



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT MERU**

**CAUSE NO. 3 OF 2018**

**(Before D.K.N.Marete)**

**FRANCIS ATANASIO KITHURE.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF MERU.....RESPONDENT**

**ETHICS & ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY**

**RULING**

This is an application by way of a Preliminary Objection dated 8th July 2020 and comes out as follows;

i) *THAT pursuant to the provisions of **Section 21 of The Government proceedings Act Cap 40 Laws of Kenya, Section 2 of The County Government Act No.17 of 2012 and Articles 167, 176 and 260 of The Constitution of Kenya 2010**, the only legal procedure to execute for payment of damages or costs, is as per the procedure set out under the provisions of Order 53 of The Civil Procedure Rules by filing a Judicial Review application against the Respondent to compel the Respondent to settle any amount due to the applicant.*

ii) *THAT no certificate of order and costs have extracted and served upon the Respondent in terms of the Provisions of **Section 21 (1) & (2) of The Government proceedings Act (CAP 40)** and as such, the application to execute the decree and the Notice to show cause against the Respondent are null and void ab initio.*

The Respondent in support of the Preliminary Objection filed her written submissions dated 15th July, 2020 whereas the claimant/Respondent's one is dated 22nd July, 2020 and filed on 27th instant.

The Respondent/ objector after laying a background to the objection opines that the Claimant/Decree holder has not applied for an order of mandamus and neither is there a certificate of order for costs contrary to the provisions of the Government Proceedings Act and specifically its provisions relating to executions of decrees against the government.

The objector's further case is that the Preliminary Objection is on a strict point of law and meets the criteria set out in the authority of **Mukhisa Biscuits Company Ltd Vs. West End Distributors Ltd (1969) EA 696**.

The Respondent/Objector further buttresses their case by relying on Section 21 of the Government Proceedings Act which provides as follows;

*21 (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 required 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.”

She further relies on the authority of **Permanent Secretary Office of the President Ministry of Internal Security & Another ex-parte Nassir Mwachhihi (2014) eKLR** where it was held as follows;

*“It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the court issues such an order, there must be proof that the provisions of the Government Proceedings Act have complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See The District Commissioner Kiambu vs.R and Others Ex-parte Ethan Njau Civil Appeal No.2 of 1960 (1960) EA 109; R vs The Brecknock And Abergavenny Canal Co. 111 ER and R vs.The Bristol and Exeter Railway Co 114 ER 859.”*

She totally denies the drawing and issue of a certificate of order for costs to herself.

The Respondent /objector further relied on the authority of **Kisya Investments Ltd vs. Attorney General & Another (2005) 1 KLR 74** where the court held as follows;

*“Order 28, rules 2(1) (a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable....History and rationale of Government’s immunity from execution arises from the following....Firstly, there has been a policy in respect of parliamentary control over revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgments is deemed to be an expenditure by parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered.”*

In further support of her case, the Respondent/Objector chose to rely on the authority of **Republic vs. County Secretary Migori County Government & Another (2018) eKLR**, where it was observed as follows;

*“I need not re-emphasize the need for strict compliance with Section 21 of the Act being the law of the land. In this matter I can gather from the record that a Decree and a certificate of costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No.22 of the Civil procedure Rules. Form No.23 provides the format for a Certificate of Costs in the event it is separately issued.*

*Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the court of service of those documents upon the party names in the certificates. In this case there is neither evidence of the Certificates nor service thereof on the Respondents or their Advocates.”*

In conclusion, she submits that in the circumstances of this case;

i) *There is no Decree and a Certificate of Order for costs against the County Government of Meru that was issued.*

ii) *There exists no application for an order of Mandamus.*

This objection therefore must stand.

The claimant/Respondent in response faults the objector for renegeing on their earlier position on the matter expressed as follows;

*“.....we urge the court to find that the 1<sup>st</sup> Respondent was very willing to settle and it actually settled the matter amicably. Therefore, in the spirit of quick resolution of disputes we urge the court to award costs on the lower scale we so pray.”*

It is his case that the procedure now prescribed by the objector is an abuse of the process of court and in any event inapplicable to the circumstances of this particular case.

The Claimant/Respondent further submits in reliance to Section 3 of the Employment and Labour Relations Court Act, 2014 which provides as follows;

*1. The principal objective of this Act is to enable the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.*

*2. The court shall in exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).*

*3. The parties and their representatives, as the case may be, shall assist the court to further the principal objective and, to that effect, to participate in the proceedings of the court and to comply with directions and orders of the court.*

This, as read with Section 3A of the Civil Procedure Act and Article 159 (d) of the constitution makes a joke of this objection. These come out thus;

*3A“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

Further, Article 159 (d) comes out as follows;

*“justice shall be administered without undue regard procedural technicalities”.*

It is his penultimate case that the Respondent/objector is, through his earlier submissions estopped from raising any such objection and urges the court to strangle the same for being unnecessary and an abuse of process of court. At the risk of repetition, this was expressed as follows;

*“.....we urge the court to find that the 1<sup>st</sup> Respondent was very willing to settle and it actually settled the matter amicably. Therefore, in the spirit of quick resolution of disputes we urge the court to award costs on the lower scale we so pray.”*

This matter, from the record of court arises out of an execution of a bill of costs amounting to Kshs.230,448.00. It primarily is a protest against a notice to show cause addressed to the County Secretary and CEC member, Finance of Meru County in relation to this amount, being the taxed bill of cost.

