



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

JUDICIAL REVIEW APPLICATION NO.2 OF 2020

**IN THE MATTER OF AN APPLICATION BY GERALD MICHAEL EREMONYE & 9 OTHERS FOR LEAVE TO FILE FOR
JUDICIAL REVIEW ORDERS OF MANDAMUS**

AND

**IN THE MATTER OF THE DECREE ISSUED ON 28.5.2019 IN THE PRINCIPAL MAGISTRATE'S COURT AT MARSABIT IN
CIVIL SUIT NO.2 OF 2016**

GERALD MICHAEL EREMONYE & 9 OTHERS

VERSUS

COUNTY GOVERNMENT OF MARSABIT & 2 OTHERS

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 10, 48 & 50(1) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

COUNTY GOVERNMENT OF MARSABIT.....1ST RESPONDENT

THE MINISTRY OF HEALTH.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE

GERALD MICHAEL EREMONYE & 9 OTHERS

RULING

1. The exparte applicants herein have filed an amended notice of motion dated 24th of July 2020 seeking for orders that:

1. An order of Mandamus to compel the respondent to forthwith and or within a time limited by this honourable court to settle the decretal sum as per the decree dated 28th May 2019 issued by the principal Magistrate's Court Marsabit in SPMCC No.2 of 2016 Gerald Michael Eremonye and 9 others versus County Government of Marsabit and 2 others together

with costs as per certificate of costs dated 18th October, 2019 together with interest of the Principal sum from the date of filling the suit till payment in full.

2. An order that the said sum be paid with accrued interest at court rates from the date of filling the suit till payment in full.

3. An order that the costs of this application/ proceedings be awarded to the exparte applicants.

2. The grounds in support of the motion are that the respondents herein have refused to settle the decretal sum on the grounds that it is not clear as to who should pay between the 1st and 2nd respondents despite the fact that the decree of the lower court was issued jointly and severally against both respondents. Further that the 1st, 2nd and 3rd respondents have not preferred an appeal against the judgment of the lower court.

3. The application was opposed by the 3rd respondent, The Hon. The Attorney General, on behalf of the 2nd and 3rd respondents. The 1st respondent did not make a response to the application.

4. The exparte applicants were represented by the firm of **J.O.Ondieki & Co Advocates** while a Senior Litigation Counsel from the office of the AG appeared for the 2nd and 3rd respondents. Both counsels made written submissions.

5. It was the case for the exparte applicants that they had supplied goods to Marsabit County Hospital way back in the year 2003 which was before the advent of county governments under the constitution of Kenya, 2010. The hospital failed to pay them and they consequently filed suit at the lower court. The respondents did not tender any evidence in the case and judgment was entered in favour of the applicants. A decree was then issued by the lower court for payment of the money owing together with costs and interest at court rates.

6. The advocates for the applicants submitted that the claim at the lower court was against the County Government of Marsabit, the Attorney General and the Ministry of Health. That judgment was entered jointly and severally against the respondents who are then under obligation to pay the debt.

7. The 3rd respondent's litigation counsel on the other hand submitted that the accrued debt is owing to the defunct County Council of Marsabit that was incurred before the commencement of constitution of Kenya 2010. That pursuant to the provisions of section 33 of the Sixth Schedule of the constitution, the Marsabit County Government is the legal successor of the defunct Marsabit County Council. Therefore that the onus of settling the owing debt lies with the said county government and not with the national government.

8. I have considered the application, the grounds in opposition thereto and the submissions by the respective counsels for the parties. The applicants are seeking to enforce a decree of the lower court where judgment was entered against the respondents to the sum of Ksh.2,348,528/= with interest at court rates from the date of filing suit. The applicants are seeking that the respondents be ordered to pay the decretal sum forthwith and or within a time limited by this court.

9. The 2nd and 3rd respondents are arguing that it is the 1st respondent who is liable to pay the debt. However, the judgment entered at the lower court was jointly and severally against the 3 respondents. The 2nd and 3rd respondents did not adduce evidence before the lower court where they could have raised the defence that it is the 1st respondent who was liable for the debt. Neither did they file any appeal against the judgment of the lower court. They cannot raise the issue now. The judgment and decree of the lower court therefore stands.

10. The decree of the lower court was issued jointly and severally against the respondents. In the case of **Kenya Airways Limited –Vs- Mwaniki Gachohi** (as cited in **Republic -V- Permanent Secretary in charge of Internal Security Exparte Joshua Mutua Paul**(2013) eKLR it was stated that:

“The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree”

In the premises, the applicants are at liberty to execute the decree against any or all of the respondents.

11. The procedure of execution of a decree against the government is set out in the Government Proceedings Act, Cap 40 Laws of Kenya. The procedure was aptly summarized by Githua J.in **Republic vs Permanent Secretary of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza** (2012)eKLR where she stated that:

“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, 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. Once the certificate of order against the government is served on the Hon. Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.

12. The applicants should follow this procedure in their execution of the decree. The prayer that the court makes an order for the respondents to pay the decretal sum forthwith is declined.

13. The upshot is that the prayers sought in the notice of motion dated the 24th July 2020 are merited. I therefore make the following orders:

(1) That an order of mandamus do and is hereby issued to the respondents herein to settle the decretal sum as per the decree in Marsabit SPMCC No. 2 of 2016 dated 28th May 2019 together with costs as per the certificate of costs dated 18th October 2019 and interest on the principal sum at court rates from the date of filing suit till payment in full.

(2) That costs of the application are hereby awarded to the exparte applicants.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 15TH DAY OF APRIL, 2021.

JESSE NYAGA NJAGI

JUDGE

In presence of:

N/A for Applicants

N/A for 1st Respondent

N/A for 2nd & 3rd Respondents

Parties

1st Applicant present

Court Assistant Galgalo

30 days Right of Appeal.