REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D.K. Kemei - J

JUDICIAL REVIEW APPLICATION NO. 260 OF 2019

IN THE MATTER OF: AN APPLICATION FOR MANDAMUS

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT

CHAPTER 26 OF THE LAWS OF KENYA

IN THE MATTER OF: ORDER 53 OF CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC.....APPLICANT/RESPONDENT

VERSUS

COUNTY SECRETARY, GOVERNMENT

OF MACHAKOS COUNTY.....1ST RESPONDENT/APPLICANT

COUNTY EXECUTIVE COMMITTEE MEMBER

FOR FINANCEGOVERNMENT

OF MACHAKOS COUNTY.....2ND RESPONDENT/APPLICANT

CHIEF OFFICER FINANCE, GOVERNMENT

OF MACHAKOS COUNTY.....3RD RESPONDENT/APPLICANT

CHIEF OFFICER, DEPARTMENT OF HEALTH

& EMERGENCY SERVICES.....4THRESPONDENT/APPLICANT

THE GOVERNOR, GOVERNMENT OF

MACHAKOS COUNTY.....5TH RESPONDENT/APPLICANT

GOVERNMENT OF

MACHAKOS COUNTY.....6TH RESPONDENT/APPLICANT

AND

***Exparte* MEDIONICS HEALTH CARE LIMITED**

RULING

1. This ruling is in respect of two applications; the first is dated 12.11.2019 and the 2nd is dated 11.6.2020 that arise from the Order of the High Court in High Court Judicial Review Application No.260 of 2019 passed on 24.9.2019.

2. The background to the instant application is that the respondent was an applicant in this court by way of notice of motion dated 1.8.2019, brought under *section 8 and 9 of the Law Reform Act CAP 26, Laws of Kenya,* Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules and all enabling provisions of the law. It sought Judicial review relief of mandamus compelling the respondents to pay it the sum of Kshs 5,033,498.60/- being the outstanding decretal amount in Machakos CMCC 721 of 2017 Medionics Healthcare Ltd v Government of Machakos County as well as an order to issue summons to appear before it to explain non-payment of the sum of Kshs 5,033,498.60/- being the outstanding decretal amount in Machakos CMCC 721 of 2017 Medionics Healthcare Ltd v Government of Machakos County.

3. The matter was slated for hearing on 24.9.2019 on which date the court noted that all the respondents were absent and there was no response to the application by the respondents. The court hence made an order that the application be allowed in terms of prayer 1, 2 and 4 and thereafter the applicant extracted the final orders.

4. The applicants who were the respondents in the substantive application approached this court vide notice of motion dated 12.11.2019 that was brought under Article 39, 48 and 50 of the Constitution, Order 51 Rule 1, 3, 4 and 12 and Order 53 of the Civil Procedure Rules, Sections 1A, 3A and 3B of the Civil Procedure Act and Article 159(2)(d) of the Constitution. The application sought the following orders:

a) Spent

b) Spent

c) That an order do issue for the Ex parte applicant to produce one John Kithinji Mbaya, a process server for cross examination by the applicants and/ or their advocates on the alleged service of summons, pleadings and court process on all the respondents/applicants.

d) That the court do set aside and/ or vacate the Orders of;

i. 24.9.2018 allowing the notice of motion dated 1.8.2019 in terms of prayer 1, 2 and 4

ii. 23.10.2019 issuing warrants of arrest against the 1st to 5th respondents herein and all proceedings and all other orders issued since the matter was filed be set aside and that the ex-parte applicant be ordered to effect proper and personal service on all the respondents/applicants herein.

e) That the respondents/applicants herein be allowed to file responses to the applications herein and the same be allowed to proceed on merits.

f) That the names of the 1st to 5th respondents/applicants be struck out of this suit.

g) *The costs of the application be awarded to the respondents/applicants*.

5. The grounds of the application are set out in the motion as follows: -

a) Dr Joel Mwova was on 11.11.2019 informed that the respondents were being sought to be arrested and yet the respondents were never served with the chamber summons, notice of motion and affidavits and attachments as well as the summons to appear before the court.

b) The court orders were issued illegally and unlawfully as the respondents were condemned unheard and that the warrant of arrest orders were issued when there were no contempt of court proceedings; that the substantive orders were for mandamus and not for arrest warrants;

c) The respondents were not served personally as required by law.

