



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW CASE NO. 4 OF 2019

REPUBLIC.....APPLICANT

VERSUS

MERU COUNTY GOVERNMENT.....1ST RESPONDENT

TITUS NTOCHIU, THE MERU COUNTY

EXECUTIVE MEMBER (C.E.C) MEMBER OF FINANCE.....2ND RESPONDENT

RUFUS MIRITI, THE COUNTY SECRETARY.....3RD RESPONDENT

AND

NICE RICE MILLERS LIMITED.....EXPARTE-APPLICANT

J U D G M E N T

1. By Motion on Notice dated 2nd April, 2019 brought under ***Order 53 Rule 3 of the Civil Procedure Rules, Section 7(1) (a), 10(1) and (11) (1) (f) and (j) of the Fair Administrative Action Act, No 4 of 2015***, the Exparte-Applicant (hereinafter “the applicant”) sought an order of Mandamus compelling the respondents to pay a sum of Kshs.134,145,234/70 and accrued interest as ordered in the **Meru H.C.C.C. No. 14 of 2015**.
2. The grounds upon which the application was predicated upon were set out in the body of the Motion, the Statutory Statement and the Verifying Affidavit of Charles Njiru Kaburu sworn on 14th March, 2019. These were that; the applicant had sued the 1st respondent in **Meru HCCC. No. 14 of 2015 (hereinafter “the said suit”)** wherein a judgment in its favour was decreed for KShs. 93,708,914/- in September, 2018.
3. That a Certificate of Order against the Government for Kshs.134,145,234/70 was issued on 27th November, 2019; that despite being served with the said Certificate of Order and the decree, the respondent has failed to settle the amount decreed and so certified. That execution can only proceed by way of Mandamus compelling the respondents to comply with the said judgment.
4. It was averred that the 1st respondent had applied for stay of execution and on 17th December, 2018, the court granted a stay on condition that the 1st respondent deposits the entire sum in court; that the 1st respondent failed to comply with the said order thus the current application. It was deposed that the applicant had earlier on applied in **Meru JR. No. 2 of 2019** for an order of Mandamus but the application was struck out.
5. The application was opposed vide a Preliminary Objection dated 8th April, 2019 which was treated and argued as Grounds of Opposition. The Notice of Preliminary Objection had an error as it referred to a non-existent Motion. I allowed Counsel for the respondents to amend the same and refer to the current Motion. It was contended that the application was bad in law and an abuse of the process of the court.
6. **Mr. Magee**, Learned Counsel for the applicant relied on the Statutory Statement and the Verifying Affidavit. He relied on the cases of **Republic vs. Principal Secretary, Ministry of Lands and Physical Planning Exparte Orbit Chemicals Ltd [2017] eKLR, Republic vs. AG & Anor Exparte the Standard Limited & Baraza Ltd [2018] eKLR, Republic vs. AG & Anor Exparte Ongata Works Ltd [2016] eKLR and Njenga Mwangi Wachira & Partners vs. County Secretary, City County of Nairobi [2018] eKLR** in support of his client’s case.
7. On the other hand, **Mr. Kibanga**, Learned Counsel for the respondents submitted that; since the applicant had filed another application in **Meru JR. No. 2 of 2019**, if the respondents’ application in that matter succeeds, the current application will be but an abuse of the process of

court.

8. **Mr. Kibanga** further submitted that; there was no evidence that there had been any effort to recover the amount and the respondents had refused to pay; that since it was the 1st respondent alone who was a defendant in the said suit, there was no basis of enjoining the 2nd and 3rd respondent; that the 2nd and 3rd respondent are not legally liable for the liability of the 1st respondent. **Counsel** relied on the cases of **Republic vs. DPP & 2 Others Exparte Edwin Dayan Dande & 3 Others [2018] eKLR** and **Kivanga Estates Ltd vs. National Bank of Kenya [2018] eKLR** in support of his said submissions.

9. In rejoinder, **Mr. Magee** submitted that the earlier application was not determined on merit and therefore the applicant was at liberty to institute the present application. That the applicant had demonstrated that it had made effort to demand the amount without any success. That the 2nd and 3rd respondent were properly before court by virtue of **Article 179 of the Constitution** and **sections 34, 36 and 44 of the County Governments Act (hereinafter “the Act”)** as stated in paragraphs 3 and 4 of the Statutory Statement of facts.

10. I have considered the entire record and Learned Counsel’s submissions. The issues that fall for determination are; **whether the application is an abuse of the process of the court; whether the 2nd and 3rd respondent have been improperly joined in these proceedings and whether an order for Mandamus should issue.**

11. The first issue is whether the application before me is an abuse of the process of the court. The respondent’s contention was predicated on the premise that the applicant had lodged a similar application in **Meru JR. No. 2 of 2019**. At the invitation of the parties, this court brought forward an application dated 21st March, 2019 in that matter and was heard at the same time with this application.

12. The application in that matter sought to review an earlier ruling where the court had struck out an application for leave to bring an application for Mandamus against the respondents for the very same amount being claimed in the present application. That application for review was dismissed as the court found out that the applicant’s application was struck out for being incompetent and was not determined on merit.

