



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

JUDICIAL REVIEW NO. 11 OF 2016

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW AND ORDER OF MANDAMUS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: JUDICIAL REVIEW UNDER SECTIONS 8 & 9 OF THE REFORM ACT, CAP 26 LAWS OF KENYA AS READ WITH ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY ROBSON RUSTON TABU FOR ORDERS OF JUDICIAL REVIEW, MANDAMUS

BETWEEN

ROBSON RUSTON TABU.....APPLICANT

VERSUS

THE NATIONAL WATER CONSERVATION

& PIPELINE CORPORATION.....RESPONDENT

Mr. Tindika for the Applicant

Ms. Obonyo for the Respondent

RULING

Introduction

1. By a Ruling by **Chitembwe J** dated 6th June 2017 and delivered by **Korir J** on 22nd June 2017 in Judicial Review No. 11 of 2016 this Court granted an order of mandamus compelling the Respondent to satisfy the decree in Malindi PMCC number 285 of 2004.

2. By a Notice of Motion dated **19th December 2018** and brought under **Sections 1A(1), (2), 3 and 3A** of the Civil Procedure Act, **Order 22 Rule 22 (1) Order 51 Rule 1** of the Civil Procedure Rules and all other enabling provisions of the Law the Respondent sought for Orders:

a. THAT this application be certified as extremely urgent and one deserving to be heard ex-parte in the first instance.

b. THAT the Honourable Court be pleased to stay execution herein pending the hearing and determination of the application.

c. THAT the Honourable Court be pleased to grant a moratorium in the execution of the decree herein to enable the Respondent discuss with Coast Water Services or to source for funds from the National Treasury to settle the decretal sum.

d. THAT cost of this application be in the cause

3. The application was supported by the grounds outlined therein and in the annexed affidavit of Eng. Sammy Mburu sworn on the 19th December 2018.

4. In response to the Application, the Applicant filed a notice of preliminary objection dated 22nd January 2019.

5. Pursuant to court directions issued on 5th March 2019, the Applicant filed submissions dated 11th March 2019 in respect of the preliminary objection.

6. In turn, the Respondent filed its submissions in support of its Application dated 19th December 2018 as well as against the notice of preliminary objection.

The Respondent's Case

7. It was contended that the Applicant's Agent served the Respondent with warrants of arrest dated 20th November 2018 intending to arrest the Respondent's Chief Executive Officer. On 14th December 2018, the Applicant's Agent came to the Respondent's offices with the intention of arresting the Applicant's Chief Executive Officer. It was further contended that prior to the delivery of judgment in the matter and service of the decree, the Respondent had innumerable taken deliberate, concise and considerate measures to have the Decretal sum settled by notifying and discussing the settlement of this matter by the Coast Water Services Board which is the Board In Charge of water services in the Coast region and Malindi in particular.

8. The case was made that the reasons for delay in settlement of the Judgment sum and bill of costs had been occasioned by the delayed release of funds from the end of the Coast Water Services Board and a delay in release of exchequer to the Respondent by the National Treasury. The deponent averred that the soon after delivery of judgment in this matter the Respondent informed the Office of the Attorney General of this judgment and impending execution thereof and accompanying auctioneer fees. That consequent from the delayed release of exchequer the Respondent further wrote to its parent Ministry, namely. the Ministry of Water and Sanitation requesting for budgetary support for settlement of outstanding Court awards and the Ministry continued to seek redress in the matter by requesting for budgetary support for settlement of outstanding Court awards with the National Treasury.

9. It was averred that the issue of settlement of pending bills outstanding in State agencies including the Applicant herein was being currently handled in compliance with Treasury Circular No. 4 of 2018 reference number ES.1/03 "N"(2) dated 19th June 2018 which had directed the Respondent amongst other state agencies to submit all pending bills for verification, authentication and payment. That there was in place a taskforce within the National Treasury verifying, authenticating and considering the pending bills for payment this matter.

10. The deponent argued that since it wholly relied on the National Treasury for its funding, it would only be able to settle the outstanding decretal sum upon release of funds from the National Treasury to meet this award.

