



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL NO. 74 OF 2016

EUNICE MAKORI & HELLEN MAKONE

(the administrators and personal representative of the estate of

JOHNSON ONDUKO MAKORI.....APPLICANTS

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

1. This ruling is the outcome of two applications. The first application is the motion dated 4th October 2019 taken out by the applicants in which they seek for the following orders:

- i) This application be certified as urgent and the same be listed for inter partes hearing on a priority basis.**
- ii) The Warrants of arrest given on 24th November 2016 against the Principal Secretary, Ministry of Defence be re-issued.**
- iii) Such other further orders and directions be given as the court shall deem it just and expedient.**
- iv) The costs of this application be borne by the Respondent**

2. The motion is supported by the affidavit of Eunice Makori. When served with the motion, the Respondent filed the replying affidavit of A.M Mate to resist the application.

3. The second application is the motion dated 7th November 2019 taken out by the Respondent in which he sought for the following orders

- i) The Application herein be certified as urgent , and service thereof be dispensed with in the first instance;**
- ii) There be a Stay of re issuance of warrants of arrest of the Principal Secretary Ministry of Defence and Execution of the Judgment delivered on 19th June 2015 by Hon. Justice H.P G Waweru and Decree issued on 21st July 2015 in HCCC No. 168 in the suit herein pending the hearing and determination of this Application inter-parties;**
- iii) There be a Stay of the Ruling issued on 27th September 2019 in the suit herein pending the hearing and determination of the Defendant/Applicant's intended Appeal;**
- iv) The costs of this Application be provided for.**

4. The motion is supported by the affidavit of Alice A. Mate. The applicant filed the replying affidavit Hellen Makone to oppose the application.

5. When the two applications came up for inter parties hearing, it was directed that the same be conversed together by way of written submissions. I have considered the grounds stated on the face of each motion together with the facts deponed in the affidavits filed in the support and against the applications. I have also considered the rival written submissions.

6. I think it is appropriate at this juncture to set out the background of this dispute. By a deed of surrender dated 16th June 2006, one John Onduko Makori now deceased surrendered parcels of land known as L.R NO 5002/3 (Title No CR 34267) and L.R No 5002/4 (Title No CR

3426) to the Government of Kenya for purposes of expansion of the Kenya Navy Base in Mombasa at a consideration of Ksh. 9,200,000/=.

John Onduko Makori passed on before he was paid the aforesaid consideration.

7. The applicants who are the administratrixes of the estate of John Onduko Makori, deceased were prompted to file Nairobi H.CCC No 168 of 2009 to recover the aforesaid sum.

8. The suit was heard and determined in favour of the Plaintiffs by Hon. Mr. Justice Hatari Waweru vide his judgment delivered on 19th June 2015. The applicants filed these judicial review proceedings seeking to compel the Respondent to satisfy the decree vide this matter (i.e Nairobi H.C Misc. Application No 74 of 2016).

9. The Respondent filed motion dated 22/3/2018 and sought to have the execution proceedings to be stayed and for an order of review and or setting aside of the Judgment of Justice Hatari Waweru. This court heard and eventually dismissed the aforesaid motion vide the ruling delivered on 27th September 2019. Arising out of this court's decision the parties were prompted to file the aforesaid two applications, the subject matters of this ruling.

10. After a careful perusal and consideration of the two applications, I think it is reasonable to treat the Respondent's motion dated 7th November 2019 as a response to the applicants' motion dated 4th October 2019. I have already set out the sort of orders each party is seeking in their respective applications. In the motion dated 4/10/2019, the applicants are basically seeking for re-issuance of warrants of arrest to have the Principal Secretary, Ministry of Defence apprehended and brought to this court to be punished for failing to satisfy the decree in his capacity as the accounting officer of the Ministry of Defence. The Applicants have argued that the accounting officer has blatantly refused to settle the decree hence the need to issue the orders sought.

11. In response to the application, the Respondent argued that the warrants being personal cannot be issued against Dr. Ibrahim Mohammed, the current Principal Secretary, Ministry of Defence because he was recently posted to the ministry to replace Ambassador Kirimi Kaberia who was transferred to another Ministry. In short, it is the argument of the Respondent that the initial warrants were personally directed at Ambassador Kirimi Kaberia hence the same cannot be reissued against Dr. Ibrahim Mohammed.

12. The Respondent in his application sought for a stay of reissuance of warrants of arrest pending appeal. It was pointed out that the Respondent seeks to impugn on appeal the decision of this court delivered on 27/9/2019 dismissing the Respondent's motion dated 22/3/2018. The Respondents sought for an order of stay of execution of the decree issued vide H.CCC no 168 of 2009.

13. In response to the Respondent's submissions and application the applicants pointed out that the Respondent has not challenged the judgment of Justice Hatari Waweru hence he is not entitled to any order of stay of execution. It is also argued that this court's order dismissing Respondent's application is not an order capable of being executed hence no order of stay can be issued. It is also pointed out that an order for stay of execution of the decree can be only sought in Nairobi HCCC No 168 of 2009 and not through these proceedings.

14. The issue which must be determined is whether the applicants are entitled to be issued with the warrant of arrest. It is not in dispute that Judgment in the sum of Ksh. 9,200,000/= was made in favour of the estate of John Onduko Makori deceased. It is also not in dispute that the aforesaid Judgment has not been challenged on appeal.

15. The Respondent has filed a notice of appeal seeking to challenge this court's ruling delivered on 27th September, 2019 whereof this court dismissed the Respondent's application which had sought to have the Judgment of Justice Hatari Waweru delivered on 19/6/2015 reviewed and set aside. There is no evidence that the Respondent has obtained leave to challenge the aforesaid Judgment. There is further no dispute that the decree has not been satisfied.

16. The Applicants have successfully obtained orders mandamus vide these proceedings to compel the accounting officer of the ministry of Defence to pay the decretal sum. In fact the court record shows that court had previously issued the applicants with warrants of arrest to have the accounting officer of the Ministry of Defence apprehended and punished for failing to settle the decretal sum.

17. The Respondent has argued that the warrants of arrest were personal and directed at Ambassador Karimi Kabaria, the former Principal Secretary.

18. With respect, I am not persuaded by the arguments put forward by the Respondent. In as much as the warrants of arrest are directed at the individual holding the office of the Principal Secretary Ministry of Defence, it is clear in my mind that when a reshuffle of principal Secretaries occur, the applicants are entitled to apply to amend the warrants of arrest to reflect the name of the new holder of that office. If this court were to entertain the argument put forward by the Respondent, then it will mean that the warrants of arrest would still be effected against the named Principal Secretary whenever he/she is transferred to.

19. In sum, the warrants will always be directed at the current holder office as the accounting officer of the Ministry. I am convinced that the Applicants are entitled to the orders sought in the motion dated 4th October 2019. Consequently, prayer 2 of the aforesaid motion is granted so that the warrants of arrest are reissued as against the current holder of the office of the Principal Secretary, Ministry of Defence.

20. Having failed to appeal against the Judgment of Justice Waweru delivered on 19th June 2015, there is no basis to grant the orders sought in the motion dated 7th November 2019. It is apparent that this court's ruling dismissing the Respondent's motion dated 22nd March 2018 is not a decision capable of being executed hence there is nothing to stay execution of.

21. In the end, the motion dated 4th October 2019 is allowed in terms of prayer 2 as proposed herein above with costs to the applicant. The motion dated 7th November 2019 is found to be without merit, hence, it is dismissed with costs to the applicants.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 6th day of May, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendant