



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JR MISC. CIVIL APPLICATION NO. 1 OF 2019

IN THE MATTER OF AN APPLICATION BY MICK SARUNI OLE SAMBEKE FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KAJIADO CIVIL SUIT NO. 335 OF 2016

MICK SARUNI OLE SAMBEKE VS COUNTY GOVERNMENT OF KAJIADO & ANOTHER

BETWEEN

REPUBLIC.....APPLICANT

AND

THE COUNTY EXECUTIVE IN CHARGE OF FINANCE

COUNTY GOVERNMENT OF KAJIADO.....1ST RESPONDENT

THE COUNTY SECRETARY OF THE COUNTY

GOVERNMENT OF KAJIADO.....2ND RESPONDENT

EX PARTE.....MICK SARUNI OLE SAMBEKE

RULING

1. Before me is an amended Notice of Motion Application 19th February, 2019 brought under **Order 53 Rule 3** of the Civil Procedure Rules and Section 8 & 9 of the Law of Reform Act Cap. 26, Laws of Kenya and all other enabling provisions of the law. The Applicant is seeking the following orders:

a) THAT an order of mandamus do issue compelling the respondents herein to satisfy the judgement and decree issued by the Chief Magistrate in Kajiado Chief Magistrate in Kajiado Chief Magistrate's Court case No.335 of 2016 Mick **SARUNI OLE SAMBEKE vs COUNTY GOVERNMENT OF KAJIADO & MOSES LOMUNYAK OSHUMO**.

b) THAT the respondents do meet the cost of this application.

2. The application is based upon five grounds. The grounds in support of the application are that on 9th March 2018, the Chief Magistrate Kajiado delivered a judgement in favour of the *ex parte* applicant Mick Saruni Ole Sambeke and against the County Government of Kajiado and **MOSSES LOMUNYAK OSHUMO** for Kenya shillings four hundred and fifty thousand (Kshs. 450,000/=) as general damages, Kenya shillings twenty seven thousand seven hundred (Kshs. 27,700/=) as special damages, costs of the suit and interest at court rates from the date of judgement.

3. Further grounds are that pursuant to the said judgement, a decree and certificate of costs was drawn by the court on 2nd May 2018 for a total of Kenya Shillings five hundred and ninety three thousand eight hundred and seventy five (Kshs.593,875); vide a letter dated 14th May 2018, the *ex parte* applicant forwarded the judgement and decree to the County Secretary demanding settlement thereof but to date the said judgement and decree remains unsatisfied; on 23rd October 2018, the court issued a certificate of order against the government and certificate of order for costs against government both of which were served upon the County Government of Kajiado on the 25th October 2018 but

regrettably the same remain unsatisfied; the *ex parte* applicant desires to realize the fruits of the said judgement and decree and therefore prays to this court for an order of mandamus to compel the respondents to satisfy the judgement and decree issued by the chief magistrate in Kajiado Chief Magistrates Court Case No.335 of 2016 and lastly, leave to apply for order of mandamus to compel the respondents to satisfy the judgement and decree issued by the chief magistrate in Kajiado Chief Magistrates Court Case 335 of 2016 was granted by the Honourable Court on 7th February, 2019.

4. The Application is supported by annexed Statutory Statement and verifying affidavit sworn by MICK SARUNI OLE SAMBEKE. He also made written submission to further reinforce his claim.

5. The fact of this case are such that the Applicant sued the County Government of Kajiado and Moses Lomunyak Oshumo in Kajiado CMCC 335 of 2016 for damages arising out of a road traffic accident which occurred on 6th March 2015 involving motor vehicle KBQ 144D owned by the County Government of Kajiado and driven by the said Moses Oshumo and in which the applicant was travelling as a passenger.

6. The said case was heard, determined and a judgement was delivered on 9th of March 2018. The Chief Magistrate Kajiado found in favor of the Applicant as against the Respondents herein. It was ordered in the said Judgement that the Respondents do pay general damages to the tune of Kshs. 450, 000/=; Special Damages to the tune of Kshs. 27, 700/=; Costs of the suit and Interest at Court rates from the date of judgement.

7. Subsequent and pursuant to the said judgement, a decree and certificate of costs was drawn by the court on 2nd May 2018 for a total of Kenya shillings five hundred and ninety three thousand eight hundred and decree remains unsatisfied. On the 23rd October 2018, the court issued certificate of order and certificate of order for costs against Government both of which were served upon the County Government of Kajiado on 25th October 2018 but regrettably the same remain unsatisfied.

8. The Applicant averred that the Respondent herein is the one who has the overall financial obligation for the purposes of the affairs of the County Government of Kajiado and he is the one under obligation to pay funds, in the capacity as the accounting officer. Further that the Respondent has abdicated his obligation and failed to satisfy the judgment and decree. As the *ex parte* Applicant desires to realize the fruits of the judgement, he prays to this court for an order of Mandamus to compel the Respondent to satisfy the judgement and decree issued by the Learned Magistrate in the said case.

Law And Analysis

9. I'm well alive of the fact that an application of Judicial Review Orders of mandamus, prohibition and certiorari shall be made in accordance with the provisions of *Order 53(1) & (2)* of the Civil Procedure Rules, 2010 states as follows:

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

10. I have no doubt whatsoever that the application herein meets all the requirements stated in **order 53(2)** of the Civil Procedure Rules, 2010. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. It is important to note that the judicial review remedy is no longer in the domain of the common law remedies but a constitutional remedy espoused in **Articles 22, 23, 47 and 50** of the Constitution of Kenya 2010. Further that these remedies are now granted as stipulated in the Fair Administrative Action Act. In the Court of Appeal decision of ***Judicial Services Commission Vs Mbalu Mutuva & Another (2015) eKLR CA 52/2014***, it was held inter alia:-

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of rights. The right to fair administrative action is a reflection of some of the national values in Article 10 of the Constitution such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under common law was developed.”

11. Further, this court is well aware of the discretionary nature of judicial review remedies and the fact that the court would in certain circumstances decline to grant the same even if the same are merited. This position was well appreciated in ***Halsbury's Laws of England 4th Edition Vol. 1 (1) paragraph 12 pg. 270:***

“The remedies of quashing orders (formerly known as order of certiorari); prohibition orders (formerly known as orders of prohibition; mandatory orders (formerly known as orders of mandamus) are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. [emphasis added].

Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decisions to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders.”

12. In the same respect, I place further reliance in **Re Bivac International SA (Bureau Veritas)** (2005) EA. 43 where the High Court expounded on the issue of discretion and stated that:-

“... whereas Judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors that led to the exercise of the court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waxing a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review sought, the grounds and possible principles of administrative law involved.”

13. As regards the scope under which a judicial review remedy of mandamus, it may issue was clearly stipulated by the Court of Appeal in **Republic vs Kenya National Examinations Council ex parte Gathenji & 8 Others, Civil Appeal No.234 of 1996** where the court cited with approval, the Halsbury’s Laws of England, 4th Edition vol. 7 p.111 paragraph 89 that:-

“The order of mandamus is of 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.”

14. It is incumbent upon the applicant in an application for leave to file a judicial review application to show that he has a **prima facie** case against the Respondent. In that regard, I associate myself with the decision in **Republic vs County Council of Kwale & Another ex parte Kondo & 57 others**, (1998) eKLR where Waki J stated that:-

“.... Leave (for an order of mandamus) may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting relief claimed by the applicant the test being whether there is a case fit for further investigation at a full interpartes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially.”

15. I have taken into consideration the application before court. I’m also alive to the fact that the institution that the Applicant is seeking an order of mandamus against is a public body that is subject to judicial review remedies.

16. The documents which this court was furnished with satisfy the threshold of establishing an arguable case for the Applicant as against the Respondent. The Applicant sued the Respondent herein for both general and special damages which were awarded by the Chief Magistrates court at Kajiado as aforementioned. The Respondent have not complied with the judgement and the decree issued by the Court in the said case.

17. I’m also aware that by dint of **section 21(4)** of the Government Proceedings Act, the Respondent is protected and clothed with immunity from execution and attachment of its property. That gives this Court no other option but to resort to the order of mandamus. In the premises the Amended Notice of Motion dated 19th February 2019 is meritorious.

18. In view of the foregoing, leave to apply for an order of Mandamus to compel the Respondent to satisfy the judgment and decree issued by the said Learned Magistrate in Kajiado CMCC NO. 335 of 2016, is hereby granted as prayed.

19. It is so ordered.

Dated, signed and delivered in Open Court at Kajiado this 7th of June, 2019

REUBEN NYAKUNDI

JUDGE

In the presence of:

Ms. Mageto h/b for Mathura for Exparte

Applicant present

The Respondent not represented