The Applicant's case

11. The Applicant in his Notice of Preliminary Objection relied on the following Grounds:

a. THAT the said Application was grossly incompetent, bad in law, lacking merits and otherwise an abuse of the due process of the Court.

b. THAT the allegations that payment herein ought to have been made Coast Water Services Board were raised during the hearing of the substantive Notice of Motion seeking orders of Mandamus and this Honourable Court, by the Judgment dated 6th June 2017, and delivered on the 22nd June 2017, rejected the same and directed the Respondent do pay the decretal sum herein. In the premises, the said issue cannot be raised afresh as the same is res judicata.

c. THAT the Suit, Applications and Judgments herein have been against the Respondent who was, ordered to pay the decretal sum and thus there is no reason whatsoever why execution should not be enforced due to the Respondent's failure to do so.

d. THAT this Honourable Court has no jurisdiction to stay execution due to external failures of the Respondents, as purportedly sought.

e. THAT the Notice of Motion Application dated 19th December 2018, ought to be dismissed with costs to the Applicant.

The Applicant's Submissions

12. In support of the Preliminary Objection, Mr. Tindika for the Applicant isolated central to the Application herein as being the connection between the Respondent and Coast Water Services Board with regard to the payment of the decretal sum. It was submitted that this issue was raised in response to the Application for Mandamus and the Honourable Justice **Chitembwe J.** in the judgment dated 6th June, 2017 and delivered on 22nd June, 2017 addressed the said issue with finality hence the matter was now res judicata. Reliance was placed on **Njue Ngai Njiru Ngai & another [2016] eKLR.**

13. Regarding whether the Court had the power or jurisdiction to grant a moratorium in the execution of the decree to enable the Respondent source for the funds from the National Treasury to settle the decretal sum, Mr. Tindika submitted that it did not as there was no provision in any written law for the same.

14. It was further submitted that judgment in the primary suit was delivered on the 30th November, 2007 against the Respondent and orders of Mandamus issued on 22nd June, 2017 yet up to now, no efforts had been made to settle the same. The court was urged not to stand on the way of the Applicant realizing his fruits of the judgment herein.

15. Counsel further submitted that the Application herein was premised on the provisions of **Order 22 Rule 22(1)** of the Civil Procedure Rules, 2010 which provides:

The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

16. In light of the above provision, it was submitted that the Application herein had no basis in law whatsoever and the Court ought to uphold the Preliminary Objection and proceed to dismiss the Notice of Motion Application dated 1^{9th} December, 2018 with costs to the Applicant in the main Application. The Court was urged to assess the costs thereof at Ksh. 15,000.00.

The Respondent's Submissions

17. Ms. Mwangi for the Respondent argued in support of their Notice of Motion filed and in opposition to the notice of preliminary objection by the Applicant and identified three issues for determination as follows:

a. Whether the Applicant has raised a proper preliminary objection.

b. Whether the Application herein is res judicata.

c. Whether the Court has jurisdiction to grant a moratorium

18. Reliance was placed on **Section 7 of the Civil Procedure Act** for a definition of res judicata and **Mukisa Biscuits manufacturing Ltd vs West End Distributors (1969) EA 696** for a description of what amounted to a proper preliminary objection.

19. It was submitted that the application was not res judicata as it was one for stay of execution. No such application had ever been filed, heard and determined. That since the Applicant had made reference to the judgment of the Court which dealt with the issues and grounds stated herein, this was not a pure point of law. That the Applicant had also made reference to evidence and factual facts that had to be ascertained before the court can make a determination. That the judgement that determined the similar issues alluded to by the Applicant did not hear and determine the issue of moratorium and time to allow the Respondent source for funds from the national treasury hence this could not amount to res judicata within **section 7** of the Civil Procedure Act.

20. On the issue of court's jurisdiction to grant moratorium in the execution of a decree to enable Respondent source for funds at the National Treasury, it was submitted that this could not be argued through a preliminary objection as it was not a pure point of law. The Applicant had not demonstrated which statutory provision barred the court from granting the orders sought.

21. The position taken was that the Notice of Preliminary Objection was without merit and ought to be dismissed with costs.

Analysis and Determinations

22. I have considered the application herein, the various affidavits filed and the submissions made on behalf of the parties herein. The circumstances under which a preliminary objection may be raised were evaluated in **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696** which set out the precincts of a preliminary objection as:

"...so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit..." per Sir Law J.A.

23. **Sir Charles Newbold P.** in the same case stated that:

"A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion."

