



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 1046 OF 2007

REPUBLICAPPLICANT

VERSUS

NAIVASHA MUNICIPAL COUNCILRESPONDENT

EX-PARTE

BENSON MUTURI KAMANDE

RULING

1. In these judicial review proceedings, Benson Muturi Kamande is the ex-parte Applicant. The defunct Naivasha Municipal Council is the Respondent. In a judgment delivered on 29th July, 2008, George Dulu, J granted an order of mandamus to the ex-parte Applicant directing the Town Clerk of the Respondent to satisfy the decree, costs and interest in Naivasha SPMCC No. 913 of 2005 within seven days from the date of service of the order. The costs for the application were also awarded to the ex-parte Applicant. The order of mandamus has not been enforced to date.
2. I will heavily borrow from the judgment of Ouko, J (as he then was) dated 25th March, 2013 and delivered on 11th April, 2013 in Nakuru High Court Civil Appeal No. 116 of 2008, the Naivasha Municipal Council v Benson Muturi Kamande, to highlight the history of this matter.
3. An ex-parte judgment was entered against Naivasha Municipal Council in favour of Benson Muturi Kamande (suing as the legal representative of the estate of Kimani Kung'u alias Kamande Kung'u (deceased) in Naivasha SPMCC No. 913 of 2005. The ex-parte Applicant's claim was that Naivasha Municipal Council had reallocated a plot valued at Kshs.600,000/=, which it had allocated to the late Kimani Kung'u alias Kamande Kung'u, to a third party.
4. After judgment was entered in favour of the ex-parte Applicant, the Respondent herein applied for the judgment to be set aside without success. The ruling dismissing the application for setting aside the ex-parte judgment gave rise to Nakuru H. C. Civil Appeal No. 116 of 2008. Ouko, J (as he then was) heard the appeal and dismissed it.
5. The Respondent did not give up. Through an application dated 17th May, 2013 it sought to stay the judgment delivered on 11th April, 2013. On 14th February, 2014, R. P. V. Wendoh, J dismissed the application for being incompetent.
6. On 6th October, 2014, the ex-parte Applicant moved this Court by way of the notice of motion dated 6th October, 2014 seeking, among other orders, the committal to civil jail of one Robert Ndungu being the Administrator, Naivasha Sub-County for failure to pay him, as per the order of mandamus, the sum of Kshs.1,963,209/= being the decretal sum, costs and interest. The application was mentioned for some time and on 18th March, 2015 the County Secretary of Nakuru County

Government was summoned to attend Court during the hearing of the ex-parte Applicant's application. The County Secretary did not attend Court on 30th April, 2015 as directed leading to the issuance of a warrant of arrest on the same day.

7. The County Secretary subsequently filed the notice of motion dated 6th May, 2015 in which he seeks orders as follows:

- “1. This application be certified as urgent and service be dispensed with in the first instance.**
- 2. The Honourable Court grants leave for the Applicants' Advocates to come on record in the matter.**
- 3. Pending the hearing and determination of this Application, the Honourable Court be pleased to grant stay of its arrest warrant issued against Joseph Mogusu Motari, the Nakuru County Secretary on 30th April, 2015.**
- 4. The Honourable Court be pleased to issue an Order setting aside its arrest warrant against Joseph Mogusu Motari, the Nakuru County Secretary.**
- 5. The Honourable Court be pleased to issue an order staying enforcement of the Judgement in Navaisha SPMCC No. 913 of 2005 pending the apportionment of liabilities by the Transition Authority.**
- 6. Such further and other relief be granted to the Applicants as this Court deems fit.**
- 7. There be no order as to costs.”**

8. The application, which is supported by the grounds on its face and an affidavit sworn by Joseph Mogusu Motari, is the subject of this ruling. For record purposes, the applicants in respect of the application in issue are the Nakuru County Government and the County Secretary, Joseph Mogusu Motari. The ex-parte Applicant (Benson Muturi Kamande) is the Respondent.

9. The ex-parte Applicant opposed the application through a replying affidavit which he swore on 22nd June, 2015.

10. Prayers 1 to 3 of the application are spent and it is only prayers 4 to 7 that require determination by the Court.

11. Upon perusal of the pleadings and submissions I have identified two issues for determination in this ruling. The first issue is whether the County Government of Nakuru is responsible for payment of the ex-parte Applicant's debt. The second question is whether the warrant of arrest issued against Joseph Mogusu Motari is proper. The issues are intertwined and I will not delineate any boundaries in addressing them.

13. According to Joseph Mogusu Motari, he was not personally served with the application, the statement and affidavit seeking leave to commence contempt proceedings. He claims that he was not aware of the judgment in question and he cannot be said to have thus acted in contempt of court.

