



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

JUDICIAL REVIEW NO. 30 OF 2017

REPUBLIC.....APPLICANT

VERSUS

1. THE COUNTY SECRETARY, COUNTY GOVERNMENT OF KIAMBU

2. COUNTRY GOVERNMENT OF KIAMBU.....RESPONDENTS

EX PARTE KIKINGA HOUSE LIMITED.....APPLICANT

J U D G M E N T

1. The ex parte Applicant in this case is Kikinga House Ltd the successful party in **Kiambu CMCC No.80 of 2016 Kikinga House Ltd v County Government of Kiambu** brought against the County Government of Kiambu, the Defendant therein and present 2nd Respondent, for the recovery of arrears of rent in respect of a tenancy agreement between the parties. Judgment was entered for the ex parte Applicant in the sum of KShs.272,000/= and costs certified at KShs.90,865/=

2. The key prayers in the motion seek the issuance of order of mandamus to compel the two Respondents to settle the said sums. The motion is supported by the statutory statement and verifying affidavit of **Jospat Muchaba Ngamau** the Managing Director of the ex parte Applicant.

3. The Respondent's response is contained in the grounds of opposition filed on 22nd May 2018. The Respondents assert that the orders sought do not lie against the Respondents as no statutory duty is imposed on them in that regard. That the said duty is the responsibility of the County executive committee member in charge of finance, under the Public Finance Management Act. That in the result the application is fatally defective and incompetent.

4. On 19.9.18 the parties appeared before me and recorded a consent in the following terms.

“By consent the application be determined on the affidavits, grounds of opposition and the authority in *R v County Secretary Nairobi City County and Others Ex parte Wachira Nderitu Ngugi & Co. Advocates [2016] e KLR*”.

5. The court has considered the pleadings on record and the parties' consent above. The Respondents did not file an affidavit to controvert the facts upon which this motion is presented. Thus there is no dispute that there exists a decree and certificate of costs issued by a competent court in favor of the ex parte Applicant and against the second Respondent. Despite being served with notice of entry of judgment and a demand for payment the Respondents have not settled the decretal sum.

6. The decision of **Odunga J** In the **Republic v The County Secretary Nairobi City County** which the parties have placed before the court did not involve the consideration of the question whether the parties sued were the correct persons bearing the relevant statutory duty. Nonetheless as in this case, the County Secretary of the Nairobi City County (and the Chief Officer Finance) were the Respondents in that suit.

6. By dint of Section 33 of the sixth schedule to the Constitution, the office of the County Secretary under the new Constitution is the successor of the office of the Town Clerk under the former Constitution who was responsible *inter alia* for ensuring compliance with the law and orders of the court against the former local authorities. Under the former Constitution proceedings to enforce a judgment of the court by way of judicial review were brought against the Town Clerk sometimes jointly with the local authorities concerned.

7. In addition, and by analogy, judicial review proceedings brought to compel obedience of court orders by the national government are ordinarily brought against the permanent secretary of the ministry against which such order was made, and not against the permanent secretary is the Treasury.

8. As the secretary to the county executive committee under Section 44 of the County Governments Act, the county secretary is what the permanent secretary is to a ministry in the national government. The Respondent's objection as regards their capacity to be sued in this matter is in the circumstances of this case without merit.

9. As to the merits of the motion before me, the Applicant has placed before the court copies of the relevant decree and certificate of costs, and demands to the Respondents to settle the decretal sum.

10. I agree with the sentiments of **Githua J** in **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Igunza [2012] e KLR** as cited in the decision of **Odunga J** in **ex parte Wachira Nderitu Ngugi & Co. Advocates:-**

“In ordinary circumstances, once a judgment has been entered in a civil suit in favor of the party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount ... similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regard to its liability to pay except when it comes to the mode of execution of the decree ... the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount ... The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the government is found in Section 21 (2) and (2) of the Government Proceedings Act which provides that payment will be based on a certificate of order obtained by a successful litigant from the suit issuing the decree which should be served on the Hon. Attorney General ... Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or his advocate together with any interest lawfully accruing thereon.”

11. Having also associated myself with the earlier finding by **Odunga J** that by dint of Section 7 of the sixth schedule, the immunity accorded to the national government under Section 21(4) of the Government Proceeding Act must necessarily extend to county governments, I am persuaded that no other legal remedy, save mandamus, is available to the ex parte Applicant in the enforcement of the decree herein. To deny the Applicant the remedy will mean denying it the fruits of its judgment and by extension access to justice. Especially, as it has been shown that the persons duty bound to settle the decretal sum have refused, despite demands to settle the same.

In the result, this court will allow the substantive motion with costs to the ex parte Applicant.

DELIVERED AND SIGNED AT KIAMBU THIS 8TH DAY OF FEBRUARY 2019.

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C. MEOLI

JUDGE

In the presence of:-

Mr. Ranja for the Respondent

Mr. Wahome holding brief for Mr. Wahome

Court clerk - Nancy