6. Also in support of the application is the undated affidavit of **Dr Joel Mwova,** stated to be the Chief Officer and the accounting officer, Medical Services of Machakos County reiterating the foregoing grounds. Annexed to the affidavit is a copy of warrants of arrest marked JM1, witness summons marked JMN 2a and b, copies of pleadings instituting Machakos CMCC 721 of 2017 marked JM3. It was averred that there was enforcement of judgement against persons who were not parties to the primary suit save for the 6th respondent.

7. In reply to the application is a replying affidavit deponed on 19.11.2019 by Geoffrey Muriungi Kiugu stated to be the advocate of the ex-parte applicant in conduct of the matter. It was averred that there were affidavits of service (GMK1) indicative of service on the applicants. It was averred that the applicants were aware of the proceedings and that there was communication with the County Government Attorney via sms (GMK-2) and the 6th applicant via sms (GMK-3). According to the deponent, section 21(3) of the Government Proceedings Act states that the accounting officer for the government department is under a duty to satisfy a judgement made by court against that department and the deponent is the accounting officer of the 6th applicant. It was averred that no compelling reasons were given as why the orders sought ought to be granted.

8. In rejoinder is an affidavit deponed by Dr Joel Mwova on 27.11.2019 where he averred that there is not a Chief Officer within the Machakos County government called Dr Mwoba. The deponent took issue with the lack of a certificate in support of the SMS extracts marked GMK2 and GMK3 by dint of section 65(8) of the Evidence Act.

9. On 4.6.2020 the matter came up for directions and this court directed that the application dated 12.11.2019 be canvassed vide written submissions and this prompted the 2nd application.

10. On record is an application vide notice of motion dated 11.6.2020 that was brought under Order 21 Rule 8(2) (3) (4) and (5) and Order 22 Rule 22 of the Civil Procedure Rules and section 26 (1) and (2) and 3A of the Civil Procedure Act. The application sought the following orders:

> *a) Spent*
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> *b) That this Honourable court be pleased to set aside the proceedings of 4.6.2020 directing parties to file submissions on the application dated 12.11.2019 and the directions issued on 20.11.2019 for cross examination of the process server be reinstated.*
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> *c) That this matter be listed for cross examination of the process server before directions on how the application dated 12.11.2019 will be canvassed are taken.*
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> *d) Costs of the application be in the cause.*

11. The grounds of the application are set out in the motion as follows: -

> a) The trial court was not sitting on 10.12.2019 and on 3.3.2020 and that on 4.6.2020 the counsels instructed to hold brief for both parties forgot to take directions to cross examine the process server.
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> b) The service on the respondents is being challenged hence it is paramount that the process server be examined;

12. Also in support of the application is the affidavit of **Dr Joel Mwova,** stated to be the Chief officer and the accounting officer, Medical Services of Machakos County dated 11.6.2020 and reiterating the foregoing grounds.

13. The court directed that the applications be canvassed vide written submissions. It is only the respondent's submissions in respect of the application dated 12.11.2019 that are on record. Vide submissions filed on 2.9.2020, Counsel for the exparte applicant/respondent placed reliance on the case of **R v Principal Magistrates Court and Mavoko & Another Exparte Joseph Ole Lenku Governor Kajiado County & Another (2018) eKLR** where it was observed that;

> "*The Court in Miscellaneous Civil Application 350 of 2015, Republic v County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR held a similar view to wit:*
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> "*the law as it stands presently is that no execution can be levied against the property of a Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of mandamus is not complied with…*"

14. It was therefore the argument of counsel that contempt of court proceedings was not necessary.

15. Counsel further submitted that service was proper on the respondents as evidenced by the affidavit of service of the process server. Reliance was placed on the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR** (*which decision I note has since been reversed by the Supreme Court on appeal in the case of Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR*) where it was stated that;

> *[28] An affidavit of service consists of sworn factual evidence of the deponent. This Court in Shadrack arap Baiywo --vs- Bodi Bach, Civil Appeal No. 122 of 1986 (UR) while applying the principles restated in; Miruka -vs- Abok & Another, [1990] KLR 544, Platt, JA stated:-*
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> "*There is a qualified presumption in favour of the process server recognized in MB Automobile -vs- Kampala Bus Service [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say: -*
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> "*3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service*."

16. It was the argument of counsel that the affidavit of service had not been challenged and therefore the same ought to be deemed sufficient evidence of the regularity of proceedings.

