Kenya and order 53 of the *Civil Procedure Rules*.

2. The application seeks the following orders:

   a. That the applicant be granted an order of mandamus directing the Secretary County Government of Kiambu to settle the decretal amount in the Employment and Labour Relations Court in Nairobi Cause No 1801 of 2011 currently outstanding at Kes 937,333/= which decree was issued on the June 3, 2016 and certificate of order against the Government issued on June 2, 2017.

   b. That the costs of this application be provided for.

   c. Such further or other relief as the Honourable court may deem just and expedient to grant.

3. The application is based on the statutory statement of facts dated May 10, 2022 and the supporting affidavit of Simon Kimani Gituria sworn on May 9, 2022.

4. From the statement of facts, judgment was entered in favour of the applicants herein on June 3, 2016 and the respondent was duly notified of the terms of the judgment *vide* a letter dated March 16, 2017. The applicants contend that they obtained a certificate of order against the government which was issued on July 18, 2017 for the sum of Kes . 937,333/=

5. The applicants hold that they filed a Miscellaneous Application No. 33 of 2017 seeking to compel the respondent to pay the decretal amount. However, the court in a judgement delivered on February 19, 2021, held that the applicants ought to await the Intergovernmental Relations Technical Committee to complete its work in determining matters of liability from the defunct local authorities.

6. According to the applicants, the said committee's records showed that the applicant's decretal sum was captured among the liabilities the county government of Kiambu was required to pay and it recommended for its payment.

7. However, the applicants contend that despite various notices, the respondent has failed and/or has refused to settle the decretal sums. The applicants then urges that the court issues an order of mandamus compelling the respondent to pay the said decretal sum.

8. It is worthnoting that the respondent was duly served with the present application and the mention notice as confirmed vide an affidavit of service filed on May 24, 2023 but has not filed any response to date. Be that as it may, the court is still called upon to consider the merits of the application.

Analysis and Determination

9. Having read through the grounds upon which the application is premised and there being no response filed by the Respondents, the issue for determination is whether the applicant's prayer is meritable.

10. The purpose of judicial review orders particularly the order of mandamus is to compel the performance of a public duty. The circumstances under which judicial review order of mandamus is issued was explained by the court of appeal in the case of *Republic v Kenya National Examinations Council Exparte Gathenji & 8 others* Civil Appeal No 234 of 1996 as follows :-

> " The order of *mandamus* is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

11. Therefore, based on the finding cited above, when it comes to execution against the government, it is trite law that certificate of order against the Government must be issued. In this regard, section 21 of the *Government Proceedings Act* provides for the requirements to be met in the enforcement of orders as against Government organs in civil proceedings 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.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

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

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, 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. From the facts set u in support of the application therein and the above provisions, this court finds that the Respondent has a public duty to pay the decretal sum which was obtained in the judgment from the trial court being Nairobi ELRC Case No. 1801 of 2011 on 3rd June, 2016. The applicants have provided proof of the certificate of order which was served upon the Government for the decretal sum. It is glaringly evident that the respondent did not oppose the application to show any reasons why it should not be compelled to pay the said decretal sum.

13. For those reasons, the court finds that the notice of motion application dated May 12, 2023 has merit and therefore the following orders issue:-

a. That an order of mandamus is hereby issued directing the Secretary County Government of Kiambu to settle the decretal amount in the Employment and Labour Relations Court in Nairobi Cause No.

1801 of 2011 currently outstanding at Kes 937,333/= which decree was issued on the June 3, 2016 and certificate of order against the Government issued on June 2, 2017.

b. That the costs of the application shall be borne by the Respondent.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF JANUARYThat, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Mwenda counsel for Applicant

No appearance for and by Respondent

Court Assistant - Kinyua