



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 78 OF 2018

IN THE MATTER OF: AN APPLICATION BY E M (through mother and next friend)

CHRISTINE NTHOKI MUANGE) FOR LEAVE TO APPLY FOR

ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE GOVERNMENT PROCEEDING ACT CAP 40 LAWS OF KENYA

BETWEEN

E M (A minor suing through mother and next friend)

CNM.....APPLICANT

AND

1. PRINCIPAL SECRETARY, MINISTRY OF HEALTH

2.THE CHIEF OFFICER, FINANCE & ECONOMIC PLANNING COUNTY

GOVERNMENT OF MOMBASA.....RESPONDENTS

RULING

The Application

1. The Notice of Motion before the Court is dated 7th November, 2018. It prays for the following orders:

(a) That this honourable court be pleased to certify this application as urgent and allocate it an early hearing date.

(b) That this Honourable court be pleased to issue an order of Mandamus to compel the 1st and 2nd Respondents to pay the Ex parte Applicant the sum of Kshs. 11, 191,440.00 with interest thereon at court rates from 18.9.2017 until payment in full and costs of Kshs. 431,521.00 being the sums awarded in MSA CMCC NO. 1558 OF 2013, E M (A minor suing through mother and next friend CNM) =VS= THE ATTORNEY GENERAL & 2 OTHERS.

(c) That costs of this suit and incidentals to this application be provided for.

(d) That this Honourable court do grant such further or other reliefs as it may deem just and expedient.

2. The application is premised on the grounds set out therein and is supported by the statement filed on 1st November, 2018. It is also supported by Verifying Affidavit sworn by CNM on 3rd October, 2018. The Applicant’s case is that she is the mother and next friend of E M (minor), the Applicant herein and that she is duly authorized as such next friend. (Copy of authority annexed “CNM-1”).

3. The Applicant states that she filed suit on behalf of her son E M in CMCC NO. 1558 OF 2013 MOMBASA against the Attorney General, Hyline Memba and the County Government of Mombasa. (She annexed and marked “CNM-2” as being copies of the pleadings). The Chief Magistrate heard the case fully and on 18th September, 2017 entered Judgment in her favour against the Defendants/Respondents for KShs. 11,191,400/= plus costs and interests at court rates. After the delivery of the Judgment, the Court issued a Decree and Certificate of Costs, (copies of which are annexed and marked as “CNM-5 and 6”). The Applicant now prays for an order of mandamus to compel the Respondent to satisfy the decree.

The Response

4. The 1st Respondent did not oppose the application. Mr. Mwandeje, learned counsel for the 1st Respondent submitted that the Attorney General is willing to pay its portion of the decretal sum and that is the reason they do not oppose the application.

5. However, the 2nd Respondent oppose the application vide a Replying Affidavit sworn by **Mtalaki Mwashimba** on 21st January, 2019 and a Supplementary Replying Affidavit sworn by **Jimmy Waliaula** on 7th March, 2019.

6. The 2nd Respondent’s case in opposition to the application is that the 2nd Respondent should not be held liable for functions that were never devolved from the National Government when the cause of action arose. The 2nd Respondent states that it is wrongly enjoined in this suit. That the cause of action arose on the 21st day of September 2012, and devolution was to be effective on the 4th day of March, 2013 hence the function of health was under the National Government. The 2nd Respondent’s case is that pursuant to the provisions of Section 2(2) of the Sixth Schedule to the Constitution, the provisions of the Constitution relating to devolved Governments became effective on the date of the first elections for County Assemblies and Governors which were conducted on 4th March, 2013. That Section 6 of the Sixth Schedule to the Constitution provides that all rights and obligations however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the National Government or the Republic under the Constitution. However, those rights and obligations are expressly stated to be subject to contrary provisions in the Constitution. The 2nd Respondent states that the framers of the Constitution intended that the National Government assist the County Government to transit into the devolved system of government and that it was not their intention that the National Government abdicates its obligations immediately after the first election hence the need for the transition period. That it was not the intention of the framers of the constitution that County Government would from day one of their establishment inherit obligations and liabilities of the National Government. The 2nd Respondent insists that the 1st Respondent should pay off the Applicant’s Decretal sum since it was liable when the cause of action arose and the same was not a devolved function and the law does not act retrogressively. The 2nd Respondent states that it is the cardinal rule of statutory construction that a retrospective operation should not be given to a statute so as to impair an existing right or obligation, except with regard to procedure. That the health service delivery function was formally transferred to counties on the 9th day of August, 2013 vide Legal Notice No. 152 of 2013. The 2nd Respondent’s case is that the obligation of this Court is to construe a statute and to give effect to the intention of parliament and to ascertain the words used by parliament.

Submissions and Determination

7. Parties made oral submissions in Court which I have considered. The issue for determination is who between the Respondents should pay the decree.

8. This Court has noted that none of the Respondents disputes the validity of the decree. In fact the 1st Respondent submitted that he is ready to pay the decree but only that portion which is due to it. The 2nd Respondent on its part objects to the payment of the same stating that the liability is with the 1st Respondent.

9. I have confirmed that the decree is properly due. It was duly extracted. The Judgment dated 18th September, 2017 leading to the decree is attached. A copy of decree dated 24th January, 2018 is also attached as is Certificate of cost dated 24th January, 2018. Also attached is Certificate of order against the government under Order 29 Rule 3 of the Civil Procedure Rules. In this regard the application is fully compliant.

10. The issue still remains who is liable between the Respondents. That issue was already settled by the Judgment in CM’s Civil Suit No. 155 of 2013 where all the Defendants in the suit were found liable. The Judgment was not appealed. This Court cannot therefore give a contrary opinion on liability. However, considering the fact that the health service delivery function was formally transferred to counties on 9th August, 2013 vide Legal Notice No. 152 of 2013, this Court is persuaded that the responsibility to satisfy the decree lies with the 1st Respondent. However, the Applicant is at liberty to execute the decree against any of the parties who were the Defendants in the primary suit. This Court notes, however, that these proceedings are taken out to compel payment against the two levels of government set out herein, and it is upon the Applicant, once it gets the orders herein, to decide against whom to execute the same.

11. In the upshot, I find that the application before the Court is merited and the same is granted with costs against the Respondents jointly and severally.

Dated, Signed and Delivered in Mombasa this 20th day of May, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Jengo holding brief Ms. Umara for Ex parte Applicant

Ms. Omboga for 2nd Respondent

Mr. Makuto for 1st Respondent

Mr. Kaunda Court Assistant