



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL MISC. APP. NO. 17 OF 2013

SAMWEL KEROSI ONDIEKI

t/a KEROSI ONDIEKI & CO. ADVOCATESPLAINTIFF

VERSUS

NAROK COUNTY GOVERNMENTDEFENDANT

RULING

1. This is an application – Notice of Motion – dated **19th day of February 2015** brought by Narok County Government – the Defendant in this case. The application is brought under **Section 1A, 1B, 3A and 63 (e) of Civil Procedure Act, Order 22 rule 22, Order 40 rule 1 and Order 51 rule 1** of the **Civil Procedure Rules** and all other enabling Provisions of the Law.

The application seeks, inter alia, for:

- a. Spent
- b. Spent
- c. **THAT an order do issue nullifying the warrant of attachment herein and any form of execution against the defendant and restraining the plaintiff, his servants, advocates, agents and/or assigns from attempting or in any manner whatsoever executing against the defendant herein in respect to the decree herein.**

The above application was supported by a supporting affidavit from Simon Sopia the defendant’s sub-county administrator averring that the defendant is the predecessor of the County Council of Transmara under the current constitutional and statutory devolved structure of government, there is a decree in court in favour of the plaintiff issued on 31st March 2003 (*12 years ago*) whereby both plaintiff and defendant had a consent to pay the defendant Kshs. 13,500,000/= and that there also exists a ruling by Bauni J. dated 2nd June 2004 filed by the plaintiff seeking the said decretal sum under Kisii HCMA No. 134 of 2003.

2. He further averred that execution cannot issue against government, that from the government records, the consent decree was fully satisfied by the defendant through cheques payable to the plaintiff in person that even with the decretal sum being fully paid, the plaintiff now attempts to fraudulently and deceptively obtain from the defendant a ridiculous sum of Kshs, 37,463,414.50 an amount of which include more interest than the principle sum although there was no order for decree. He further averred that oblivious that the decree had already been settled, the defendant made a payment of Kshs.

5,168,000/= to the plaintiff and he contends that the defendant shall separately file a suit seeking the recovery of these monies. In addition to this, the plaintiff contends that even if the plaintiff was duly owed, he has slept in his laurels for twelve years to revive execution of the decree herein thus he now contends that the plaintiff's claim is time barred and has abated. Lastly, he contends that the plaintiff has now proceeded to unlawfully levy execution against the defendant and has proceeded to attach the defendants motor vehicles which are utilized by the county executive committee members and that the plaintiff suffers no prejudice which cannot be compensated should the application be granted as prayed.

3. The above application was opposed by the plaintiff by a replying affidavit filed in court on 6th March 2013. In his replying affidavit Kennedy Bosire Gichana the advocate of the plaintiff has contended that twelve years have not lapsed from the date of entry of the judgment being executed herein, that the plaintiff applied for an order of mandamus to compel the clerk of the Transmara County Council to pay the decretal sum in full with interest and costs, that at the time the local authorities were duly protected by the statute against execution of court decrees and that unlike the National Government and the former local authorities which statutorily protected against execution, the county government does not enjoy such protection. He further averred by contending that the consent decree has never been satisfied as alleged in connection to this case, the allegation that the interest exceeds the decretal sum is based on a misconceived view, the execution is being carried out within the statutory period and that the ongoing execution is valid and procedurally being concluded.

4. When the matter came before me on 9th March 2015 Mr. Chelanga for the defendant submitted by acknowledging that there was a decree issued on 30th March 2003 against the defunct county council of Transmara. That by operation of the law, the county council of Transmara's assets and liabilities were taken by Narok County Government which is now the defendant. That pursuant to that decree, the plaintiff has demanded the liquidation of the same and has proceeded to institute prosecution proceedings against the defendant. In addition to this he submitted by referring to the annexed affidavit of Simon (*the defendant's county administrator*) there is a warrant against the county. He proceeded by posing the question of whether execution can issue against the defendant. He referred to **Section 21 (4) of Government Proceedings Act** and submitted that government is exempted from executing proceedings under the civil proceedings under **Civil Procedure Rules**.

