



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL CAUSE NO. 379 OF 2010

REPUBLIC.....APPLICANT

VERSUS

THE TOWN CLERK, MUNICIPAL COUNCIL OF MALINDI.....RESPONDENT

EX PARTE: VICTORY CONSTRUCTION CO. LTD

RULING

Introduction

1. By a Notice of Motion dated 22nd January, 2015, the *ex parte* applicant herein, **Victory Construction Co. Ltd**, seeks the following orders:

1. That the proceedings in this matter brought against the Municipal Council of Malindi be deemed as proceedings as against the Kilifi County Government.

2. That the order of Mandamus and other orders issued by the Court on 15th December 2011 as against the Town Clerk, Municipal Council of Malindi to pay to the ex parte applicant the sum of Kshs. 16,000,000/= or any balance thereof arising from a decree of the High Court in High Court Civil Case Number 435 of 2009, Milimani be deemed as issued against the Kilifi County Executive Member for Finance.

3. That an order of Mandamus do issue compelling the Kilifi County Executive Member for Finance or the Accounting Officer for Kilifi County Government to pay to the Ex parte Applicant, Victory Construction Company Limited, the sum of Kshs 8,000,000/= being the outstanding balance of the decretal amount arising from the decree of the High Court of Kenya in HCCC No. 435 of 2009, Milimani Commercial Courts.

4. That the costs of all proceedings in this matter be borne by the Kilifi County Government.

2. According to the applicant, by a consent judgment in HCCC No. 435 of 2000, Milimani Commercial Courts, it obtained judgment against the Municipal Council of Malindi, now defunct by operation of law, for the sum of Kshs 16,000,000/= all inclusive.

3. Subsequently, on 15th December, 2011, this court issued an order of *mandamus* directed as the Town Clerk of the defunct council to pay to the *ex parte* applicant the aforesaid decretal sum or balance thereof.

However, the council only paid Kshs 8,000,000/= leaving a balance of Kshs. 8, 000,000/= due and payable which despite attempts by the applicant remained unpaid by Kilifi County Government, being in law the successor to the activities, functions, liabilities and assets of the council.

4. It was this state of affairs that provoked this instant application by which the applicant now seeks that the Kilifi County Executive Member in charge of Finance to forthwith settle the said debt.

Determinations

5. I have considered the application which was not opposed.

6. According to **Kasango, J** in **Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008**, in which the learned Judge cited with approval the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006**:

“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.”

7. **Majanja, J** who delivered the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** pronounced himself on the provisions of section 59 of the *Urban Areas and Cities Act* No. 13 of 2011 as read with Section 33 of the Sixth Schedule of the Constitution. The former provides:

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 field 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.

8. The learned Judge accordingly found that:

“the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgement. The court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See Republic vs. Minister for Land & 2 Others ex parte Kimeo Stores Ltd (2011) eKLR, Kenya National Examination Council vs. Republic exparte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996).”

9. It follows that legal rights and liabilities of the defunct local authorities are to accrue in favour of and be sustained against their successors which in this case are the respective County Governments.

10. Similarly, in this case we are dealing with the duty to pay a debt already decreed by a competent Court of law to be due and payable by the defunct local authority which liability has been statutorily and constitutionally inherited by the County Government.

11. Having considered the issues raised herein, I have no reason to decline to grant the orders sought herein

Order

12. Accordingly I grant the following orders:

1. The proceedings in this matter brought against the Municipal Council of Malindi are hereby deemed as proceedings as against the Kilifi County Government.

2. The order of Mandamus and other orders issued by the Court on 15th December 2011 as against the Town Clerk, Municipal Council of Malindi to pay to the ex parte applicant the sum of Kshs. 16,000,000/= or any balance thereof arising from a decree of the High Court in High Court Civil Case Number 435 of 2009, Milimani are hereby deemed as issued against the Kilifi County Executive Member for Finance.

3. An order of Mandamus is hereby issued compelling the Kilifi County Executive Member for Finance or the Accounting Officer for Kilifi County Government to pay to the Ex parte Applicant, Victory Construction Company Limited, the sum of Kshs 8,000,000/= being the outstanding balance of the decretal amount arising from the decree of the High Court of Kenya in HCCC No. 435 of 2009, Milimani Commercial Courts.

4. The costs of all proceedings in this matter are to be borne by the Kilifi County Government.

Those shall be the orders of this Court.

Dated at Nairobi this 7th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omari for Mr Nyawara for the exp Applicant

Cc Mutisya