



**Republic v County Executive Member, Finance and Economic Planning  
& another; Mwatoki (Exparte Applicant) (Judicial Review Application  
23 of 2019) [2024] KEHC 12084 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12084 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION 23 OF 2019**

**OA SEWE, J**

**OCTOBER 9, 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 3A OF THE CIVIL PROCEDURE**

**ACT, CHAPTER 21 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 RULES 1, 2 AND 3 OF THE**

**CIVIL PROCEDURE RULES AND SECTION 3A OF THE CIVI**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY EXECUTIVE MEMBER, FINANCE AND ECONOMIC  
PLANNING ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER, FINANCE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DAWSON MZUMBI MWATOKI ..... EXPARTE APPLICANT**

**RULING**

1. The ex parte applicant filed the Notice of Motion dated 31<sup>st</sup> May 2023 on the ground that the respondents had willfully refused to settle the decree passed in his favour in Mombasa PMCC No. 819



of 2016: Dawson Mzumbi Mwatoki v County Government of Mombasa. The said application was filed under Section 5 of the *Judicature Act*, Chapter 8, Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules and all the enabling provisions of the law for orders that:

- (a) Spent
  - (b) The Court be pleased to find the 1<sup>st</sup> and 2<sup>nd</sup> respondents in contempt of court for willfully disobeying the order made on 21<sup>st</sup> October 2021.
  - (c) The Court be pleased to commit the 1<sup>st</sup> and 2<sup>nd</sup> respondents to civil jail for a period of 6 months.
  - (d) The costs of the application be borne by the respondents.
2. The application was premised on the grounds that, on the 21<sup>st</sup> October 2021, the Court gave a judicial review order of Mandamus compelling the respondents to satisfy the decree issued on 17<sup>th</sup> March 2019 in Mombasa PMCC No. 819 of 2016; and that the respondents were duly served with the said order. The applicant further averred that, despite personal knowledge of the order, the respondents have willfully disobeyed the same by blatantly refusing to satisfy the decree. The applicant contends that, in the circumstances, committal orders are deserved.
3. Annexed to the applicant's Supporting Affidavit were copies of the Order dated 21<sup>st</sup> October 2021 as well the demand letter dated 4<sup>th</sup> October 2022.
4. The court record confirms that, in the course of time, the respondent made payment to the applicant through his Advocates. The respondent did so in full satisfaction of the decree. The applicant's Advocates were of a contrary view. Mr. Mwakireti is on record as having informed the Court on 14<sup>th</sup> March 2024 that only 80% of the decretal sum had been settled. On account of this disputation, the applicant filed a subsequent application dated 28<sup>th</sup> March 2024, seeking the following orders:
- (a) That the respondents be ordered to comply fully with the order of the Court made on 21<sup>st</sup> October 2021 by paying the balance of Kshs. 44,051/= in settlement of the decree in PMCC No. 819 of 2016 plus costs of the proceedings herein.
  - (b) That the payments made by the respondents be deemed as payments made pursuant to the order made by the Court on 21<sup>st</sup> October, 2021, and not as legal fees as purported by the respondents in their payment voucher dated 27<sup>th</sup> October 2023 and therefore not subject to any deductions in respect of Income Tax and Value Added Tax payments by the applicant's Advocates.
  - (c) That costs of the application be provided for.
5. In support of the 2<sup>nd</sup> application, which is the subject of this ruling, the applicant reiterated his assertions that the Court made an order of Mandamus as 21<sup>st</sup> October 2021 commanding the respondents to satisfy the decree issued in Mombasa PMCC No. 819 of 2016; and that on the 27<sup>th</sup> October 2023 the respondents commenced the process of making the payment by preparing a payment voucher. The applicant further averred that, on 29<sup>th</sup> February 2024, the respondent paid him the sum of Kshs. 611,064/= instead of Kshs. 655,116/=. He noted that the amount was paid as legal fees in respect Case No. 23 of 2019 together with Withholding Tax and Value Added Tax.
6. The applicant averred that the respondents have, as a result, exposed the firm of Mwakireti & Asige Advocates to tax obligations it is not liable for in that the Kenya Revenue Authority has since issued an Additional Assessment Order to the firm to pay Kshs. 94,878.67 as Value Added Tax and interest thereon. The applicant added that the firm of Mwakireti & Asige Advocates has never offered any



