



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

JUDICIAL REVIEW APPLICATION NO. 8 OF 2017

IN THE MATTER OF AN ORDER OF MANDAMUS AGAINST 1ST AND 2ND

RESPONDENTS OF THE COUNTY GOVERNMENT OF KAKAMEGA

AND

IN THE MATTER OF SECTION 44(1) OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND SECTION 59 OF THE URBAN AREAS AND CITIES ACT NO 13 OF 2011 ARTICLE 156, 176

OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

REPUBLIC.....APPLICANT

VERSUS

JACINTA ALUOCH ODHIAMBO,

COUNTY SECRETARY (KAKAMEGA COUNTY).....1ST RESPONDENT

GEOFFREY NAFUKO Omutayi,

CHIEF OFFICER/TREASURER (KAKAMEGACOUNTY).....2ND RESPONDENT

EXPARTE: VINCENT CHOKAA T/A V CHOKAA & CO ADVOCATE

RULING

1. The application herein is by way of a notice of motion dated 3rd December 2019 by the ex-parte applicant/advocate seeking for orders of mandamus to the respondent to perform their duty and pay the firm of Chokaa & Co Advocates the sum Ksh 8,791,507/=and interest therein at 14% per annum from 26th September 2019.
2. The applicant relies on the grounds on the face of the application to wit:-
 1. That judgment was entered in favour of the applicant against the County Government of Kakamega on 20th September 2019.
 2. That the 1st and 2nd respondents are the accounting officers of the County Government of Kakamega but have failed to satisfy the decree issued in favour of the applicant issued on the 7th October 2019.
 3. That the respondents have withheld payment of the decretal sum to the applicant without lawful justification.
 4. That the respondents have acted and continue to act in contravention of the law by withholding the judgment sum instead of

performing their public duty to pay the applicant the decretal sum.

3. The application is supported by the affidavit of the applicant in which he states that in the years 2007 to 2008 the predecessor of the County Government of Kakamega, i.e, the Municipal Council of Kakamega engaged his services as an advocate but failed to pay him. That he had the bills taxed that amounted to Ksh 8,791,507/= and together with interests now stands at Ksh 13,713,750 /=. That he demanded the same from the County Government of Kakamega who refused to pay. He prayed for the application to be allowed.

4. The respondents opposed the application by way of a replying affidavit. They acknowledged the existence of the decree but however state that they have since filed an appeal against the decree. That the appeal has high chances of success. 5. Counsel for the respondents submitted that the application is premature as there are clear laid down procedures in which debts owed by the previous Municipal Council ought to be paid. They relied on the case of Kisumu Court of Appeal No 14 of 2015.

Determination -

6. The applicant seeks for orders of mandamus in a bid to execute a money decree against the County Government of Kakamega. The issue for determination is whether the applicant has met the threshold to warrant this court to grant the prayer sought.

7. The applicable law on execution proceedings against the national and county governments is Section 21 of the Government Proceedings Act that provides that:-

“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.”

8. In **Republic –V- County Secretary Migori County Government & Another [2019] eKLR** Mrima J. cited the case of **Permanent Secretary Office of the President Ministry of Internal Security & Another Ex parte Nassir Mwadhigi (2014) eKLR** where Odunga J. stated the following on the matter: -

“33...It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See **The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs The Brecknock and Abergavenny Canal Co. 111 ER and R vs. The Bristol and Exeter Railway Co 114 ER 859.**

34....The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.....”

9. From the above, it is clear that before one can file an application for mandamus, they have to comply with the provisions of Section 21 of the Government Proceedings Act and obtain a Certificate of Order.

10. The procedure of obtaining the certificate of order is prescribed under **Order 29 Rule 3 of the Civil Procedure Rules, 2010** which provides for the application for a certificate under section 21 of the Government Proceedings Act 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.”

11. It has to be noted that where there is a pre-requisite to be met before an order of mandamus can issue, the same cannot issue unless the condition is complied with. In the case of **Republic –Vs- County Government of Uasin Gishu & Another Ex Parte Jedrom Building and Civil Engineering [2020] eKLR** Osewe J. cited the case of **Republic –Vs- Attorney General & Another, Ex Parte Stephen Wanyee Roki [2016] eKLR** where it was held that:-

“...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...”

12. In the instant application, the applicant has annexed copies of the decree, certificate of cost and demand letters. He has not attached the certificate of order against the government. An application for Mandamus can only be made after obtaining the certificate of order. In the absence of the said certificate of order, the application herein is premature. The application is accordingly dismissed with costs to the respondents.

Delivered, dated and signed at Kakamega this 5th day of June, 2020.

J. N. NJAGI

JUDGE

Representation:

By consent of Mr. Chokaa through e-mail for Applicant

By consent of Mr. Chokaa through e-mail for Respondents

Applicant - Absent

Respondents - Absent

Court Assistant - Polycap

30 days right of appeal.