



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 7 OF 2015

CORAM: D.S. MAJANJA J.

BETWEEN

REPUBLIC.....APPLICANT

AND

KISII COUNTY GOVERNMENT.....RESPONDENT

EX PARTE

PETER KAUNDA NYAMOSI

DAVID NYAMWEYA SAGERO

KENNEDY BOSIRE MOINDI trading as FIVE STAR SERVICES.....EX-PARTE APPLICANT

RULING

Introduction

1. On 10th February 2016, this court issued an order of mandamus directing the Kisii County Government (“the County”) to settle and or satisfy the decree in *Kisii CMCC No. 93 of 2009* where the County was ordered to pay Kshs. 213, 200/- together with costs and interest. In addition, the Court ordered that in default of such payment, a warrant of arrest do issue against one Julius Ndege, the Secretary and accounting officer of the County Government (or his successor, if any) for committal to civil jail for a period of 6 months at the ex-parte applicant’s expense on subsistence.

2. In due course, the County moved the court by an application dated 19th April 2016 seeking an order to set aside the warrants of arrest issued against the County Secretary and an order to set aside the decree in *Kisii CMCC No. 93 of 2009* and the that the County be allowed to file an affidavit to provide relevant documents on the status of the decree in *Kisii CMCC No. 93 of 2009*. Before dealing with the application, I directed the County Secretary to file an affidavit to show how the County intends to settle the decree.

Respondent’s Case

3. In response to the notice to show cause, the County Secretary, Patrick Lumumba, filed a detailed affidavit sworn on 26th July 2018 giving reasons why the decree could not be executed. The legal arguments raised were reiterated by counsel for the County, Mr Onsembe.

4. The respondent contended that the original claim arose out of a judgment and decree against the defunct Kisii Municipal Council and not the County Government of Kisii and as such the claim could not be maintained. The County Secretary deponed that he could not be called upon to show cause as he was not the accounting officer of the County Government as envisaged under **section 148** of the *Public Finance Management Act, No. 18 of 2012*.

5. Counsel pointed out that following the establishment of the County government and dissolution of local authorities established under the repealed *Local Government Act (Chapter 265 of the Laws of Kenya)*, the Intergovernmental Relations Technical Committee under the *Intergovernmental Relations Act, 2012* established institutional structures to facilitate the verification and transfer of assets and liabilities belonging to defunct local authorities vide **Gazette Notices No. 858, 2701 and 4370 of 27th January 2017, 24th March 2017 and 11th May 2018** respectively. In relation to transfer and verification of assets, it provided that, “*all assets belonging to the defunct local authorities as on the 27th March, 2013 were transferred and are vested in the respective county governments on an ‘as is where is basis.’*” As regards

verification, validation and liquidation of liabilities, the structures provided as follows:

2(1) All the liabilities of the defunct local authorities as on 27th March, 2013 shall be verified and validated by the Intergovernmental Relations Technical Committee.

(2) The Intergovernmental Relations Technical Committee, in consultation with relevant stakeholders shall develop liquidation options for the settlement of the liabilities of the defunct local authorities.

6. In view of the aforesaid provisions, counsel for the respondent submitted that the issue of who pays and the modalities of settlement of liabilities of the defunct local authorities has not been settled hence the judgment debt could not be settled until the County Assets and Liabilities Committees formed under **Clause 7(1) of Gazette Notice No. 4370** to **identify, verify and validate** the **assets and liabilities** of the defunct local authorities has submitted its final report to the Intergovernmental Relations Technical Committee by the **31st August 2018**. It is only when the County Assets and Liabilities Committee's report has been submitted to the Intergovernmental Relations Technical Committee, the Council of Governors and the Intergovernmental Budget and Economic Council for deliberation and directions issued by gazette notice that modalities for settlement of the defunct local authorities' liabilities that the *ex-parte* applicant's judgment debt can be settled. Until this is done, counsel submitted, the Controller of Budget will not approve the County's budget with an element on settlement of debts/liability owed by the defunct local authorities. In addition, the respondent took the position that it could not settle this debt/liability as it did not have a vote or budget for the same and that would be in total contravention of the **Public Finance Management Act, No. 18 of 2012**.

7. The respondent also relied on the case of **Masosa Construction Company v Executive Committee, Kisii County and Others, KISII HC JR. No. 72 of 2015 [2016] eKLR** where Hon. Karanjah J., dismissed an application where issues similar to this case were raised and dismissed and the County Government ordered to Show Cause but the proceedings were stayed by the Court of Appeal in **Executive Committee, Kisii County and 2 Others v Masosa Construction Company Limited and Another Kisumu Civil Application No. 27 of 2016 [2016]eKLR** pending the hearing of the main appeal.

