



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 7 OF 2019

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

-AND-

IN THE MATTER OF CIVIL PROCEDURE RULES AND CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

-AND-

IN THE MATTER OF THE CHIEF MAGISTRATES’S COURT CIVIL SUIT NO.872 OF 2017

-AND-

IN MATTER OF NAKURU COUNTY GOVERNMENT

-AND-

IN THE MATTER OF THE CHIEF OFFICER FINANCE/COUNTY TREASURER NAKURU COUNTY GOVERNMENT

-BETWEEN-

REPUBLIC.....APPLICANT

-VERSUS-

NAKURU COUNTY GOVERNMENT

CHIEF OFFICER, FINANCE/COUNTY TREASURER,

NAKURU COUNTY GOVERNMENT.....RESPONDENTS

EXPARTE PALBINA TRAVEL LIMITED

RULING

1. This is a ruling on Notice of a Preliminary Objection dated **29th September 2020** seeking the following orders: -

- i. The instant suit is premature and an abuse of the court process as it offends Section 21 of the Government Proceeding Act.**
- ii. The suit fails to meet the tenets of Article 159(c) of the Constitution and Section 88 and 89 of the County Government of 2012.**
- iii. The suit is incompetent, bad in law and the same should be struck out.**
- iv. And other reasons to be adduced at the hearing thereof.**

2. The preliminary objection was filed in response to Notice of Motion application dated **22nd March, 2019** filed by Exparte Applicant herein is **Palbina Travel Limited** seeking to institute judicial review proceedings for orders of *Mandamus* in relation to the judgement

delivered on 23rd October 2018 by the **Chief Magistrate Court Civil Suit No. 872 of 2017** in Nakuru.

3. This Court gave directions that the Respondents' Notice of Preliminary Objection do proceed by way of written submissions.

RESPONDENT'S SUBMISSIONS

4. The Respondents submitted that the Court has to consider whether based on the facts disclosed in the pleadings, the Applicant is entitled to order of *mandamus* as prayed.

5. The Respondent submitted that it is settled law that in arriving at its decision, the Court must satisfy itself that the Applicant has demonstrated that the Respondents' action was marred with illegality, irrationality and procedural impropriety as was held in the case of **Ernest B.M. Oranga Kakamega County Commissioner of Cooperatives & 6 others [2016] eKLR** where the Court cited with approval the case of **Council of Civil Servants Union vs Minister for the Civil Service 1985 2 AC**.

6. The Respondent further submitted that for an Applicant to succeed in an application for the order of *mandamus*, the Court must first be satisfied that the Respondents are under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant, and if the answer is to the affirmative, whether the Applicant is entitled to the reliefs sought and relied on the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**.

7. The Respondents submitted that the application herein fails to meet the tenets of **Section 21 of the Government Proceedings Act** which are properly applicable to the 15 Respondent and the said provision outlines the procedure to be followed where a decree has been issued against the government and the Applicant has failed to comply with the procedure required.

8. The Respondent further submitted that as per the provisions of **Section 26 of the Government Proceedings Act** payments by the Respondent (Government) will be based on a Certificate of Order obtained by the successful litigant from the Court issuing the decree. That the Certificate of Order should be served upon the Attorney General (or as the case may be by the Court after the expiration of 21 days after entry of judgment and once the certificate has been served, **Section 21(1) of the Government Proceedings Act** imposes a duty on the accounting officers to pay sums specified in the order to the person or his advocate together with interest lawfully accrued.

9. The Respondents further submitted that execution proceedings against a government or public authority can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgement made by the Court against such body and enjoining the 2nd Respondent to the instant is misplaced and cited the case of **Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012] eKLR**.

10. The Respondents concluded by submitting that although judicial review remedies are discretionary, they would urge the Court to compel the applicant to strictly adhere to the above provisions of the Government Proceedings Act. They urge the Court to dismiss the instant application with costs.

