



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW APPLICATION NO. 7 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER OF MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF VIHIGA.....1ST RESPONDENT

COUNTY EXECUTIVE MEMBER, MINISTRY OF FINANCE.....2ND RESPONDENT

MINISTRY OF ENVIRONMENT, WATER & NATURAL RESOURCES

VIHIGA COUNTY.....3RD RESPONDENT

***EX PARTE*: COUNTY CONTRACTORS AND FABRICATORS ENTERPRISES LIMITED**

JUDGMENT

1. There are two applications for simultaneous disposal, dated 28th May 2020 and 23rd November 2020.
2. The Motion, dated 28th May 2020, seeks a *mandamus* order to compel payment of moneys decreed in Vihiga PMCCC No. 95 of 2019, and therefore, in it, the *ex parte* applicant is on a mission to enforce that decree he holds against the respondents. The respondents have resisted the application, on grounds that the decree sought to be enforced had been obtained irregularly, as they were not served with the application for entry of judgment contrary to Order 5 Rules 8, 9 and 10 of the Civil Procedure Rules. It is also averred that the certificate envisaged in section 21 of the Government Proceedings Act, Cap 40, Laws of Kenya, had not been obtained and served on them as required under that law. It is also averred that the decretal sum had since been paid to the *ex parte* applicant, and obtaining enforcement in these proceedings would amount to double payment, and unjust enrichment.
3. The Motion, dated 23rd November 2020, is by the respondents. They seek stay of these judicial review proceedings, pending hearing and determination that they have filed in Vihiga PMCCC No. 95 of 2019, seeking stay of execution in that suit and the setting aside of the judgment entered in that suit against them, which is the subject of enforcement in these proceedings. Their argument is that the judgment was obtained irregularly. The application is resisted by the *ex parte* applicant who has filed grounds of opposition and a preliminary objection on a point of law.
4. Regarding the first application, dated 28th May 2020, the same is not tenable, to the extent that the *ex parte* applicant has not complied with section 21 of the Government Proceedings Act, by obtaining a Certificate of Order against Government, and serving it on the respective government agency, in order to bring life to the enforcement of money decrees against the government.
5. Section 21 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: CAP. 40 Government Proceedings [Rev. 2015] 14 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. Section 21 of the Government Proceedings Act makes a Certificate of Order against Government a prerequisite for enforcement of a decree against the government, as was underscored in *Republic vs. County Government of Vihiga Ex parte Global Exhibitions Incorporated Ltd* [2021] eKLR (Musyoka J.), as follows:

“A party wishing to realize the fruits of a judgment or decree against the government must obtain a certificate of order against the government. The government pays against the certificate of order against it. It is a critical accounting instrument for the purpose of government finances and accounts. The centrality of the certificate of order against government, with respect to enforcement of money decrees against the government, whether at the national or at the county level, has been the subject of pronouncement by the courts.”

7. As the *ex-parte* applicant has failed to comply with legal requirements necessary for the issuance of the order of sought, of *mandamus*, the Motion before me, dated 28th May 2020, does not meet the threshold, and it is not merited.

8. Determination of the second application, dated 23rd November 2020, should be largely academic, with the finding above, that the Motion, dated 28th May 2020, is deficient, to the extent that a Certificate of Order against Government was never obtained and served on the relevant agency within the County Government of Vihiga. The dismissal of the Motion would mean that the entire suit is lost, including the second application. There would be no proceedings to stay after that, as the said Motion is the originating pleading, and its dismissal would mean the whole edifice collapses.

9. However, since directions had been given for the simultaneous disposal two applications, I will still proceed to look at its merits. Stay of proceedings is sought on grounds that the respondents have moved in Vihiga PMCCC No. 95 of 2019, seeking to have execution of the decree issued in that suit stayed, to await determination of an application mounted in the suit for setting aside of the said decree. The respondents have exhibited documents that demonstrate that such an application is pending, and that fact has not been contested by the *ex parte* applicant. The order sought in the second application sounds sensible and reasonable. They are saying, stop or suspend these proceedings for now, since their goal is enforcement of the decree that were are seeking to sets aside in the parent suit, Vihiga PMCCC No. 95 of 2019. If this court were to ignore what is going on and proceed with enforcement of the decree, and ultimately the court seized of the primary suit set aside the decree, then this court would have acted in vain. The second application is, therefore, merited.

10. The final orders are that I hereby accordingly dismiss the Motion, dated 28th May 2020, for the reasons given in paragraph 8 of this ruling; and allow the Motion, dated 23rd November 2020, for whatever it is worth, for the reasons given in paragraph 9 of the ruling. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE, 2021

W MUSYOKA

JUDGE