



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CASE NO. 368 OF 2016

Republic.....Applicant

Versus

City Council of Nairobi.....1st Respondent/Applicant

Nairobi City County Secretary,

County Government of Nairobi.....2nd Respondent/Applicant

Kepha O. Maobe & 365 Others on their behalf and

of all residents of Kimatghi Estate.....Ex parte applicant

RULING

Introduction

1. In order to fully appreciate the application the subject of this ruling, a brief history of the factual matrix that gave birth to these judicial review proceedings is apposite.
2. With the leave of this court granted on 17th August 2016, the *ex parte* applicants filed the substantive application on 18th August 2016 seeking an order of *Mandamus* to compel the first and second Respondents to pay to them Ksh. 10,247,610/= being party and party costs awarded in Nairobi HCCC No. 516 of 1997. The Certificate of Taxation dated 14th June 2016 and also the Certificate of Order against the Government similarly dated 14th June 2016 both of which were issued in the said case are annexed to the application seeking leave. The *ex parte* applicants also prayed for costs of these proceedings.
3. The Respondents herein filed responses in opposition to the substantive application and the matter was subsequently heard *inter partes* and on 31st January 2017 and the court issued an order of *Mandamus* compelling the Respondents to pay the *ex parte* applicants the said sum of Ksh. 10,247,610/= plus costs. However, no payment was been made.
4. The refusal or failure to pay the said sum as decreed in the said order prompted the *ex parte* applicants to file a Notice of Motion on 8th February 2017 seeking an order that the Governor and the County Secretary of the County Government of Nairobi be cited for contempt of court for failing to comply with the court order. An amended application was subsequently filed on 8th March 2017 adding a prayer for Notice to the Accounting Officer, the Governor and the County Secretary of the County Government of Nairobi to show cause why contempt of court proceedings should not be commenced against them for failing to comply with the said order.
5. On record is an application dated 10th June 2017 seeking an order that the Accounting Officer, the Governor and the County Secretary of the County Government of Nairobi be cited and convicted and sentenced for contempt for failing to comply with the said order. The said application was heard *inter partes* and on 6th October 2017, and, the court allowed it. Subsequently, several summons to attend court were issued, but the Respondents never appeared prompting the court to issue warrants of arrest on 1st June 2018. The court subsequently issued summons to the contemnors to appear for sentencing, but they have never appeared.
6. On 1st March 2019, the *ex parte* applicants filed a Notice of Motion dated 28th February 2019 seeking orders *inter alia* that pending the sentencing, this court garnishees the Respondents funds held in various institutions among them the Co-operative Bank of Kenya Limited. Perhaps that explains why the Respondents in their application under consideration added the said Bank as a Garnishee. However, the said

application is yet to be heard, hence the inclusion of the Bank in the title to the Respondent's application the subject of this ruling is premature.

The instant application

7. By a Notice of Motion dated 20th day of June 2019 the Respondents seek pray for:-

i. *Spent.*

ii. *Spent.*

iii. *Spent.*

iv. ***That*** there be a stay of execution of the judgment herein, warrants of arrest, orders to show cause, and all execution processes herein, pending the determination of this application.

v. ***That*** the orders of January 31st 2017, November 16th 2017 and 28th February 2018 be set aside in light of their unlawfulness following the amendments to the Government Proceedings Act, Order 29 Rules 2, 4 and 5 and in light of Article 6 of the Constitution.

vi. ***That*** the costs of this motion be to the applicants.

8. The application is premised on the grounds listed on the face of the application and the annexed affidavit of Christine Ireri attached thereto. Essentially, the applicants state that the garnishee was enjoined in this suit vide an order made on 28th February 2018, hence, funds held by the garnishee risk being unlawfully garnished. The applicants also state that order 29 Rule 3 of the Civil Procedure Rules, 2010 removes the Government from any garnishee process of execution, hence, it is imperative to issue an order of stay of further execution since such garnishee process would be patently unlawful.

