REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

JUDICIAL REIVEW NO. 2 OF 2017

MICHAEL WACHIONGO BARAGU.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KIRINYAGA.....RESPONDENT

JUDGMENT

BACKGROUND

The applicant, Michael Wachiongo Baragu commenced these Judicial proceedings by an Ex-parte Chamber Summons dated 21st August 2017 and on 16th October 2017, this Court granted him leave to apply for an order of mandamus to compel the respondent to comply with the orders of the Court in Senior Resident Magistrate Court at Kerugoya Civil Case No. 59 of 1970 between Moses M. Gitonga & 2 others Vs Kirinyaga County Council.

On 7th November 2017, the applicant in his substantive motion sought the following orders:

> ***(1) The Honourable Court be pleased to issue an order of mandamus compelling the respondent to comply with the Court order in Senior Resident Magistrate at Kerugoya Civil Case No. 59 of 1990; Moses M. Gitonga & 2 others Vs Kirinyaga County Council granted on 6/2/1995.***
>
> ***(2) In the alternative, the Honourable Court be pleased to compel the respondent to pay both special and general damages for failure to comply with the Court order above mentioned.***
>
> ***(3) Costs of this application be provided for.***

The respondent through the firm of V.A. Nyamodi & Co. Advocates filed grounds of opposition in response to the said motion.

APPLICANT'S CASE

The application is based on the ground that the defunct Kirinyaga County Council allocated the applicant and his partner an open space to conduct the business of saw milling, rice hauling and metal works, carpentry and blacksmith. They proceeded and conducted their business in the premises for over 20 years when Kirinyaga County Council issued a vacation notice in April 1990.

Being aggrieved by the said notice, the applicant filed a Civil Suit No. 59 of 1990 (Kerugoya) against the Kirinyaga County Council whereby both agreed that the matter be determined by a panel of elders. The panel returned a verdict that he should not be evicted unless Kirinyaga County Council allocated them alternative premises. The award was adopted as an order of the Court on 06/02/1995. Kirinyaga County Council allocated them Plot No. 174 in Kagio whereby he installed their machinery. However, in December 2005, the applicant and his partner were evicted from the said Plot No. 174 by Gichuhi Githumbi who alleged that it belonged to him.

They requested to be allocated another premises which had no problems but Kirinyaga Couunty Council kept insisting Plot No. 174 belonged to it. He is therefore seeking an order to compel Kirinyaga County Council to comply with the orders and if they cannot, to compensate him for loss of business, business opportunities and general damages.

RESPONDENTS CASE

The respondent in their response stated that the applicant wants to execute a Court order in a manner that violates ***Section 4 (4) of the***

Limitation of Actions Act. She further stated that the orders obtained were against the Kirinyaga County Council and not the respondents herein. The respondent further contends that they were not parties in SRMCC No. 59 of 1990 and did not have sufficient notice of the orders therein to enable it satisfy or enforce it. She contends that the applicant has not complied with ***Section 21 of the Government Proceedings Act*** and ***Order 29 of the Civil Procedure Rules, 2010*** for this Court to issue the order of mandamus.

ISSUES FOR DETERMINATION

(1) Whether the applicant is entitled to the order of mandamus as prayed for in the application?

(2) Whether the respondent is liable for actions of its predecessor?

(3) Who is liable for costs of this Judicial Review Application?

LEGAL ANALYSIS

I have considered the pleadings and the submissions by the parties. I have also considered the applicable law. The applicant herein is seeking to enforce an order issued by the Senior Magistrate Court being SRMCC No. 59 of 1990 (Kerugoya) between Moses M. Gitonga & 2 others Vs Kirinyaga County Council. The said order was issued against the defunct Kirinyaga County Council. The respondent herein was not a party to the said suit since it only came into existence in the year 2013 after the repeal of ***Local Government Act Cap 265 of the Laws of Kenya*** and the enactment of the ***County Government Act No. 17 of 2012.*** The respondent was therefore enjoined in these proceedings for purposes of satisfying or enforcing the orders issued on 6th February 1995.

It is not in dispute that an order of mandamus can only be granted against public bodies. Mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute where that person or body of persons have failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. The ***Black's Law Dictionary Tenth Edition*** defines ***Mandamus*** as follows:

> ***"The modern writ of mandamus may be defined as a command issuing from a common law Court or competent jurisdiction, in the name of the State or sovereign, directed to some Corporation, Officer, or inferior Court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. In the specific relief which it affords, a mandamus operates much in the nature of a bill in chancery for specific performance, the principal difference being that the latter remedy is resorted to for the redress of …… private wrongs, or the enforcement of contract rights, while the former generally has for its object the performance of obligations arising out of official station, or specifically imposed by law upon the respondent. The object of mandamus is to prevent disorder form a failure of justice and a defect of Police, and it should be granted in all cases where the law has established no specific remedy and where in justice there should be one. And the value of the matter in issue, or the degree of its importance to the public, should not be too scrupulously weighed……."***

