



REPUBLIC OF KENYA

IN THE HIGH COURT OFF KENYA

AT MERU

JUDICIAL REVIEW NO 9 OF 2017

REPUBLIC.....APPLICANT

VERSUS

COUNTY SECRETARY, COUNTY

GOVERNMENT OF ISIOLO.....1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE

MEMBER IN CHARGE OF FINANCE.....2ND REPENDENT

COUNTY CHIEF OFFICER IN CHARGE OF FINANCE...3RD RESPONDENT

RE: CICILIO MURANGO MWENDA T/A MURANGO

MWENDA & CO ADVOCATES.....EXPARTE APPLICANT

JUDGMENT

Mandamus

[1] The Ex parte Applicant sought for two significant orders, namely:-

A. An order of mandamus to compel the respondents to pay a sum of Kshs. 2,149,975 plus all subsequent costs and interest as per the decree of court dated 24th March 2017 in ERU HC MISCELLANEOUS APPLICATION NO. 47 OF 2016.

B. In default thereof, the respondents be committed to prison for a period of six months.

[2] In the submissions dated 12th January 2018 and 21st February 2018, the *Ex parte* Applicant argued that decree herein followed after judgment entered in favour of the Ex parte Applicant on Certificate of Costs in **MERU HC MISC APPL NO 47 OF 2016**. The decree remains unpaid. The Ex parte Applicant attempted to execute the decree by way of attachment of the Respondent’s bank account but the application was rejected by the court. Demands for payment herein was made in vain. Hence, these proceedings. The *Ex parte* Applicant stated that, the Respondents being public officers bore public duty to settle such decrees. And unless compelled to pay the decree, the *Ex parte* Applicant will be left without remedy as he cannot seek attachment of the respondents’ assets.

[3] The *Ex parte* Applicant took a swipe at the grounds of opposition filed herein; that they were filed out of time and should be disregarded by the court. But, also urged substantive replies thereto; that contrary to the arguments by the Respondents; (1) these proceedings are competent and court’s jurisdiction has been properly invoked as leave was accordingly obtained; and (2) the officers cited are the ones responsible for finance and bear authority to disburse county funds. They need not be parties to the suit for mandamus to issue.

Respondents: Proceedings incompetent

[4] The respondents filed grounds of objection dated 16th February 2018. The gist of the objection is that these proceedings are incompetent and have improperly invoked the jurisdiction of the court, for the Motion has not cited any provision of law and seeks to enforce judgment against persons who were not parties in the primary suit.

ANALYSIS AND DETERMINATION

Amusing but venial omission

[5] Failure to cite the provision of the law on which an application is premised is a mistake especially where the pleading is drawn by legal counsel. But, it is a venial omission especially in light of article 159(2) (d) of the Constitution which dwindled the potency of objections based on technicalities. Nonetheless, astute advocacy requires proper grounding of applications on the relevant law. That said, the Motion before me is expressed to be brought in the matter of order 23 (sic) - I suppose it ought to be 53- of the Civil Procedure Rules, section 8 & 9 of the Law Reform Act. Therefore, even on merit, the objection by the respondents does not hold sway. I reject it.

Statutory duty of accounting officers

[6] Similarly, the other objection that the officers cited are not parties in the primary suit fails as County Government Accounting Officers are in law, under an obligation to pay decrees from court. This obligation is placed on the accounting officers by law; see section 21(5) of the Government Proceedings Act. Such is a statutory duty which may be enforced by way of mandamus. Needless to state that, an order of mandamus is to be implemented by the relevant accounting officer of the county government lest they should be cited for contempt if they default. See the persuasive decision by Odunga J in the case of **REPUBLIC vs. THE ATTORNEY GENERAL & ANOTHER EX PARTE JAMES ALFRED KOROSO** Judicial Review Miscellaneous Application No. 44 of 2012 that:

... In mandamus cases it is recognized that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

[7] **The Ex parte Applicant stated that the County Secretary, County Executive Committee Member in Charge of Finance and County Chief Officer in Charge of Finance for the County Government of Isiolo, are in charge of disbursement of county government funds and accounting officers therefor. The officers cited are indeed public offices responsible for disbursements of funds and are accounting officers of county government. And Mandamus in such case as this should be directed at such officers. And, when that happens, the court is not imposing any personal liability on the individuals holding the relevant offices but on the office of the relevant or accounting officer which in law must comply with the order of mandamus. Nonetheless, to avoid such arguments as I have heard here, it is desirable that the substantive party in the proceedings should always be the county government except the applicant should couch the order sought in a manner that it be directed at the relevant accounting officer or officers of the county government. In this case it is the respondents.**

[8] Coming back to this case, the Ex parte Applicant is a holder of a decree of court which certifies the sum payable by the county government of Isiolo. As such, the County Secretary, County Executive Committee Member in Charge of Finance and County Chief Officer in Charge of Finance, being the accounting officer and in charge of disbursements of funds for the County Government of Isiolo, bear a statutory duty to pay the decree herein. It bears repeating, such is a public duty to satisfy the decree of the court in MERU HCMIC APPL NO. 47 Of 2016.

[9] The *Ex parte* Applicant has shown that it has attempted to execute the decree in vain. The other methods of execution are not easy. In the circumstances, mandamus is deserved for the sake of justice. On this see *Halsbury's Law of England, 4th Edition Volume 1 at page 111 from Paragraph 89:*

... Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that 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 that mode of redress is less convenient, beneficial and effectual."

[10] Hitherto, it is clear the direction the court is taking. In the upshot, I issue an order of mandamus to compel the officers responsible for finance and the accounting officers of Isiolo County Government i.e. respondents to pay a sum of Kshs. 2,149,975 plus all subsequent costs and interest as per the decree of court dated 24th March 2017 in **MERU HC MISCELLANEOUS APPLICATION NO. 47 OF 2016**. To be fair, I will allow the respondents 45 days to pay up the decree herein. In default, they may be cited and punished for contempt of court. It is so ordered.

Dated, signed and delivered in open court at Meru this 15th day of May 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Murango advocate for Ex-parte applicant

Mr. Munene advocate for respondents

F. GIKONYO

JUDGE