5. Moreover, he submitted that it has been a procedure where there is a decree or an order against government that the decree holder makes an application to compel the government or the public officer in question to satisfy the decree that application is urgent by way of judicial review by way of mandamus. However, he submitted by stating that the plaintiff in this case acting with knowledge made an application under Kisii HC. 134 of 2003 seeking the orders to make good to satisfy. He also referred to the ruling by Justice Bauni dated 2nd June 2004. He further submitted by referring to **Article 11 (4) of the Constitution** which created both National and County Government as separate entities. That the provision is alluded to in **Article 6 (2), Article 176 (i) of the Constitution**. He referred the court to **Section 7 of the 6th Schedule** which talks about existing laws at the commencement date. Moreover, he submitted by stating that that article states these laws should be read with no alteration; with modifications and qualification to be in line with the constitution.

6. Thus he submitted that the government proceedings Act should be read in that line that Government should include county government. He referred to **Misc. Application of 2011, Kilimanjaro Safari Club -v- Governor of Kajiado County**. Lastly he submitted by stating that the court should take note of the conduct of the plaintiff in concluding unlawful execution as against the defendant in that on 22nd September 2003, the plaintiff took out garnishee proceedings against the defendant. It was unlawful. He also submitted by referring to **Order 29 of Civil Procedure Code 2010 rule (2)** which says that no order shall issue under or against the government for instance **Order 22 (execution)** and noted that even the offices of the court should be recognized in this rule. He thus prayed that prayer 3 of his application should be granted.

7. Mr. Bosire in reply to the above submission submitted that the above application is misconceived as it has been brought without jurisdiction. He submitted that even if the court has unlimited jurisdiction in

matters of this nature ought to have been dealt with by the court of the lowest competent jurisdiction which is the Deputy Registrar. He referred to **Section 34 of the Civil Procedure Rules** which dealt with questions to be determined by court executing decree and stated that the decree herein was executed by orders of the Deputy Registrar and therefore this court has no jurisdiction. Furthermore, he submitted that the application by defendant has no right of audience as he (defendant) is in contempt of this orders and a party who disobeys the court order has right to seek an equitable relief. Hence he submitted the Application No. 134 of 2003 was filed after the applicant failed to satisfy the court decree.

8. Moreover, he submitted that the applicants (defendant) are only before this court saying that they are protected by the law against execution and in reality that is not the position in law. That the local government at **Section 263 (e)**. Hence the present County Government who are the successors of the local government do not have statutory provision protecting the county government against execution and if government intended to have it, it ought to have inserted it in the act in an express way. In addition to this he submitted that the law that was serving the local authority was repealed and was taken over by county government. He also submitted that the county government specifically stated that it is a body corporate with perpetual succession which ought to sue and to be sued in its own name therefore that distinguishes it from the national government.

9. He further submitted by stating that the government proceedings Act does not apply to county government and the authority is merely persuasive. It dealt with both national and county government as one that since there is no specific provision restraining the opponent from executing there is nothing wrong with executing. He referred to the letter (SS-4 annexures) which were documents asking the defendant to pay based on Kshs. 5,700,000/= was paid as part payment. That upon payment, that the applicant does not want to pay only but is also obstructing payment.

10. Lastly he submitted that the conduct of the defendant is questionable as freezing the account is itself an offence. See **Section 82 read with Section 8-9 of the Advocate Act**. Thus he urged the court to reject the application and allow the execution to proceed. Mr. Chelanga in reply submitted on the issue of jurisdiction that Mr. Bosire used the term the lowest competent jurisdiction and thus the decree was issued by the High Court so the court is competent to handle the issue that the Deputy Registrar is an officer of the court, that is the High Court is not a court in itself with provisions under **Order 49 of Civil Procedure Rules**. Thus he submitted therefore that this court has jurisdiction to hear this application with even the strict reading of the law under **Article 165 of the Constitution**. He further submitted on the right of audience having not settled the decretal sum under **Section 134 of 2008**, the defendant would have made contempt proceedings.