The circumstances under which Judicial Review orders of mandamus are issued were set out by the Court of Appeal in ***Republic Vs Kenya National Examination Council Ex-parte Gathenji & others Civil Appeal No. 266 of 1996*** where it was held:

> ***"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of justice directed to any person, Corporation, or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual …….. These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed".***

I entirely agree with the decision of the Superior Court and the learned author on the principles and application of the doctrine of mandamus. The applicant in this Judicial Review proceedings is seeking an order to compel the County Government of Kirinyaga to comply with the decree/order in SRMCC No. 59 of 1990 between Moses M. Gitonga & 2 others Vs Kirinyaga County Council issued on 6/2/1995. The said decree/order reads as follows:

> ***"(1) That the award read on 6th September 1994 is adopted as this Courts judgment.***
>
> ***(2) That the Kirinyaga County Council 1st defendant allocates Plot No. 174 Kagio to the 1st and 2nd plaintiffs, since the County Council conceded that the same was meant for Rwamuthambi Saw Mill which is the property of the 1st and 2nd plaintiffs or allocate the 1st and 2nd plaintiffs an alternative site Before they order the 1st and 2nd plaintiffs to vacate the open space (what the County Council is now calling a back lane) where the new Saw Bench is".***

The decree/order required the then Kirinyaga County Council to either allocate Plot No. 174 Kagio to the 1st and 2nd plaintiffs who are the applicants or allocate an alternative site. It is trite law that the procedure for enforcing a Court order against the Government including the County Government is laid down in ***Section 21 of the Government Proceedings Act, Cap. 40 Laws of Kenya*** which reads as follows:

> ***"(1) Where in any Civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any Court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the Court, shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:***
>
> ***Provided that, if the Court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.***
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> ***2. A copy of any certificate issued under this Section may be served by the person in whose favour the order is made upon the Attorney General ……***
>
> ***3. If the order provides 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 for the Government concerned, shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:***
>
> ***Provided that the Court by which any such order as aforesaid is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.***
>
> ***4. 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.***
>
> ***5. This Section shall with necessary modifications, apply to any civil proceedings by or against a County Government, or in any proceedings in connection with any arbitration in which a County Government is a party".***

It is explicit from my reading of the above provisions of the law that for this Honourable Court to issue an order of mandamus to compel the respondent herein to comply with the order of 6th February 1995, the applicant must first proof that he had complied with the provisions of ***Section 21 of the Government Proceedings Act***. There is no evidence adduced that the applicant applied to the Registrar of the subordinate Court to be issued with the certificate of order against the County Government of Kirinyaga as required under ***Section 21 of the Government Proceedings Act*** as read with ***Order 29 Rule 3 of the Civil Procedure Rules, 2010***. It is my view that it is only on the basis of the certificate of order against the County Government that the respondent herein would be able to satisfy the Court order of 6th February 1995 and where none has been applied and issued by the Registrar or the subordinate Court, the said Court order cannot be granted. I also note that there is also no proof of service of either the said certificate or the Court order issued on 6th February 1995 upon the respondent or Kirinyaga County Council which is her predecessor in SRMCC No. 59/1990. The respondent has been enjoined in the instant application for purposes of satisfying the orders of the subordinate Court issued against the defunct Kirinyaga County Council. There is equally no evidence that she was served with a notice or a demand requiring her to comply with the said orders and failed and/or ignored to comply with the same. I have also observed that the orders which the applicant is seeking to enforce was issued on 6th February 1995 which is more than 22 years ago. ***Section 4 (4) of the Limitation of Actions Act*** provides as follows:

> ***"4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiry of six years from the date on which the interest became due".***

From my simple calculation, the impugned order and/or judgment issued by the Senior Resident Magistrate's' Court on 6th February 1995 ought to have been executed or enforced on or before 7th February 2007. No reasonable explanation has been given by the applicant for failing to enforce that order within the stipulated period. I find and hold that this Honourable Court cannot enforce an order outside the mandatory period unless reasonable explanation has been given. That was the holding by the Court of Appeal in ***Willis Onditi Odhiambo Vs Gateway Insurance Co. Ltd (2014) e K.L.R*** where it was held:

> ***"In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decree is governed by Section 4 (4) of the Limitation of Actions Act which is in the following terms:***
>
> > ***"4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.***
>
> ***The judgment which the appellant sought to execute was passed on 26th August 2008".***

Again in the case of ***Koinange Investments and Development Company Limited Vs Ian Kahiu Ngethe & 3 others (2015) e K.L.R***, the Court cited with approval ***ELC No. 57 of 1992 (O.S) Hudson Moffat Mbue Vs Settlement Fund Trustees & 3 others*** *(unreported)* where **Mutungi J.** held as follows:

"What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4 (4) of the Limitation of Actions Act will bar you from carrying on with such execution".

