



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 69 OF 2018

IN THE MATTER OF: AN APPLICATION OF ORDER OF MANDAMUS AGAINST THE 1ST AND 2ND RESPONDENTS OF THE COUNTY GOVERNMENT OF MOMBASA

AND

IN THE MATTER OF: SECTION 44(1) OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012 AND SECTION 59 OF THE URBAN AREAS AND CITIES ACT NO. 13 OF 2011, ARTICLE 156, 176 OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

V. CHOKAA & COMPANY ADVOCATES.....APPLICANT

AND

1. COUNTY SECRETARY (MOMBASA COUNTY)

2. CHIEF FINANCE OFFICER/COUNTY TREASURER

(MOMBASA COUNTY).....RESPONDENTS

RULING

The Application

1. This Ruling is in regard to the Amended Notice of Motion dated 14th June, 2019 which prays for the following orders:

(1) That this application be certified as urgent.

(2) That Francis Thoya, County Secretary, Mombasa Government, Aisha Abdi, Cabinet Secretary, Finance, Mombasa County Government and Mariam Mbaruk, County Executive, Finance Department, Mombasa County Government be punished by way of committal to civil jail for such a long period of time as the Court may deem reasonable for their failure to comply with an order issued herein on 4th March, 2015 for the payment of the sum of Kenyan Shillings 6,612,000/= (Six Million, six Hundred and Twelve Thousand Shillings) issued in Mombasa High Court Case No. 213 of 2014 V. Chokaa vs. County Government of Mombasa.

(3) That Costs of this Application be costs in the cause.

(3) (a) That the Warrants be issued for the arrest and committal to civil jail of the following persons:

(i) Mr. Francis Thoya...County Secretary of Finance, Mombasa County Government.

(ii) Ms. Asha Abdi... Cabinet Secretary Finance, Mombasa County Government.

(iii) Ms. Mariam Mbaruk...County Executive, Finance Department Mombasa County Government.

AND the same be effected by the Regional Commander of Police, Mombasa County.

(4) That the costs of this Application be costs in the cause.

2. The application is premised on the grounds set out therein and is supported by affidavit of Vincent Chokaa sworn on 14th June, 2019 and a Further Affidavit of the same person sworn on 26th August, 2019.

3. The Applicant's case is that the Court issued an order requiring the Mombasa County Government to pay sum of Kshs. 6,612,000/= (Six Million, six Hundred and Twelve Thousand Shillings) to the Applicant herein. The said order was duly served on the County Government and the three aforesaid principal officials namely: Francis Thoya County Secretary, Asha Abdi Cabinet Secretary Finance and Mariam Mbaruk, County Executive Finance Department, through service upon the County Executive, Finance Department Mariam Mbaruk as per Affidavit of Service dated 7th June, 2019 and the Court Order issued on the 4th day of June, 2019 with a correction order issued on the 6th June, 2019; that after the said service the Applicant unsuccessfully persistently followed up with the said Mombasa County Government so as to know when the said County intended to effect payment in order to comply with the order of Court; that it is apparent to the Applicant that the Mombasa County Government and its officials appear to have absolutely no regard to the said order of the Court, indeed considering that Hon. Justice Mary Kasango entered Judgment for the Plaintiff in Mombasa High Court Case No. 213 of 2014 V. Chokaa & Company Advocates vs. County Government of Mombasa against Mombasa County Government in the sum of Kshs. 6,612,000/= (Six Million, Six Hundred and Twelve Thousand Shillings) interest at 12% per annum from 1st January, 2014 on the said sum of Kenyan Shillings Six Million, Six Hundred and Twelve Thousand (6,612,000/=) until payment in full and costs way back on 1st day of July, 2015 yet up to now the Mombasa County Government has not even paid a single cent to the Applicant which means that the Respondent and its officers will only take this matter seriously when the Court flexes its muscles by punishing the three (3) named principal officers of the Mombasa County Government for the said contemptuous acts; that there is indeed no other way of enforcing recovery herein except through the Court exercising its inherent jurisdiction so as to ensure that the Court Orders are not issued in vain.

4. The motion is opposed by the Respondent who filed Grounds of Opposition on 17th June, 2019 and a Preliminary Objection on 22nd July, 2019.

5. The Respondent's case is that the Application does not show willful disobedience of the orders of the Court on the part of the Respondents; the Application is premature as the interest on the amount awarded by Court has not been verified by the Deputy Registrar; the Application is premature because the Applicant has not taxed costs relating to the Application pursuant to which the Application herein is filed; the Respondents were not personally served with the Application herein as is mandatory in Applications for contempt; the Application is fatally defective and should be struck out with costs; the Notice to Show Cause offends the provisions of Order 29 Rule 2(2) c of the Civil Procedure Rules and the Notice to Show Cause offends the provisions of Section 21 of the Government Proceedings Act.

The Determination

6. I have considered the Application. An order of mandamus was issued by this Court on 4th June, 2019 against the 1st Respondent compelling the payment of the decretal sum herein of Kshs. 6,612,000/= with interests therein at 14%.

7. That order was not complied with hence the filing of this Application by the Applicant for a Notice to Show Cause by the cited responsible authorities of the 1st Respondent.

8. In response to the application, the contemnors state that this application is premature, that interests have not been calculated, and that the disobedience is not willful, and that the contemnors were not personally served. I do not find these objections merited.

9. In further opposition to the Application the contemnors have cited provisions of Order 29 Rule 2(2)(c) of the Civil Procedure Rules and Section 21 of the Government Proceedings Act.

10. However, in my view the said provisions are only relevant in the defence of mandamus proceedings and not after the mandamus order has been issued against the 1st Respondent.

11. The matter is now at the execution stage and the defence afforded under Section 21 of the Government Proceedings Act is not available.

12. Accordingly therefore, there is no merited defence to the Application. The Application is allowed as prayed.

Dated, Signed and Delivered in Mombasa this 7th day of October, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Oyier holding brief Chokaa for Applicant

Mr. Mangaro holding brief Tajbhai for Respondent

Mr. Kaunda Court Assistant