



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. 10 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

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

AND IN THE MATTER OF ELC CASE NO. 227 OF 2014

REPUBLIC.....APPLICANT

-VERSUS-

THE COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

COUNTY SECRETARY, COUNTY

GOVERNMENT OF UASIN GISHU.....2ND RESPONDENT

JEDROM BUILDING AND CIVIL ENGINEERING.....EX PARTE APPLICANT

RULING

[1] The Notice of Motion dated 22 November 2018 was filed herein by the *ex parte* Applicant, **Jedrom Building and Civil Engineering Ltd** (hereinafter the Applicant), pursuant to **Sections 3 and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; Sections 8 and 9 of the Law Reform Act, Chapter 22 of the Laws of Kenya; and Order 53 of the Civil Procedure Rules** for orders that:

[a] the Court be pleased to grant an Order of Mandamus directed to the Respondents, their agents, servants and officers compelling them to comply by paying the Applicant a sum of **Kshs. 8,664,000/=** (Eight Million Six Hundred and Sixty-Four Thousand), which arises from **Kshs. 4,000,000/=** (Four Million) ordered to be paid from **29 September 2014** at 12% interest per annum together with loss of income of **Kshs. 56,000/=** per month from the time of filing suit till settlement in full; being the amount owed in respect of the summary judgment awarded against the 1st Respondent in the Environment and Land Court at Eldoret in **Eldoret ELC Case No. 227 of 2014.**

[b] That the costs of the application be borne by the Respondent.

[2] The application was premised on the grounds that the Applicant and the 1st Respondent were the Plaintiff and Defendant, respectively, in **ELC No. 227 of 2014**; and that summary judgment was entered therein against the 1st Respondent for the liquidated sum of **Kshs. 4,000,000/=** and for loss of income of **Kshs. 56,000/=** to be paid per month till full settlement together with interest and costs of the suit. The Applicant further averred that no appeal has ever been lodged against the summary judgment and that as at the time of filing this application, the amount due stood at **Kshs. 8,664,000/=**. Thus, it was prayed that, since the 1st Respondent is a public body, the 1st Respondent's property is immune to execution by way of attachment and sale; and that despite demand having been made, the Respondents have declined to settle the judgment debt, yet the 2nd Respondent is obliged by law to promptly settle the claim.

[3] In the Affidavit Verifying the Facts, sworn by **William Kipkorir Kipkirui**, the Applicant explained that, following threats to its ownership of property known as **Eldoret Municipality Block 10/2052** (hereinafter, "the Suit Property"), the Applicant moved the Environment and Land Court and was granted an injunction in **Eldoret ELC Case No. 227 of 2014**. That, in disregard of the order, and in

contempt of court, the 1st Respondent proceeded to destroy the Suit Property, valued at **Kshs. 4,000,000/=** and thereby obliterated the income of **Kshs. 56,000/=** that the Applicant was earning therefrom.

[4] It was on account of the destruction that the Applicant amended its **Plaint in Eldoret ELC Case No. 227 of 2014** to reflect the loss flowing from the 1st Respondents illegal acts; and thereupon obtained summary judgment in its favour on **24 July 2017**. A copy of the Ruling and Order were annexed to the affidavit and marked **Annexures WKK3(a) and (b)** thereto. The Applicant also exhibited a copy of the demand made by it for payment as well as a response thereto by the 1st Respondent, requesting for more time to enable it deliberate on the issue and provide feedback to the Applicant. It was the assertion of the Applicant that, since then, the Respondents have failed to pay the sums due to it in spite of its several promises; and therefore that it was constrained to file these proceedings to enable it enjoy the fruits of its judgment.

[5] The Respondents opposed the application; and to that end they filed Grounds of Opposition dated **3 April 2019** contending that:

- [a] the application is frivolous, vexatious and an abuse of the court process;
- [b] the Applicant has not demonstrated valid grounds to deserve the orders sought;
- [c] the application does not meet the requisite standards under **Section 8 and 9** of the **Law Reform Act** for granting the orders sought;
- [d] the amount of **Kshs. 8,664,000/=** sought by the Applicant has no factual basis;
- [e] the loss of income calculated in the amount of **Kshs. 56,000/=** per month by the Applicant is untrue; and
- [f] that the application is misconceived, untrue and an abuse of the court process.

[6] The application was canvassed by way of written submissions, pursuant to the directions issued herein on **3 April 2019**, and for the Applicant, **Mr. Kariuki** pitched the argument that there exists no other means of compelling the 1st Respondent to perform the decree issued by the Environment and Land Court; and therefore that the only option available to the Applicant is the remedy of Mandamus. He added that the Applicant has the right to enjoy the fruits of its Judgment without undue delay and cited **Article 159(2)(a) and (b)** of the **Constitution of Kenya** and **Republic vs. Town Clerk of Webuye County Council & Another** in support of his submissions. He also relied on **Miscellaneous Civil Application No. 207 of 2015 (JR): Danson Mwangi Kiawano vs. County Secretary, Nairobi City County and Republic vs. The County Secretary, Machakos County Government, Ex Parte Veteran Pharmaceuticals Ltd** wherein the remedy of Mandamus was issued to compel payment in similar circumstances.

[7] On behalf of the Respondents, it was submitted that the application falls short of the mandatory requirements of the law; in that not only has the Applicant failed to attach a copy of the decree and certificate of costs sought to be executed, it has also failed to comply with the requirements of **Section 21** of the **Government Proceedings Act, Chapter 40** of the **Laws of Kenya**. **Mr. Kamau**, learned Counsel for the Respondent also submitted that there was failure on the part of the Applicant to adhere to the explicit requirements of **Sections 8 and 9** of the **Law Reform Act, Chapter 8** of the **Laws of Kenya**. He accordingly urged the Court to find the application incompetent and to dismiss it with costs.

