



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW NO. 3 OF 2019

IN THE MATTER OF: ARTICLES 10, 43, 232(b), (c), (e) AND 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 104(1), 116 AND 131 OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: SECTIONS 129, 130, 131 AND 154(1)(a) OF THE PUBLIC

FINANCE MANAGEMENT ACT NO. 18 OF 2012

REPUBLIC

VERSUS

CEC FINANCE

COUNTY GOVERNMENT OF KISUMU..... 1ST RESPONDENT

CHIEF OFFICER FINANCE

COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

EXPARTE:-

AMONDI & COMPANY ADVOCATES.....APPLICANT

JUDGMENT

The application dated 5th March 2019 was brought by way of Judicial Review.

1. The Exparte Applicant, **AMONDI AND COMPANY ADVOCATES**, (hereinafter "*the Advocates*") have sought an Order of Mandamus to compel the Respondents to do their public duty, by paying to the Advocates the sum of Kshs 37,303,975/=.
2. The Respondents are the **CEC – FINANCE, COUNTY GOVERNMENT OF KISUMU**, and the **CHIEF OFFICER – FINANCE, COUNTY GOVERNMENT OF KISUMU**.
3. The Advocate's contention was that the County Government of Kisumu had retained them.
4. It was indicated that the Advocates had been retained since 2014, and that they had handled quite a number of legal matters on behalf of the County Government.
5. The Advocates have provided this court with copies of the letters which show that the County Government of Kisumu had given them written instructions.

6. It is the Advocates case that the County Government is under a public duty to pay them fees for the services they rendered.

7. In the light of the letters giving them instructions to provide legal services to the County Government, the Advocates submitted that that created a legitimate expectation in law, that the client would have funds for use in settling the legal fees.

8. The Advocates stated that they have brought this action against the;

*“..... specific public officials who are tasked
with the responsibility of effecting payments
after the completion of the budgetary cycle,
but (who) have deliberately opted not to do
their job.”*

9. As far as the Advocates were concerned, there was no need for them to secure a judgment against the County Government of Kisumu, as the said entity was not disputing the fees being claimed by the Advocates.

10. The Advocates noted that the County Government had already done its part, by factoring the pending fees in the 2018/2019 Supplementary Budget Estimates.

11. The County Assembly of Kisumu is said to have already passed the said Supplementary Budget Estimates in December 2018.

12. It was therefore the considered opinion of the Advocates that the public officers who he had sued had simply been stubborn and arrogant, in their refusal to settle the outstanding fees.

13. The court was informed that the tabulated Bill was originally for Kshs 104,720,790/=. The said tabulated Bill was presented to the **TASKFORCE ON PENDING BILLS**, and the Advocates described them as “*undisputed*.”

14. That was in or about November 2017.

15. However, in March-April 2018 the Advocates were informed that all files pertaining to Legal Services would be subjected to a fresh audit.

16. The said audit was spearheaded by the Law Firm of **SAGANA BIRIQ AND COMPANY ADVOCATES**.

17. The audit resulted in the reduction of the fees payable from

Kshs 104,720,790 to Kshs 37,304,975.12.

18. Notwithstanding some promises that the fees would be paid, the Advocates were later informed that;

*“..... officers from the OFFICE OF THE
AUDITOR-GENERAL had placed a freeze
on our payments demanding that we
furnish instruction letters that authorized
us to work for COUNTY GOVERNMENT OF
KISUMU.”*

19. The Advocates found that development to be bizarre, considering that some two audits had already been carried out on their fee notes.

20. Nonetheless, the Advocates provided the Instruction Letters to the officers from the office of the Auditor-General.

21. When payments were still not forthcoming, the Advocates felt obliged to institute these proceedings, seeking orders which would compel the Respondents to pay the outstanding fees.

22. In answer to the application, the Respondents conceded that the Taskforce on Pending Bills and the Law Firm of Sagana Biriq &

Company Advocates carried out separate and independent audits on the Advocates Claim for unpaid fees.

23. However, the Respondents insisted that the Reports from the two audits did not constitute an agreement between the Advocates and the County Government of Kisumu.