The Applicant/Objector and even the Claimant/Respondent do not in their pleadings shed any light as to how execution for the decretal amount was made. This is left to the imagination of the court, inasmuch as this would have been a good guide in construing the genesis and mind behind this objection. This can only be left to second guessing and I leave it at that.

The Claimant/Respondent opposes the application/objection on grounds that the procedure of seeking an order for a mandamus with a view to execution is long and expensive. It is circumlocutous and hardship ridden to him. This is unnecessary in a simplistic execution like we have in the present case. It is his submission that this is an abuse of the process of the court which should not be let go by this court. In any event, at all times during the proceedings on taxation, the Applicant/Objector was in good spirits and willing to pay the amount taxed to the Claimant/Respondent.

The Claimant/Objector in further justification of this case seeks to rely on the authorities of Section 3 of Employment and Labour Relations Court Act, 2014 and also Section 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya which provide the principle objective of the statutes as a guide to dealing in such litigation.

Again, he chooses to rely on Article 159 (2) (d) for the Constitution of Kenya 2010 which prohibits undue regard to procedural technicalities in litigation.

I view this application as one wholly bordering on the meaning and nature of procedural technicalities. What is it? What are they?

The constitution and statutes envisage procedural technicalities to be rules of procedure whose consequence is to inhibit the substance of the

law and reality. Ofcourse, these are a creation of the law and statutes. Section 21 of the Government Proceedings Act and Section 3 and 3 A of the Employment and Labour Relations Court Act and Civil Procedure Code comprise such legitimate technicalities. They offer guideline on process and procedure.

The overriding objective, also referred to as the double o (oo) or oxygen principle comes out and urges courts to deal with a view to meting out the ends of justice. This is in agreement with the provisions of Article 159 (2) d of the Constitution of Kenya, 2010 above cited. This is further illustrated in the authority of **Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010** where a notice of appeal was served on the respondent out of time and without leave of court. Upon being asked to strike it out, (Omolo, Bosire and Nyamu JJ.A) observed thus;

*“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....”*

*In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure.”*

Whereas this court agrees with the principle and philosophy behind the need to institute an application for the writ mandamus in government proceedings, the same must now be justified by the circumstances of the case. With the numerous of government as a consequence of devolution, it behoves upon parliament to rethink and restructure this legal and procedural requirement to entrench palatability. This is because, in the first place, it's foundations are victorian, if not outrightly medieval.

I am sizeably and uncomfortable with the observation in the authority of **Kisya Investments Ltd vs. Attorney General & Another**, supra, to the extent that the application of any written law cannot amount to an abuse of the process of court however much its effect is harsh or even undesirable... This could be true and applicable, but again, the circumstances of the case must be had in mind.

The circumstances of this case point out a situation where, in a sheer rebuff to execution, the objector raises the provisions of Section 21 of the Government proceedings Act and says, comply or no more. Is this fair? Isn't this harsh? Does it not amount to a procedural technicality? I answer all these in favour of the Claimant/Respondent's reasoning and case. It is not necessary whatsoever that the Claimant/Applicant should be subjected to this kind of undue misery.

Section 3 of the Employment and Labour Relations Court Act, 2014, supra, provides the principal objective of the Act. This mandates the court to facilitate a just, expeditious, and proportionate resolution of disputes before it. This is now termed the oxygen principle, the double O's or overall, the overriding objective principle and provision.

This court has had occasion to visit this subject in the past. This was in the case of **Judicial Review 2 of 2017 Republic –vs- National Government Constituency Development Fund Board & another (2017) eKLR**, where this was expressed as follows;

*“The double O's in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In Hunker Trading Company Limited vs Elf Oil Kenya Limited perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (Sections 3A and 3B), it was held that section 1A of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. It states:-*

*“The overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil dispute governed by the Act.”*

*Considering the above provisions which introduced the oxygen principle, the court in Kamani vs. Kenya Anti-Corruption Commission drew comparisons to the Wolf reforms which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of Bigizi vs Bank Leisure in which Lord Woolf himself talked about the concept of overriding principle objective as follows;*

*“Under the (Civil Procedure Rules) the position is fundamentally different. As rule 1.1 makes clear the (rules) is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the (rules) was that often the court had to take draconian steps such as striking out the proceedings....”*

The provisions of statute and the constitution sought to be applied in this application appear contradictory. This is, however, not the case. These are legal provisions intended to ebb out good to society. The only difference is their application and the interpretation of the applying authority. This is where the court is called upon to interpret and set it out.

The Claimant/Respondent's case, to me, overwhelms that of the Objector/Respondent. Courts must rise up to met out the ends of justice in a just, expeditious and proportionate manner. And this is it.

It is notable that this application has a public interest and bearing therefore repercussions on the issue of cost (s.) We take this into account.

I am therefore inclined to dismiss the preliminary objection with orders that each party bears their cost (s) of the application.

**Dated and delivered at Meru this 3<sup>rd</sup> day of February, 2021.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr.Karanja instructed by Mwirigi Kaburu & Co.Advocates for the Respondent/Objector
2. No appearance for the Claimant/Respondents