



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW CIVIL SUIT NO. 286 OF 2008

COASTAL BOTTLERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MUNICIPAL COUNCIL OF MOMBASA...DEFENDANT/RESPONDENT

RULING

The Application

1. Before the court is an amended Notice of Motion dated 12th December, 2019 which prays for the following orders:

1. That the County Executive Member Finance and Economic Planning and the Chief Officer Finance and Economic Planning of the County Government of Mombasa be imprisoned to civil jail for failure to pay the agreed costs to the Plaintiff despite sufficient notice.

2. That the Costs of this Application be provided for

2. The application is premised on the grounds set out therein and is supported by affidavit of Sanjeev Khagram sworn on 16th December, 2019.

3. The Applicant's case is that the Plaintiff's case was withdrawn with costs to the Plaintiff on 30th June, 2011. The Plaintiff filed its bill of costs which was settled before the taxing master as drawn. The taxing master on 7th May, 2010 certified the bill of costs and taxed the same at Kshs. 318,962.30 as against the Defendant. The Plaintiff/Applicant is seeking Kshs. 963,361.70. (Nine Hundred and Sixty Three, Three Hundred and Sixty Shillings and 70 cents) which is together with interest from the year of the order to the day the Application was filed.

4. The Applicant unsuccessfully with numerous correspondences persistently followed up with the said Mombasa County Government so as to know when the said County intended to effect payment in order to comply with the order of Court. It seems to the Applicant that the Mombasa County Government and its officials have absolutely no regard to the said Court order.

The Response

5. The motion is opposed by the Respondent, who filed Grounds of Opposition on 26th May, 2020 and a Replying Affidavit on 1st September, 2020. The Respondent's case is that the alleged contemnors are public officers within the ambit of sections 196 and 197 of the Public Finance Management Act (2012), and are not allowed to spend public funds without authorization. That the Defendant has every intention to comply with the order but the delay is caused by the verification and transfer of assets and liabilities to the county assets and liabilities committee. It is averred further that the Plaintiff did not serve any order on the alleged contemnors who are not personally aware of the court order; and that the Application is filed without leave of court and as such offends section 5 the Judicature Act. The Plaintiff/Applicant filed its submissions on 25th November, 2020 while the Defendant/ Respondent filed its submissions on 6th November, 2020.

Determination

6. I have carefully read the pleadings and the submissions. The issue that comes out clearly is **whether the County Government officers should be committed to civil jail**. The Respondent has complained that it was not served with the order of court and therefore had no knowledge of the same. In its own Replying Affidavit, the deponent Jimmy Waliaula on paragraph 4 stated that:

“The Defendant/Respondent has not in any way disregarded the orders of the Court. It has every intention of complying

with them.”

7. He proceeded on paragraph 5 to explain that the delay in settling the decretal amount was not intentional nor an act of disobedience of the court order but it is affected by the verification and transfer of assets and liabilities by the county Assets and Liabilities committee.

8. To that extent I find that the Respondent was aware of the Order. In **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** where Judge Lenaola held that: -

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary”

Section 21 (3) of the Government Proceedings Act provides:

“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.”

9. The effect of the provision is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgment made by the Court against that department. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso** Justice Odunga expressed himself as follows:

“...In the present case the *ex parte* applicant has no other option of realising 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 been awarded is realized. 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.....” (Emphasis supplied)

10. The Respondent has argued that the delay in paying the Applicant has been caused by the verification and transfer of assets and liabilities by the county Assets and Liabilities committee; such payments can only be done when verification and validation is done and a report tabled and gazette. I do not think this is a sufficient reason to delay the payment for almost 10 years. In normal operations of the County Governments, such payments are factored in the expenditure budget such that when there is a court order such as the one in question, the accounting officer is able to process the payments without problems at all.

11. I will not deny that once a decree or judgment is obtained against the Government, it would require some reasonable time to have it forwarded to its finance department, budget department, auditing officers and such for scrutiny and approvals for it to be paid. The county departments do not have their own funds to settle such decrees or payments and considering the structures involved, it might take a long time. However in the instant case the County Government has exhausted the window of reasonable time. The certificate of costs was issued on 7th May, 2010. It has been more than ten years.

12. It is not clear why the Respondent has been waiting for the verification and transfer of assets and liabilities process so as to pay the Applicant but at this point it is important to note that this has been the Respondent’s excuse since 2018 as evidenced by annexure “SK-2”. The question arises is what would happen if the documents are not forwarded to the County Assets and Liabilities Verification Unit, and if in the long run the liquidation process fails, does that mean that the Applicant will not realize the fruits of its certificate of costs?

13. For the interest of justice and to uphold the rule of law, the Notice of Motion herein dated 12/12/2019 is allowed. The County Executive Member Finance and Economic Planning and the Chief Officer Finance and Economic are hereby convicted of contempt of court. The contemnors shall appear before this Court to show cause why they should not be jailed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Ondego for Applicant

M/S Nyaga for Respondent

Ms. Peris Court Assistant