



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CIVIL APPLICATION NO. 3 OF 2017

REPUBLIC.....APPLICANT

VERSUS

COUNTY SECRETARY MIGORI

COUNTY GOVERNMENT.....1ST RESPONDENT

CHIEF OFFICER, FINANCE

MIGORI COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. Before me is a Notice of Motion dated 16/11/2017 and filed on 21/11/2017 seeking the following orders: -

1. THAT an order of mandamus now be issued and the same be directed to the County Secretary, Migori County and the Chief Officer Finance / County Treasurer, Migori County.

2. THAT the County Secretary, Migori County and the Chief Officer, Finance shall comply by paying to the applicant within 7 days the sum of Kshs. 2,847,532/= being the decretal sum, costs and accrued interest up to 30th June 2017 in respect of Principal Magistrate's Court Migori Civil Suit No. 807 of 2016.

3. THAT the County Secretary, Migori County and the Chief Officer, Finance shall in addition pay to the applicant further interest on the said sum of Kshs. 2,846,532/= at the rate of 14% from the 1st July 2017 until payment in full.

4. THAT in default, notice to show cause do issue against the County Secretary, Migori County, and the Chief Officer, Finance, Migori County for them to show cause why they should not be cited for contempt of court.

5. THAT the cost of this application be provided for.

2. The application is based on the five grounds appearing on the face thereof and is supported by the Affidavit of **Lameck Onyango Mbani**, the Exparte Applicant herein, sworn on 16/11/2017.

3. The application was opposed by the Respondents through Grounds of Opposition evenly dated and filed on 24/11/2017.

4. Directions were taken, and on consensus of Counsels and with the approval of Court the application was disposed of by way of written submissions which both parties duly complied.

5. The brief background of the application as gathered from the Statement and the Affidavit of the Exparte Applicant is that the Exparte Applicant was contracted by the County Government of Migori to supply livestock vaccines and fish feeds which he duly undertook and when payment was not forthcoming the Exparte Applicant instituted recovery proceedings through **Migori Chief Magistrate's Civil Suit No. 807 of 2016** (hereinafter referred to as '**the suit**').

6. The suit was determined in favour of the Exparte Applicant on 11/05/2017 and the Exparte Applicant served the Respondents herein with a copy of the decree and a Certificate of Costs on 12/07/2017. The Applicant then filed these recovery proceedings where on 15/11/2017 leave was granted to apply for the order of mandamus hence the filing of the application.

7. In his submissions the Exparte Applicant contends that he fully complied with all the legal requirements for the grant of the order of

mandamus and relied on case law in support of his submission that the order ought to issue. The Respondents on their part were of the contrary position. They contended that the application was bad in law since an order of mandamus was sought against parties who have no statutory duties to comply with and satisfy the decree. To the Respondents the correct party against whom such an order ought to be sought was the Executive Committee Member for Finance who is the accounting officer but not the Respondents herein. It was the Respondents further contention that the *Ex parte* Applicant had not fully complied with the law as provided under the **Government Proceedings Act, Cap. 40** of the Laws of Kenya (*hereinafter referred to as 'the Act'*) and **Order 29** of the **Civil Procedure Rules**. Several decisions were as well referred to.

8. I have certainly perused and understood the contents of the application, the grounds of opposition, the rival submissions and the decisions referred to by the parties. I must commend the Counsels who have filed very precise submissions and relied on relevant case law which will no doubt lighten the work of this Court.

9. I will begin with a look at the competency of the application in respect to the Respondents. The application is in the nature of judicial review for an order of mandamus against a County Government. The order is sought as a means of enforcing the satisfaction of the money decree in the suit. The nature and applicability of the order of mandamus was clearly expounded by both Counsels in their submissions as drawing significantly from the case of **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 (1970) EA 543** where it was stated that the order of mandamus can only be issued against a public servant who has a public duty to perform.

