



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 516 OF 1997

KEPHA O MAOBE & 365 OTHERS

on their behalf and of **ALL RESIDENTS**

OF KIMATHI ESTATE.....PLAINTIFFS/APPLICANTS

VERSUS

BENSON MWANGI & ANOTHER.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT/RESPONDENT

NOW COUNTY GOVERNMENT OF NAIROBI

RULING

1. The application dated 25th July, 2019 principally seeks orders **that the 2nd Defendant/Judgment Debtor shall pay Plaintiffs' party to party costs of Ksh.10,247,610/= duly taxed and certified as costs against the 2nd Defendant, from funds allocated to it by the National Treasury pursuant to the directive of the President of Kenya made during the 5th (sic) Madaraka Day celebrations held at Narok Stadium, failure which it shall forthwith pay the same from its revenue account held at the National Bank Kenya Limited, the Central Bank of Kenya and or in any other bank and or from its funds allocation to its legal department.**
2. It is stated in the grounds and the affidavit in support of the application that the Plaintiffs'/Applicants' party and party costs against the 2nd Defendant/Respondent were taxed at Ksh.10,247,610/= on 14th June, 2016 and a Certificate of Taxation and a Certificate of Order against the Government issued. That the 2nd Defendant has failed to satisfy the taxed costs and subsequently the Plaintiffs filed Judicial Review proceedings in NBI HC Misc. Civil Appl. No. 368 of 2016 and obtained orders of *Mandamus* on 31st January, 2017 compelling the 2nd Defendant to pay the said costs.
3. It is further deponed that the 2nd Defendant still failed to pay the said costs and the Plaintiffs commenced Contempt of Court proceedings which resulted in the conviction of the Executive member in charge of Finance on 16th November, 2017 but the sentencing thereof has been avoided by the 2nd Defendant due to Cabinet reshuffles.
4. That the Plaintiff by way of letter dated 10th July, 2019 sought the intervention of the Cabinet Secretary to the National Treasury who confirmed that the 2nd Defendant had agreed to pay the costs in question from the funds allocated to it by the National Treasury pursuant to a directive, given on 1st June, 2019 during the 56th Madaraka Day Celebrations that Counties settle pending bills.
5. It is further stated that the Applicant followed up the matter with the County Secretary and the County Attorney but without success. The Applicant is apprehensive that the 2nd Defendant may deplete the funds allocated to it by the National Treasury without paying the Applicant.
6. There was no response filed by the Respondent. The application proceeded *ex parte*. The Respondent did not attend court though duly served.
7. I have considered the application and the submissions by the counsel for the Applicant.

8. The Applicants' counsel referred this court to Section 17 of the Government Proceedings Act Cap 40 which stipulates as follows:

“1. In any civil proceedings or arbitration to which the Government is a party, the costs of and incidental to the proceedings shall be awarded in the same manner and on the same principles as in cases between subjects, and the court or arbitrator shall have power to make an order for the payment of costs by or to the government accordingly:

Provided that -

(i) in the case of proceedings to which by reason of any written law or otherwise the Attorney-General, a Government department or any officer of the Government as such is authorized to be made a party, the court or arbitrator shall have regard to the nature of the proceedings and the character and the circumstances in which the Attorney General, the department or officer of the Government appears, and may in the exercise of its or his discretion order any other party to the proceedings to pay the costs of the Attorney-General, department or officer, whatever may be the result of the proceedings; and

(ii) nothing in this section shall affect the power of the court or arbitrator to order, or any written law providing for, the payment of costs out of any particular fund or property, or any written law expressly relieving any department or officer of the Government of the liability to pay costs.”

9. In the case at hand, there is no particular fund that had been identified by the Applicant. The affidavit evidence refers generally to the funds allocated by the National Treasury and not any particular fund. For example, this court has not been told that there is a particular fund earmarked by the Respondent for the payment of the costs like the ones in question.

10. In the Case of **Kisya Investments Ltd v attorney General & another [2005] 1 KLR 74** the court had the following to say in regard to execution proceedings against the Government:

“History and rationale of Government's immunity from execution arises from the following ...Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i) The raising of revenue (by taxation or borrowing); (ii) its expenditure; and (iii) The audit of public accounts. The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the government by reasons of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorised payment may be recovered...As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation.”

11. The Applicants' counsel referred this court to a directive given by the President of the Republic of Kenya made during the 56th Madaraka Day celebrations. A letter dated 10th July, 2019 written to the Applicant by the Principal Secretary, National Treasury has been exhibited herein. The letter advises the Applicant to follow up the debt with the 2nd Respondent. The said letter further recommends a follow up with the controller of Budget if there is failure to pay. It has not been shown to this court any law under which such declarations can be enforceable through the court.

12. Under Section 21 (4) and (5) of the Government Proceedings Act Cap 40:

“(4)...no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any government department, or any officer of the government as such, of any money or costs.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

The effect of the orders sought will be tantamount to execution or attachment.

13. In conclusion, this court finds no merits in the application. Consequently the application is hereby dismissed with costs.

Date, signed and delivered at Nairobi this 6th day of Nov., 2019

B. THURANIRA JADEN

JUDGE