



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

JUDICIAL REVIEW NO. 7 OF 2020

REPUBLIC.....APPLICANT

-VERSUS-

THE COUNTY SECRETARY MIGORI COUNTY.....1ST RESPONDENT

THE CHIEF OFFICER FINANCE MIGORI COUNTY ..2ND RESPONDENT

MIGORI COUNTY GOVERNMENT.....3RD RESPONDENT

FRANCIS MONANKA.....EX - PARTE APPLICANT

JUDGMENT

By a Notice of Motion Application dated 26/6/2020 filed evenly, the *ex-parte* applicant through the firm of Kerario Marwa seeks the following orders: -

i. That an order of mandamus do issue from this Honourable Court commanding the respondents to pay the applicant the decretal sum of Kshs. 271,680 together with costs and interest at 14% up to date of payment, being the decretal sum in Migori CMCC No. 36 of 2013;

ii. That the respondents be condemned to pay the costs of this application.

The application is based on five (5) grounds found in statement of facts dated 28/2/2020 and verifying Affidavit of **Francis Monanka** the *ex-parte* applicant sworn on 5/6/2020.

According to the *ex-parte* applicant, he obtained judgment in his favour in **Migori CMCC No. 36 of 2013 Francis Monanka vs Mathias Gitwekere and Kehancha Municipal Council (Predecessor to Migori County Government)** for now a total of Kshs. 271, 680 together with interest.

The *ex-parte* applicant's advocates extracted a certificate of order of costs against the 3rd respondent dated 9/10/2019 which was served upon the Respondents through its legal department on 23/10/2019. Despite the service, the respondents have not made any efforts to make good the *ex-parte* applicant's claim against them and it prompted the filing of this application.

The application is not opposed. Despite being served numerous times, the respondents chose not to participate in these proceedings.

I have duly considered the submissions by the *ex-parte* applicant. He reiterated that he sued the respondents in Migori CMCC No. 36 of 2013 claiming general and special damages arising from an accident which occurred on 13/9/2012 along Kehancha Taranganya Road. The motor vehicle which was driven by one Mathias Gitwekere was owned by Kehancha Municipal Council, the predecessor of the 3rd respondent.

On 25/10/2018 the trial court delivered a judgement in his favour for a sum of Kshs. 180,000 together with costs and interest. The costs were assessed at Kshs.66,480. The *ex-parte* applicant served the 3rd respondent with a decree which it failed to satisfy.

At the time of filing this application, the decretal sum had accumulated to Kshs. 246,480 and interest continues to accrue at court rates of 14% since the date of judgement until the date of payment.

I have considered the application and submissions of the *ex-parte* applicant. It is not in dispute that a judgement was delivered in his favour on 25/10/2018 for Kshs. 180, 000 together with costs and interest at court rates. To support his application, the *ex-parte* applicant has

annexed a certificate of order against the 3rd respondent.

By dint of Section 3 of the Sixth Schedule to the Constitution, the office of the County Secretary under the new Constitution, is the successor of the office of the Town Clerk under the former Constitution who was responsible inter alia, for ensuring compliance with the law and orders of the Court against the former Local Authorities. Under the retired Constitution, proceedings to enforce a judgment of the court by way of Judicial Review were brought against the Town Clerk sometimes jointly with the Local Authority concerned. Under Section 44 of the County Government Act, County Secretary to the County Executive Committee is like a Permanent Secretary in a Ministry of the National Government and is therefore the Accounting Officer.

Section 44(1) of the County Government Act, provides as follows:-

“Section 44 (1) of the County Government Act 2012, There is established for each county, the office of the County, Secretary who shall be secretary to the County Executive Committee. Section 44 (3) provides for the functions of the County Secretary as follows;

- a) Be the head of the county public service;**
- b) Be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of executive committee;**
- c) Convey the decision of the county executive committee to the appropriate persons or authorities; and**
- d) Perform any other functions as directed by the County Executive Committee.”**

Section 45 of the County Government Act establishes the office of the County Officer of Finance which provides as follows;

“ (1) the Governor shall-

- a) Nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and**
 - b) With the approval of the county assembly, appoint county chief officers;**
- (2) The office of a county chief officer shall be an office in the county public service;**
- (3) A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46;**
- (4) The county chief officer shall be the authorized officer in respect of the exercise of the delegated power.”**

The Respondents are in charge of the operations of the Public service and the treasury respectively.

The function of the two officers were considered by J. Nyamweya in **Republic vs County Secretary Nairobi City County and 3 others ex parte Koceyo Advocate (2020) eKLR**. The judge stated this ;-

“Section 44 of the County Government Act in this respect establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service. The Public Finance Management Act, Section 103 of the Public Finance Management Act No. 18 of 2012 also establishes the County Treasury responsible for finance and fiscal matters. Under Section 103 (3) of the Act, the County Executive Committee Member for Finance is the head of Treasury, and is thus the person responsible for finance matters in the County.

This Court therefore finds that arising for these provisions, the 1st, 2nd and 3rd Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the Nairobi City County by virtue of their roles and functions. In addition, the decretal sum due from the Respondents in the present applications has not been disputed, and the Applicant in this respect annexed copies of the judgments and decrees awarded in the various cases that are the subject of this application. The Applicant also annexed copies of the Certificates of Costs issued in its favour, after taxation of its Bills of Costs in the various suits.”

Before an order of Mandamus can issue, the applicant must comply with Section 21 of the Government Proceedings Act. In **Kisya Investments Ltd vs The A. G. (2005) 1KLR 74**, the Court explained why the strict and elaborate procedure under that section has to be followed, that is to allow the Government time to enable it to make arrangements to satisfy of the decree. In this case, the certificate of order was served on the 1st Respondent's on 23/10/2019 by the process server David Odoyo Onyango. It was received and stamped by the 3rd Respondent's Legal Department. Despite the service thereof, and the service of the instant Notice of Motion, there has been no response from the Respondents.

Whether the exparte applicant is deserving of the order of Mandamus: The scope and efficacy of an order of mandamus was discussed by the Court of Appeal in **Republic vs Kenya National Examination Counsel ex parte Gathenji & Others, (1997) eKLR** where it held,

“The next issue we must deal is this; what is the scope and efficacy of an order of mandamus?”

The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

The applicant has demonstrated that he has a judgment against the predecessor of the 3rd Respondent whose functions were taken over by the 3rd Respondent. The 1st and 2nd Respondent are Public Officers charged with settling such claims as the applicant’s. Despite demand, the same remains unpaid. The court therefore issues an order of Mandamus to compel the Respondents to perform their duty to settle the applicant’s claim. The applicant will have the costs of this application.

DATED, DELIVERED AND SINGED AT MIGORI THIS 7TH DAY OF JULY, 2021.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Omwenga holding brief Mr. Marwa for the Ex-Parte Applicant.

No appearance for the Respondents.

Nyauke Court Assistant.