



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

JUDICIAL REVIEW APPLICATION NO. 2 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE BILL OF RIGHTS CHAPTER 4 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES

IN THE MATTER OF THE LAW REFORM ACT CAP 26 (SECTIONS 8 AND 9)

AND

IN THE MATTER OF THE JUDGMENT IN KISII HCCC NO. 132 OF 2008

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE

HYDRO BAKERY LIMITED.....1ST SUBJECT

GEORGE ANYOKA

(Suing on behalf of the estate of JOHN ANYOKA –deceased)2ND SUBJECT

WILLIAN GISORE.....3RD SUBJECT

WILLIAM ONYANCHA.....4TH SUBJECT

JUDGMENT

INTRODUCTION

1. By a Notice of Motion dated 28th October 2020 the Ex-parte Applicants moved the court seeking the following orders:

a) That the Honourable Court be pleased to issue an order of Mandamus compelling the Respondents to satisfy the Judgment and Decree dated and issued on 4th December 2015 in **Kisii High Court Civil Case No. 132 of 2008 Hydro Bakery Ltd and 3 Others v The Attorney General and Another** or in the alternative, orders of Prohibition be issued against the Respondents, prohibiting them from the continued occupation and use of the Applicants' parcel of land known as Plot No. MWAMANG'ERA/982 Keroka Township more particularly known as the Kenya Industrial Estates sheds numbers 1, 2, 3, 4 and 6 measuring 0.055 Ha, 0.086 Ha, 0.092 Ha, 0.100 Ha and 0.160 Ha respectively.

b) That the costs of this application be in the cause.

2. The background of the case is that the Ex-parte Applicants were allottees of the Kenya Industrial Estates shed numbers 1,2,3,4 and 6 within Keroka Township measuring 0.055 Ha, 0.086 Ha, 0.092 Ha, 0.100 Ha and 0.160 Ha respectively which were comprised in plot no. MWAMANG'ERA/982 Keroka Township. The Ex-parte Applicants peacefully occupied the said Plots until the year 2007 or thereabouts when the District Commissioner, Masaba North District unlawfully and without the Ex-parte Applicants' consent trespassed onto and forcefully took possession of the said parcel of land and converted the Ex-parte Applicants premises to the offices of the District Commissioner (now Deputy County Commissioner, Masaba North).

3. It is the Ex-parte Applicant's case that as a result of the actions of the District Commissioner, the Ex-parte Applicants were deprived of the use and occupation of the said premises and they have suffered loss and damage. The Ex-parte Applicants instituted a suit vide **Kisii High Court Civil Case No. 132 of 2008, Hydro Bakery Ltd and 3 Others v The Attorney General and Another** whereby the court rendered its judgment on 4th December 2015 in favour of the Ex-parte Applicants.

4. Pursuant to the said judgment, the state was ordered to compensate the Ex-parte Applicants in accordance with the judgment and decree of the court but the Respondents have failed to do so. It is the Ex-parte Applicants' contention that the Respondents continued occupation of their premises and refusal to compensate them is in violation of their legitimate expectation that there will be certainty and predictability in the Government's dealing with the public.

5. They further contend that the protection of their legitimate expectation is at the root of the constitutional principles of the rule of law which the court is enjoined to protect. They also contend that the Respondent's failure to satisfy the decree amounts to failure to perform a statutory obligation which ought to be remedied through the grant of an order of mandamus.

6. Despite being served with the Notice of Motion, the Respondents did not file any response. The Court directed that the application be canvassed by way of written submissions and the Ex-parte Applicants filed their submissions on 25th June 2021, while the Respondents did not file any submissions despite being granted ample time to do so.

ISSUES FOR DETERMINATION.

7. The singular issue for determination is whether the Ex-parte Applicants are entitled to the orders of mandamus and prohibition sought in the Notice of Motion.

ANALYSIS AND DETERMINATION

8. Section 21(4) of the Government Proceedings Act prohibits execution against the Government. The said section provides as follows:

Section 21(4) "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"

9. However, the procedure for satisfying a court decree by the government is found in section 21(10) which provides that:

"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 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 that order . Provided that if the court directs, a separate certificate shall be issued with respect to costs (if any) ordered to be paid to the applicant"

10. The above mentioned procedure was reaffirmed in the case of **Republic v Permanent Secretary, Ministry of state for Provincial Administration and Internal Security Ex-parte Fredrick Manoah Egunza (2012)eKLR**.

11. Furthermore, in **High Court Judicial Review Miscellaneous Application No. 44 of 2012, Republic v Attorney General & Another Ex -parte James Alfred Koroso, Odunga J** observed as follows:

“In the present case the ex-parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has awarded is realized. Unless something is done, he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice. 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 judgments due to roadblocks placed on their path by actions or inactions of public officers. Public officers it must be remembered, are held in trust for the people of the Republic of Kenya. To deny a citizen his or her lawful rights which have been decreed by a court of competent jurisdiction is in my view unacceptable in a democratic society. Public officers must remember that under Article 129 executive authority is derived from the people of Kenya and it is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya and for their well-being and benefit.”

12. In the instant case, the Ex-parte Applicants obtained judgment against the Respondents way back in 2015 and todate they have not been compensated as decreed by the court. Instead, the Respondents have continued to occupy the premises developed by the Ex-parte Applicants in violation of the Ex-parte Applicants’ rights.

13. In view of the foregoing, I am persuaded that the Ex-parte Applicants are entitled to an order of mandamus.

14. I do not find the prayer for prohibition appropriate in the circumstances as the court declined to make a declaration that the suit property belonged to the Ex-parte Applicants.

15. Accordingly, an order of mandamus is hereby granted compelling the Principal Secretary in the Ministry of Interior and Coordination of National Government to settle the decree in Kisii HCCC No. 132 of 2008.

The costs of this suit shall be borne by the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF OCTOBER, 2021.

J.M ONYANGO

JUDGE