24. The preliminary objection by the Applicant is primarily premised on the allegation that the Respondent's Application is res judicata. The **Civil Procedure Act Cap. 21 Laws of Kenya** provides for res judicata under **Section 7** in the following terms:

7. Res judicata

Nocourt shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard

and finally decided by such court.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

25. Discussing the principles of res judicata, the Court of Appeal in **Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others [2016] eKLR** had this to say:

“47. The Supreme Court of England in **Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2014] 1AC 160; [2013] 4 All E R 715** referred to res judicata as “a portmanteau term...used to describe a number of different legal principles with different juridical origin”. The court in that case identified at least five different legal principles underlying the doctrine of res judicata. It is necessary to quote from that judgment at some length:

“The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is “cause of action estoppel”. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see **Conquer v Boot [1928] 2 KB 336**. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant’s sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as “of a higher nature” and therefore as superseding the underlying cause of action...

...Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties...

...Finally there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”

26. In the instant case, it is the Respondent’s contention that what is in issue is a stay of execution application and such an application has not been brought before the court and hence cannot be deemed as res judicata. It is further argued that there is an issue of moratorium which was not raised in the previous litigation. As such, it is the Respondent’s contention that the preliminary objection ought to fail. My analysis of the pleadings reveals otherwise. The Applicant, having been the successful party in **Malindi PMCC number 285 of 2004** sought to enforce the judgement and decree in his favour by filing an application for grant of a writ of mandamus as against the Respondent as he was enjoined to do by the law. Upon the hearing of that application, the court in that instance issued an order of mandamus compelling the Respondent to pay the decretal sum. The Respondent at no point appealed against the judgment in favour of the Applicant and neither did it appeal the resulting mandamus orders. I further take note that the grounds upon their application dated 19th December 2018 were premised are substantially similar to the grounds raise in opposition of the application for an order of mandamus. As explanation 4 of **Section 7** of the Civil Procedure act provides, ‘Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit’. The Respondent cannot therefore come this late in the day to raise the issue of a moratorium against payment of decretal sums that are due to the Applicant. Going even further, the Orders for stay sought were for the pendency of the hearing of the Application dated 19th December 2018. Having found, as I hereby do, that the same is res judicata, there are no substantive orders left to issue from the Application.

27. In **Wachira Nderitu, Ngugi & Co. Advocates v Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 [2015] eKLR, Odunga J** had occasion to deal with a substantially similar issue. In that instance, he reasoned thus:

“Therefore once an order of mandamus is issued, the matter is no longer merely one of settlement of a decretal sum, but that of compelling a public officer to carry out his/her statutory duty. Therefore the issue of the officer’s immunity for payment of sums due from a public body no longer arise. What then is in issue is the failure by the concerned officer to carry out a duty imposed on him/her by the law.”

28. Going further, **Odunga J** opined:

“In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is no longer a question of verifying the liabilities which seems to have been the Authority’s concern in the said notice.

Both the orders of mandamus which were issued herein have not been appealed against. In fact a careful reading of the application before me does not seem to challenge or question the said decisions. To make the matters worse the manner in which the instant application is drawn limits the period of the grant of the orders sought to the inter partes hearing and to determination of the application. In other words there are no substantive orders sought in the instant application. So that even if the application was to be granted as prayed, no useful purpose would be served by the same.

In my view the issue being raised herein ought to have been raised at the time of the hearing of the application for mandamus since the effect of the moratorium could have been to keep the finding of the respondent liable to satisfy the decree in abeyance. Once that stage was passed the horse had bolted and any attempt to close the stable thereafter would not serve any useful purpose. (Emphasis)

I therefore do not see any reason why the respondent cannot comply with the orders of this Court.”

29. I wholly associate myself with the sentiments expressed in the preceding excerpt. In the circumstances, I find that the following Orders are appropriate:

- a. The Applicant’s Notice of Preliminary Objection dated 22nd January 2019 has merit and it is hereby upheld.***
- b. The Respondent’s Application dated 19th December 2019 is hereby dismissed.***
- c. The Applicant shall have the costs.***
- d. Further award of costs assessed at Kshs.15,000 of the suit and this motion to the applicant/plaintiff***

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 19TH DAY OF JULY 2019

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R NYAKUNDI

JUDGE