



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 107 OF 2014

REPUBLICAPPLICAN

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VERSUS

PRINCIPAL SECRETARY MINISTRY OF PLANNING & NATIONAL
DEVELOPMENT.....1ST RESPONDENT

NATIONAL CONSTITUENCIES DEVELOPMENT FUND MANAGEMENT
COMMITTEE.....2ND RESPONDEN

KITUI SOUTH CONSTITUENCY DEVELOPMENT FUND
COMMITTEE.....3RD RESPONDEN

EMMACULATE NDUKU

MUSYULA.....Ex-Parte

RULING

1. On 22nd July, 2014 this Court issued an order of mandamus compelling the Principal Secretary in the Ministry of Planning and National Development, the National Constituencies Development Fund Management Committee and the Kitui South Constituency Development Fund Committee being the 1st, 2nd and 3rd respondents respectively to pay the ex parte Applicant Emmaculate Nduku Musyula the sum of Kshs.975,307/= together with interest at court rates with effect from 19th December, 2012 until payment in full being the decretal sum awarded against the Attorney General in favour of the ex parte Applicant in **Nairobi C.M.C.C. No. 1037 of 2010 Emmaculate Nduku Musyula v Attorney General**.
2. It is the ex parte Applicant’s case that the respondents have failed or neglected to comply with the said order of mandamus and that is why she brought the application dated 24th November, 2014 seeking orders as follows:

- “1. That this application be certified as urgent and be heard ex-parte in the 1st instance.**
- 2. That the Applicant be granted leave to proceed with the application for contempt of court filed herein against the Respondents.**

3. That the Respondents be committed to jail or be otherwise punished for contempt of court.

4. That the Respondents be condemned to pay the costs of this application.”

3. Out of the four prayers only prayers No. 3 and 4 remains for the Court’s determination. The application is supported by the grounds on its face and the affidavit of Advocate Nzamba Kitonga sworn on 24th November, 2014.

4. The ex parte Applicant’s case is brief and simply. It is her position that after this Court issued the order of mandamus on 22nd July, 2014, she served the same upon Mr. Peter Mangiti, Mr. Yusuf Mbuno and Mr. Patrick Mwangangi being the 1st to 3rd respondents’ respective accounting officers but they have failed, refused and/or neglected to comply thus being in utter contempt of court hence the need to punish them.

5. The 1st Respondent’s accounting officer Engineer Peter Mangiti opposed the application through a replying affidavit sworn on 29th January, 2015. It is his case that the order which the ex parte Applicant seeks to execute through her application was not served on him in person as required by the law. According to him, the order allegedly served on him bears the stamp **“For: Permanent Secretary Ministry of Planning, National Development”** thus confirming his assertion that he was not indeed served in person.

6. Secondly, it is Peter Mangiti’s case that he is unable to comply with the said order as he had not been advised by the office of the Attorney General to do so. Further, that the office of the Attorney General has not advised payment of the decretal sum as the judgment and Certificate of Order against Government have not been provided to that office to enable payment. It is his averment that the documents have been called for from the ex parte Applicant without success.

7. Another ground on which the application is opposed is that the 1st Respondent has not been allocated funds by the Treasury for the settlement of the debt. Further, that the Permanent Secretary cannot be personally held liable for the payment of any monies by the Government as contemplated by Section 21(3) of the Government Proceedings Act.

8. It is also the 1st Respondent’s assertion that the 2nd Respondent has obtained orders of stay of the Chief Magistrate’s judgment pending an appeal from a ruling in **Nairobi C.M.C.C. No. 1037 of 2010**. The 1st Respondent asserts that should the appeal succeed these proceedings will be rendered nugatory and it is therefore imperative to stay these proceedings pending the outcome of that appeal. In addition, the 1st Respondent asserts that the ex parte Applicant’s application is thus premature.