9. The applicants also state that section 21 (4) of the Government Proceedings Act^[1] forbids the execution of process in the manner sought against the Respondents and by operation of Article 6 of the Constitution which designates Government as constituting the National and County Governments, it would be unconstitutional to circumvent the process of settlement of claims set out in the Government Proceedings Act^[2] as against the first Respondent.

10. The Respondents further state that the orders made on 31st January 2017 and 16th November 2017 were made without disclosure of the said position, and, that, the counsel then on record had no capacity to commit the first Respondent to an execution process outside the purview of the law. The applicants further state that no Certificate was issued as provided under section 21(4) (5) of the Government Proceedings Act,^[3] and Order 29 Rule 3 of the Civil Procedure Rules, 2010. In view of the foregoing, the Respondents state that the orders of *Mandamus* issued on 31st January 2017 and 16th November 2017 are outside the scope of the law and ought to be set aside and discharged. The Respondent also states that its previous advocates had no authority to act outside the scope of the law.

Applicant's grounds of opposition

11. In opposition to the application, the applicants filed grounds of opposition on 26th June 2019 stating *inter alia* that the application is misconceived since these are not Garnishee proceedings. In addition, the applicant states that the Respondent has not appealed against the said orders, hence, this application is barred by Order 21 Rule 3(3) of the Civil Procedure Rules, 2010.

12. The applicant further states that the impugned orders were lawful, and, that, the proceedings were conducted *inter partes* and the contemnor was convicted on 16th November 2017. Also, the applicant states that the Respondent has misconstrued the proceedings to mean that the contemnor would personally satisfy the decree. Lastly, the applicants state that the application is aimed at delaying these proceedings.

Advocates legal submissions

13. Mr. Kinyanjui, counsel for the applicants in the application under consideration argued that that section 34 of the Civil Procedure Act^[4] provides that questions relating execution process must be within the suit not by way of fresh suit. He argued that these Judicial Review proceedings are unsustainable. He posed the question whether an illegality can be validated by courts discretion.

14. He also argued that section 21 (4) (5) of the Government Proceedings Act^[5] entitles the Respondent to contest execution, and, that, the first Respondents officer cannot be arrested in execution of a court decree. He submitted that Article 10(2) (b) (c) of the Constitution entitles this court to set aside the orders on grounds of want of jurisdiction because the orders are unlawful.

15. Mr. Obwayo, the *ex parte* applicants' counsel in opposition to the application relied on their grounds of opposition and submitted that section 34 of the Civil Procedure Act^[6] does not bar these proceedings. He submitted that *Mandamus* is not execution proceedings. He submitted that this court has the jurisdiction to entertain these proceedings. He referred to Order 21 Rule 3(3) of the Civil Procedure Rules and argued that the Respondents/applicants have not appealed against the orders they are challenging. He submitted that the applicant seeks to alter the judgment. He pointed out that the applicant failed to attend sentencing and submitted that section 34 (1) of the Civil Procedure

Act^[7] is not applicable in the circumstances of this case. He submitted that there is no illegality or a violation of Article 10 of the Constitution as alleged. He also argued that the Respondent participated in the original suit.

16. Replying to the above submissions, Mr. Kinyanjui argued that the issue of contempt ought to have been canvassed in the original suit.

Determination

17. To start with, the application under consideration is legally frail, unsustainable and bound to collapse for several reasons. It fails to appreciate the fact that the *ex parte* applicants moved to this court by way judicial review proceedings seeking the writ of *Mandamus*. The judicial review application was heard *inter partes* and a judgement was rendered on 31st January 2017. The Respondents never appealed against the said judgment nor did they comply with the order. Two years down the line, the applicants cannot seek to set aside the judgment citing the reasons they purport to rely on in the instant the application.

18. The applicants appear to have deliberately confused the nature, extent and purpose of the writ of *Mandamus* with execution proceedings. The applicants are not disputing the existence of the judgment which gave rise to these judicial review proceedings. They failed to comply with the decree. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.^[8] The *ex parte* applicant has a legal right to compel the Respondents to satisfy the decree. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed.

19. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.^[9]

20. The court in a detailed judgment weighed the facts of the case and the law and it was satisfied that the orders of *mandamus* were merited. This court cannot by a stretch of imagination set aside or interfere with the said judgment and the orders flowing therefrom on the strength of the grounds cited nor can it act as an appellate court and temper with a decision rendered by a court of coordinate jurisdiction.

21. Similarly, the orders issued on 16th November 2017 allowed the *ex parte* applicants' application ordering the contemnors to appear for sentencing. No appeal has ever been preferred against the said ruling.

22. The record does not show any orders were issued on 28th February 2018. As observed above, the garnishee application is still pending, hence any argument or prayers touching on the pending application are pre-mature.

23. The second ground upon which the application under consideration collapses is that the applicant has improperly invoked the provisions of section 34 of the Civil Procedure Act^[10] which provides that:-

34(1) All questions arising between the parties to suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

24. The above argument is unsustainable. First, execution cannot be levied against the government. Indeed Order 29 (2) of the Civil Procedure Rules, 2010 provides in clear terms that no order against the Government may be made under (b) Order 22 (execution of decree and orders), (b) Order 23 (attachment of debts). A clear and faithful reading of this provision shows that execution cannot be levied against the government. It follows that by the same analogy, section 34 (1) of the Civil Procedure Act^[11] cannot apply in proceedings relating to the government because the law prohibits execution against the government. The instant suit is a judicial review application under order 53 of the Civil Procedure Rules, 2010, and not execution proceedings under order 22 of the Civil Procedure Rules, 2010. Accordingly, the argument founded on section 34 (1) fails.

25. In addition, order 29 Rule 4 (1) is explicit that no order of the attachment of debts can issue against the government under Order 23 or under order 41. The proceedings before the court do not seek to attach government debts. Before the court is a judicial review application for orders of *mandamus* to compel payment. The application seeking to garnishee funds held by some other institutions is still pending and I cannot comment on it at this point in time nor has it been canvassed.

26. The applicant's counsel referred to Order 29 Rule 3 of the Civil Procedure Rules which provides that an application for a certificate under section 21 of the Government Proceedings Act shall be made to the court in the prescribed form. Court here means the court issuing the decree. In this regard the Certificate of Taxation and the Certificate of Order against the Government were properly issued by the court issuing the decree and not by this court. They were introduced in the applicant's application as annexures in support of the application for *Mandamus*. Accordingly, I find no conflict with the said provision in this case.

27. Mr. Kinyanjui also argued that no certificate as per section 21 (4) of the Government Proceedings Act.^[12] I have herein above severally referred to the Certificate of Order against the Government annexed to the *ex parte* applicants' application. It follows that the said argument also fails.

28. It was also argued that that the Respondent is the County Government, and therefore a government within the meaning of Article 6 of the Constitution hence, the entire execution process is unlawful. Arguments invoking the Constitution are usually attractive, appealing and are bound to turn on the jurisprudential canons of any legal mind. However, the said argument collapses because before this court are not execution proceedings contemplated under Order 22 of the Civil Procedure Rules but a judicial review proceeding in which a writ of *Mandamus* was issued. The said argument is therefore inapplicable in the instant case.

29. Flowing from the above analysis of the facts of this case and the law, the inevitable conclusion is that the Respondents' application dated 17th August 2016 is unmerited. It fails both in law and in substance. The same is fit for dismissal. Accordingly, I dismiss the said application with costs to the *ex parte* applicants.

Orders accordingly

Right of appeal

Dated, Signed and Delivered at Nairobi this 16th of December 2019

John M. Mativo

Judge

[1] Cap 40, Laws of Kenya.

[2] Ibid.

[3] Ibid.

[5] Cap 40, Laws of Kenya.

[6] Cap 21, Laws of Kenya.

[7] Ibid.

[8] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[9] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[10] Cap 21, Laws of Kenya.

[11] Cap 21, Laws of Kenya.

[12] Cap 40, Laws of Kenya.