8. Mr Lumumba deponed that in the event this Court finds that the County Government is liable to make good this claim, the County should be allowed to liquidate the debt in three equal instalments in the 2nd quarter of this financial year to enable the County Government factor the debt into the current budget. He also urged the court to allow the ongoing verification and validation exercise to be completed so that the judgment debt is settled.

Ex-parte Applicant's Case

9. In response to the position taken by the respondent, counsel of the ex-parte applicant, Mr Nyatundo, relied on his affidavit in reply sworn on 7th August 2018 in addition to submissions on the legal issues raised. He contended that the Notice to Show Cause was dealt with on 20th June 2018 when the County Secretary undertook to ensure settlement and that the only issue left was for the respondent to confirm settlement of debt hence the respondent is estopped from objecting to Notice to Show Cause.

10. The ex-parte applicant's position is that there is in force a valid decree against the respondent as the legal successor of the defunct Kisii Municipal Council pursuant to **section 33 and 18** of the **Sixth Schedule** to the Constitution as read with **section 6 and 134** of the **County Governments Act, 2012** which effectively repealed the **Local Government Act (Chapter 265 of the Laws of Kenya)**. Counsel pointed out that from the cited provisions and also from a reading of **sections 23 and 24** of the **Interpretations and General Provisions Act**, the necessary and logical implication is that following the enactment of the **County Governments Act**, local authorities established under the **Local Governments Act** were absorbed by the respective County government and that therefore the respondent succeeded the defunct Kisii Municipal Council and even took over its assets.

11. Mr Nyatundo submitted that whereas the **Intergovernmental Relations Act** was constitutional, **Gazette Notices Number 858, 2701 and 4370** are unconstitutional and therefore of no effect in so far as they affect individual rights. He contended that the **Act** only relates to the relations between the National and the County Government and it had nothing to do with the rights and interests of citizens including the ex parte applicants who not only hold a valid decree but also an order of mandamus against the respondent. He further contended that by not excluding execution of lawful decrees and orders in the Gazette Notices, the Cabinet Secretary purported to impose an illegal moratorium on those decrees and orders to the detriment of successful litigants. Counsel pointed out that the Gazette Notices are in violation of **section 3(b) and 15(2)** of the **Sixth Schedule** to the Constitution which provided for the strict timeline transfer of national functions to County Government by providing "*for a phased transfer, over a period of not more than 3 years from the date of the first election*" and that by purporting to vest all the assets of the defunct local authorities in the County Government while in the same breath unreasonably holding liabilities in abeyance indefinitely, the provisions violated the Constitution.

12. As regards the position of the position of the Controller of Budget, counsel submitted that **Article 228(5)** of the Constitution merely mandates the Controller of Budget not to "*approve any withdrawal from a public fund unless satisfied that the withdrawal is authorized by law.*" In his view, the provision does not prohibit the Controller from approving a County request to settle a debt that is duly certified by court.

13. It is the case of the ex-parte applicants that the County Secretary as the head of the County Public Service, an organ of the County Administration, is a person who should ensure compliance with orders of mandamus issued by the court.

14. Finally, counsel submitted that the decision referred to in **Kisumu Civil Application No. 27 of 2016 (Supra)** did not apply to the position in this case as the court did not make any substantive pronouncement and merely granted conditional stay in a matter concerning other parties.

Determination

15. The first question to answer is whether the County Government is the natural successor to the Local Government established under the repealed **Local Government Act**. I had occasion to deal with this issue in **Republic v Town Clerk of Webuye County Council Milimani HCCC No. 4408 of 2006 [2014]eKLR** where I observed as follows:

[11] Under **section 18 of the Sixth Schedule to the Constitution**, all local authorities established under the **Local Government Act** existing immediately before the effective date shall continue to exist subject to any law that might be enacted. Pursuant to **section 134 of the County Government Act, No. 17 of 2012, the Local Government Act**, stood repealed after the General Elections of 4th March 2014. The section states that, “The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.” A study of the **County Governments Act** reveals that it does not have transitional provisions for dealing with pending actions and judgment against local authorities.

[12] **Section 134 (2) of the County Governments Act**, provides that, “All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition.” The body dealing with transition referred to in this section is the Transition Authority established under the **Transition to Devolved Governments Act, No. 1 of 2012** which likewise does not have a specific provision vesting causes of action and judgments against local authorities. I therefore agree with the sentiments of Okong’o J., in **Dr J. A. S. Kumenda and Another v The Clerk, Municipal Council of Kisii and Others, Kisii HC ELC Misc. App. No. 3 of 2013 [2013]eKLR** where he stated that, “ I don’t think that it was the intention of Parliament having regard to the temporary nature of the life of the Transition Authority as an institution to give it power to continue with or defend suits pending by or against local authorities that were constituted under the repealed Local Government Act. If that was the intention of the legislature, it would have been stated expressly in the said section of the County Governments Act.”

[13] Another piece of legislation, the **Urban Areas and Cities Act, Act No. 13 of 2011** which was passed before the **County Governments Act** provides that **Part VII**, which contains the Transitional Provisions, shall come into force upon repeal of the **Local Government Act**. **Section 59** of thereof provides that, “Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.” This section vests the power to proceed with and to defend actions and legal proceedings pending against defunct local authorities upon “a body established by law” which is neither defined nor constituted under this Act. What is clear though is that proceedings commenced against or in existence are not extinguished by operation of law but continue to exist. This position is fortified by **section 23(3)(e) of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** which provides that, “Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not-(e) affect investigations, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy may be instituted, continued or enforced.....”

16. I reiterate that the County Government is the lawful successor of the defunct local authority and that the County Government of Kisii is a proper party to these proceedings. I wish to emphasise the provisions of the **Urban Areas and Cities Act** (“the **UACA**”) which deals with classification, management and governance of urban areas. Under **section 1(3)** thereof, **Part VIII** of the **Act** came into operation upon repeal of the **Local Government Act**. **Part VIII** titled, “**Transitional Provisions**” contains two critical provisions as follows:

Rights and liabilities

55. All rights, assets and liabilities accrued in respect of the properties vested in the local authorities established under the **Local Government Act (Cap. 265)** which shall stand repealed after the first election under the Constitution shall be dealt with as provided by law.

Pending actions and proceedings

59. Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.

17. The **County Governments Act** and **UACA** both recognise that dissolution of local authorities after the results of the first general elections under the Constitution are announced but only the **UACA** is of general application as provides for what happens to existing court proceedings after the repeal of the **Local Government Act**. The transitional provisions I have cited above deal with assets and liabilities which may be dealt with as provided by law and the legal rights accrued and causes of action commenced in any court of law or tribunal continue against anybody established by law. It follows therefore that causes of action are saved by the **UACA** and continue against a body established by law.

18. This body established by law to replace the Local Authorities are the respective County Governments. I find support for this in **Section 33** of the **Sixth Schedule** to the Constitution which provides for succession of institutions upon promulgation and it states:

An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.

19. As Kasango J., stated in **Argos Furnishers Limited v Municipal Council of Mombasa HCCC No. 13 of 2008**,

Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 County Governments are

therefore the natural and presumptive legal successors of the defunct local authorities.

20. The next question raised by the respondent is whether the debt or liability is vested in the County Government. The respondents view is that the court should be guided by the provision of the **Intergovernmental Relations Act** which provides for the manner in which assets and liabilities of the defunct Local Authorities are to be vested. It contends that the ex-parte applicant's claim cannot be enforced until the judgment debt is identified, verified and validated through the established structures as I have outlined elsewhere in this judgment. This view has the support of the decision in **County Government of Busia & another v Julius Orina Manwari & 12 others Busia HC Petition No. 2 of 2014 [2015]eKLR** in which Tuiyott J., agreed with the position taken by Ngaah J., in **Republic v County Secretary Murang'a County Government ex-parte Thiga Thuita [2014] eKLR** where he observed that:

The closest law that appears to address the devolution of assets and the assumption of liabilities of the local authorities prior to their extinction is the Transition of Devolved Government Act, Chapter 265A, of the Laws of Kenya. With the emergence of the County Governments, the assets and pre-existing liabilities of the now defunct local authorities were to be shared between those county governments and the national government. The body that was established to work out how this distribution was to be done was the Transition Authority which is created under section 4 of the Transition to Devolved Government Act. Among its functions set out in Section 7 of the Act, the Transition Authority is required to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities. Once this is done it is upon the Transition Authority to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. As at the time this application was argued, there was no evidence and none was brought to the attention of the court that such a criteria is now in place as contemplated under the Transition to Devolved Government Act. Without this criteria, it would be premature to attribute the local authorities' pre-existing liabilities to the County Governments. It follows that even if the applicant's motion was properly before court, there would still be no basis to hold the county government of Murang'a responsible for liabilities which were hitherto attributed to the Municipal Council of Murang'a.

21. The respondent's position is that based on the provisions of the **Intergovernmental Relations Act** and the **Transition to Devolved Government Act**, there is a moratorium on any settlement of liabilities belonging to the defunct local authorities in light of the verification and validation provisions. I reject this argument. As I stated elsewhere in this judgment, **section 55** of the **UACA** deals with vesting of assets and liabilities as provided by law. This law is what is provided for under the **Transition to Devolved Government Act** and the **Intergovernmental Relations Act**. However, cases pending in court are clearly provided for in **section 59** of the **UACA** and are therefore excluded from the operation of the provisions for **identification, verification and validation** of pending liabilities.

22. In **Wachira Nderitu, Ngugi & Co. Advocates v The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 [2015] eKLR** the Court dealt with whether judgment debts were subject to the **Transition to Devolved Government Act** and expressed the view that:

[20] In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is no longer a question of verifying the liabilities which seems to have been the Authority's concern in the said notice.

