



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PET. NO. 13 OF 2016

JOHN KABURUKI KIBICHO (CHAIRMAN).....1ST PETITIONER

MICHAEL G. THUO (TREASURER)..... 2ND PETITIONER

(Suing on their own behalf and on behalf of

MILIMANI RESIDENT (NAKURU) WELFARE ASSOCIATION)

VERSUS

COUNTY GOVERNMENT OF NAKURU1ST RESPONDENT

MERATI INVESTMENT LTD 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY..3RD RESPONDENT

RULING

1. The 1st Respondent moved the court vide Chamber Summons dated 10th July 2017 seeking the following orders:

i. Spent.

ii. That pending the hearing and determination of this application inter partes there be stay of execution of the orders issued on 21st April 2017 allowing the application dated 7th April 2017.

iii. That this honourable court be pleased to review, stay and or vary the orders issued on 21st April 2017 allowing the application dated 7th April 2017.

iv. That the honourable court do declare that the petitioner's failure to adhere to the Government Proceedings Act Cap 40 Laws of Kenya renders the execution proceedings and or any consequential proceeds resultant of the execution illegal and hence null and void ab initio.

v. That the honourable court be pleased to order and or compel the petitioner to refund and or reimburse the sum of Kshs.1, 125, 870/=.

vi. That costs of this application be borne by the petitioner/1st respondent.

2. The application is supported by an affidavit sworn by Hari Gakinya, the County Attorney of Nakuru

County Government. It is deposed in the affidavit that the 1st respondent is a devolved unit of government and consequently execution against it must comply with the provisions of Section 21 of the Government Proceedings Act. That at the time of granting the garnishee orders of 10th May 2017, the court failed to take into account the said provisions of Government Proceedings Act and that there is therefore need to reimburse the sum of Kshs.1, 125, 870/= to the 1st respondent. That there is therefore an error on the face of the record which warrants review of the orders of 10th May 2017.

3. The petitioners opposed the application through a replying affidavit sworn by John Kaburuki, the 1st petitioner who is also the Chairman of Milimani Residents – Nakuru Welfare Association. He deposed that despite participating in the garnishee proceedings, the 1st respondent did not object to the said proceedings or raise any issue regarding their competence. He added that the funds have since been disbursed and appropriated by the petitioner and its members. That the 1st respondent has not indicated how it proposes to settle the decree on costs assuming a reimbursement was done.

4. The court ordered that the application be argued by written submissions. Directions and time frames were given for filing and serving submissions. The applicant did not file any submissions. The petitioners filed submissions on 6th December 2017 wherein they urged the court to dismiss the application.

5. I have considered the application, both the supporting and replying affidavits and the submissions filed. It is important to give a little background of the matter.

6. Judgment in respect of the petition was delivered on 13th October 2016 by Munyao J. The court found in favour of the petitioners and among other reliefs, awarded them costs and ordered that the respondents were to bear the costs jointly and severally. The costs were ultimately taxed by the Deputy Registrar at Kshs.1, 125, 870/= and a Certificate of Taxation dated 7th April 2017 issued. Subsequently, the petitioners commenced garnishee proceedings against KCB Bank Kenya Ltd and National Bank of Kenya on 12th April 2017. The record shows that the applicant participated in the garnishee proceedings on 10th May 2017 when the garnishee order nisi was made absolute.

7. Though the applicant has other prayers in the application, the issue at the heart of the matter is whether or not review is available since all the other prayers would only fall for consideration once the Garnishee Order Absolute of 10th May 2017 is reviewed and set aside.

8. The applicant's case is that the court did not take into account the provisions of **Section 21** of the **Government Proceedings Act** and that there is therefore an error apparent on the face of the record. The said section provides as follows:

21. Satisfaction of orders against the Government

(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.

(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 department 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 direction 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.

9. In essence therefore, the applicant is arguing that pursuant to the foregoing provisions, execution by way of a garnishee order absolute ought not to have issued and that in making the order of 10th May 2017, the court did not ensure compliance with the said section. According to the applicant, this constitutes an error apparent on the face of the record. I am afraid I do not agree with the applicant. Basically, the applicant is stating that the court did not take into account the aforesaid provisions. If that be the case, we are dealing with a case of an error of law.

10. An erroneous exposition or conclusion of law is certainly not a ground for review, even though it may be a fertile ground for appeal. If I were to accede to the applicant's request, I would be sitting on an appeal from my own decision and that is not permissible. There are ample authorities in this regard. In **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR** the Court of Appeal stated:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

11. In view of the foregoing, I am not satisfied that the applicant has made a case that merits an order of review. The applicant does not dispute that costs were awarded against itself and the other respondents jointly and severally on 13th October 2016 and that those costs were taxed and a certificate of taxation issued on 7th April 2017. In essence, liability to pay costs is not disputed. Yet in the face of all this, the applicant has maintained loud silence as regards how, assuming the garnishee order absolute was set aside and a refund ordered, it would satisfy the decree on costs. Similarly, the applicant has not demonstrated any efforts which it has made to satisfy the decree. I do not think that kind of an attitude speaks well of the applicant.

12. I have come to the conclusion that review is not available to the applicant. That being the case, all the other prayers sought in the application cannot issue. In the end, Chamber Summons dated 10th July 2017 is dismissed. Each party to bear own costs.

Dated, signed and delivered in open court at Nakuru this 6th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kisila for the Petitioners/respondents

No appearance for the 1st Respondent/applicant

Court Assistants: Gichaba & Lotkomoi