10. The 2nd Respondent opposed the application through the replying affidavit of Simon Ndweka sworn on 2nd February, 2015 and Grounds of Objection dated the same date. The grounds of Objection are:

“1. That the ex parte Applicant, upon being granted leave to file a substantive motion for orders of mandamus, did not properly invoke the jurisdiction of the court and filed an incurably defective Notice of Motion Application dated 24th March 2014.

2. That the defect is incurable and the court ought to strike out the proceedings *in limine*, with costs and to discharge the orders granted herein. The orders have sought prematurely in the circumstances as demonstrated by the 2nd Respondent and based on a defective application.

3. That the court would not have granted the application if the said defect was brought

to its attention. The 2nd Respondent did not participate in the proceedings at the time.

4. That the defect is a matter of law that cannot be cured and the entire proceedings are a nullity in law.”

11. On top of the 2nd Respondent’s contention that the proceedings leading to the issuance of an order of mandamus are a nullity, Mr Simon Ndweka averred that the 2nd Respondent was never served with any pleadings and was never aware of any court case up to the time it was served with the decree and order. According to the 2nd Respondent, it is a body capable of suing and being sued on its own behalf and it ought to have been made a party to the civil suit before the subordinate court.

11. Secondly, it was contended for the 2nd Respondent that there is an order of stay pending appeal against a ruling issued by the lower court and this application for contempt of court has not crystallized. Further, that the Attorney General had entered appearance in the Chief Magistrate’s Court under protest.

12. The 3rd Respondent opposed the application through a replying affidavit sworn by Peter Mwangangi on 24th February, 2015. Peter Mwangangi is the person named as the alleged contemnor on behalf of the 3rd Respondent. He averred that he is the constituency office manager of the Kitui South Constituency and not the accounting officer of Kitui South Constituency Development Fund Committee. His case is that he was never a party in Nairobi CMCC No. 1037 of 2010 or these proceedings and only became aware of the same on 13th July, 2015 when he was called by his advocates to put in a response to the ex parte Applicant’s application. He denied ever being served with the order of mandamus and is thus of the opinion that he cannot be held liable for disobeying orders he was not aware of.

15. In addition, Mr. Mwangangi averred that the orders as drafted are not specific and thus difficult to comply with as it is not possible for any of the respondents to determine which one of them is meant to comply with the said order. His view is that the application is defective for failure to describe the parties and their role in relation to the contempt.

16. Finally Mr. Mwangangi deposed that there was a pending application by the Kitui South Constituency Development Fund Committee seeking to set aside or vary this court’s order.

17. That then brings me to the 3rd Respondent’s application dated 24th February, 2015 praying for orders as follows:

“1. THAT the Application herein be certified as urgent and interim orders be granted in the first instance.

2. THAT there be a stay of execution of the orders of this Honourable Court issued on 6th August, 2014 herein pending the hearing and determination of this Application.

3. THAT there be a stay of execution of the Orders of this Honourable Court issued on 6th August, 2014 herein pending the hearing and determination of the proceedings in Nairobi C.M.C.C. No. 1037 of 2013 (sic).

4. THAT costs of this application be provided for.

5. THAT this Honourable Court be pleased to grant such further orders as it may deem fit to grant.”

18. The application is supported by the grounds on its face and the affidavit of Boniface Mbiti

Mbwaga who introduces himself as the Chairman of the 3rd Respondent.

18. In seeking to stay the order of this court, the 3rd Respondent asserts that there was no knowledge on its part about the civil case before the Chief Magistrate's Court and even these proceedings. Upon becoming aware of the matter they sought and obtained leave to join **Nairobi CMCC No. 1037 of 2010**. It is the 3rd Respondent's position that its defence in the Chief Magistrate Court's case raises triable issues. The 3rd Respondent therefore urged this Court to stay this matter.

19. The ex parte Applicant replied to the respondents' pleadings through a further affidavit sworn on 27th February, 2015. In response to the assertion that the 2nd and 3rd respondents ought to have been made parties to the proceedings before the lower court, she contended that at the time she was filing her suit the 2nd and 3rd respondents had no corporate status and the suit was filed against them through the Attorney General. Further, that the motor cycle which injured her was in the possession and management of the 2nd and 3rd respondents but was registered as G.K. 952P hence the suing of the Attorney General on behalf of the respondents.