23. At the end of the day, what we are dealing with is the unconditional duty of a state organ to pay a debt decreed by a court of law. The fact of the judgment constitutes identification, verification and validation and to put a judgment through another process not contemplated by the Constitution would be an affront to the independence of the Judiciary and the doctrine of separation of powers. In other words, a body not contemplated by the Constitution would be sitting on appeal from valid judgments and decisions of the court. In addition, I would reiterate what I stated in **Republic v Town Clerk of Webuye County Council & Another (Supra)** that:

[16] [A] decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution.

24. Having found that the judgment debt is due and payable by the next question is whether the County Secretary is the proper person against whom the order of mandamus may be enforced. On this issue I agree with the respondent that the county government responsibility of management and control of public finance under the **Public Finance Management Act** and in particular the statutory duty to pay out funds from the County Treasury vests in the County Executive Committee members in charge of Finance. The office of County Secretary is established under **section 44(3)** of the **County Governments Act** which provides that he or she shall be the head of the public service, be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee, convey the decisions of the county executive committee to the appropriate persons or authorities; and perform any other functions as directed by the county executive committee. In **Council of Governors & Others v The Senate Petition No. 413 of 2014 [2015] eKLR** the Court considered the meaning of accounting officer in relation to the County government under the Constitution, the **County Governments Act** and the **Public Finance Management Act**. It observed as follows:

[134] The Petitioners have also sought the interpretation of the term "Accounting Officer". In that regard, Article 226 of the Constitution provides;

(1) Act of Parliament shall provide for -

(a)

(b) The designation of an accounting officer in every public entity at the national and county level of government.

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

[135] It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

[136] As regards the accounting officer for the County Assembly, Section 148(4) of the Public Finance Management Act provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

[137] Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.

25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see *Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute [2003] KLR 582* and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) NBI HC Misc. App. 222 of 2016 [2018] eKLR*).

26. I also reject the position taken by the respondent that the judgment debt cannot be settled as the Controller of Budget will not approve an unlawful payment. The Controller of Budget under **Article 228(5)** of the Constitution, will only approve payments authorized by law. I have shown that a judgment debt is not subject to a process of identification, verification and validation of assets and liabilities of defunct local authorities provided for under the provisions of the *Transition to Devolved Government Act* and *Intergovernmental Relations Act* and it is a lawful debt inherited by the County Government by its predecessor.

27. I now turn to consider the case of *Executive Committee, Kisii County and 2 Others v Masosa Construction Ltd and Another (Supra)* relied on by the respondent. In that case the Court of Appeal stayed the decision of the High Court where the court found the respondents guilty for contempt of court and liable to arrest and committal to civil jail for failure to settle the judgment debt in favour of the respondent. The decision of the Court of Appeal did not deal with the substantive issue concerning whether the County was liable to pay the debt. The Court dealt with whether the applicant had met the threshold for granting an order of stay. In short, I do not find any holding of that court germane to this case as that decision was a ruling in respect of a stay application.

28. Finally, in the application dated 16th April 2016, the respondent seeks to set aside the decree in *Kisii CMCC No. 93 of 2009*. The application is incompetent as the decree in that case has already merged into the order of mandamus issued in this matter. A determination on any issue regarding the decree or proceedings can only be made in the original suit as was held in *Republic v Attorney General and Another ex-parte James Alfred Koroso NRB JR Misc. App. No. 44 of 2012 [2013] eKLR* that:

[9]In an application for mandamus the Court can only compel the Respondent to undertake the duty imposed by the judgement and not anything else. It is not upon the Court determining an application for an order of mandamus to determine the intention of the Judge who granted the decree being enforced. Any such determination ought to be sought in the original suit and not in the application for enforcement thereof.

I therefore decline to set aside the decree in *Kisii CMCC No. 93 of 2009*.

Conclusion

29. In conclusion, I find and hold that the County Government of Kisii as the legal successor of Kisii Municipal Council is liable to settle the judgment debt in *Kisii CMCC No. 93 of 2009*.

30. Since the order of mandamus has been issued by the court, I set aside the Notice to Show Cause against the County Secretary and direct the relevant accounting officer of the Kisii County, that is the Executive Committee Member in Charge of Finance to appear before this County to Show Cause, on a date fixed, why the *ex-parte* applicants' judgment debt has not been settled.

31. The *ex-parte* applicant shall have the costs of this application which I assess at Kshs. 35,000/-.

DATED and **DELIVERED** at **KISII** this **11th** day of **October** 2018.

D.S. MAJANJA

JUDGE

Mr Nyatundo instructed by Nyatundo and Company Advocates for the ex-parte applicant.

Mr Onsembe, Advocate for the respondent.