



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

MISC CIVIL CASE NO. 8 OF 2016

**IN THE MATTER OF AN APPLICATION BY JACKSON ONYANGO MUSUNGU FOR
ORDERS OF MANDAMUS**

AND

**IN THE MATTER OF AN UNSATISFIED DECREE IN BUNGOMA CHIEF MAGISTRATE'S
COURT CIVIL SUIT NO. 436 OF 2008**

AND

IN THE MATTER OF THE CONSTITUTION, ARTICLES 22, 23 & 48

AND

IN THE MATTER OF THE LAW REFORMS ACT, SECTIONS 8 & 9

AND

IN THE MATTER OF THE TRANSITION TO DEVOLVE GOVERNMENT ACT, 2013

BETWEEN

REPUBLIC

VERSUS

THE COUNTY GOVERNMENT OF TRANS NZOIA THRO' THE

COUNTY SECRETARY.....RESPONDENT

JACKSON ONYANGO MUSUNGU.....EX PARTE APPLICANT

JUDGEMENT

1. By his application dated 30/3/2016 the applicant prays for orders that;

a) This Honourable court be pleased to issue Judicial review orders of Mandamus directed to the County Government of Trans Nzoia through the County Secretary, to satisfy the decree in Bungoma CMCC No 436 of 2008 together with costs and interest accruing thereon.

b) Costs of this application.

2. The application is supported by the sworn affidavit of the applicant together with the statements thereof.

3. From the annexures to the said affidavit it appears that there was suit No. Bungoma CMCC No Bungoma CMCC No 436/2008 between the applicant and the Municipal Council of Kitale and judgment was granted in his favour.

The applicant then proceeded to apply for garnishee proceedings but it did not yield much as the respondent had by then taken over the accounts from the defunct Municipal Council.

4. The applicant then proceeded to apply for Judicial review proceedings but the same was dismissed as the court was not satisfied that leave to apply for the orders of Mandamus had been granted.

5. The applicant has therefore petitioned this court to order the respondent to settle the pending decree which has remained unsettled over many years. On his part one Pius Mumelo the County Secretary has sworn a replying affidavit dated 25/10/2016 in which he has essentially not denied that there is a decree pending against the respondent. He has however raised two pertinent issues namely that the Transitional Authority has not handed over the revenue and audit report pertaining to assets and liabilities to the respondent so as to enable it make budgetary allocations. He deposed further that the Intergovernmental Relations Committee which took over from the Transitional Authority has not either completed its work.

6. He argued that the applicant has not availed certified copies of proceedings and judgment to authenticate the decree fully and that this matter is res judicata this court having dismissed such application before.

7. I have perused the entire application together with the annexures as well as the submissions by the applicant's counsel.

There is no dispute that the applicant has a pending decree which the now defunct Kitale Municipal Council did not satisfy. It is not therefore true that the respondent is not in the picture and the argument that the applicant has not supplied the certified judgment and decree is spurious.

8. The only substantive argument in my view is whether it is the responsibility of the respondent to settle the liabilities left behind by the Kitale Municipal Council. It must of course be emphasised here that the decree in question emanated from the courts and thus the full due process was followed. The respondent had the chance to defend itself and therefore it is a valid decree. By extension it is a valid Liability left behind by the respondent predecessor.

9. Whereas it could be true that there were unfinished business by the Transitional Authority, as explained by the respondent that in my view does not absolve it from settling its liabilities. One wonders if the said unfinished business would not collect and protect the assets left behind by her predecessor.

10. I have further perused the ruling of this court of 28/5/2015 and I can't agree with the argument by the respondent that this application is res judicata for the simple reason that there was no evidence that the applicant had sought leave of the court before applying for the orders of Mandamus.

11. Further there was no evidence to show that the respondent had been issued with the necessary notice to pay. In the instant application it is clear that leave was sought and that there are plethora of correspondence demanding the payments.

12. My attention has been drawn to Section 59 of the Urban Areas and Cities Act No 13/2011 which had transitional processes. It is my view that in the absence of any transitional process for the Intergovernmental Relations Committee Section 59 above is applicable. The said Section states as follows:-

“Any legal right accrued cause of action commenced in any court of Law or tribunal

established under any written law in force, or of 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.”

13. My brother *Okongo J in J.A.S. Kumende & Another Vs Clerk Municipal Council of Kisii and 6 others (2013) eKLR* stated in respect to the above. Section 59 as follows:

“This Section is clear that suits commenced in a court of Law against any local authority prior to the repeal of the Local Government Act shall continue to be sustained. This section is in accord with the provisions of Section 23(3) (e) of the interpretation and General Provisions Act Cap 2 Laws of Kenya which provides as follows;

“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 proceedings 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.....”.

14. Consequently it would not be fair to state that the applicant ought to wait till the Intergovernmental Relations Committee acts. Litigation ought to come to an end. The respondent is an entity recognisable in law. It has capacity to sue and be sued. It canNOT shy away from its duties. In any event it has not proposed to bring in the intergovernmental Relations Committee as a party. Even if the said Committee was to carry out any relevant legislation in respect to the assets and liabilities of the respondent one wonders whether it will create a law blocking the settlement of the respondents liabilities. It was not the applicant who applied that the Kitale Municipal Council be extinguished. I do not know any law that one can create to shield a debtor from its liabilities.

15. Respectively therefore, I do not find the argument by the respondent meritorious. The debt has been pending for several years. No meaningful efforts have been undertaken to settle the same. No proposal has been given by the respondent. Even after the ruling of this court of 28/5/2015 was delivered and the respondent issued with notices it remained adamant and shielded itself under the umbrella of the Transitional Authority and now Intergovernmental Relations Committee.

16. The application dated 30/3/2016 is allowed with costs to the applicant.

Delivered this 2nd day of March, 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Barongo for Karani

Analo for Kebira

Court Assistant - Kirong