20. The ex parte Applicant deposed that although the Attorney General entered appearance under protest, he fully participated in the suit until judgment was delivered. It was her case that although the respondents were served with the papers for the proceedings, they had ignored to respond and have never sought to set aside the order of mandamus issued by this Court.

21. The ex parte Applicant averred that the lower Court proceedings were concluded on 19th December, 2012 when judgment was delivered. The 2nd Respondent's attempt to join the civil suit and stay the judgment was rejected through a ruling delivered by the lower court on 19th December, 2014 and this is the ruling allegedly stayed pending appeal.

22. The ex parte Applicant also averred that the Attorney General had been supplied with all the necessary documents and in any case it was upon that office to seek any documents from the court.

23. The best starting point is to determine the 3rd Respondent's application dated 24th February, 2015. Through that application the 3rd Respondent is seeking stay of these proceedings, meaning stay of the ex parte Applicant's application dated 24th November, 2014 pending the hearing and determination of the proceedings in **Nairobi C.M.C.C. No. 1037 of 2010**.

24. From the papers filed in Court, it is clear that there are no longer any active issues in **Nairobi C.M.C.C. No 1037 of 2010** as all the respondents' applications have been dismissed. It is agreed that there is a pending appeal in the High Court but a stay granted to the 2nd Respondent lapsed after the 2nd Respondent failed to comply with a condition of the stay which required deposit of the decretal amount in Court.

25. The 3rd Respondent's said application has therefore been overtaken by events. Although I no longer need to make any comment on the same, I must state that the same was an abuse of the court process and would not have attracted any positive orders from this court. It was not brought in good faith but was simply meant to defeat the ex parte Applicant's application for contempt. The same stands dismissed.

26. The next port of call is the 2nd Respondent's Preliminary Objection dated 2nd February, 2015. Sadly, the said Preliminary Objection is not aimed at the ex parte Applicant's application dated 24th November, 2014. It is directed at the judgement delivered by this Court on 22nd July, 2014. The only way to overturn that judgement is either through an appeal to the Court of Appeal or a review by this Court upon a proper application. None of the respondents have taken any of these routes. The 2nd Respondent's Preliminary Objection is therefore irrelevant to the matters before this Court and the same fails and is dismissed.

27. The only remaining application for the consideration of this Court is that of the ex parte Applicant. The 1st Respondent has consistently raised one issue namely that the ex parte Applicant has never served the office of the Attorney General with the necessary documents to effect payment. The ex parte Applicant does not seem to deny this fact and she has even told the Attorney General that he can go and source the documents from the lower court.

28. This is her claim and she is the one to furnish the Attorney General with the necessary documents. In order for an accounting officer of a Government department to pay a decretal amount, he/she must be furnished by the claimant with a certificate of order against the government-see Section 21(3) of the Government Proceedings Act, Cap 40. Service of the order is made upon the Attorney General by the person in whose favour the order is made. That is a statutory requirement and none of the respondents can pay a cent from the Government coffers without an order to justify the payment.

29. For the reason that the ex parte Applicant is yet to serve the certificate of order against the government on the respondents, I find that the ex parte Applicant's application dated 24th November, 2014 is premature. It must fail for that reason. The respondents at this stage are yet to cross the contempt barrier as they are protected by Section 23 of the Government Proceedings Act, Cap 40. Once they receive the certificate of order against the Government they must comply. The application dated 24th November, 2014 is therefore dismissed.

30. Considering that none of the parties herein has been successful in the quest for orders, I will make no orders as to costs. Each party will meet own costs in respect of the two applications and the Preliminary Objection.

Dated, signed and delivered at Nairobi this 5th day of Nov., 2015

W. KORIR,

JUDGE OF THE HIGH COURT