24. The Respondents are not the persons who had given instructions to the Advocates. The instructions in respect to the 50 or so matters, were given by the County Government of Kisumu.

25. For reasons which the Advocates have not made known to the court, they did not enjoin the instructing client to these proceedings.

26. From the evidence tendered by the Advocates I find that they were retained by the County Government of Kisumu.

27. Therefore, if the Advocates had any legitimate expectation, that they would be paid after they had rendered services, such payment ought to have been expected from the Instructing Client, the County Government of Kisumu.

28. In the case of **JUSTICE KALPANA H. RAWAL Vs JUDICIAL SERVICE COMMISSION & 3 OTHERS, CIVIL APPEAL NO. 1 OF 2016**, the Court of Appeal expressed itself thus;

“The decision of the Supreme Court that we have just cited adds that legitimate expectation involves a representation that must be one which it is competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. Other important aspects of the doctrine is that the law does not protect every expectation save only those which are legitimate.”

29. In this case it has not been shown that the Respondents are, or either of them is the decision-maker on the issue as to whether or not the fees being claimed by the Advocates should be paid.

30. From the material placed before the court, by the Advocates, it would appear that other entities had a say on the issue as to whether or not the Advocates should be paid, and if so, how much should be paid. I so find because the Taskforce on Pending Bills appears to have had a significant say in the matter, and the Advocates acknowledged the role of the taskforce, as they submitted their evidence to it.

31. Thereafter, the Law Firm of Sagana Biriq & Company Advocates also conducted an audit on the issue. By submitting themselves to that audit, the Advocates are deemed to have acknowledged that the Law Firm had some decision-making role in the process leading to the payment of fees being claimed by the said Advocates.

32. Indeed, even though there was a very substantial reduction of the fees, the Advocates appear to have accepted the Report of the audit which was conducted by Sagana, Biriq & Company Advocates.

33. Even after the Advocates had accepted the reduced figure, the same had to be placed before the County Assembly.

34. That is yet another body which had to make a decision on the issue.

35. In the circumstances, I find that the Respondents cannot be said to have been the decision-maker, who made a representation to the Advocates, and upon whose said representation the Advocates derived a legitimate expectation.

36. Indeed, it has not even been demonstrated that the Respondents made any specific decision.

37. In the case of **KENYA NATIONAL EXAMINATION COUNCIL Vs REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS CIVIL APPEAL NO. 266 OF 1996**, the Court of Appeal quoted the following words with approval;

“The order of mandamus is of a 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, so the end of 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 the mode of redress is less convenient, beneficial and effectual.”

38. In this case the Advocates acknowledge that it is open to them to obtain judgment for the sums they claim is due and payable to them.

39. However, they have chosen not to go through that route.

40. In my considered opinion, if the Advocates obtained judgment, whether or not it is after the Advocate/Client Bills of Costs have been taxed, that would be the most effectual and definite way of recovering what is due to them.

41. There would be no room for any audits by anybody else.

42. At present, the reason why the sums which the Advocates deemed to be undisputed, were reduced from over Kshs 100 Million to under Kshs 40 Million, is because there was no determination of the quantum by a body mandated to make the requisite determination.

43. If there had been a Retainer Agreement, within which an Agreed Fee was specified, there would be no room for any dispute.

44. However, at present, although there was a Retainer, there was no Retainer Agreement.

45. Furthermore, the fact that the fees being claimed has come down substantially is a clear indication that there had been no agreement on the quantum payable.

46. I also find that the doctrine of estoppel is not applicable in this case as the Respondents do not have any legal relations with the Applicant. The contractual relationship was between the County Government of Kisumu and the Advocates.

47. I also find that the Advocates have not demonstrated that the Respondents are holding the requisite funds, and that they have just refused to remit payment.

48. It is one thing to be in control of the process through which payment is to be processed, and quite something else to be in control of the decision to make or not to make payment.

49. In the result, the application is unsuccessful, and is dismissed.

50. However, I order that each party will meet their own costs. I so order because it would be an injustice to order the Advocates to pay costs

when the County Government of Kisumu appears to owe them money.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF OCTOBER 2019

FRED A. OCHIENG

JUDGE