14. The applicants hold the view that the proper party to deal with the ex-parte Applicant's claim, as provided by Section 134 (3) of the County Governments Act, 2012, is the Transition Authority. It is the applicants' position that the ex-parte Applicant ought to have applied to enjoin the Transition Authority to these proceedings.

15. The applicants assert that the judgment in Naivasha SPMCC No. 913 of 2005 imposed a liability on the defunct Naivasha Municipal Council and such liability ought to have first been audited and verified before being transferred to the County Government of Nakuru. It is the applicants' view

that the County Government of Nakuru cannot be compelled to implement the judgement before liabilities are apportioned by the Transition Authority.

16. At the hearing of the application on 9th March, 2015, Mr Wanyama for the applicants informed the Court that the Transition Authority had since ceased to exist by an act of law and the responsibility of apportioning liabilities had been taken over by the Intergovernmental Relations Technical Committee. It was his opinion that since the ex-parte Applicant's claim had been submitted to the Transition Authority for verification, the exercise should first be concluded before orders are issued as to who between the National Government and the County Government of Nakuru should pay the ex-parte Applicant's debt.

17. The applicants contend that Articles 1(1), 5, 184, 186, 202, 203, 209 of the Constitution as well as the Fourth Schedule and Section 18 of the Sixth Schedule of the same Constitution creates two levels of Government, national and county. It is the Applicants' position that the transition to Devolved Government Act, 2013 was enacted to guide the transition process including identification and apportionment of assets and liabilities between the two levels of government. The applicants contend that before the process of identification and apportionment is concluded, the liabilities of the former Naivasha Municipal Council cannot be imposed on the County Government of Nakuru.

18. Another point taken up by the applicants is that by virtue of Article 176(1) of the Constitution, the County Government of Nakuru comprises the County Executive headed by the Governor and the County Assembly headed by the Speaker. The applicants are of the opinion that there is no legal basis for the ex-parte Applicant to direct the enforcement of the judgement to the County Assembly.

19. The applicants assert that there is no entity known as Naivasha Municipal Council and the ex-parte Applicant should have made an application for substitution before seeking contempt orders against the Nakuru County Secretary.

20. The applicants contend that committal to civil jail is unconstitutional as it violates the provisions of Article 11 of the International Covenant on Civil and Political Rights which Kenya has ratified and which is part of Kenyan law by virtue of Article 2(6) of the Constitution.

21. Another argument by the applicants is that the County Secretary cannot incur any personal liability as he is protected by Section 21(1) of the Government Proceedings Act as read together with Section 131 of the County Governments Act No. 17 of 2012 following the repeal of Section 263 A of the Local Government Act which imposed liability on the clerk of a local authority. The applicants add that by virtue of Section 6 of the Sixth Schedule of the Constitution of Kenya, obligations and liabilities accrued by the defunct local authorities before 4th March, 2013 vest with the national government. The applicants therefore submit that the ex-parte Applicant should claim for his money from the national government.

22. The applicants also assert that there is no money budgeted for the payment of the ex-parte Applicant's debt and it would therefore be illegal to make any payment.

23. The applicants further contend that the County Government of Nakuru shall suffer irreparable loss and damage for a claim which the defunct Naivasha Municipal Council negligently failed to defend therefore resulting in judgment without a hearing before the subordinate Court. It is the applicants' position that no valuation report or ownership document was tendered to prove value or ownership of the land that was the subject of litigation before the subordinate Court.

24. The ex-parte Applicant's response is that the County Government of Nakuru took over and continued the matter after 4th March, 2013 in accordance with Section 59 of the Urban Areas and Cities Act, 2011. The ex-parte Applicant asserts that the County Government of Nakuru has thus assumed responsibility over the matter.

25. It is the ex-parte Applicant's view that the judgment debt herein accrued and became payable on 14th February, 2014 when the applicants' application for stay pending appeal was dismissed by the High Court at Nakuru.

26. The ex-parte Applicant asserts that the debt herein being a decree of the Court does not fall within the category of liabilities contemplated to be verified by the Transition Authority. The ex-parte Applicant argues that in any case, the applicants seek stay awaiting action by the Transition Authority which is not a party to these proceedings and is not subject to or accountable to any orders issued by this Court. Further, that the subject decree is already determined by a Court of law as a debt payable by the County Government of Nakuru as the successor of Naivasha Municipal Council and is thus not subject to verification by the Transition Authority or any other body.

27. The ex-parte Applicant contends that the Transition Authority which is a body corporate with the capacity to sue and to defend suits has not applied to stay or set aside the judgment and the applicants cannot be allowed to apply for such orders on behalf of the Transition Authority.

