



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 69 OF 2018

IN THE MATTER OF: AN APPLICATION OF ORDER OF MANDAMUS AGAINST THE 1ST AND 2ND RESPONDENTS OF THE COUNTY GOVERNMENT OF MOMBASA

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

BETWEEN

V. CHOKAA & COMPANY ADVOCATES..APPLICANT

AND

1. COUNTY SECRETARY (MOMBASA COUNTY)

2. CHIEF FINANCE OFFICER/COUNTY TREASURER

(MOMBASA COUNTY).....RESPONDENTS

RULING

1. By a Notice of Motion herein dated 5/3/2020 the Applicant prays for the following orders:

(i) That this Honourable Court be pleased to certify this application as urgent and that it be heard ex parte on the ground, inter alia, that execution of the order passed herein on the 16/1/2020 against the Respondents/Applicants is imminent. In the event of the execution of the said order the Respondents/Applicants would suffer irremediable harm as the liberty of persons is at stake.

(ii) That pending the inter partes hearing and determination of this application, this Honourable court be pleased to stay the order delivered on 16/1/2020 and the Arrest Warrants dated 11/10/2019.

(iii) That after inter partes hearing this Honorable Court be pleased to review, vary, set aside and/or discharge the order delivered on 16/1/2020 and the Arrest Warrants dated 11/10/2019.

(iv) That the costs of this application be in the cause.

2. The application is premised on the grounds set out therein and is supported by affidavit of Jimmy Waliaula sworn on 6/3/2020. The Applicant's case is that the Respondents/Applicants were not given an opportunity to be heard considering the fact that they have a pending Application before this Court dated **2nd December 2020** which is yet to be determined; that Contempt of Court proceedings are quasi-criminal in nature and the minimum threshold would have been to guarantee the Respondents an opportunity to be heard before condemning them unheard; that the matter was to be mentioned on 4/3/2020 for the Respondents/Applicants to confirm settlement, or any further communication with regards to settling the alleged judgement debt; that there was a Constitutional Petition filed by the County Government of Mombasa with respect to debts emanating from the times of Municipal Council of Mombasa, being Constitutional Petition No. 4 of 2020; County Government of Mombasa – Versus – The National Treasury & 2 others, whereby the County Government of Mombasa moved the

court to enable the National Treasury to set aside and/or make payments to claims arising from times of Municipal Council of Mombasa; that the Court on 20/2/2020 in its ruling, ruled that both the County Government of Mombasa and the National Treasury should first pursue mediation to resolve the dispute as to the accrued Municipal debts; that the Constitutional Petition No. 4 of 2020 shall be mentioned 60 days from 20/2/2020 to confirm the position of the Mediation process and/or any settlement as between the County Government of Mombasa and the National Treasury and the Hon. Attorney General; that bearing in mind the alleged Judgement debt emanated from legal fees allegedly owed by the Municipal Council of Mombasa, the mediation process as captured in Constitutional Petition No. 4 of 2020; County Government of Mombasa – Versus – The National Treasury & 2 Others, has a bearing on this suit; that the delay in payment to the Applicant/Respondent was due to lack of funds; that the only misgiving or set back that the Respondent/Applicant suffers at this stage is that it cannot advance any payments to the Applicant/Respondent until on or after the National Treasury's decision to halt financial disbursements be suspended, reviewed and/or revoked; that it is therefore necessary for the Respondent/Applicant to move this Court through this Application to seek indulgence and redress in ensuring this matter is concluded amicably by virtue of the Court's guidance; that payment of the full amount would not be possible considering this is a Government, 2nd tier in nature and it is subjected to budgetary allocations and guided by the Public Finance Management Act; that the Respondent/Applicant has not refused to pay the Applicant/Respondent the decretal amount; however the only challenge is that there is a procedure to be followed particularly the identification, verification and validation by the Intergovernmental Technical Relations Committee pursuant to the Transition to Devolved Act 2012; that in the interests of justice, the said Order issued on 16th January 2020 be stayed in order for parties to amicably settle this dispute as Warrants of Arrest as against the Respondent/Applicant's public officer does not provide an equal level playing field for negotiations and that indulgence from this Court is important as it is the only avenue left for the lifting and/or staying of Warrant of Arrest issued on 11th October 2019 for the protection of the rights of the Public Officers.

3. The motion is opposed by Replying Affidavit of Vincent Chokaa sworn on 6/4/2020 and on the following grounds:

- (a) There are no reasons to review or set aside the orders made on the 11/10/2019 or 16/1/2020.
- (b) The Orders/Judgment set to be affected by the orders sought in the application were all by consent.
- (c) There is inordinate and unreasonable delay to the complain about the Judgment and/Orders made in the matter.
- (d) Constitutional Petition No. 4 of 2020 no longer exists and has no relevance to this Judicial Review application.
- (e) The application is an abuse of the court process.

4. Parties filed submissions which I have considered. In my view, the file before me has sufficient information and record to enable me determine the application, together, of course, with the parties' pleadings and submissions. The application seeks to set aside the order made by this court on 16/1/2020. The proceedings on 16/1/2020 were as follows:

“Mr. Tajbhai:

We have not yet been able to satisfy the debt. We ask for 14 days to enable my client make payments.

HON. E. K. OGOLA

JUDGE

Mr. Manguro:

We do not oppose the 14 days.

HON.E. K. OGOLA

JUDGE

Court:

This matter will be mentioned on 4/3/2020. The Respondent is given enough time to satisfy the debt. After 4/3/2020 the warrants shall be executed if there shall be no settlement.

HON. E. K. OGOLA

JUDGE

16/01/2020”

5. It is that part of the order which states that *“After 4/3/2020 the warrants shall be executed if there shall be no settlement”* that the application herein seeks to set aside, together with the said warrants.

6. It is important to note, firstly, that the Judgment leading to execution herein was as a result of the consent by all the parties. However, the Respondent failed to settle the debt, causing the Ex parte Applicant to seek orders for mandamus which was granted. Upon the grant of order of mandamus, the parties again committed to a consent to settle the matter, and on 17/12/2019 Mr. Tajbhai, learned counsel for the Applicant herein submitted to the court that they had made some payments towards the decree. Counsel asked for a further mention, which court granted on 16/1/2020. On 16/1/2020 Mr. Tajbhai informed the court that they had not yet fully paid the decree. Counsel asked for 14 more days, and the court granted more than that ending on 4/3/2020 but with the rider that if by that date there should be no settlement, the Ex parte Applicant should be at liberty to execute the warrants.

7. It is clear that the Applicant herein did not pay the debt. However, on 6/3/2020 Mr. Tajbhai filed the current application in which the Applicant attempts to provide a completely different history of the matter, alleging things which ought to have been canvassed in the trials leading to the decretal awards. In this current narration the Applicant selectively forgets that in the matter before the court orders have solely been based on consent, and part payments of the decree have been made.

8. It is therefore my considered view that the application herein is a grave abuse of the process of this courts, is an attempt to change the cause of proceedings, is brought in bad faith, and has no legal legs to stand on.

9. I dismiss the application with costs to the Respondent.

Dated, Signed and Delivered in Mombasa this 14th day of July, 2020.

E. K. O. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Tajbhai for Applicant

No Appearance for Respondent

Mr. Kaunda Court Assistant