10. The decree in the suit was obtained against the County Government of Migori. **Article 176(1)** of the **Constitution** created the County Governments to be comprised of the County Assembly and the County Executive. **Article 179** of the **Constitution** provides that the executive authority of a County is vested in and can only be exercised by a County Executive Committee whose members include the County Governor, the Deputy County Governor and other members appointed by the County Governor with the approval of the assembly. One of such members is the Executive Committee Member in charge of Finance.

11. **Section 103** of the **Public Finance Management Act, 2012** (*hereinafter referred to as 'the Finance Act'*) establishes a County Treasury for each County to be comprised of the Executive Committee Member for Finance, the Chief Officer and the department or departments of the County Treasury responsible for financial and fiscal matters. The Executive Committee Member for Finance is the head of the County Treasury. Under **Section 148** of the **Finance Act** the Executive Committee Member for Finance must designate accounting officers responsible for managing the finances of the County Government entities. Such officers are the ones ordinarily responsible for the administration of a county government entity. **Section 45(3)** of the **County Government Act** provides that a Chief Officer shall be responsible to the respective Executive Committee Member for the administration of a county department. The Chief Officers by virtue of their offices hence become the accounting officers of their respective county departments.

12. I therefore find and hold that the accounting officer for the Department of Finance is the Chief Officer who is responsible for administration and as such responsible for managing the finances of that department.

13. I have also addressed my mind to the roles of the County Secretary as provided for under **Section 44(3)** of the **County Government Act** and do not see how a County Secretary is responsible for managing any finances of the county department. A County Secretary is in fact the head of the County Public Service. The County Secretary hence has no role to play in these proceedings.

14. Having so found, I am of the considered holding that the application is still competent having been brought against the Chief Officer of the Department of Finance.

15. The other contention relates to the procedure to be followed in execution of money decrees against government. It is settled that before an order of mandamus is issued the elaborate procedure provided for under **Section 21** of **the Act** must be strictly complied with. For ease of this discussion I hereby reproduce the said provision verbatim:

"21(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty – one days from the date of the order or, in case the order provides for the payment of costs and the costs required to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order.

Provided that if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney- General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon.

Provided that the Court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, 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.

16. Expounding on the foregone my Lordships Visram and Ibrahim, JJ (as then were) discussed the rationale for the immunity against the normal execution proceedings against the Government and by extension the foregone elaborate procedure. This is what they stated in Kisya Investments Ltd vs. Attorney General (2005) 1KLR 74 thus: -

“Order 28, rules 2 (1) (a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.... 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 judgements 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 unauthorized payment may be recovered. SEE HALSBURY’S LAW OF ENGLAND 4th EDN VOL. 11 PARA 970, 971 AND 1370. As a result of the foregoing, which was borrowed from the Crown proceedings Act, 1974 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No ministry or Department has any ready funds at all times to satisfy decrees or judgments. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. SEE AUCKLAND HARBOUR BOARD VS. R (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgment is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and / or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgments and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the law that prohibits execution against and attachment of the Government assets and property.”

17. The Court, Odunga, J. in Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi (2014) eKLR also had the following to say of the matter: -

“33. It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs The Brecknock And Abergavenny Canal Co. 111 ER and R vs. The Bristol and Exeter Railway Co 114 ER 859.

34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.....”

18. I need not re-emphasize the need for strict compliance with Section 21 of the Act being the law of the land. In this matter I can gather from the record that a Decree and a Certificate of Costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.

19. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately,

together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.

20. I therefore have no difficulty in finding that the Applicant has not fully complied with the legal requirements for an order of mandamus to be availed. The application is premature and cannot stand.

21. The upshot is that the Notice of Motion dated 16/11/2017 is hereby struck out with costs.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of May 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Ojalla, P. R. instructed by the firm of Messrs. P. R. Ojalla & Co. Advocates for the Applicant.

Mr. Marvin Odero instructed by the firm of Messrs. Okong'o, Wandago & Company Advocates for the Respondents.

Evelyne Nyauke – Court Assistant