17. Before proceeding with my analysis, I wish to point out that in judicial review proceedings the Court is not required to vindicate anyone's rights but merely to examine the circumstances under which the impugned act is done to determine whether it was fair, rational and or arrived at in accordance with rules of natural justice. The purpose of Judicial Review is concerned not with the decision but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made and that it is not an appeal and further that the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. In the case of **R vs Secretary of State for Education and Science ex-parte Avon County Council (1991)** which was referred to in the case of the **Commissioner of Lands vs Kunste Hotel Limited CA No 234/95**, the Court held that,

> "*…. judicial review is not concerned with private rights or the merits of the decision being challenged, but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."*

18. Having considered the pleadings and the applicable law, the issues to be resolved in the instant application are firstly **Whether this court has jurisdiction to set aside orders in granting prayer 1 of the application dated 1.8.2019 made on the 24.11.2019 and Whether the court went into error in granting prayer 2 of the judicial review application dated 1.8.2019 as well as the orders dated 23.10.2019.**

19. Having noted that judicial review jurisdiction is sui generis, case law has posited that orders issued with finality in the exercise of the said jurisdiction namely *mandamus, prohibition* and *certiorari* are not amenable to recall, review and setting aside. See **Biren Amritlal Shah & another versus Republic & 3 others [2013] eKLR.** Further, the reliefs such as recall, review and setting aside are only available under suits that fall under the Civil Procedure Act procedures with the exception of Judicial Review. That jurisdiction the applicant had invoked to redress its grievances are not applicable to Judicial review that is a special jurisdiction which is neither civil nor criminal. See **Stella Richard & 13 Others v DPP & 2 Others; Daniel Kyalo Lua & Another (Interested Parties) (2019) eKLR**

20. Section 8(5) of the Law Reform Act does state that:

> "*Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal*."

21. However, in **Aga Khan Education Service Kenya Versus Republic & 3 others civil Appeal No. 257 of 203**, the court cautioned that the exercise of the power of recall, review and setting aside of orders not issued in finality under the Judicial review jurisdiction is a very restricted jurisdiction and will only be exercised very sparingly and in very clear- cut cases.

22. In the case of **Methang'athia & 4 others versus District Land Adjudication and Settlement Officer Meru North (Nyambene) District and 3 others Nairobi Misc. Appl. 230 of 1993 [2000] KLR 500** it was held that "*the High Court has no jurisdiction to stay, arrest, recall, review, set aside or quash a prerogative order which has already been made or granted in finality, as such an order is final and subject only to the right of appeal conferred by section 8(5) of the Law Reform Act*.

23. From the foregoing, I find that the grant of the orders allowing prayer 1 of the application dated 1.8.2019 issued on 24.9.2019 were final orders that dispensed with the application before the court and as such this court cannot set aside the same. The same can only be interfered with by the Court of Appeal in terms of section **8(3)** as read with section **8(5)** of the Law Reform Act.

24. Turning to issue number 2, the applicant has taken issue with the warrants of arrest of the 1st to 5th respondents, as there was no contempt of court proceedings instituted. I note that the prayer 2 is akin to a notice to show cause and I am guided by the case of **Republic v Baringo County Government & 2 others Ex parte KTK Advocates [2018] eKLR** where Justice Mativo observed that;

> "*This is because for the notice to show cause to issue, the disobedience of the Court order must be established first. It follows that it would have been appropriate for the applicant to pursue an order of Mandamus first and if it is disobeyed, then move the Court under the Contempt of Court Act for the Notice to Show Cause and ultimately committal for Contempt.*

25. In the light of the above finding, I find that there was an error in granting prayer two that resulted in the grant of the orders issued on 23.10.2019 and in *suo moto this court has the discretion to* review and set aside the same. The ex parte applicant after being granted an order directing the respondents to make payment in terms of prayer 1 of the application ought to have served the same on the respondents and then moved the court that there was a disobedience (if any) then seek a notice to show cause that would be served upon the respondents and if the court was satisfied that no good cause has been shown it will then grant an order for committal. The ex-parte applicant is hereby advised to follow the mentioned procedure.

26. In view my reasoning and finding with regard to issue 1 and 2, I decline to grant the prayers in the application dated 11.6.2020 as well as prayers 2, 3, 4ii and 5 and 6 of the application dated 12.11.2019 as the same shall serve no purpose and be operating in a vacuum because my finding in paragraphs 23 to 25 above will fully cater for what is covered under prayers 2, 3, 4ii, 5 and 6 of the application dated 12.11.2019.

27. In the result and save to the extent as hereinabove analysed, the respondents' applications dated 21.11.2019 and 11.6.2020 lack merit and are dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 8th day of October, 2020.

D.K. Kemei

Judge