



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

JR NO.68 OF 2018

{FORMERLY JR APPL NO.330 OF 2018}

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF MANDAMUS

AND

IN THE MATTE ROF ENFORCEMENT OF THE DECREE ISSUED ON THE 3RD AUGUST ,2017 IN NAIROBI ENVIRONMENT AND LAND COURT

CASE NO.71 OF 2014

{FORMERLY PETITION NO.330 OF 2013}

STEPHEN KAMUNGE WAINAINA & 2 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

AND

SPEPHEN KAMUNGE WAINAINA & 2 OTHERS.....EX-PARTE APPLICANTS

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

TREASURER COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT

SECRETARY COUNTY GOVERNMENT OF NAIROBI.....3RD RESPONDENT

RULING

1. This is a ruling in respect of a chamber summons dated 9/8/2018 in which the Ex-parte Applicants are seeking leave to file judicial review proceedings in the nature of mandamus compelling the Respondents to meet the decree in ELC case No. 71 of 2014. The application was initially filed in the Constitutional and Human Rights Division of the High Court. It was transferred to the Judicial Review Division of the High Court before it was finally transferred to the Environment and Land Court.

2. On 1/11/2018 the parties to this application filed a consent in which they agreed to dispose of the application through written submissions and filing further affidavits. The Ex-parte Applicants filed their written submissions on 12/11/2018. The Respondents filed theirs on 23/11/2018.

3. I have considered the written submissions by the parties. The only issue for determination herein is whether leave should be granted to the Ex-parte Applicants or not. The brief background of this application are that the Ex-parte Applicants are registered owners of LR No.29/14882 (IR No.94183) at Embakasi in Nairobi. Sometime in 2005, the Nairobi City Council the predecessor of the 1st Respondent took

over the property and put up a Health Centre without compensating the Ex-Parte Applicants.

4. The Ex-parte Applicants moved to court and filed a constitution petition in the High Court which petition was finally transferred to the Environment and Land Court. This petition was finally heard and a judgement in favour of the petitioners was given on 17/3/2017 for KShs.172,500,000/= with costs. The petitioners extracted a decree which was then forwarded to the 1st Respondent for settlement.

5. From correspondence attached to the application, the 1st Respondent received the decree and only queried the basis of interest which the Ex-parte Applicants lawyer had charged at 6%. The Ex-parte Applicants lawyer wrote back explaining the basis of the 6% interest. The Ex-parte Applicants have now come to court contending that the Respondents have refused to make payment arising from a decree of the court which there was no appeal filed. The Ex-parte Applicants now seek for leave to file judicial review in the nature of mandamus compelling the Respondents to settle the decretal sum.

6. The Respondents have opposed the Ex-parte Applicants application through a replying affidavit sworn by David Oseko, the acting County attorney of the 1st Respondent who states that he is aware of the amount arising from the decree in ELC petition No.71 of 2014 and that there is a committee which was established vide a gazette notice calling for all holders of pending bills and claims to submit them to the committee for consideration. He further deponed that the claim by the Ex-parte Applicants falls within the mandate of the committee and that therefore the Ex-parte Applicants should await the outcome of the committees' verdict which will inform the mode of settlement of the claims.

7. In a further affidavit sworn on 9/11/2018, the Ex-parte Applicants contend that their claims are not in the nature of a pending bill or claim as it arises directly from a decree of the court; that there is no appeal from the decree; that the Gazettement of the committee scrutinizing the pending bills and claims cannot overrule a decree of the court and that they are entitled to fruits of their judgement and in any case the Respondents have not made any proposal on settlement of their claims.

8. I have carefully considered the Ex-parte Applicants application and the opposition to the same by the Respondents. I notice from the application that the County secretary of 1st Respondent was served with a decree on 7/8/2017. From the letter of 21/11/2018, the County Attorney wrote and enquired the basis of the 6% interest as shown in the letter of 11/5/2018 by the advocate for the Ex-parte Applicant. The Ex-parte Applicants advocate explained the interest vide his letter of 29/5/2018. The committee which was to scrutinize the pending claims and bills was Gazetted on 9/3/2018. It is chaired by respected lawyers. From the correspondence annexed to the application, it is clear that the Ex-parte Applicants' claim was under consideration and there is no way one would refuse to settle a decree of court which has not been appealed against. It is therefore clear that the Respondents are not refusing to pay the decretal sum as to call for grant of leave to commence judicial review proceedings in the nature of mandamus to compel the Respondents to pay.

9. I notice that most of the authorities cited by the Ex-parte Applicants and the Respondents are on the main notice for judicial review. What is before me is an application for leave to bring such a motion. From the above analysis, it is clear that there is no outright refusal to pay as to necessitate one to commence judicial review in the nature of mandamus to compel the Respondents to act. I therefore decline to grant leave and proceed to dismiss the chamber summons dated 9/8/2018 with costs to the Respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 7th day of November 2019.

E.O.OBAGA

JUDGE

In the presence of M/s Nyabuto for Mr Kamau for Petitioners and

M/s Chepkonga for Mr Wesonga for Respondent

Court Clerk : Hilda

E.O.OBAGA

JUDGE