



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MOMBASA
CIVIL SUIT 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 ARBITRARY
DEMOLITION AND ATTEMPTED COMPULSORY ACQUISITION OF HIS LAND
PLOT NOS MOMBASA/BLOCK IX/277 AND MOMBASA/BLOCK IX/294, PERMANENTLY
BY UNCONSTITUTIONAL MEANS BY THE COUNTY GOVERNMENT OF MOMBASA**

BETWEEN

JAPHETH NZILA MUANGIPETITIONER/APPLICANT

VERSUS

THE MINISTER FOR LAND AND ENVIRONMENT OF THE

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

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

R U L I N G

1. For determination is the application dated 15th March 2019 brought by the plaintiff/applicant under the provisions of Section 100, 1A & 1B of the Civil Procedure Act. The applicant prays for orders:

(i) Spent

(ii) The Honourable Court be pleased to correct/amend the ruling and order issued on 15th February, 2019 to read as follows:

“(a)

(b) THAT the CHIEF OFFICER DEPARTMENT OF FINANCE & ECONOMIC PLANNING COUNTY GOVERNMENT OF MOMBASA MS ASHA ABDI or her successors be summoned to personally appear in court on 12th March, 2019 and present a workable and or verifiable plan of settling the decree herein within 14 days and if no cause is shown, the applicant to attach accounts held by the 2nd Respondent for settlement of the debt herein.”

2. The motion is supported by the affidavit of Japheth Nzila and following grounds listed on its face:

1) During the hearing of the application dated 2/5/2018, counsel for the respondents kept saying from the bar that the title of DEPARTMENT OF FINANCE DIRECTOR does not exist. This was again repeated in court on 12/3/2019.

2) The applicant has established from the 2nd respondent's website that the correct department dealing with finance and budget is the DEPARTMENT OF FINANCE AND ECONOMIC PLANNING headed by the Chief Officer.

3) That order of 15/2/2019 should be amended to reflect the correct title.

4) The order is only to be corrected on the title of the officer only.

5) The court can correct this on its own.

3. The application is opposed by the Respondent's replying on the following grounds:

1) The application lacks merit because the law is clear that an Application to substitute parties shall not lie after the Court has made its determination on the matter at hand.

2) That it is trite law that the Honourable Court can only correct its decision when there is an error apparent on the Court record.

3) That the Honourable Court made its decision based on the pleadings before it as such, it cannot be called upon to 'amend' the Orders emanating from its Ruling.

4) The Applicant is the author of its misfortune in so far as the orders which the Applicant seeks to 'correct' are concerned.

5) That equity does not aid the indolent as such, the application is frivolous, vexatious and should be struck out with costs.

6) The application does not confirm to the provisions of the County Government Act.

4. Both parties filed brief submissions in support and opposition to the application. The applicant submits that Section 100 of CPA gives the court powers to amend any defect or error in the proceedings in a suit. Further that under Section 3A of CPA provides that nothing in the Act shall limit the inherent power of the Court. That the current application is filed with an intent to amend the title of the officer in charge of the finance docket in the County Government of Mombasa in order to beat the mischief being played by the Respondent. The applicant submitted further that article 159 of the Constitution abhors elevation of technicality to defeat substantive justice.

5. The Respondent on its part submitted that justice will not be served because Asha Abdi was not specifically named in the application dated 2nd May 2018 to enable her state her case. Secondly is that the Chief Officer of the Finance Department is not the accounting officer in so far as the County Government Act are concerned. The Respondent states that this application does not meet or fall under the Order 45 rule 2 of Civil Procedure rule application. It's the Respondent's submissions that the court rendered itself based on the pleadings that were before it hence there is nothing to correct. That the present application is inviting the court to preside over a nullity because attachment cannot issue against the County Government.

6. I have noted the issues raised by the submissions of both the applicant and the Respondent. For the court's determination is to decide whether the amendment sought is obtainable under Section 100 of the Civil Procedure Act. Both Sections 100 and 80 of the Civil Procedure Act provides for amendment of any defect or error in the proceedings in a suit. The applicant states the error in his motion was to bring a show cause application against the Finance Director of County Government of Mombasa instead of Chief Officer Finance Department of Finance and Economic Planning County Government of Mombasa, Ms Asha Abdi or her successors.

7. The impugned motion dated 2/5/2018 was heard and determined on merits. From the earlier proceedings, the applicant stated that he learnt that he had brought execution proceedings against a non-existent department of the Respondent. The applicant confirms this knowledge in his first ground in support of the application. However, in spite of this information made from the bar by the Respondent's counsel, the applicant opted to prosecute that application as it was and the court rendered itself on 15th February 2019 based on the pleadings on record.

8. The applicant after obtaining the order has been unable to execute the decree it as is hence the current motion. Section 100 of CPA provide for amendments of defects or error in the proceedings. The decree was issued against the County Government of Mombasa and any application brought against its officers is not severable from the initial decree so as to equate with effect of to non-joinder or misjoinder of parties as contended by Counsel for the Respondent.

9. The consequence of allowing the prayers as currently being sought would not result into bringing a party to answer to orders he/she was not given an opportunity to defend before the said orders were issued since Chief Officer Finance & Economic Planning will be showing cause on behalf of the Respondent. The Respondent's submissions that a party should not be condemned unheard does not lie since the

concerned officer will be heard through the Notice to Show Cause.

10. Lastly, the Respondent has submitted that the Court is being asked to preside over a nullity since a Chief Officer is not necessarily an accounting officer of the department. One of the reasons given by the applicant for seeking the amendment is because the department of Finance and Economic Planning dealing with finance and budget is headed by a Chief Officer. Whether or not the Chief Officer of the department is the one that is liable in execution against the County Government is a matter to be dealt with during the show cause hearing.

11. In conclusion, I make a determination that what is sought to be amended is capable of being amended under Section 100 and 3A of the Civil Procedure Act. Consequently, I allow the application but with costs to the Respondent.

Dated and signed at BUSIA this 14th day of October 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 28th Day of October, 2019

C. YANO

JUDGE