



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

JUDICIAL REVIEW NO. 1 OF 2019

IN THE MATTER OF ORDER 53 RULE 1 & 2 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLE 22(1), 23(1), (3), 25(C)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF BUSIA.....RESPONDENT

AND

DISMAS EGESA OSINYA.....EX PARTE APPLICANT

J U D G E M E N T

1. For determination is the amended notice of motion dated 4th November 2019 brought under the provisions of Sections 1, 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act; Order 51 and 53 rule (1) and (2) of the Civil Procedure Rules. The orders sought in the application are;

1) That an Order of mandamus compelling the County Government to settle the decretal sum of Kshs.70,000,000 being the principal sum and costs of Kshs.1,250,755 (One Million Two Hundred and Fifty Thousand Seven Hundred and fifty Five) and interest on the above figures at 15% per annum since 5th December, 2018 (date of judgment) and since the 10th July, 2019 (date of taxation).

2) That costs of this application be borne by the interested party.

2. The application is supported by the grounds on its face and the supporting and supplementary affidavits sworn by the Applicant on 23rd January 2020. The grounds stated include;

a) That the Respondent herein compulsorily took away the Ex-parte Applicant's land to wit L.R No. BUKHAYO/MUNDIKA/7883.

b) That Ex-parte Applicant has written to the Respondent herein seeking for payment and those demands have not been met nor even acknowledged.

c) That this is a case of refusal to pay rather than inability to pay.

d) That the Respondent herein should be compelled by this Court to fully compensate the Ex-arte Applicant for the same.

c) That the Respondent herein be compelled to pay the costs of this application.

3. The applicant took issue with the facts deposed to in the replying affidavit of the respondent. He deposed that the respondent's allegation of filing an application for review against the judgment is unsupported and even if it were so, that application would have zero chance of success. That he has perused the gazette notices filed by the respondent which notices do not include the details of the suit property L.R BUKHAYO/MUNDIKA/7883. The applicant further deposed that his title was curved from L.R No. BUKHAYO/MUNDIKA/6339 and not BUKHAYO/MUNDIKA/1295. That the respondent is on a wild goose chase and is unsure which property it compulsorily acquired. The applicant continued that his claim is not overtaken by the Limitation of Actions Act since there is no evidence of compulsory acquisition. He urged the Court to allow the motion.

4. The respondent opposed the application through the replying affidavit of Joe Maurice Odundo sworn on 14th October 2019. Mr. Odundo deposed that the respondent has filed an application for review of the judgement issued in Busia ELC 23 of 2009 hence this application should be stayed to await the determination of their application. He deposed also that the suit parcel No. Mundika/7883 was the subject of compulsory acquisition by the Government in 1977 – 1981 duly held in trust by the defunct Municipal Council of Busia as shown in the gazette notices numbers 1217 & 1218 of 16th April 1981. That he is advised that by dint of Section 7 and 9 of the Limitation of Actions Act, the suit was nullity with the consequence that the judgment issued is also a nullity and should be so adjudged. That the application herein discloses no reasonable cause of action, is defective and should be struck out with costs.

5. Both parties filed written submissions which I have considered. The question herein is whether or not orders of mandamus can issue against the respondent as prayed. The respondent thinks otherwise and submits that an order of mandamus is not an order of specific performance. That a party in a judicial review application seeking an order of mandamus must show the existence of a statutory duty conferred or invested by statute upon some person or tribunal and the person/tribunal has failed to perform. He cited the Case of ***R Vs Registrar of Societies and 5 others exparte Kenyatta and 6 others (2008) 3 KLR 521.***

6. There is no dispute that a judgment was entered against the defendant in ELC Case No. 23 of 2009. That judgment has not been varied or set aside. There has been argument made by the respondent that the said judgement is a nullity because it was given in a suit that was time barred. That line of argument can only lie in application made in that file/case where the judgment was issued. This Court cannot sit on appeal against its own judgment as the respondent is urging herein.

7. Further the respondent claims that there is no statutory duty in this case that permits the applicant to be granted orders of review. Section 38 of the Civil Procedure Act gives Court powers to enforce execution in the various modes provided to include;

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree -

- (a) by delivery of any property specifically decreed;**
- (b) by attachment and sale, or by sale without attachment, of any property;**
- (c) by attachment of debts;**
- (d) by arrest and detention in prison of any person;**
- (e) by appointing a receiver; or**
- (f) in such other manner as the nature of the relief granted may require:**

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court,

for reasons to be recorded in writing, is satisfied -

- (a) That the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree -**
 - (i) is likely to abscond or leave the local limits of the jurisdiction of the court; or**
 - (ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or**
- (b) That the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or**
- (c) That the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account”.**

8. Section 21(1) and (3) of the Government Proceedings Act states as hereunder;

“(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 require 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.

(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”.

9. In the Case of *Shah Vs A.G (No.3) 1970 E.A 543* Goudie J expressed himself thus;

Mandamus is an English word and therefore it is logical for the Court to look at its definition. “Mandamus is a prerogative order issued in certain Cases to compel the performance of a duty ... especially where the obligation arises out of the official status of the respondent. Thus it is issued to compel public officers to perform duties imposed upon them by common law or statute. The person or authority to whom it is issued must be either under statutory or legal duty to do or not to do something”.

10. The respondent is a public office under the devolved government thus its properties cannot be attached in the execution of decrees without leave of the Court. The Civil Procedure (statute) imposes on a judgment debtor to settle a decree. In this Case, it is a monetary decree which the respondent is required to pay and which it has not paid thus forcing the applicant to come to court for an order to compel them to settle it. It is distinguishable from specific performance as being argued because the award was made under the heading of general damages to compensate the applicant for loss of his land L.R No. Bukhayo/Mundika/7883.

11. Githua, J in Republic Vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR expressed herself as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.” (Underline mine for emphasis).

12. I am therefore persuaded to find as I hereby do that there is no ground laid by the respondent to make this Court deny the applicant the fruits of his judgment obtained in ELC Case No. 23 of 2009. Consequently, the application dated 4/11/2019 is found to be merited and is granted as prayed.

Dated, signed and delivered at BUSIA this 18th day of June, 2020.

A. OMOLLO

JUDGE