I agree with the decision by the learned Judge which I apply in this case mutatis mudandis.

Suffice to add that when the applicant filed the Ex-parte Chamber Summons dated 21st August 2017, the Court granted him leave to apply for an order of mandamus to compel the respondent to comply with orders of the Court issued in SRMCC No. 59 of 1990 (Kerugoya) between Moses M. Gitonga & 2 others Vs Kirinyaga County Council. The applicant did not seek and obtain the second prayer in respect of compelling the respondent to pay damages. These proceedings have been instituted pursuant to the leave granted on 17th October 2017. It therefore follows that the reliefs sought in substantive Notice of Motion should be the relief (s) for which leave to commence the proceedings was granted. Since this Honourable Court did not grant leave to the applicant to apply for orders sought to compel the respondent to pay both specific and general damages it is therefore not available.

In the case of ***Republic Vs Attorney General & another Ex-parte James Alfred Koroso (2013) e K.L.R***, the Court held as follows:

> ***"It is clear therefore that unless the statement is amended, the applicant is not permitted to seek a relief which is not set out in the statement. In this case, it is clear that in prayer 2 of the Notice of Motion, the Ex-parte applicant seeks a relief which was not set out in the statement. Although the said statement was amended, no such relief was added. It is in any case doubtable whether an applicant can by amendment to a statement seek a relief for which leave to commence the proceedings was neither sought nor granted.***
>
> ***Accordingly, prayer No. 2 sought in the motion is ordinarily incapable of being granted. I say ordinarily because in this case, what is sought therein is simply a consequential order and not a substantive relief hence even if the same was not sought, the Court in the exercise of its inherent jurisdiction and in order to ensure that its order is implemented is perfectly entitled to grant the same".***

I also agree with the decision by the learned Judge save to add that these proceedings have been instituted for purposes of enforcement of the orders by the subordinate Court granted on 6th February 1995. It is my view that this Honourable Court is limited to compelling the respondent herein to comply with the said Court order and not consider matters or issues that were not placed before the said Court for determination. The issue of whether the respondent should pay general and specific damages to the applicant ought to have been raised and canvassed in the original suit at the subordinate Court and not in these proceedings for enforcement.

That was the reasoning by Hon. Mr. Justice Odunga (as he then was) in ***Republic Vs County Secretary, Nairobi City County & another Ex-parte Wachira Nderitu Ngugi & Co. Advocates (2016) e K.L.R*** where he held:

> "***Costs are usually at the discretion of the Court and where the same is not awarded as the decree herein seems to show, to seek in these proceedings the costs of the previous proceedings when the decree emanating therefrom is silent thereon would amount to calling upon this Court to determine whether or not costs therefore ought to have been awarded and, just like Wendoh, J. I am of the view that that is not the purview of this Court's jurisdiction. The certificate of costs exhibited hereto, without an express order awarding costs is foreign to the decree in Misc. Application No. 732 of 2012 which the respondent is sought to be compelled to settle. It is outside this Court's jurisdiction to assume and to determine whether or not costs of the said proceedings were payable and since the Court therein was silent on costs, it was upon the appellant to move that Court for a review or correction of the decree on account of there being an omission or error on the face of the record, assuming there was such error. this Court's jurisdiction is limited to compelling the respondent to pay based on the decree as exhibited. Accordingly, this Court has no jurisdiction to award the costs of the previous proceedings. Costs are usually at the discretion of the Court and where the same is not awarded as the decree herein seems to show, to seek in these proceedings the costs of the previous proceedings when the decree emanating therefrom is silent thereon would amount to calling upon this Court to determine whether or not costs therefore ought to have been awarded and, just like Wendoh J. I am of the view that that is not the purview of this Court's jurisdiction. The certificate of costs exhibited hereto, without an express order awarding costs is foreign to the decree in Misc. Application No. 732 of 2012 which the respondent is sought to be compelled to settle. it is outside this Court's jurisdiction to assume and to determine whether or not costs of the said proceedings were payable and since the Court therein was silent on costs, it was upon the appellant to move that Court for a review or correction of the decree on account of there being an omission or error on the face of the record, assuming there was such error. This Court's jurisdiction is limited to compelling the respondent to pay based on the decree as exhibited. Accordingly, this Court has no jurisdiction to award the costs of the previous proceedings".***

The orders being sought by the applicant in prayer No. 2 in this application are at all fours with that in the cited case. I find the same applicable to the circumstances of this application.

ORDER

In the final analysis, I find the Notice of Motion dated 7th November 2017 lacking in merit and the same is hereby dismissed. The respondent shall pay the costs of these proceedings.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th day of November, 2017.

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E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019

In the presence of:

1. Mr. E.N. Mugu for Applicant

2. Respondent/Advocate – absent

3. Kabuta – Court clerk – present