EXPARTE APPLICANT'S SUBMISSIONS

11. The Exparte Applicant submitted that the threshold on preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1969] EA 696**. Where the Court held that preliminary objection should be on a point of law.

12. And in respect to this case, once a judgement had been delivered, the party upon whom such judgement favors has the right to enjoy the fruit of the said judgment by executing its decree.

13. The Exparte Applicant submitted that in cases where judgement is entered against the Government, the 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 was held in the case of **Republic vs Permanent, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR**.

14. On whether this **suit** offends the principles of **Article 159(c) of the Constitution and Section 88 and 89 of the County Government Act**, the Applicant stated that whereas the Constitution provides mechanisms upon which parties may resolve disputes without necessarily resulting to courts, the spirit of the Constitution under **Article 159** was not meant to oust party's obligations against each other or used arbitrarily at the behest of one party to delay justice or stifle individual rights, neither does it not preclude the injured party from seeking Court's intervention where amicable solution has failed.

15. The Exparte Applicant submitted that where the Government has been sued by private citizen, it should not be seen to enjoy special privileges with regard to its liability to pay.

16. The Exparte Applicant further submitted that **Section 88 and 89** on citizen participation envisages public interest petitions on governance and legislation as drawn from **Section 87** of the said Act and not private liability owed by governmental institution that does not necessary affect County's legislation and governance. That further, **Section 2** of the **Nakuru County Public Participation Act** defines public participation; **"the process of educating, informing and engaging the public or a representative sector of the public in an open, democratic and accountable forum in formulation of policies, developing laws and making decision that affect the public."**

17. On whether this suit should be struck out, the Exparte Applicant submitted that the Respondents have persistently contended the facts pleaded by the Exparte Applicant by its effort to file defence albeit out of time and refusal to pay the amount outstanding which gives clear indication of contention of the facts. That it remains the duty of the Exparte Applicant (as already discharged) to ascertain the facts and the

claim to enable this Court exercise its discretion on the matter.

18. On joinder of the 2nd Respondent in the suit being misplaced, they submitted that the 2nd Respondent by virtue of holding Public Office, as the County Finance/Treasurer is mandated to perform duties imposed upon him/her by law and the orders sought are not directed in his/her personal capacity nor do they seek relief from the Respondents; but are directed at the 2nd Respondent's capacity as the Public Office holder to ensure compliance on payment of the decretal amount.

19. The Exparte Applicant concluded by submitting that the preliminary objection application in question is made in bad faith, is intended to delay this matter and urged this Court to dismiss it with costs in its favour.

ANALYSIS AND DETERMINATION

20. I have considered the pleadings and submissions by the parties herein and what I wish to consider is whether the Respondents' preliminary objection has merit. It is trite law that a Preliminary Objection must be on a strict point of law and must meet the criteria set out in the case of **Mukhisa Biscuits Company Ltd Vs. West End Distributors Ltd (1969) EA 696**. I will start by addressing the first ground of the preliminary objection whereby the Respondents contends that the instant suit is premature and an abuse of the court process as it offends **Section 21 of the Government Proceeding Act**, which provides as follows: -

“(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: 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.”

21. Further, in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR**, the Court stated as follows: -

“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.”

22. I note from the evidence on record that a decree for the decretal sum of Kshs.6, 415,485/= and certificate of costs for Kshs. 372,400/= were both issued on 6th November, 2017. I note that there is an official stamp by the 1st Respondent on the said document indicating they were received on 4th May, 2018 and this was followed by a demand letter to it on 7th July, 2017 from the Exparte applicant's advocates demanding payment of the aforesaid amount. This in my opinion has satisfied the requirements under section 21 (1) of the above mentioned act.

23. From the foregoing, I see no merit in the preliminary objection and dismiss it with costs to be borne by the Respondents.

24. FINAL ORDERS

1) The Preliminary objection dated 29th September 2020 seeking Is hereby dismissed.

2) Costs to the Respondents.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 15TH DAY OF JULY, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Ms. Oseko holding brief for Avendi for Applicant

Mr. Kinuthia for Respondents