



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 63 OF 2018

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS FOR MANDAMUS BY DISNEY INSURANCE BROKERS LIMITED

AND

IN THE MATTER OF: IN ACORDANCE WITH ORDER 53 RULES 1, 2, 3 AND 4 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT AND THE COUNTY GOVERNMENT ACT

BETWEEN

DISNEY INSURANCE BROKERS LIMITED.....APPLICANT

VERSUS

1. FRANCIS THOYA, COUNTY SECREATRY MOMBASA COUNTY

GOVERNMENT

2. ASHA ABDI, CABINET SECRETARY, FINANCE MOMBASA COUNTY

GOVERNMENT

3. MARIAM MBARUK, COUNTY EXECUTIVE FINANCE DEPARTMENT

MOMBASA COUNTY GOVERNMENT.....RESPONDENTS

RULING

The Application

1. The Notice of Motion application before the court is dated 17th September, 2018 and seeks the following orders:

(a) That an order of mandamus do issue to compel the Respondents to satisfy the decree issued by the Mombasa High Court Civil Case No. 1 of 2013 Disney Insurance Brokers Limited versus Mombasa County Government wherein the decretal sum now outstanding is Kshs. 94,197,536/= inclusive of interest at the rate of 12% from 4th July, 2013.

(b) That the costs of this application be paid by the Respondents.

2. The application is premised on grounds that the Ex parte Applicant filed a suit in Mombasa High Court being Civil Suit No. 1 of 2013. The matter went to full trial where both presented their respective witnesses who testified in court and produced their supporting documents in court as exhibit; that the trial court, made careful consideration of the evidence and submissions from both parties and entered a Judgment on 28th February, 2018 for the Plaintiff, against the Defendant for a sum of Kshs. 58,958,263/= together with interest. The court also awarded costs of the suit to the Applicant; that the total decretal sum now outstanding is Kshs. 94,197,536/= inclusive of interest at the rate of 12% from 4th July, 2013; that the Mombasa County Government did not file an appeal challenging the Judgment of the court that was delivered

by the court on 28th February, 2018; that the Respondents were served with the decree of the court by the Applicant but the Respondents have decided not to do anything about the matter thus making this application necessary; that it is now five months since the said Judgment was delivered and the Respondents have not showed any sign of settling the claim neither have they communicated to the Applicant in that regard. The Respondent has simply decided to treat the decree in a casual manner; that failure by the Respondents to discharge its duties as mandated by the law is causing the Ex parte Applicant to suffer losses as the Applicant cannot enjoy the fruits of its successful litigation in the said matter and that in the circumstances, this application is merited and the orders sought herein should be granted by the court.

3. To the application is attached copy of a decree of this court dated 14th May, 2018, a copy of Judgment in the parent suit where the court had awarded a sum of Kshs. 58,958,263/= to the Ex parte Applicant herein. Also attached is a copy of demand letter dated 27th June, 2018 for Kshs. 94,197,536.20 sent to the Respondents advocates by the advocates of the Ex parte Applicant. It is instructive to note that the said decree or the said Judgment was not appealed, and that the said decree is a final Judgment in this matter. The Applicant has not taxed its costs but its counsel Mr. Gikandi in his oral submissions to the Court stated that they are willing to forgo their costs.

