



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW NO. 10 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE SPEAKER MIGORI COUNTY ASSEMBLY.....1ST RESPONDENT

THE CLERK MIGORI COUNTY ASSEMBLY.....2ND RESPONDENT

THE COUNTY ASSEMBLY PUBLIC SERVICE BOARD MIGORI.....3RD RESPONDENT

RULING

The application dated 6th August 2020 is for leave to file an application for an order of *Mandamus* against the three Respondents, seeking to compel them to comply with the Judgment dated 3rd October 2019.

1. The said Judgment was delivered in the case of **JAMES AGGREY MWAMU Trading As MWAMU AND COMPANY ADVOCATES Vs MIGORI COUNTY ASSEMBLY, MISC. APPLICATION NO. 103 OF 2018.**
2. In the alternative, the Applicant sought orders that the 1st and 2nd Respondents be jailed for Six (6) Months, for failure to pay the decretal amount of Kshs 7,519,282.40 together with interest.
3. In the further alternative, the Applicant sought an order for the attachment of Account No. **1253455813** at **KCB Migori Branch**: the said account was said to belong to the 3rd Respondent.
4. When canvassing the application, Mr. Mwamu advocate pointed out that the Applicant was entitled to seek leave to compel the Respondents to make payment.
5. In answer to the application, Mr. Kanyangi, the learned advocate for the Respondents, submitted that it would be wrong to compel any of the Respondents to make payment for a judgment arising from a case to which none of them was a party.
6. As far as the Respondents were concerned, the Judicial Review proceedings herein ought to have been instituted against the Judgment-Debtor, which is the **COUNTY ASSEMBLY OF MIGORI.**
7. Instead of taking action against the said County Assembly of Migori, the Applicant took steps against the Speaker and the Clerk to the County Assembly, as well as the Public Service Board.
8. The Respondents pointed out that whilst the County Assembly played a legislative role, the Public Service Board was the Administrative Wing of the County Assembly.
9. It was the understanding of the Respondents that the Assembly and the Board were separate bodies, which had separate functions. Therefore, because there was no judgment against any of the Respondents, they believe that there would be a miscarriage of justice if the court were to compel them to pay something owed by an entity which was separate from them.
10. But the Applicant submitted that it was the Respondents who were, by law, supposed to comply with orders which had been made against civic bodies.

11. The Applicant emphasized that pursuant to the **Public Finance Management Act**, as read together with the **County Government Public Management Act**, the Accounting Officer of the County Assembly is the Clerk to the County Assembly.

12. The understanding of the Applicant was that the Clerk to the County Assembly has the authority to make payment; and that in order to initiate steps for payments, the Clerk (in his capacity as the Secretary to the Public Service Board), would work with the Speaker (in his capacity as the Chairman of the said Board).

13. In the circumstances, the Applicant submitted that it was now the responsibility of the Respondents to show cause why they had not given the necessary authorization.

14. I have given careful consideration to the application.

15. In my considered view, the Applicant had the responsibility of making the decision concerning the person whom he deemed to be the Accounting Officer of the County Assembly.

16. Once the Applicant had determined the identity of the Accounting Officer, he had no obligation to enjoin other persons or officers, just because such other persons or officers had the mandate to give the requisite authorization to the Accounting Officer.

17. The interest of the Applicant is to receive payment. Therefore, the order of *Mandamus* can only be directed against the officer who has the duty to make the payment, and whose obligation to act is plainly defined.

18. In the case of **REPUBLIC Vs COUNTY CHIEF OFFICER, FINANCE & ECONOMIC PLANNING, NAIROBI CITY COUNTY, EX PARTE STANLEY MUTURI, MISC. CIVIL APPLICATION NO. 221 OF 2016**, Odunga J, held as follows;

“It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in his capacity as the accounting officer.”

19. In the case of **REPUBLIC Vs COUNTY SECRETARY, MIGORI COUNTY GOVERNMENT & ANOTHER, HIGH COURT MISC. CIVIL APPLICATION NO. 3 OF 2017**, Mrima J. also came to the conclusion that the accounting officer for the Department of Finance is the Chief Officer who is responsible for administration, as it is he who is responsible for managing the finances of that department.

20. Meanwhile, in the case of **COUNCIL OF GOVERNORS & OTHERS Vs THE SENATE, PETITION NO. 413 OF 2014**, the Court held as follows;

“As regards the accounting officer for the County Assembly, Section 148 (4) of the Public Finance Management

Act provides that;

‘The Clerk of the County shall be the accounting officer of the County Assembly.’

.....

It therefore follows that the person who has overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer.”

21. Based on those decisions, I find that neither the Speaker of the County Assembly nor the County Assembly Public Service Board are the accounting officer for the County Assembly.

22. In the result, the application seeking leave to institute *Mandamus* proceedings against the 1st and the 3rd Respondents is dismissed.

23. The Applicant will pay costs of the application to those 2 Respondents.

24. However, as the Clerk to the County Assembly is the accounting officer, I grant leave to the Applicant to institute *Mandamus* proceedings against the 2nd Respondent.

25. As regards the costs in that respect, the same shall abide the outcome of the substantive application. If the said substantive application is successful, the costs of the application herein shall be awarded to the Applicant. But if the substantive application is unsuccessful, the Applicant will pay to the 2nd Respondent herein, the costs of the application dated 6th August 2020.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 14TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE