



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 240 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...RESPONDENT

EX PARTE: MUSIKARI NAZI KOMBO

JUDGMENT

The Application

1. Musikari Nazi Kombo, the *ex parte* Applicant herein, (hereinafter “the Applicant”), was the Petitioner in **Bungoma High Court Election Petition No. 3 of 2013** and 1st Respondent in **Kisumu CA Civil Appeal No. 43 Of 2013**, which cases arose the General Elections held in 4th March 2013. The Respondent on the other hand the Independent Electoral and Boundaries Commission is a Constitutional body charged with the mandate of undertaking elections in Kenya under Article 88 of the Constitution.

2. The Applicant has filed an Amended Notice of Motion dated 14th December 2018 seeking the following orders:

a) That this honourable court be pleased to issue an order of mandamus directed at the Chief Executive Officer of the Independent Electoral and Boundaries Commission compelling him to pay the Applicant a sum of Kshs 3,200,409/= plus the accrued interests at court rates arising from the judgements, decrees and certificate of Costs made and issued in favour of the Applicant in Election Petition No 3 of 2013 (Bungoma) and in Civil Appeal No 43 of 2013 (Kisumu).

b) That the costs of the Application be borne by the Respondent.

3. The application was supported by the grounds on its face and a supporting affidavit and verifying affidavit sworn by the Applicant on 14th December 2018 and 23rd July 2018 respectively. The Applicant contends that he filed an election petition in **Bungoma High Court Election Petition No. 3 of 2013 -Musikari Nazi Kombo vs Moses Masika Wetangula, Independent Electoral and Boundaries Commission, and Madahana Mbaya**, seeking orders that the elections for the Bungoma County Senatorial Seat in the elections held on 4th March 2013 be nullified. That the Petition was duly heard and the judgement delivered on 30th September 2013, wherein the petition was allowed and the said election nullified, and the three Respondents where ordered jointly and severally to meet the costs of the said petition which were capped as Kshs 4,000,000/=.

4. It is the Applicant’s case that the 1st Respondent, being dissatisfied with the said judgment, filed an appeal in the Court of Appeal at Kisumu, being **Civil Appeal No. 43 Of 2013-Moses Masika Wetangula vs Musikari Nazi Kombo & 2 others**, which appeal was heard and dismissed in a judgement that was delivered on 14th March 2014. The Court of Appeal further ordered the costs of the appeal which were capped at ksh 4,000,000/= be paid and met by the Appellant and the 2nd and 3rd Respondents jointly and severally.

5. The Applicant averred that pursuant to the costs that he was awarded in **Bungoma High Court Election Petition No 3 of 2013**, he filed a Party and Party Bill Of Costs dated 31st January 2014 which bill was thereafter taxed by the taxing master at 3,850,510/= and a Certificate of Costs resultant from the taxation was made and issued on 26th April 2016. Likewise, he also filed a Party and Party Bill Of Costs dated 8th May 2015 in respect of the costs awarded in **Kisumu CA Civil Appeal No. 43 Of 2013**, which were taxed at Kshs 1,633,880/= and a Certificate of Costs to this effect issued on 29th February 2016.

6. That the total sum of the costs to be paid to the Applicant arising from the two Certificates of Costs is Kshs 5,483,409/=, out of which a sum of Kshs 2,283,000/= has been paid by Hon. Moses Masika Wetangula, leaving an unpaid and unsettled balance of Kshs 3,200,409/=. Further, that the Respondent is liable to pay the balance as the judgments entered in **Bungoma High Court Election Petition No 3 of 2013**, and **Kisumu CA Civil Appeal No. 43 Of 2013** found and held that the Respondent and Hon. Moses Masika Wetangula jointly and severally liable for the said costs, neither has it challenged or contested the certificate of costs dated 25th April 2016 and 29th February 2016.

7. However, that the Respondent has failed and/or refused to pay the costs despite several demands and reminders to do so. In addition, that the Respondent is under a statutory duty to pay the said costs. The Applicant annexed copies of the judgments and Certificates of Costs issued in **Bungoma High Court Election Petition No 3 of 2013**, and **Kisumu CA Civil Appeal No. 43 Of 2013**, as well as copies of letters written to the Respondent seeking payment of the costs

The Response

8. The Respondent filed a replying affidavit sworn on 21st December 2018 by Chrispine Owiye, its acting Director for Legal and Public Affairs, wherein it was stated that it was aware of the judgments and Certificates of Costs issued in **Bungoma High Court Election Petition No 3 of 2013**, and **Kisumu CA Civil Appeal No. 43 Of 2013**, which it summarised. According to the Respondent, the total costs which it and Hon. Moses Wetangula are to pay is Kenya Shillings Five Million Four Hundred and Eighty Three Thousand, Four Hundred And Nine (Kshs 5,483,409.00), arising from taxed costs of Kshs 3,850,510/= in **Bungoma High Court Election Petition No 3 of 2013**, and taxed costs of Kshs 1,632,899/= in **Kisumu CA Civil Appeal No. 43 Of 2013**

9. The Respondent averred that the it is an independent commission funded by the exchequer including the Petitioner and it would only be fair, in the interest of the general public and prudent use of public resources if the costs are split so that Hon. Moses Wetangula pays half the costs and the Respondent pays the other half, in which case the costs to be borne by the Respondent is Two Million Seven Hundred and Forty One Thousand Seven Hundred and Five (Kshs 2,741,705.00). Further, that the Applicant has since disclosed that it received a sum of two million two hundred and eighty three thousand (Kshs 2,283,000) as costs from Hon. Moses Masika Wetangula.

10. Lastly, the Respondent averred that the Applicant taxed the costs and was issued with Certificates of Costs on 29th February 2016 and 26th April 2016 respectively, and it would be prudent that the costs paid are the one taxed and allowed. Therefore, that it would be an unnecessary burden on the tax payer if interest were awarded on the costs.

The Determination

11. The Applicant and Respondent both wholly relied on their pleadings during the hearing of the application. In arriving at a determination, I have considered the said pleadings, as well as the holding by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] e KLR**. The said Court held as follows in this regard:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..... .”

12. It is not disputed in the present application that judgments as to costs were entered in favour of the Applicant in **Bungoma High Court Election Petition No 3 of 2013**, and in **Kisumu CA Civil Appeal No. 43 Of 2013**. The issues therefore that require to be determined are firstly, whether the Chief Executive Officer of the Independent Electoral and Boundaries Commission is under a public duty and obligation to satisfy the orders as to costs issued in favour of the Applicant in the said judgments, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

13. The first question to be answered therefore, is whether the Respondent is under a public duty and obligation to satisfy orders as to costs issued in favour of the Applicant in the said judgments. Section 13 of the Independent Electoral and Boundaries Commission Act provides as follows in this respect:

1) The Commission shall be a body corporate with perpetual succession and a common seal and shall be capable, in its own name, of—

(a) acquiring, holding and disposing of movable and immovable property;

(b) suing and being sued; and

(c) doing or performing all such acts and things as a body corporate may by law do or perform.

(2) Any legal proceedings for execution of judgments against the Commission shall be subject to the Government Proceedings Act.

14. Section 21 of the Government Proceedings Act provides as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

“(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

15. Execution proceedings against a government or public authority can thus only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was also the holding in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012)** where J. Githua held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. 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 regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, 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 as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. 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(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is 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 to his advocate together with any interest lawfully accruing thereon.”

16. The provisions of section 21 of the Government Proceedings Act must be read with the necessary changes in relation to the Respondent's Commission. In this regard, the Respondent's Commission being a corporate body, the service of the certificate of costs that is required by the said section on the Attorney General must read as requiring service on the appropriate officer in the Respondent Commission.

17. Section 10 of the Independent Electoral and Boundaries Commission Act provides for a Secretary to the Respondent's Commission, and section 10(7) of the Act provides for the following functions of the Secretary to the Commission:

(7) The secretary shall be—

(a) the chief executive officer of the Commission;

(b) head of the secretariat;

(c) the accounting officer of the Commission;

(d) custodian of all commission's records;

(e) responsible for—

(i) executing decisions of the Commission;

(ii) assignment of duties and supervision of all employees of the Commission;

(iii) facilitating, co-ordinating and ensuring execution of Commission's mandate;

(iv) ensuring staff compliance with public ethics and values; and

(v) the performance of such other duties as may be assigned by the law and Commission.

18. The Respondent is therefore both the executive officer and accounting officer for purposes of section 21 of the Government Proceedings Act, and the proper party to be served with any legal documents and process involving the Respondent's Commission. The Applicant in this respect annexed letters sent to the Respondent dated 9th March 2018 and 28th October 2016 seeking payment of the costs.

19. The second question to be answered in the present application is what amount of costs the Respondent ought to pay, arising from the judgment that the costs be born jointly and severally by the Respondent and other parties. **Black's Law Dictionary, Tenth Edition** defines joint and several liabilities at page 1054 as follows:

“Liability that may be apportioned either among two or more parties or to only one or a few select members of the group at the adversary's discretion. Thus each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.”

20. This position was also reiterated in the case of **Kenya Airways Limited vs. Mwaniki Gichohi High Court (Milimani Commercial Courts) Civil Case No. 423 of 2002** by Ringera, J (as he then was) as follows:

“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”

21. Likewise, Odunga J. in **Republic v Permanent Secretary in Charge of Internal Security – Office of the President & Another ex-parte Joshua Mutua Paul (2013) eKLR** set out the meaning and effect of a “joint and several” judgment as follows:

“

it is not disputed that judgement was entered jointly and severally against the defendants in the suit whose decree gave rise to these proceedings. It is therefore important to understand the meaning and effect of a “joint and several” judgement or liability. In Dubai Electronics vs Total Kenya And 2 Others High Court (Milimani Commercial And Admiralty Division) Civil Case No. 870 Of 1998 after considering past decisions on the issue I stated:

‘Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability’.....”

22. Therefore, joint and several liability refers to a shared responsibility for a debt or a judgment, in which each debtor is responsible for the entire amount of the debt or judgment. The person owed money can collect the entire amount from any of the debtors and not be limited to a share from each debtor.

23. It is thus at the discretion of the Applicant to choose against which party to execute the judgment as to costs. From the pleadings the Applicant has chosen to enforce against the Respondent, and as the entire costs can be executed as against the Respondent, it would be prudent for the Respondent to pay the amount of costs that is demanded by the Applicant, and then seek either contribution or indemnity from Hon. Moses Wetangula and any other judgment debtors with whom it was held jointly and severally liable for the said costs.

24. As to the actual amount of costs due from the Respondent, the Certificate of Costs issued in **Bungoma High Court Election Petition No 3 of 2013 on 26th April 2016** on 26th April 2016, and in **Kisumu CA Civil Appeal No. 43 Of 2013** on 29th February 2016 were annexed by both the Applicant and Respondent, and were for taxed costs of Kshs 3,850,510/= and Kshs 1,632,899/= respectively. The total taxed costs were thus Kshs 5,483,409/=. The parties do not contest the averment that Hon. Moses Wetangula, who was one of the Respondents in and the Appellant in has since paid costs of Kshs 2,283,000/= to the Applicant, thus leaving an unpaid balance of Kshs 3,200,409/=.

25. Lastly, it is clear from the judgments and certificate of costs in **Bungoma High Court Election Petition No 3 of 2013** and in **Kisumu CA Civil Appeal No. 43 Of 2013** that no specific orders were made as regards payment of interest on the costs. On the contrary, the costs to be paid were capped.

26. In the premises, I find that the Applicant's Amended Notice of Motion dated 14th December 2018 is merited. I accordingly grant the following orders:

I. An order of mandamus directed to the Chief Executive Officer of the Independent Electoral and Boundaries Commission compelling him or her to pay to the *ex Parte* Applicant Kshs 3,200,409/=. being the balance of costs awarded and taxed in Bungoma High Court Election Petition No. 3 of 2013 and in Kisumu CA Civil Appeal No. 43 Of 2013

II. The *ex Parte* Applicant shall have the costs of the Amended Notice of Motion dated 14th December 2018 of Kshs 50,000/=.

27. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF MARCH 2019

P. NYAMWEYA

JUDGE