The Response

4. The application is opposed by the Respondent vide a Replying Affidavit sworn by **Mtalaki Mwashimba** on 15th January, 2019. The Respondent's case is that the Notice of Motion application dated 17th September, 2018 seeks Judicial Review orders in the nature of mandamus to compel the County Government of Mombasa to settle a debt allegedly amounting to Kshs. 94,197,536.00 to satisfy a Judgment allegedly entered in favour of the Applicant in **HCCC No. 1 of 2013 Disney Insurance Brokers Limited versus County Government of Mombasa**. The Respondent states that the suit as it is makes it seem like the debt is being sought against the three officers in their personal capacity yet the law is clear that a Public Officer should not be held personally liable for things done by a public entity and that the order of mandamus should if at all be sought against the County Government itself and not its officers since its only after the order of mandamus has been served and the officers responsible to act on behalf of the County Government have failed to act that they should be cited for contempt upon which the officers are mentioned for purposes of being called upon to take responsibility on behalf of the County Government. The Respondent further states that the application is defective and should be struck out with costs to the Respondents and the Judgment relates to insurance services rendered by the Applicant to the now defunct Municipal Council of Mombasa between the year 2011 and 2012. The Respondent states that the Applicant was required to submit its alleged contractual debt to the Transitional Authority that was established to ensure smooth transition to the devolved system of government for verification there having been no Judgment as at the time the cause of action arose. The presence of a Judgment prior to 2013 would have been enough verification and therefore, since what was there as at the time the cause of action arose was but a debt incurred by the now defunct Municipal Council of Mombasa, it ought to have been presented before the Transitional Authority for verification as required by law. That failure by the Applicant to forward its then debt to the Transitional Authority contravened Section 35 of the Transition to Devolved Government Act, 2012 which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the Authority. The Respondent states that as the County Government of Mombasa was sued on behalf of the now defunct Municipal Council of Mombasa in the absence of clear directions by the Transitional Authority regarding the debt (something which was occasioned by the Applicant who failed to present its claim to the said authority), it will not be proper for the Applicant to assume that the responsibility to settle the said debt lies with the County Government of Mombasa. The Respondent states that the Applicant seeks the assistance of the court in perpetuating an illegality by filing the application herein knowing very well that the County Government is not responsible for ensuring that the amount is paid and asking it (The County Government of Mombasa) to pay the requested sum will be akin to perpetuating an illegality contrary to public policy and that the Applicant is clearly using the County Government of Mombasa to try and circumvent the law and the court should stop that attempt because the Applicant was indolent and it is clear that equity does not aid the indolent.

Submissions

5. Parties made oral submissions which I have considered.

Determination

6. The issues I raise for determination are as follows:

- (i) Whether the county government officers cited in the application can be sued herein.
- (ii) Whether the matter before the court is barred under Section 35 of the Transition to Devolved Government Act, 2012.
- (iii) Whether the taxation should precede this application.

7. On the first issue, it is my view that the officers of the county government cited herein are improperly cited. The Defendant in the primary suit was the County Government of Mombasa. Its officers can only be cited after an order of mandamus has been given and the officers fail to comply thereto. It was therefore improper to cite the said officers in their names in this application. Having said that, I have noted that they are being sued as officers of the County Government of Mombasa who was the Defendant in the primary suit. I therefore herewith strike out all the said officers, and so as not to resort to unnecessary technicalities, retain the name Mombasa County Government as the sole Respondent.

8. The second issue is whether or not the debt herein does belong to the Mombasa County Government. It was submitted by **M/S Kisingo** that in line with Section 35 of the Transition to Devolved Government Act 2012, the debt accrued prior to the devolved system of Government and it not having been verified by the then transitional authority under the law the said debt is time barred and the suit should be dismissed.

9. **Mr. Gikandi** for the Applicant submitted, rightfully in my view that the Defendant in the primary suit was the County Government of Mombasa. There was nothing to verify since the Defendant was already properly named. It was not the Municipality of Mombasa. The

primary suit was properly defended and the issue of Section 35 of the Transition to Devolved Government Act 2012 was not invoked. Further, there was no appeal against the said Judgment. Substantive issues of law cannot be raised at the point of execution. It is the finding of this court that the debt is payable by the Mombasa County Government who was the Defendant in HCCC No. 1 of 2013.

10. The last issue is whether or not the Applicant should have taxed its costs before coming to this court. Mr. Gikandi submitted that the ex parte Applicant is prepared to forgo its costs. What more can this court say? Taxation process is necessary where parties dispute costs. If parties agree on costs, or if a party does not want costs, there will be no need to tax costs. In such a case a decree of court is enough to ascertain the sum due. The decree of this court is dated 14th May, 2018 which awarded Kshs. 58,958,262/= with interest at court rates to the Ex parte Applicant. The demand letter demanding the same is dated 27th June, 2018. There was no complaints with the said demand. It is the finding of this court that the Ex parte Applicant need not tax its billing costs if it has, as in this case, forfeited its costs. Therefore subject to a correct calculation of interests, the decree dated 14th May, 2018 shall suffice.

Disposition

11. From the foregoing it is the finding of this court that the Notice of Motion dated 17th September, 2018 is merited and the same is allowed as prayed, subject to a certification by the Deputy Registrar that the applicable interest is properly calculated.

Dated, Signed and Delivered at Mombasa this 11th day of March, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Parties absent

Mr. Kaunda Court Assistant