



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 204 OF 2016

(FORMERLY CONSTITUTIONAL PETITION NO. 43 OF 2015)

IN THE MATTER OF: CHAPTER FOUR OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 23, 40, 47 OF THE CONSTITUTION

AND

IN THE MATTER OF: PETITION BY JAPHETH NZILA MUANGI CHALLENGING INFRINGEMENT OF HIS CONSTITUTIONAL RIGHTS BY

THE ABRBITRAY DEMOLITION AND ATTEMPTED COMPULSORY ACQUISITION OF HIS LAND PLOT NO

MOMBASA/BLOCK IX/294 PERMANENTLY BY UNCONSTITUTIONAL MEANS BY THE COUNTY GOVERNMENT OF MOMBASA.

BETWEEN

THE MINISTER FOR LAND & ENVIRONMENT

OF THE COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT

RULING

1. This application dated 2.5.2018 is brought under the provisions of article 159 of the Constitution and Section 38 (b) of the Civil Procedure Act. The plaintiff/decree holder prays for orders:

1. Spent

2. That the Finance Director of County Government of Mombasa being the accounting officer be summoned to personally appear in Court and present a workable and verifiable plan of settling the decree.

3. That the Court be pleased to order for attachment of accounts held by the 2nd Respondent in settlement of the decree.

4. Costs of the application be provided for.

2. The application is supported by the grounds on the face of it inter alia that payment of a decree is a part of justice that should not be delayed yet the Respondents have not given any proposal on how to settle the decree. The application is supported further by the facts deposed to in the plaintiff/decree holder's affidavit. In the affidavit the plaintiff annexed copies of the decree, certificate of costs and affidavit of service. That he came to Court for justice which he is yet to receive because the Respondents are not ready to pay the decree. He urged the Court to allow the attachment to proceed.

3. The application is opposed by the 2nd Respondent who filed grounds of opposition dated 30th July 2018. The grounds lists the following reasons:

1. The orders sought cannot issue since the person responsible for the finances of the 2nd Respondent has not been personally served with the order pursuant to which the application has been filed.

2. The orders sought to be enforced were obtained unprocedurally and without the participation of the Respondents hence the Applicant is asking the Court to enforce what is primarily an illegality.

3. That Order No 2 cannot issue against the 2nd Respondent for the reason that the 2nd Respondent is a Government entity.

4. The 2nd Respondent was not served with the requisite 30 days' Notice as required prior to filing of the Application especially noting that the Applicant seeks to enforce a money decree.

5. That no efforts have been made by the Applicant to engage the Respondent on the order that the Applicant seeks to enforce prior to filing of the Application.

6. The Application is misconceived, fatally defective and an utter abuse of the Court process and should thus be dismissed with costs to the Respondents.

4. The parties in their oral submissions reiterated the contents of the facts contained in the application and the grounds. The 2nd Respondent submitted further that section 21 (4) of the Government proceedings Act requires the certificate of decree to be directed to the relevant officer and nothing has been shown that such a procedure was followed. Secondly section 134 of the County Government Act and section 129 of the Public Finance Act provides that the consent of the County Assembly has to be sought. The Applicant in reply submitted that the decree gave the County option of either reconstructing the demolished house or paying the value. That the 2nd option has come into play because the 2nd Respondent failed to rebuild. He therefore urges the Court to grant the orders sought in the application.

5. The 2nd Respondent is not disputing it has not settled the decree. Section 129 of the Public Finance Act provides that the County Executive Committee member to submit budget estimates and other documents to County Executive Committee for approval. Section 134 of the County Government Act deals with repeal of the Local Government Act Cap 265 therefore is not relevant to the present application. Section 21 of Cap 40 makes provisions on the manner in which orders against the government are to be satisfied. Section 21 (4) provides thus;

“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 and no person shall be individually liable under any order for the payment by the Government.”

6. However section 21 (3) of Cap 40 provides that where the order requires for the payment of any money by way of damages or otherwise or of any costs, the certificate shall state the amount so payable and the accounting officer shall pay to the person entitled or his advocate. Although section 21 (4) forbids attachment of government property, it does not preclude the government from paying out monies. Secondly seeking of consent of County Assembly and or County Executive Committee is a duty bestowed on the 2nd Respondent and not the applicant herein. The applicant has annexed affidavit of service to demonstrate that the decree and certificate of costs was served upon the 2nd Respondent in compliance of the law. The facts contained in that affidavit of service have not been denied.

7. The 2nd Respondent has not thus satisfied this Court why the orders sought cannot be granted. Accordingly I do allow prayer 2 of the motion to be complied with within the next 14 days of delivery of this ruling and if no cause is shown, the applicant shall be entitled to execute as sought in prayer No 3 of the application by attaching the accounts held by the 2nd Respondent. The costs of the application is hereby awarded to the plaintiff/decreed holder.

Dated, signed & delivered at Mombasa this 15th February 2019

A. OMOLLO

JUDGE