28. It is the ex-parte Applicant's case that the County Government of Nakuru admitted the debt through paragraph 28 of the supporting affidavit of Joseph Mogusu Motari and the County Secretary should be committed to civil jail for being in contempt of the Court.

29. It is the ex-parte Applicant's position that by virtue of the powers, duties and responsibilities bestowed upon the County Secretary by Section 44 of the County Governments Act, the County Secretary is the person responsible for the settlement of the decree herein.

30. This is how I see this matter. At this point in time, the validity of the decree issued in Naivasha SPMCC No. 913 of 2005 is no longer open for discussion. That issue was put to rest through the ruling delivered on 14th February, 2014 by R.P.V. Wendoh, J. The assertion by the County Government of Nakuru that it should not be made to pay in respect of a judgement in which no valuation report and ownership document were produced therefore amounts to nothing.

31. The key question in these proceedings is whether the County Government of Nakuru is the proper entity to pay the ex-parte Applicant's claim.

32. It is the applicants' position that the Transition Authority is yet to apportion the assets and liabilities of the defunct local authorities and in accordance with sections 6 and 33 of the Sixth Schedule to the Constitution the national government is the one expected to satisfy the ex-parte Applicant's decree.

33. In support of this position the applicants cited the decision in **Republic v County Secretary Murang'a County Government ex-parte Stephen Thiga Thuita [2014] eKLR** in which Ngaah Jairus, J held that:

"One other issue merits mention in this judgement. The applicant initially applied and obtained leave for an order for mandamus against the town clerk, Municipal Council of Murang'a. The motion named the town clerk as the respondent; however, the applicant amended the motion and substituted the town clerk with the county secretary of the County Government of Murang'a. I suppose this amendment was informed by the presumption that the County Government of Murang'a carried over the liabilities of the Municipal Council of Murang'a. This presumption however is not supported by any legal provision I know of and none was shown to me.

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 to 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 that 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."

34. The ex-parte Applicant's answer to that decision is by way of the ruling delivered on 16th February, 2015 by Odunga, J in the case of **Wachira Nderitu, Ngugi & Co. Advocates v the Town Clerk, City Council of Nairobi**. The judge who was confronted by arguments similar to those of the applicants herein held that:

"19. From the respondent's own deposition, it is clear that the public notice that the Transitional Authority gave was to advise the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a County Government. [Emphasis added].

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."

35. I have carefully looked at the two decisions cited by the parties herein and I will now proceed to state my view.

36. The appeal in Nakuru H.C. Civil Appeal No. 116 of 2008 was prosecuted by the County Government of Nakuru and so was the application for stay pending appeal. The applicants cannot now turn around and try to disown the outcome of that appeal because the appeal did not end in their favour.

37. The applicants are trying to shift liability to the Transition Authority or the Intergovernmental Relations Technical Committee and the national government. Those organs are not parties to these proceedings. If the applicants strongly believed that the said organs ought to have paid off the ex-parte Applicant's claim then they should have applied for their enjoinder to these proceedings.

38. In this matter, judgement was entered against Naivasha Municipal Council. An order of mandamus was subsequently issued but the same was not enforced as an appeal was pending in the High Court at Nakuru. After the promulgation of the Constitution of Kenya, 2010, the Naivasha Municipal Council ceased to exist.

39. The County Government of Nakuru which is a creature of the Constitution thereafter took over the matter. The ex-parte Applicant is therefore correct that liability accrued upon dismissal, on 14th February, 2014, of the applicants' application for stay of judgment pending appeal. From that perspective, the debt became payable on that day and the duty to pay belongs to the County

Government of Nakuru. I therefore find and hold that the ex-parte Applicant's decree is to be satisfied by the County Government of Nakuru.

40. The remaining question is whether the warrant of arrest issued against the County Secretary is proper. Upon reflection on this issue, I find that the parties proceeded as if they were arguing the ex-parte Applicant's notice of motion dated 6th October, 2014. To the best of my knowledge that application has not been argued. It would therefore be improper to proceed to make findings on the various issues raised by the applicants in regard to that application.

41. The warrant of arrest against the County Secretary of Nakuru was issued on 30th April, 2015, after he failed honour summons to attend Court on that day. To date he has not explained why he disobeyed the court order. The reason for issuing the warrant of arrest is still valid. The warrant of arrest therefore remains in force and is valid.

42. The end result is that the applicants' application dated 6th May, 2015 has no merit. The same is therefore dismissed with costs to the ex-parte Applicant, Benson Muturi Kamande.

Dated, signed and delivered at Nairobi this 12th day of April, 2016

W. KORIR,

JUDGE OF THE HIGH COURT