



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**JUDICIAL REVIEW NO. 54 OF 2020**

**EUNICE AMAKOVE.....APPLICANT**

**VERSUS**

**THE COUNTY ASSEMBLY CLERK, UASIN GISHU COUNTY ASSEMBLY....1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER FINANCE/COUNTY ASSEMBLY**

**TREASURER, UASIN GISHU COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**M/S Morgan Omusundi & Co Advocates for the applicant**

**M/S Kamau Langat & Co Advocates for the respondent**

**R U L I N G**

1. What is before the court is a Notice of Motion application expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act and Order 10 Rule 8 of the Civil Procedure Rules. The applicant seeks orders for leave to request for judgment in default against the respondents herein. The application is based on the grounds that the applicant instituted Judicial Review as ordered on 20<sup>th</sup> June 2020 and served the Judicial Review application on the same day. The respondents have failed to defend or enter appearance whereas the timeframe upon which to defend the Judicial Review has lapsed.

2. The applicant was the decree holder in PMC Kapsabet Civil Case No. 106 of 2018 - Eunice Amakove vs The County Assembly of Uasin Gishu and Alex Kipkosgei Malakwen. The respondents have partially paid the sum of kshs. 500,000/- leaving a balance of kshs. 1,990,980/-. He submitted that it is within the constricts of the law that an enforcement in full satisfaction of a decree against the government ought to be made by an application for mandamus hence the application herein. He cited the case of Republic vs Kenya National Examination Council ex Parte Gathenji & others. He also cited the case of Republic v Principal Secretary State Department of Interior, Ministry of Interior and Coordination of National Government & Principal Secretary Ex parte Salim Awadh Salim & 12 others (2018) eKLR. He asked that the orders be granted as sought.

3. Upon perusing the pleadings, submissions and affidavits filed herein I have identified that the issue for determination is whether the applicant should be granted leave to request for judgment in default against the respondents.

**WHETHER THE APPLICANT SHOULD BE GRANTED LEAVE TO REQUEST FOR JUDGMENT IN DEFAULT AGAINST THE RESPONDENTS.**

4. Order 10 Rule 8 of the Civil Procedure Rules states that:

**8. No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”**

5. Order 21 of the Government Proceedings Act provides;

**21. Satisfaction of orders against the Government**

(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.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

6. With regard to money decrees issued against the Government, the court in *R v. Permanent Secretary Ministry of State for Provincial Ministry of State for Provincial Administration and Internal Security & Anor ex parte Fredrick Manoah Egungza [2012] eKLR* held as follows:

“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 regards 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 on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment.”

Further, in *Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwadhihi (2014) eKLR* also had the following to say of the matter: -

... an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government.

After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See *The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109*; *R vs The Brecknock And Abergavenny Canal Co. 111 ER and R vs. The Bristol and Exeter Railway Co 114 ER 859*.

7. The respondents are well aware of the decretal sum by virtue of the fact that they partially paid kshs. 500,000/-. I note that the Applicant claimed to have served the Respondents and evidenced this by the return of service annexed and marked EA 1(a) and (b) however there is only annexure EA1(a) on record.

8. That notwithstanding, the applicant has proven that there is a certificate of costs and has produced the decree. The fact that part of the decretal sum has been settled is evidence that the respondents are well aware of the decree and therefore cannot claim they were not served.

9. In the premises I hereby issue an order for mandamus compelling the Respondents to pay the applicants the balance of kshs, one million, nine hundred and ninety thousand, nine hundred and eighty only (Kshs. 1,990,980.00/-) together with all accrued interest on the decretal sum at 12% per annum in full satisfaction of the orders in PMC Kapsabet Civil Case No. 106 of 2018 - Eunice Amakove vs The County Assembly of Uasin Gishu and Alex Kipkosgei Malakwen issued on 17<sup>th</sup> May 2019.

The respondents shall also bear the costs of this Petition.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 14<sup>th</sup> DAY OF FEBRUARY, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**