



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 158 OF 2019

IN THE MATTER OF AN APPLICATION BY WAYRREN

ENTERPRISES LIMITED FOR AN ORDERS OF *MANDAMUS*

AND

IN THE MATTER OF MILIMANI CMCC NO. 5590 OF 2018

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT

REPUBLIC.....APPLICANT

AND

THE COUNTY SECRETARY, NAIROBI CITY COUNTY.....1STRESPONDENT

CHIEF OFFICER, FINANCE/COUNTY TREASURER,

NAIROBI CITY COUNTY.....2NDRESPONDENT

AND

WAYRREN ENTERPRISES LTD.....EX PARTE APPLICANT

JUDGMENT

Introduction

1. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. The applicant's obtained a court decree in its favour against the Nairobi County Government in Nairobi CMCC No. 5590 of 2018, *Wayrren Enterprises Limited v Nairobi City County Governments* on 14th December 2018. A copy of the decree and Certificate of Costs issued on 23rd January 2019 is annexed to the application seeking leave.

2. The applicant served a Notice of Entry of judgment upon the Nairobi City County Government on 3rd May 2019 demanding the decretal sum of Ksh. 7,639,055.85 but the same was not paid.

The application

3. The applicant approached this court on 17th May 2019 seeking leave to apply for judicial review orders of *mandamus* to compel the Respondents to satisfy the decree and certificate of costs together with interests and costs of this application.

4. Leave was granted on 28th May 2019 and the applicant filed the substantive application on 30th May 2019. The application is founded on three grounds, namely, that the judgment and decree against the Respondents remains unsatisfied, that the Respondents are not willing to satisfy the said decree, and, that the applicant seeks the orders so as to enjoy the fruits of the judgment.

Respondents' grounds of opposition

5. The Respondents filed grounds of opposition dated 1st July 2019 stating that they were never served with any pleadings, entry of judgment and Certificate of Costs or decree. They also state that the Certificate of Costs and decree were never served upon the Attorney General contrary to section 21 (1) (2) of the Government Proceedings Act. [1] In addition, they state that the interest claimed has been overstated by applying 25% as opposed to 14% provided in section 27(2) of the Civil Procedure Act. [2]

Applicant's advocates' submissions

6. Mr. Ondabu, counsel for the applicant submitted that the applicant has no other way of enforcing the decree, and, that, *mandamus* is the only available option. He cited *Nduku Mutiso v County Secretary, Nairobi City County & 2 Others* [3] in support of his argument that the application satisfies the tests for granting the orders of *mandamus*.

The Respondent's Advocates' submissions

7. The Respondents' counsel cited *John Mining Temoi & Another v Governor of Bungoma County & 17 Others* [4] for the proposition that the applicant upon obtaining the decree slept on its rights by not serving the respondent with a Notice. He submitted that the applicant never served the Certificate of Costs and Decree as required by section 21 (1) (2) of the Government Proceedings Act. [5]

8. In addition, counsel argued that the interest claimed has been overstated by applying 25% as opposed to 14% provided under section 27(2) of the Civil Procedure Act. To buttress his argument counsel cited *Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others*. [6]

Determination

9. I find it necessary to address the legal competence of this application, an issue both advocates did not address despite its relevancy and importance. This warrants an examination of the provisions of section 21 of the Government Proceedings Act [7] and Order 29 Rule (2) & (4) of the Civil Procedure Rules, 2010.

10. Section 21 of the Government Proceedings Act [8] provides as follows:-

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:*

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.*

11. The above section has been the subject of interpretation by our superior courts. In *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manohah Egunza* [9] the High Court expressed itself 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....” [Emphasis mine].

12. Order 29 Rule 3 of the Civil Procedure Rules, 2010 provides for the application for a certificate under section 21 of the Government Proceedings Act^[10] in the following words:-

“Any application for a certificate under section 21 of the Government Proceedings Act (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of form Nos. 22 and 23 of Appendix A with such variation as circumstances may require.”

13. As correctly observed in *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* (supra), the Certificate of Order against the Government is not only a requirement but it is also a condition precedent to the satisfaction or enforcement of decrees issued against the Government. Section 21 of the Government Proceedings Act^[11] provides that the Certificate of Order against the Government should be issued by the court after the expiry of 21 days from the date of entry of the judgment. Once the Certificate of Order against the Government is served, 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 thereto.

14. In the instant case, the applicant only annexed a copy of the Decree and Certificate of Costs marked as exhibit BA-6 annexed to the substantive application and a Notice of Entry of judgment. In fact, there is no mention at all in the application whether the Certificate of Order against the Government was obtained and served as provided under the said section. There is a difference between the decree and certificate of costs and the Certificate of Order against the Government referred to in section 21 of the Government Proceedings Act^[12] and Order 29 Rule 3 of the Civil Procedure Rules.

15. The omission to obtain and serve the Certificate of Order against the Government as dictated by the above provisions renders the instant application pre-mature and unsustainable. The Respondents cannot be compelled to pay the decretal sum before the pre-requisites are met. Differently put, the applicants has failed to satisfy the very first test for *mandamus* to issue that is the existence of a duty to pay. My reading of section cited above is that it is peremptory for the Certificate of Order against the Government to be served before an enforcement action such as the *mandamus* sought in this application is sought.

16. Accordingly, I dismiss the applicants’ application dated 30th May 2019 with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 17th day of January 2020

John M. Mativo

Judge

^[1] Cap 40, Laws of Kenya.

^[2] Cap 21, Laws of Kenya.

^[3] {2019} e KLR.

^[4] {2014} e KLR.

^[5] Cap 40, Laws of Kenya.

[6] {2018} e KLR.

[7] Cap 40, Laws of Kenya.

[8] Ibid.

[9] {2012} e KLR.

[10] Cap 40, Laws of Kenya.

[11] Ibid.

[12] Cap 40, Laws of Kenya.