



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 7 OF 2015**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**KISII COUNTY GOVERNMENT.....RESPONDENT**

**EXPARTE**

**PETER KAUNDA NYAMOSI**

**DAVID NYAMWEYA SAGERO**

**KENNEDY BOSIRE MOINDI**

**trading as FIVE STAR SERVICES .....EX-PARTE APPLICANT**

**RULING NO. 2**

1. On 10<sup>th</sup> February 2016, this court issued an order of mandamus directing the Kisii County Government (“the County”) to settle and or satisfy the decree in ***Kisii CMCC No. 93 of 2009*** where the County was ordered to pay Kshs. 213, 200/- together with costs and interest. In addition, the Court ordered that in default of such payment, a warrant of arrest do issue against Julius Ndege, the Secretary and accounting officer of the County Government (or his successor, if any) for committal to civil jail for a period of 6 months at the ex-parte applicant’s expense on subsistence.

2. In due course, the County moved the court by an application dated 19<sup>th</sup> April 2016 seeking an order to set aside the warrants of arrest issued against the County Secretary and an order to set aside the decree in ***Kisii CMCC No. 93 of 2009***. It also prayed that the County be allowed to file an affidavit to provide relevant documents on the status of the decree in ***Kisii CMCC No. 93 of 2009***. Before dealing with the application, I directed the County Secretary to file an affidavit to show how the County intends to settle the decree.

3. After taking arguments on that application, I rejected the argument that the County Government was not the legal successor of local authorities established under the ***Local Government Act (Repealed)*** falling within its jurisdiction prior to the promulgation of the Constitution. I therefore held that the County Government of Kisii was the legal successor of Kisii Municipal Council and was liable to settle the judgment debt in ***Kisii CMCC No. 93 of 2009***. I also held that the accounting officer for the County Government is the County Executive Member for Finance.

4. I also rejected the position taken by the County that the judgment debt could not be settled as the Controller of Budget would not approve an unlawful payment. I also held that a judgment debt is not subject to a process of identification, verification and validation of assets and liabilities of defunct local authorities provided for under the provisions of the ***Transition to Devolved Government Act*** and ***Intergovernmental Relations Act*** as it is a lawful debt inherited by the County Government.

5. Following the order to show cause, the County Executive Committee Member in Charge of Finance, Moses Onderi Oure, filed an affidavit dated 18<sup>th</sup> April 2019 in which he stated that guided by a circular dated 25<sup>th</sup> October 2018 issued by the Office of the Controller of Budget. He was of the view that the circular expressly barred the County from paying judgment debts from defunct local authorities. Consequently,

he wrote to the Controller of Budget a letter dated 28<sup>th</sup> March 2019, seeking directions on court decrees in matters pertaining to the defunct local authorities.

6. On 1<sup>st</sup> April 2019, the Controller of Budget wrote back and stating as follows:

Our Circular Ref No. COB/CIR/002/VOL.1(97) Circular No. 23/2018 dated 25<sup>th</sup> October, 2018 sought a status report on pending bills accrued by county governments. In the same circular, a template of the status attached. Since the intention was to quantify the status of pending bills accrued by county governments since their inception, the Circular directed that pending bills inherited from the defunct local authorities should not be included in the Status Report.

We reiterate that the Circular only sought a status report on the pending bills accrued by county governments as at 30<sup>th</sup> June, 2018.

7. In view of the response by the County Executive for Finance, I directed the Controller of Budget to file a Replying Affidavit to explain its position in relation to the position taken by the County. The Controller of Budget, Agnes Odhiambo, swore a replying affidavit on 23<sup>rd</sup> April 2019 in which she detailed the role of the Office of the Controller of Budget in relation to payment of accrued debts by the County Government. In particular, and in response to the contention by the County Executive for Finance that the County was barred from settling judgment debts accrued by the County Government, she deposed as follows:

[11] THAT in light of the mandate of the OCOB in reporting and advising on budget implementation, OCOB vide a Circular dated 25<sup>th</sup> October, 2018 sought for a Status Report of Pending Bills of all county governments. Annexed hereto and marked “**AO-1**” is the Circular dated 25<sup>th</sup> October, 2018.

[12] THAT the Status Report was intended to quantify the pending bills that had been accrued by County Governments since the advent of the devolved system of government in the year 2013.

[13] THAT contrary to the position given in the Affidavit of Moses Onderi Oure, the Circular did not in any way place any moratorium on payments by County Governments.

[14] THAT vide a letter dated 1<sup>st</sup> April, 2019, OCOB sought to clarify to the County Government of Kisii that the Circular dated 25<sup>th</sup> October, 2018 only sought for a Status Report and was not intended to prohibit payments. Annexed hereto and marked “**AO-2**” is a copy of the letter dated 1<sup>st</sup> April, 2019.

[15] THAT the mandate of OCOB does not extend to approval of payments to either Service Providers, contractors or the settlement of judgment debts.

[16] THAT the mandate of OCOB is limited to authorizing withdrawal of public funds from the County Revenue Fund.

[16] THAT the approval for withdrawal of funds by the OCOB is at “Vote level” and not line items. Consequently, the OCOB would not be in a position to bar settlement of a particular payment.

8. I agree with the position taken by the Controller of Budget. The role of the office under **Article 228(4)** of the Constitution is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds including the Equalization Fund under **Article 204(9)** of the Constitution, the Consolidated Fund under **Article 206(4)** of the Constitution and County Revenue Funds under **Article 207(3)** of the Constitution. However, under **Article 228(5)** of the Constitution, the Controller of Budget can only authorize withdrawals when satisfied that the withdrawal is authorized by law. It is therefore clear that in relation to the County, the Office of Controller of Budget authority is limited to authorising withdrawal of public funds from the County Revenue Funds and not authorising each and every expenditure by the County. Conversely, the County has not shown under what authority it seeks the authority of the Controller of Budget to pay off a judgment debt. As the Controller of Budget has stated, “The approval for withdrawal of fund by the OCOB is at “Vote level” and not line items. Consequently, the OCOB would not be in a position to bar settlement of a particular payment.”

9. Having found that the Office of the Controller of Budget is not an impediment to the settlement of the judgment debt, the Office is discharged from these proceedings. I now invite the County Executive for Finance, Kisii County to demonstrate how it intends to pay the judgment debt in favour of the ex-parte applicants.

**DATED and DELIVERED at KISII this 20<sup>th</sup> day of MAY 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyatundo instructed by Nyatundo and Company Advocates for the ex-parte applicant.

Mr Mosota, Advocate for the respondent.

Mr W. Tuti, Advocate for the Office of Controller of Budget.