



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW APPLICATION NO. 66 OF 2017

IN THE MATTER OF APPLICATION FOR ORDERS OF MANDAMUS UNDER ORDER 53 RULE 1 AND 2 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA, THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA

AND

IN THE MATTER OF ELECTION PETITION NUMBER 3 OF 2013 FRANCIS MWANIKI NGUNGA VERSUS OLIVER NZEKI MUNYAKA, THE RETURNING OFFICER – MACHAKOS TOWN CONSTITUENCY AND INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION

AND

IN THE MATTER OF WARD ELECTIONS FOR THE COUNTY ASSEMBLY ELECTIONS FOR MUA WARD HELD ON 4TH MARCH, 2013

AND

IN THE MATTER OF WARD ELECTIONS FOR THE COUNTY ASSEMBLY ELECTIONS FOR MUA WARD HELD ON 4TH MARCH 2013

REPUBLICAPPLICANT

VERSUS

THE CHIEF EXECUTIVE OFFICER,

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....RESPONDENT

AND

FRANCIS MWANIKI NGUNGAEXPARTE APPLICANT

RULING

1. The Exparte Applicant herein filed a Notice of Motion dated 8th June, 2017 seeking for the following reliefs:-

(a) An order of mandamus compelling the Chief Executive officer of the Independent Electoral and boundaries Commission (IEBC) to pay to the Applicant Kshs.476,583/= as costs and interest as ordered and taxed in Machakos Chief Magistrate's Court Election Petition Number 3 of 2013.

(b) The costs of the application be provided for.

2. The Application is supported by the following grounds:-

- (i) That judgment was entered against the IEBC in Machakos Election Petition No. 3 of 2013 on 16/09/2013 and the Exparte Applicant awarded Kshs.350,000/= as costs of the suits.*
- (ii) That subsequently the Exparte Applicant obtained a decree for the said sums which remain unpaid to date and has attracted interest with the sums now standing at Kshs.476,583/=.*
- (iii) That the Respondent has failed, ignored and or neglected to satisfy the decree despite demands being made.*
- (iv) That the said decree falls within the auspices of Government proceedings Act and any execution decree against the same ought to be done by way of Judicial Review Proceedings.*
- (v) That the Applicants risks losing the award issued in his favour unless the orders are granted.*
- (vi) That in all circumstances justice demands that the orders sought be granted.*

3. The Application is opposed by the Respondent. A replying affidavit was sworn and filed by the Respondent's Counsel Ann M. Kiusya who raised the following grounds of opposition.

- (i) That the application is time barred since the same ought to have been lodged within six months after the decision was made.*
- (ii) That the sums taxed was Kshs.350,000/= and not kshs.476,583/= as the interests is not recoverable since Applicant did not take any steps to realize the costs in time.*
- (iii) That no decree and a certificate of costs was served upon the Respondent as an indication that the Applicant made attempts to pursue for costs immediately judgement was delivered in 2013.*
- (iv) That the Applicant has not attached a copy of decree, certificate of costs, demand notice to the Attorney General or certificate of order against the Government and hence the application is fatal.*
- (v) The application lasts merit and same ought to be dismissed with costs to the Respondent.*

4. The Application was canvassed by way of written submissions. It was the submission of Mr. Makundi for the Applicant that the Application speaks for itself in that the Applicant was the successful petitioner in Machakos **CMC Election Petition No.3 of 2013** and in which the court had awarded him costs of Kshs.350,000/= and that a decree was subsequently issued on 19/5/2014 followed by demand notice to the Attorney General for payment. It was further submitted that the Respondent did not lodge any appeal or stay of Execution against the said costs which now stands at Kshs.476,583/= and which should be paid by the Respondent.

It was submitted by Miss Kiusya for the Respondent that the Application has been brought five years after the costs were taxed and there is no reason that has been given for the inordinate delay. It was further submitted that the Applicant did not serve a notice of intention to institute this Judicial Review Application and further no decree or certificate of costs were served upon the Respondent or the relevant government body in line with the provisions of the Government Proceedings Act. It was also submitted that the Applicant has claimed more than what had been taxed and as such the Respondent cannot be compelled to pay what has not been ascertained.

