



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 9 OF 2016

IN THE MATTER OF APPLICATION BY MARRIETTA CHEPTOO KISORYO

FOR JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT SECTION 8 AND 9

AND

IN THE MATTER OF ELDORET CHIEF MAGISTRATE CIVIL SUIT NO. 878 OF 2007

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

SECRETARY, UASIN GISHU COUNTY GOVERNMENT.....2ND RESPONDENT

AND

MARRIETTA CHEPTOO KISORYO.....EXPARTE APPLICANT

RULING

Before this court is a Notice of Motion application dated 10th April 2017 in which the Exparte applicant seeks the following orders; -

1. That this honourable court be pleased to grant an order of Mandamus directed to the respondents, their agents, servants and officers compelling them to comply by paying the applicant the decretal sum of Kenya shillings Four Hundred and Sixty-Eight Thousand, Two Hundred and Ninety (Kshs. 468,290/=) and certificate of Costs of Kenya Shillings Ninety-Nine Thousand, Two Hundred and Fifty making all a total of Kenya Shillings Five Hundred and Sixty-Seven Thousand, Five Hundred and Sixty-Seven and forty (Kshs. 567,540/=), with interest at the rate of Fourteen percent (14%) per annum from 6th March 2014 till payment in full, being the decretal sum and costs in respect of Eldoret C.M.C.C No. 878 of 2007.
2. That costs of this application be borne by the respondents.

The Exparte applicant claims that the county Council of Wareng and 3 others were defendants in Eldoret CMCC No. 878 of 2007.

The Exparte applicant further claims that in the aforementioned suit, judgment was entered against the defendant on 15th November 2011 for the sum of Kshs. 99,250/=. The applicant attached copies of the decree and certificate of costs in support of the application.

The Exparte applicant avers that the county government of Uasin Gishu is the legal successor of the now defunct County Council of Wareng. She claims that the respondents have admitted to the same and that they were substituted as respondents in the trial court proceedings.

The Exparte applicant anchors her application on *Section 59 of the Urban Areas and Cities Act* which states,

‘Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.’

The Exparte applicant further state that she has, on numerous occasions, tried to have the respondent satisfy the decree but her efforts have been futile.

The respondents, vide their written submissions dated 20th July submit that they should not be condemned to shoulder the liability of the defunct municipal council.

The respondents submitted that the cause of action arose in 2007 before the commencement of the devolved system of governance and as such they were not in existence.

The respondents claimed that the now defunct Transitional Authority, established under The Transition to Devolved Government Act was tasked with harmonizing the transfer of assets & liabilities from the former municipal council to the current county governments. They however, submit that the authority’s constitutional existence lapsed without them creating a clear framework on the transfer of assets & liability.

The respondents further submit that The Intergovernmental Relations Technical Committee established under Section 11 of The Intergovernmental Relations Act, 2012 has been tasked with continuing the functions of the Transitional Authority under Section 12(b) of the Act. The respondents claim that the above mentioned body has so far not gazetted the institutional structures for verification and transfer of the Assets and Liabilities of the defunct local authorities.

The respondents therefore hold the view that they shouldn’t be asked to settle unverified claims and liabilities on behalf of the national government.

Determination.

Section 134 (2) of the *County Government Act*, provides that, **“All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition.”** The body dealing with transition referred to in this section is the Transition Authority established under the ***Transition to Devolved Governments Act, No. 1 of 2012.***

Article 187 (1) of the constitution provides that,

‘A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—

a) the function or power would be more effectively performed or exercised by the receiving government; and

(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.’

Further, Section 33 of the Sixth Schedule states that an office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.

It is on the above bedrock that the County Government of Uasin Gishu were substituted in place of the now defunct County Council of Wareng as respondents in Eldoret CMCC No. 878 of 2007. This court therefore holds the view that the former is indeed the legal successor of the latter.

The above having been ascertained, I would now delve into whether the County Government of Uasin Gishu should be compelled to meet the decree resulting from Eldoret CMCC No. 878 of 2007.

Section 3 (d) of the Transition to Devolved Government Act sets out one of the purposes and objects of the Act as,

‘To provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of—

(i) assets and liabilities;

(ii) human resources;

(iii) pensions and other staff benefits of employees of the government and local authorities; and

(iv) any other connected matters;’

Okong’o J., in **Dr J. A. S. Kumenda and Another v The Clerk, Municipal Council of Kisii and Others, Kisii HC ELC Misc. App. No. 3 of 2013 [2013]eKLR** stated that,

“I don’t think that it was the intention of Parliament having regard to the temporary nature of the life of the Transition Authority as an institution to give it power to continue with or defend suits pending by or against local authorities that were constituted under the repealed Local Government Act. If that was the intention of the legislature, it would have been stated expressly in the said section of the County Governments Act.”

A Court of law cannot grant orders in vain. Majanja J., in **Republic v Town Clerk of Webuye County Council & another [2014] eKLR** stated that a decree holder’s right to enjoy the 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.

Furthermore, the respondents continued this suit, having been substituted as the respondents from Eldoret CMCC No. 878 of 2007. The case was not a wild goose chase. The respondents were aware, or ought to have been aware, that they would be bound by the outcome of the trial court suit, and by extension this suit, and that the outcome could have been in their favour or otherwise.

At the time of the delivery of the said judgment, the magistrate was alive to the fact that the County Council of Wareng was no longer in existence and the court’s intentions were for the judgment to be effected by the County Government of Uasin Gishu. It is therefore my contention that it is only the name, ‘County Council of Wareng’ that is inexistent, but the Council still exuberates life, breaths and kicks under a bigger new identity which is the County Government of Uasin Gishu, in place to accommodate the issues, intents and objects of the Kenyans as expressed in the 2010 Constitution with regards to the devolved system of government.

Having said that, I hereby order the 1st and 2nd respondents or their agents, servants and officers do honour the decree and judgment resulting from Eldoret CMCC No. 878 of 2007, as prayed for in this application.

Costs incidental to this application be borne by the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 9th day of July, 2019.

In the presence of;

Mr. Simboye holding brief for Mrs Tum for the Applicant

And in the absence of Mr. Kebenei for the Respondent

Ms Sarah - Court assistant