



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E009 OF 2021

IN THE MATTER OF: AN UNSATISFIED JUDGMENT DEBT ARISING FROM

[MOMBASA] HCCC NO.145 OF 2000: HARRY KITULA MUMO VS COUNTY

GOVERNMENT OF MOMBASA AND ANOTHER

AND

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

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

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

CIVIL PROCEDURES RULES, 2010 (ORDER 53)

BETWEEN

REPUBLIC.....APPLICANT

AND

THE COUNTY EXECUTIVE MEMBER IN CHARGE OF FINANCE & ECONOMIC

PLANNING, COUNTY GOVERNMENT OF MOMBASA

THE CHIEF OFFICER FINANCE COUNTY GOVERNMENT OF MOMBASA

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENTS

AND

HARRY KITULA MUMO.....EX-PARTE APPLICANT

RULING

1. The Notice of Motion application before this court is dated 21/5/2021. The application is seeking the following orders:

(a) An order for mandamus directed to the respondents be issued compelling them jointly and/or severally to pay to the

applicant, as per the decree and certificate of costs issued on 07 February 2019 and 28 October 2020 respectively in [MSA]HCCC No.145 of 2000, the following:

- (i) Kshs. 2,000,000/-as general damages;
- (ii) Interest on the sum of Kshs 2,000,000 at 12% per annum from 19 October 2018 until payment in full;
- (iii) Kshs .7,500/-as special damages;
- (iv) Interest on the sum of Kshs 7,500/- at 12% per annum from 29 March 2000 until payment in full; and
- (v) The costs of Kshs .263,692.33/-

(b) The respondents to meet the applicant's costs of this Application.

2. The application is based on the statutory Statement of Facts dated 18/3/2021 and verifying affidavit of Harry Kitula Mumo sworn on the same date.

3. The Applicant's case is that despite service of the decree issued on 7/2/2019 as well as the Certificate of Taxation, Certificate of Order against the Government and Certificate of Order for Costs against the Government all issued on 28/10/2020 in [MSA] HCCC No. 145 of 2000, the Respondents have failed, refused and neglected to pay to the Applicant the following:

i. Kshs .2, 000,000 as general damages;

Interest on the sum of kshs.2, 000,000 at

12% per annum from 19 October 2018 until payment in full;

ii. Kshs.7, 500 as special damages

iii. Interest on the sum of kshs.7, 500 at 12% per annum from 29 March 2000 until payment in full.

iv. The costs of Kshs. 263,692.33

(herein all together referred to as the "judgement debt")

4. It is stated further that the 3rd Respondent enjoys legal immunity from attachment and sale of its property, leaving the Applicant with no other means, other than seeking an order of mandamus, of enforcing the decree issued on 7/2/2019.

The Response

5. The County Attorney filed grounds of opposition dated 7/6/2021 on behalf of the Respondents, and states that the application offends Section 21 of the Government Proceedings Act Chapter 40 Laws of Kenya and that the same is inconsistent with Order 29 of the Civil Procedure Rules 2010.

6. The Respondents further aver that these proceedings are special in nature and are more so procedural in nature and as such the Applicant has failed to fulfil the requirements of Section 21 of the Government Proceedings.

7. The Respondents aver that the application is unfounded, frivolous and vexatious and is a waste of this court's time and urges the court to dismiss the application with costs.

8. The Respondents filed further grounds of opposition dated 2/7/2021 and reiterated their position and added that the Applicant has not fulfilled those requirements captured in section in Section 21 of the Government Proceedings Act specifically the following requirements: -

i. Service of the decree or certificate of taxation upon the accounting officer of the respondent.

ii. Service of any certificate issued or required upon the Hon. Attorney General.

9. It is further argued that the application offends Sections 103 and 104 of the Public Finance Management No.18 of 2012 to the extent that the applicant failed to serve any of the accounting officers with the decree or Certificate of Taxation.

