



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JR APPLICATION NO. 1 OF 2017

REPUBLIC.....APPLICANT

VERSUS

COUNTY SECRETARY, UASIN GISHU.....1ST RESPONDENT

COUNTY EXECUTIVE IN CHARGE

OF FINANCE UASIN GISHU COUNTY.....2ND RESPONDENT

COUNTY GOVERNEMENT OF UASIN GISHU.....3RD RESPONDENT

EX PARTE:

PETER SHIKHAYA

THOMAS ONANDAH

JUDGMENT

1. The *ex parte* applicants have moved the court by a Motion dated 14th February 2017, seeking an order of *mandamus* to bring to command the 1st and 2nd respondents to pay the *ex parte* applicants the decretal dues, costs and interests in: -

- (a) Vihiga PMCCC No. 68 of 2006 – Thomas Onandah vs. Municipal Council of Eldoret, amounting to Kshs. 284, 805.00;
- (b) Vihiga PMCCC No. 99 of 2006 – Peter Shikhaya vs. Municipal Council of Eldoret, amounting to Kshs. 366, 305.00;
- (c) Kakamega HCCA No. 115 of 2009 – Municipal Council of Eldoret vs. Thomas Onandah, costs amounting to Kshs. 99, 223.00;
- (d) Kakamega HCCA No. 116 of 2009 – Municipal Council of Eldoret vs. Peter Shikhaya, costs amounting to Kshs. 99, 223.00; and
- (e) Interests calculated at court rates from the date of judgement of the trial court and costs of this suit.

2. The factual background to the application is set out in the affidavit in support sworn on 14th February 2017 by William Ndinya Omollo, advocate for the *ex parte* applicants. He avers that the *ex parte* applicants had obtained judgements against the Municipal Council of Eldoret arising from a traffic accident. The Municipal Council of Eldoret was not satisfied, and proffered an appeal at the High Court of Kenya at Kakamega. The appeals were heard and subsequently dismissed with costs, which costs were subsequently assessed. The respondents were duly notified of the judgements and the assessed costs, but the judgements and costs have remained unsatisfied to date. It is averred that the 3rd respondent is a successor of the defunct Municipal Council of Eldoret.

3. Attached to the affidavit in support are several documents. There are copies of the complaints lodged at the lower court, and of the judgements rendered in the two suits. There is correspondence from the *ex parte* applicants' advocates informing the advocates for the Municipal Council of Eldoret of the entry of the said judgements, as well as the dismissal of the appeals and the costs assessed in respect of the appeals. There are also copies of the memoranda of the appeals lodged by the Municipal Council of Eldoret at the High Court at Kakamega, as well as copies of the consents that the parties entered into on costs in respect of costs at both the trial court and the appeal court. There are also copies of the certificates of costs issued in respect of the appeals.

4. The respondents entered appearance and filed an affidavit in response, sworn by the County Attorney-General. They admit the judgements

the subject of the proceedings. They concede that the 3rd respondent succeeded the Municipal Council of Eldoret following the promulgation of the Constitution 2010, but contend that the Constitution did not provide a mechanism for dealing with such liabilities as the instant ones and therefore there was no legal basis for the respondents to settle the said liabilities. It is specifically contended that the *mandamus* order cannot issue over obligations that have not yet vested. It is averred that on that account the application was misconceived and bad in law.

5. In response to that reply, the advocate for the *ex parte* applicants swore and filed a further affidavit, essentially asserting that there were valid decrees of courts of competent jurisdiction which had neither been satisfied nor set aside. He avers that the 3rd respondent, as successor to the Municipal Council of Eldoret, was bound to settle the said liabilities.

6. Directions were given that the application be disposed of by way of written submissions to be highlighted. The parties have each filed their respect written submissions. They were not highlighted, as the parties invited me to prepare judgement based on the said submissions. I have read through the same and noted the arguments advanced.

7. It is not disputed that the 3rd respondent is the successor to the Municipal Council of Eldoret under the Constitution 2010. That would mean that the 3rd respondent is bound legally to settle any debts and liabilities of the defunct Municipal Council of Eldoret. The contention is that there is mechanism under the Constitution for identification and verification of such debts and liabilities before they are settled by the new authorities.

8. I have read through the Constitution 2010 and the new legislation around the subject. I am of the considered view that the 3rd respondent having succeeded the Municipal Council of Eldoret, including its assets and liabilities was legally bound to settle any debts and liabilities of the Municipal Council of Eldoret, and more so decrees made against the said Municipal Council of Eldoret by courts of competent jurisdiction. I am persuaded that a *mandamus* should issue to compel satisfaction of court decrees. Parties who have obtained such decrees should not be seen as lacking enforcement mechanisms of judgements in their favour merely because the state has been slow in working out mechanisms for succession by the County Governments into the assets and liabilities of the defunct local authorities.

9. My attention has, however, been drawn to the decision of the Court of Appeal in *(Interim) County Secretary, County Government of Kakamega vs. Republic ex parte Ali Adam & another* (2017) eKLR, where the majority view was that the new devolved authorities need not be immediately burdened with the liabilities of the defunct local authorities, and holders of court decrees against the defunct authorities ought to await the transition mechanisms that are in the process of being put in place to facilitate handling of the assets and liabilities of the defunct local authorities by the new devolved units, and therefore that a *mandamus* order need not issue at this stage. That decision binds me, much as I may not agree with it, and I have to bend to it.

10. I note too that proceedings against public authorities by way of judicial review for the orders *of mandamus* is an execution process for a valid decree of a court of competent jurisdiction. The execution process is quite clear that a party who seeks to enforce a judgement or ruling must extract a formal decree or order and have it duly served on the party bound to satisfy the decree or order. Execution would be considered to have proceeded properly in circumstances where proof is provided that a decree or order had been formally extracted and duly served. There is no evidence that decrees had been drawn up and formally extracted in the four suits the subject of these proceedings. There is also no evidence, by way of affidavit of service, that decrees had been formally served on the defunct Municipal Council of Eldoret or its successor, the 3rd respondent. It would appear that the *ex parte* applicants have jumped the gun, and therefore their application is a little premature.

11. I need not say more. The Motion before me is for dismissal, and I hereby dismiss the same. I shall, however, not award costs given that the *ex parte* applicants are entitled to the proceeds of the judgements in their favour, and they cannot enforce the same because of procedural bottlenecks. They are entitled to take the steps they have taken, but there are legal obstacles on their way which have nothing to do with them.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF February 2019

J. NJAGI

JUDGE