legal services to the County Government of Mombasa in this matter or any other matter and or raised any invoice in regard thereto. He posited therefore that, in making the payment as legal fees, the respondents acted in breach of the court order made on 21<sup>st</sup> October 2021. He therefore prayed that the respondents be directed to comply fully with the court order dated 21<sup>st</sup> October 2021 by paying the entire amount in settlement of the decree without any deductions whatsoever.

7. The application was supported by the affidavit sworn by Mr. Mwakireti, Advocate, in which he reiterated the assertions aforementioned. He annexed to the affidavit a copy of the Payment Voucher under reference as well as the Additional Assessment Order dated 13<sup>th</sup> March 2024.
8. The respondents opposed the application. They relied on the Replying Affidavit sworn by the County Attorney, Mr. Jimmy Waliaula, on 22<sup>nd</sup> July 2024. They explained that the County Government of Mombasa can only make payments through the Integrated Financial Management Information System (IFMIS) portal; and that the portal automatically deducts relevant taxes, such as Withholding Tax. The respondents therefore contended that the applicant ought to raise his grievances with the Kenya Revenue Authority.
9. From the foregoing, it is manifest that, in the process of payment, a mistake may have been made by the County Government of Mombasa in posting the decretal sum as professional legal fees as opposed to a judgment debt. The Payment Voucher annexed to the Supporting Affidavit further shows that the payment was in respect of Case No. 23 of 2019 as opposed to PMCC No. 819 of 2016. It is also evident that the error aforementioned has exposed the firm of Mwakireti & Asige Advocates to an Additional Tax Liability to the tune of Kshs. 94,878.67.
10. [10] The application is unique, and that explains why it was brought under the inherent jurisdiction of the Court. In Halsbury's Laws of England, 4<sup>th</sup> Edn. Vol. 37 Para. 14 it is opined that:

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

11. Likewise, in *Kenya Bus Services Ltd & Others v Attorney General and Others* [2005] 1 EA 111; [2005] 1 KLR 743 it was held:

“Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was



derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.”

12. It is also significant that in Rule 3(8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, it is provided that:

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

13. I am satisfied that in so far as the applicant is concerned, he is entitled to be paid the entire decretal sum of Kshs. 655,115/= and that in so far as he was paid only Kshs. 611,064/= only, the County Government of Mombasa is still indebted to him. He has no obligation in my view to pursue the matter with Kenya Revenue Authority because he did not render any professional services for which he would be obliged to pay tax. Moreover, the mistake in posting the information in the IFMIS portal was that of the County Government of Mombasa. It should itself follow up the matter for appropriate action.

14. Accordingly, I find merit in the application dated 28<sup>th</sup> March 2024. The same is hereby allowed and orders granted as hereunder:

- (a) That the respondents be and are hereby ordered to comply fully with the order of the Court made on 21<sup>st</sup> October 2021 by paying the applicant the balance of Kshs. 44,051/= in settlement of the decree passed in PMCC No. 819 of 2016 plus costs of the proceedings herein.
- (b) That the payments made by the respondents be and are deemed as payments made pursuant to the order dated 21<sup>st</sup> October, 2021, and not as legal fees as purported by the respondents in their payment voucher dated 27<sup>th</sup> October 2023 and therefore not subject to any deductions in respect of Income Tax and Value Added Tax payments.
- (c) That costs of the application be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9<sup>TH</sup> DAY OF OCTOBER 2024**

**OLGA SEWE**  
**JUDGE**