10. The Respondents rely on the case of **Republic v County Secretary, Nairobi City County & Another Ex-Parte Mohamed Tariq Khan [2017] eKLR.**

Submissions

11. The Applicant filed submissions dated 5/7/2021 and raised four issues for determination namely:

- a) **Whether the application by the ex-parte applicant seeking orders of mandamus against the respondents offends Section 21 of the Government Proceedings Act, Cap 40, and Laws of Kenya.**
- b) **Whether the application is inconsistent with order 29 of the civil procedure rules.**
- c) **Whether the notice of motion dated 21 may 2021 is meritorious.**
- d) **Who should pay costs.**

12. Counsel submitted that the Applicant has abided by Section 21 of the Government Proceedings Act because there is no dispute that:

- a) **There are in existence the certificates required by section 21(1) of the government proceedings act.**
- b) **The same –in addition to the decree and the certificate of taxation, were served, on various occasions upon the respondents herein as well as the County Attorney of Mombasa; and**
- c) **Though not a mandatory requirement, the same were also served on the office of the attorney general via registered post.**

13. The Applicant relied on **Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary Ex Parte Salim Awadh Salim & 12 Others [2018]eKLR** and submitted that similarly, in this case the respondents have not provided any reason why the decree has not been satisfied more than three years down the line; that if the court were to decline to grant mandamus, the applicant may be left without an effective remedy despite holding a lawful decree.

14. The Applicant further submitted that they have a lawful decree and certificate of taxation, which was duly served, and that no good grounds have been put forth as to why the respondents have not paid the judgement debt, and that the grounds of opposition lack basis as the ex-parte Applicant has abided by Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules.

15. The Respondents did not file any submissions. Instead their counsel stated that they rely on the grounds of opposition and further grounds of opposition filed herein.

The Determination

16. I have considered the application, the responses herein and the Applicant's submissions and the issues that emerge for determination are:

- a) **Whether the applicant has met the requirements of Section 21 of the Government Proceedings Act**
- b) **Whether the application offends Section 29 of the Civil Procedure Rules**
- c) **Whether the application offends section 103 and 104 of the Public Finance Management Act**

17. The Court in **Susan Wayua v Attorney General & another [2019] eKLR** stated that:

“In my view the Applicant seeks the order of mandamus to compel the Respondents to perform a public duty which has been imposed on them due to their negligence. They have failed to satisfy the decree to the detriment of the Applicant who has a legal right. Justice J. V. Odunga in the case of REPUBLIC VS. ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] EKLR referred to the case of R (REGINA) VS. DUDSHEATH, EX PARTE, MEREDITH [1950] 2 ALL E.R. 741, AT 743, where Lord Goddard C. J. held as follows:

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy... "

The Applicant suffered loss and injury and judgment was entered in their favour. The Respondents failure to comply will be an injustice occasioned to the Applicant. Judge G. V. Odunga in the case of REPUBLIC VS. ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] eKLR referred to the case of REPUBLIC VS. PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EXPARTE FREDRICK MANOAH EGUNZA [2012] eKLR where Githua J stated as follows:

“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, where decrees for the payment of money or costs had been issued 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

18. In the case of **Republic v County Secretary Migori County Government & another [2019] eKLR** the Court held:

“in dealing with the application I have to address my mind to the procedure to be followed in execution of money decrees against government. It is settled that before an order of mandamus is issued the elaborate procedure provided for under Section 21 of the Government Proceedings Act, Cap. 40 of the Laws of Kenya (*hereinafter referred to as ‘the Act’*) and Order 29 of the Civil Procedure Rules must be strictly complied with. For ease of this discussion I hereby reproduce Section 21 of the Act: -

“21(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 required 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.”

19. I have considered the documents annexed in the Applicant’s verifying affidavit sworn on 18/3/2021 and am satisfied that the Applicant has met the requirements of Section 21 of The Government Proceedings Act, and is consistent with Order 29 Of the Civil Procedure Rules 2010. In the instant case the Applicant has demonstrated that he has a judgment against the County Government of Mombasa which the Respondents have failed to satisfy and it is only fair that the Respondents be compelled to perform their duty and pay the Applicant.

20. Accordingly, this application is allowed with costs to the Applicant.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Bhaga for Applicant

No appearance for Respondents

Ms. Peris Court Assistant