13. In the circumstances, it cannot be said that the applicant has lodged a similar application as the one that was struck out in the aforesaid **Meru JR. No. 2 of 2019**. Was not a substantive Motion for mandamus. In this regard, the cases relied on by the respondents are not applicable in the circumstances of this case. In **Republic vs. DPP & 2 Others (supra)**, the applicants therein had failed to disclose that they had a pending application in the Court of Appeal and that they were pursuing a similar application in two different courts.

14. In **Kivanga Estates Ltd vs. National Bank of Kenya (supra)**, the court declared the application before it as an abuse of the court process because the applicant therein had lodged four different suits against the same defendant seeking similar remedies. That is not the case before me. Firstly, the applicant has disclosed that it had filed a similar application but it was struck out. Secondly, the **Meru JR. No.2 of 2019** was never determined on merit as the application that was lodged prayed for leave to bring an application for on order for Mandamus, leave which had already been granted. For this reason, the respondent’s application in the said suit was dismissed. Accordingly, that ground is without basis and the application is properly before me.

15. The second issue is whether the 2nd and 3rd respondents are properly enjoined in these proceedings. They argued that they were not defendants in **Meru HCCC. No. 14 of 2015** whose decree is being sought to be enforced through these proceedings.

16. **Article 179 of the Constitution** provides for the County Executive Committee. It vests the executive authority of the county on the Executive Committee which consist of the Governor, Deputy Governor and Members appointed by the Governor with the approval of the county assembly.

17. **Section 34 of the County Governments Act, No.17 2012** operationalizes **Article 179 of the Constitution**. While **section 36 of the Act** provides for the functions of the Executive Committee. The functions include those set out in **Article 183 of the Constitution**, supervise the administration and delivery of services in the county and all other functions incidental thereto.

18. Finally, **section 44 of the Act** provides for the establishment of the office of the County Secretary who is the secretary to the Executive Committee.

19. The totality of the foregoing is that the Executive Member of finance is in charge of finances of the County while the County Secretary executes the mandate or decisions of the County Executive Committee. In this regard, since the orders sought by the applicant are to be executed and/or complied with by the 1st respondent, the accounting officers who would ensure compliance therewith are but the 2nd and 3rd respondent. The act of naming the current holders of those offices does not in any way whatsoever make them personally liable for the amount sought by the applicant and it does not therefore affect the application.

20. In **Njenga Mwangi Wachira & Partners vs. County Secretary, City County of Nairobi (supra)**, Mativo J. held:-

“It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case, the respondent ought to have been the accounting officer”.

21. Accordingly, I find that the 2nd and 3rd respondents were properly enjoined in these proceedings as they are the ones who will ensure compliance of any order made against the 1st respondent.

22. The final issue is whether a case has been made for an order of Mandamus. In the case of Shah vs. Attorney General [1970] EA 543, Goudie J observed that:-

“Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by an Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...”

In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest, the court has jurisdiction to grant Mandamus to compel the fulfilment. .. The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgment which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act”. (Emphasis provided)

23. In Republic vs. Attorney General & Anor Exparte James Alfred Koroso [2013] eKLR, the Odunga J. held:-

“In the present case, the ex-parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from Mandamus, he has no option of ensuring that the judgment he has been awarded is realized. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks put on their paths by actions or inactions of public officers”.

24. In the present case, the applicant exhibited a Judgment made in Meru HCCC. No. 14 of 2015, a Certificate of Order against Government dated 27th November, 2018 for KShs. 134,145,234/70 and an affidavit of service of Geoffrey Mburugu M’Mukiri sworn on 2th November, 2018. In the said affidavit of service, the process server deposes that on 27th November, 2018 at about 11.00am, he served the 3rd respondent with copies of the decree, Certificate of Order against Government and a demand letter.

25. The applicant has deposed that despite the said demand, the 1st respondent has never contacted its advocate to either pay the decreed sum or deposit the amount in a joint account as ordered or make any proposals. All these depositions were not denied.

26. There is a lawful judgment and decree in force against the 1st respondent; a Certificate of Order against the Government has been issued against the 1st respondent in compliance with section 21(3) of the Government Proceedings Act. The 1st respondent has neither paid the decreed sum nor given proposals how to settle the same. The applicant cannot execute the decree it has against the 1st respondent by any other means unless an order of Mandamus issues. It may be left baby sitting barren decree.

27. For the foregoing reasons, I will associate myself with the sentiments of Majanja J. in the case of Republic vs. Town Clerk of Webuye County Council & Another [2014] eKLR wherein he delivered himself as follows:-

“... a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) and (b) and the applicant’s right to access to justice protected under Article 48 of the Constitution”.

28. In view of the foregoing, I find the applicants application to be meritorious. Accordingly, an order of Mandamus hereby issues compelling the respondents to pay the sum of KShs.134,145,234/70 together with interest as ordered in Meru HCCC. 14 of 2015. For the avoidance of doubt, this order binds the respondents by themselves and any other officer for the time being discharging the offices of County Executive in Charge of Finance and the County Secretary of the 1st respondent.

29. The applicant shall have the costs of the application.

It is so ordered.

DATED and DELIVERED at Meru this 2nd day of May, 2019.

A. MABEYA

JUDGE