11. On the issue of precedence he submitted that the court should not run away from the precedence used but followed under **Government Proceedings Act**. He thus submitted that the application be allowed. After considering the above application by the defendant, the replying affidavit by the plaintiff and the oral submissions in court, the issue that this court needs to determine is whether or not the defendant deserves the relief he seeks this court to grant him. **Section 33 of the Sixth schedule of the Constitution 2010** 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 on a new name.”

12. Thus by virtue of the above section, it is plain that Narok County is the successor of the defunct Transmara and which was a creation under the repealed **Local Government Act**. It is also trite law that no attachment can issue against Government property with regard to civil proceedings against the government. The **Government Proceedings Act of Section 21 (40)** provides:-

“Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid and no person shall be individually liable under any order

for the payment by the government or any government department, or any officer of the Government as such of any money or costs?”

Further **Order 29 rule 2(2) (c)** of the **Civil Procedure Rules** provides: *prevents this court from making any order of attachment of debts as against the government.*

13. However, it was submitted by Mr. Bosire for the plaintiff that the County Government is not a “government” as per the **Government Proceedings Act**. According to counsel, the **County Government Act (Section 43)** says nothing about the Attorney General representing the county government in accordance with the Government Proceedings Act. In **Kilimanjaro Safari Club –vs- The Governor Kajiado County & Anor [2014] eKLR Nairobi HCMA No. 442 of 2011** Ogola J, faced with the same argument rendered himself thus:-

“It is common ground that the Government Proceedings Act came into force before devolution. There is no express definition of the term governor in the said Act. In that case the term government is used in the said act is inclusive and there is no reason why the county government should be excluded from the operations of the said Act”.

14. This begs the question, what is government? The interpretation and general provisions act under **Section 3 (1)** states that the government means “the Government of Kenya, in the Black Law Dictionary, 8th Edition the term “government” is defined as being:-

“ 1) The structure of principles and rules determining how state or organization is regularized.

2) The sovereign power in a nation or state

3) An organization through which a body of people exercises political authority, the machinery by which sovereign power is expressed.”

15. The second and third definition above when read together with **Article 1** of the **Constitution of Kenya** clearly brings out the picture that county government is equally government. **Article 1 of the Constitution** provides as follows:

1.

2.

3. Sovereign power under this Constitution is delegated to the following organs which shall perform their functions in accordance with this constitution:

a. Parliament and the legislative assemblies in the county government.

b. The national executive and the executive structures in the county governments; and

c. The judiciary and independent tribunals.

d. The sovereign power of the people is exercised at:-

a. The national level

b. The county level

16. It is not in dispute that the representation of the county government by the Attorney General as provided for in **Section 43 of the County Government** does not mention **Government Proceedings**

Act. However to interpret the same to mean that the Government Proceedings Act does not apply to the County Government is in my view a narrow approach. The said section only provides that the Attorney General may represent the county government in court or in any other proceedings other than criminal proceedings. The section does not in any way provide for the substantive procedures of proceedings against government. The draftsman in coming up with the Government Proceedings Act had in mind the interests of the Government as a whole. The county government is not an exception.

17. I agree entirely with the above sentiments as expressed by Ogola J. The county government for all purposes is Government within the meaning of the Government Proceedings Act and therefore the provisions of the said Act apply in proceedings brought against the county government. Having made the foregoing observations it follows that the Defendant's prayer No. 3 of the Notice of Motion dated 19th February 2015 must succeed.

Dated, signed and delivered at Kisii this 12th day of June, 2015.

HON. C. B. NAGILLAH

JUDGE

In the presence of:

- Oguttu holding brief for Bosire Gichana for the Plaintiff/Respondent
- Ochoti holding brief for Chelanga for the Defendant/Applicant
- Samuel Omuga - Court Clerk