5. I have considered the Applicant's Application as well as the replying affidavit. I have also considered the submissions and the authorities cited by the learned counsels for the parties herein. I find the following issues necessary for determination namely:-

- (i) Whether the Exparte Applicant's Application is time barred.*
- (ii) Whether the Applicant's Application complies with the provisions of the Government proceedings Act.*
- (iii) Who bears the costs of the suit?*

6. As regards the first issues, it is noted that the bill of costs had been assessed on the 3/12/2013 and the decree issued on the 19/05/2014. A demand notice for the payment was made on the 11/12/2013 to the Respondent's Advocate while a notice for the payment was served upon the Attorney General on the 25/09/2015. The Respondent's counsel has submitted that the Application ought to have been lodged within six months of the decision being made. However, I am not persuaded by the said submissions since the statutory six months only relates to applications for orders of certiorari to quash the impugned decision of the public body. In the present circumstances, the Applicant is not seeking to quash any decision of the Respondent but is only seeking for an order to compel the Respondents to pay the amounts awarded and assessed by the court. The election petition had already been determined and the costs duly assessed and a decree issued and what was only remaining was for the Respondent to make payments. It is not uncommon for various Government institutions to delay payments or settling decrees issued by the courts and that parties affected by the non-payment aforesaid usually resort to the remedy of judicial Review order of mandamus. The judicial review applications in that regard are only resorted to after the public body has declined to perform its duty of paying the amounts due from it to the affected Applicant. The Exparte applicant who has been waiting for the payment all along has now been compelled to resort to the present application for judicial review orders of mandamus. I am therefore unable to find that the said application is time barred as claimed by the Respondent. Suffice to add that demand notices had been served upon the Respondent for payment of costs to no avail thereby warranting the filing of the application.

7. As regards the second issue, it is noted that the Exparte Applicant is the judgement creditor vide **Machakos Chief Magistrate's Court Election Petition Number 3 of 2013** vide the judgement dated 16/09/2013. The costs were subsequently assessed on the 3/12/2013 in favour of the Exparte Applicant as against the Respondent in the sum of Kshs.350,000/=. The Applicant duly obtained a decree issued on the 19/05/2014. A demand notice for the assessed sum was first sent to the Respondent's advocates. Pursuant to the Government proceedings Act, the requisite notice was served upon the Honourable Attorney General on the 25/09/2015. Learned counsel for the Respondent has submitted that no decree and certificate of costs as well as demand notice and court order against the Respondent have not been presented by the Applicant. However upon perusal of the Applicant's application, I find there is a decree as well as demand notices of intention to commence legal action against the Respondent. The only two items missing is the certificate of costs and the order against the Respondent. However, I find the absence of these two documents does not in any way render the Applicant's Application defective because of the fact that the costs had already been awarded by the trial court and subsequently the said court duly assessed the bill and came up with the sum of Kshs. 350,000/= as the costs due from the Respondent to the Applicant. The said sum was duly certified by the trial court in its ruling dated 3/12/2013. The order of the trial court was quite clear in the judgment and ruling that it was the Respondent that was to meet the said costs. I find the Respondent did not require for any other order to be issued against it yet there was such an order in the judgment and ruling of the trial court. Indeed the Respondent has never appealed against the order and ruling of the trial court and further has not sought for a review of the same. The only conclusion one makes is that the Respondent had been aware of its obligation and duty to pay up the said sums to the Applicant. In the circumstances, I am satisfied that the Applicant has fully satisfied the provisions of the Government proceedings Act. The present application was only lodged after the Respondent failed to perform its public duty of settling the costs properly incurred from a successful Election petition in favour of the Applicant.

I need to mention something about the correct amounts due from the Respondent to the Applicant. The trial court had awarded the Applicant costs in the sum of Kshs.350,000/=. I note that the Applicant herein has sought for the sum of Kshs.476,583/=. It seems the Applicant has brought up the aspect of interest. I find this court is not in a position to delve into other claims for interest etc. since its role is only to grant the review order of mandamus for the payment of the sums indicated in the decree. It is noted that the aspect of interest is not alluded to either in the judgement or the ruling on the assessment of costs. That being the position, it should be upon the Applicant to approach the trial court over the fate of any extra costs. Hence the only amounts due to the Applicant from the Respondent should be Kshs.350,000/=.

8. As regards the third issue, the rule of thumb is that costs follow the event. As the Applicant's Application has succeeded, then I order that the Respondent should meet the costs of the suit.

9. In the result, I find the Exparte Applicant's Application dated 8/6/2017 has merit. The same is allowed as prayed save only to the extent that the sums due from the Respondent to the Applicant should be Kshs.350,000/=.

It is so ordered.

Dated and delivered at MACHAKOS this 11th day of October, 2018.

D. K. KEMEI

JUDGE