



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISCELLANEOUS CIVIL APPLICATION NO. E002 OF 2020

REPUBLIC.....APPLICANT

VERSUS

COUNTY EXECUTIVE COMMITTEE

MEMBER (FINANCE) EMBU COUNTY.....1ST RESPONDENT

CHIEF OFFICER (FINANCE) EMBU COUNTY.....2ND RESPONDENT

EMBU COUNTY GOVERNMENT.....3RD RESPONDENT

EX- PARTE

PAUL MAINA T/A PAM ELECTRICAL,

REFRIGERATION & GENERAL SERVICES.....EX-PARTE APPLICANT

RULING

1. The *ex parte* applicant herein, instituted these judicial review proceedings by way of a Notice of Motion dated 18/11/2020 seeking judicial review orders of mandamus compelling the Respondents to implement the judgment awarded in Embu Chief Magistrate's Court Civil Case No. 316 of 2013 by payment of Kshs. 529,110/- being the decretal amount awarded and indicated in the certificate of order against the government dated 23/07/2019. The applicant also sought for the costs of the application to be borne by the respondent.
2. The application is founded on the grounds set out in the statutory statement of facts by his advocates dated 13/08/2020 and the affidavit verifying the facts sworn by the ex-parte applicant. In a nutshell, the applicant's case is that he sued Embu County Government in Embu Chief Magistrate's Court Civil Case No. 316 of 2013 which matter was concluded in his favour and that he is currently owed a total of Kshs. 529,110/- being the award in the judgment, interest and costs as per the certificate of order against the government dated 23/07/2019. That the respondents have despite having participated in the proceedings in the lower court, knowledge of the court award, having been served with the decree and all other requisite documents, have refused to make good the ex-parte applicant's claim by implementing the judgment.
3. Further that the respondents have a legal duty to comply with the said judgment by settling the applicant's claim which duty they have abdicated and threaten to continue abdicating unless compelled by this court to comply and that the continued delay in implementing the said award is unjust, unfair, an abuse of the due process of the law and it violates the legitimate expectations of the applicants.
4. The court record indicate that the respondents were served with the application and the hearing notice and an affidavit of service filed in that respect. However, this notwithstanding, the application is not opposed.
5. At the hearing of the application, Mr. Thuku Learned counsel for the applicant relied on the grounds on the face of the application and the statement of facts in support of the application.
6. I have considered the application herein and the annexures thereto. It is clear that the applicant seeks the orders of mandamus against the respondents herein. It is trite that an order of mandamus is always issued so as to compel 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. (See **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, (1997) eKLR**).
7. It is not in dispute that judgment was entered in favour of the applicant in Embu CM's Civil Case number 316 of 2013 and a decree issued

which the respondents have failed to satisfy. As such, it is my view that the issue which this court ought to determine is whether the respondents are under a public duty and obligation to satisfy the said decree, and if so, whether the applicant is entitled to the reliefs sought.

8. The 1st respondent, Embu County Government, is one of the Counties established by Article 6 of the Constitution and the First Schedule to the Constitution, and is constitutionally recognized as a distinct level of government by the said Article. (See **Republic v County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR** and **Josphat Gathee Kibuchi v Kirinyaga County Council [2015] eKLR**). Being a government, it therefore means that it has a duty to satisfy debts owed to people and which duty is public.

9. Section 44 of the County Government Act of 2012 establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service. Section 103 of the Public Finance Management Act of 2012 also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters. Under the said section, the County Executive Committee Member for Finance is the head of Treasury and is thus the responsible for finance matters in the County.

10. It is clear therefore that the respondents have a statutory and public duty to satisfy the decree issued by a competent court in favour of the applicant. Section 21(5) of the Government Proceedings Act Cap. 40 Laws of Kenya recognises the application of Section 21 to 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. They have a statutory duty bestowed on them by the virtue of their roles and functions. They have a duty to pay the decretal sum herein and which is a public duty by virtue of the said roles and functions. However, they have failed to perform the said duty. There is no evidence of the decree subject of these proceedings having been satisfied. As such, the ex-parte applicant is entitled to execute the said decree. The government does not enjoy any special privileges.

11. The legal position is that, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, and the same remains unsatisfied, it 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. (See **Republic –vs- Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) eKLR**).

12. **The only requirement which serves as a condition precedent to the satisfaction or enforcement of such decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act. Under the said provisions, the applicant is supposed to obtain a certificate of order from the court which issued the decree. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment or where 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. Once this requirement has been met and/ or complied with and the decree is not satisfied, the decree holder can then proceed to seek orders of mandamus.**

13. **I have perused the application herein and I note that indeed the applicant obtained a certificate of orders against the government and which was issued on 23/07/2019. The applicant further obtained certificate for taxation issued on 26/07/2017. All these document bear stamps acknowledging receipt by the 3rd respondent (whose 1st and 2nd respondents are its accounting officers). There is an affidavit of service of the said certificate of orders and further the certificate for taxation was received in the office of the County Secretary on 17/08/2018. The applicant further attached a letter dated 20/08/2019 addressed to the County Secretary- County Government of Embu.**

14. **As such, the applicant has complied with the procedure under Section 21 of the Government Proceedings Act. However, the respondents have, without any lawful justification and/or excuse for failure to fulfill its aforesaid duty to the detriment of the applicant despite the fact that no appeal was lodged by the Government against the judgment entered in his favour in the subordinate court. In Republic v Attorney General & another Exparte James Alfred Koroso (2013) eKLR, which decision I agree with, Odunga J when faced with a similar application held that: -**

“.....in the present case the ex-parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left babysitting 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 for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. 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. Public officers must remember that under Article 129 of the Constitution, executive authority derives from the people of Kenya and 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...”

15. In view of the foregoing, it is my view that the applicant has demonstrated that he is deserving of the relief sought in the notice of motion dated 18th November 2020.

16. The same is allowed with costs to him.

17. Orders accordingly.

Delivered, dated and signed at Embu this 10th day of February, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

.....for the Exparte Applicant