[8] Having given due consideration to the application and the documents filed therewith as well as the response made by the Respondents, it is common ground that the Applicant had filed a suit before the Environment and Land Court against the 1st Respondent, being **Eldoret E&L Case No. 227 of 2014: Jedrom Building and Civil Engineering Ltd vs. County Government of Uasin Gishu**. Initially, the suit was for a permanent injunction to restrain the 1st Defendant, who is the 1st Respondent herein, from interfering with his occupation of the suit premises. There is sufficient proof that the Applicant even successfully applied for and obtained a temporary injunction to preserve the *status quo* pending the hearing and determination of the suit, and that the 1st Defendant, in utter disregard of the Court Order, proceeded to demolish the suit premises.

[9] It was on account of that destruction that the Applicant amended its **Plaint in Eldoret E&L Case No. 227 of 2014** to reflect the loss suffered by it on account of the 1st Respondents subsequent acts. The Amended **Plaint** was exhibited herein as an annexure to the Applicant's affidavit, and it was marked **Annexure WKK2**. There is also sufficient proof that thereafter, summary judgment was entered in the Applicant's favour on **24 July 2017**. A copy of the Ruling and Order were annexed to the Applicant's affidavit and marked **Annexures WKK3(a) and (b)** thereto. In effect therefore, the Applicant has demonstrated that it has judgment in its favour against the 1st Respondent, which judgment has not been satisfied since **24 July 2017**. Thus, the contention by the Respondent that no decree was extracted for execution as required by **Order 21 Rule 8(2)** of the **Civil Procedure Rules** is plainly untenable.

[10] Moreover, the Applicant has demonstrated that the Respondents were, at all times material to this dispute, aware of the judgment but made no attempt to challenge it by way of review or appeal. The Applicant also exhibited a copy of the demand it made to the 1st Respondent as well as a response thereto by the 1st Respondent, by which the 1st Respondent requested for more time to enable it deliberate on the issue and provide feedback. It is plain, therefore, that the assertion by the Applicant that, since then, the Respondents have deliberately failed to pay the sums due to it in spite of several promises, remains unrefuted. In the premises, it is understandable that the Applicant felt constrained to file these proceedings to assert its right to the fruits of its judgment, granted the provisions of **Section 21(4)** of the **Government Proceedings Act**, which shield county governments such as the 1st Respondent from execution by way of attachment and sale of its property.

[11] Needless to say that Mandamus is a relief available to litigants under **Article 23(3)(f)** of the Constitution and **Order 53** of the **Civil Procedure Rules**. Its scope was well explicated in **Halsbury's Laws of England, 4th Edition, Volume 1** thus:

"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..."

[12] In the premises, I entertain no doubt at all that the remedy sought is warranted; as otherwise, the Applicant would be left at the mercy and whims of the Respondents as to when and whether his decree would come to fruition. Hence, I entirely agree with the sentiments expressed by **Hon. Odunga, J.** in **Republic vs. the Attorney General & Another, Ex parte James Alfred Keroso** that:

"...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya..."

[13] Thus, the twin issues for determination herein have to do with **compliance** and the **competence** of the application from the standpoint of **Sections 8 and 9** of the **Law Reform Act**, and **Section 21** of the **Government Proceedings Act**. In this connection **Order 53 Rule 1** of the **Civil Procedure Rules** provides thus in sub-rules (1), (2) and (3):

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

[14] In this matter, there was compliance with the aforesaid provision and a copy of the order granting leave was annexed to the Applicant's affidavit and marked **Annexure WKK6**. It shows that an application for leave was made and that leave was granted to the Applicant on **15 November 2018** to commence these proceedings; which proceedings were promptly filed on **26 November 2018**. I therefore find no merit in the Respondent's argument that these proceedings were filed in contravention of **Sections 8 and 9** of the **Law Reform Act**.

[15] The Respondent's second line of argument was that, since there was failure on the part of the Applicant to comply with **Section 21** of the **Government Proceedings Act**, the orders sought cannot issue. **Section 21(1) and (2)** of the **Government Proceedings Act** provides:

"(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."

[16] Subsections (3) and (4) of Section 21 of the **Government Proceedings Act**, on the other hand provides:

"(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.”

[17] Thus, the Applicant was under obligation to cause a certificate to issue in the prescribed form for service on the Attorney General as provided for in **Section 21** aforementioned for purposes of payment after the expiration of 21 days of the issuance of the order in issue. That order was issued on **20 September 2017**. There is no indication that **Section 21(1)** of the **Government Proceedings Act** aforesaid was complied with as no copy of such certificate, if any, was annexed to the Applicant’s affidavit for the Court’s consideration. In the premises, and granted the peremptory nature of **Section 21(4)** of the **Government Proceedings Act**, it would follow that the instant application is premature.

[18] In **Newton Gikaru Githiomi & Another vs. Attorney General [2015] eKLR**:

“It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative and public inconvenience or where the object for which the application is made has already been realized.”

[19] In the same vein, it was held in **Republic vs. Attorney General & Another, Ex Parte Stephen Wanyee Roki [2016] eKLR**:

“...the Court only compels the satisfaction of a duty that has become due. In other words, where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass...”

[20] In the premises, it is my finding that, in the absence of a Certificate of Order as provided for in **Section 21** of the **Government Proceedings Act**, this application for mandamus is premature, and is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY, 2020

OLGA SEWE

JUDGE