



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

JUDICIAL REVIEW NO. E002 OF 2021

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY,

NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU.....2ND RESPONDENT

AND

MICHAEL MWANGI GACHERU.....EX-PARTE APPLICANT

JUDGMENT

1. The Ex-parte Applicant herein filed Notice of Motion application dated 16th February, 2021 on 18th February, 2021 through the firm of Maragia Ogaro and company advocates seeking the following orders; -

a) That an Order of MANDAMUS be issued to compel the 2nd Respondent to pay the Applicant as sum as hereunder shown

i) The decretal amount of Kshs. 6,737,654.00/-

ii) Interest on the amount above from the date of default (That is 2nd day of February, 2020) till payment in full.

b) THAT in default to pay the applicant the amount in (b) above within 30 days from the date of judgment of the review proceedings herein, the 1st respondent to be held in contempt of court and liable for consequent penalties for breach and disobedience of court orders.

c) That the 2nd Respondent to be compelled to bear the costs of the instant application.

2. The Judicial review is premised on the following grounds: -

a. That the Ex-parte Applicant sued the respondent in ELRC Cause No. 141 of 2015 and obtained a decree of Kshs. 6,737,654/- issued on 13th December, 2019.

b. That the applicant served the respondent with the certificate of order against the government issued on 11th December, 2020 together with several reminders but the respondent have failed to comply with the said Order without giving any explanation.

c. He thus urged this Court to compel the Respondents to satisfy the said decree.

3. The application is also supported by the verifying Affidavit of the ex-parte Applicant **Michael Mwangi Gacheru** deposed upon on 11th February, 2021 and whose averments reiterate the facts in the above grounds and the statement of facts.

4. The suit is contested and **Joseph Muchina**, the chief officer finance for the Respondents swore a replying affidavit deposed upon on the

1st April, 2021 and averred that the respondents are aware about the said decree and have not refused to satisfy it as alleged but that the payment of any monies to third parties have to be budgeted for under the public finance management Act, 2012.

5. He contends that the advocates for the ex-parte Applicant were informed that the payment of the decretal sum shall be factored in by the Respondent in 2020/2021 financial year as the budget for 2019/2020 financial year had already been utilized. Further that the monies factored in for payment of outstanding decree were diverted toward combating Covid-19 insurgencies.

6. That according to section 21 of the Government Proceedings Act, the respondents were to be served with Certificate of Order in order for it to budget the same, however the ex-parte applicant served it with the said Order on 11th December, 2020 therefore the said decretal sum was factor for budgeting in 2021/2022 financial year and the same is to be paid in the new financial year.

7. They therefore urged this court to dismiss the application as the decree has been budgeted and is to be paid in the next financial year.

8. This suit was disposed by written submissions with the applicant filing on 27th April, 2021 and a supplementary on 7th May, 2021 and the Respondent filing on 5th May, 2021.

Ex-parte Applicant's Submissions.

9. The gist of the applicant's submissions is that a decree was issues in ELRC Cause number 141 of 2015 on 13th December, 2019 requiring the Respondents to pay the entire decretal sum of Kshs, 6, 737,654/- by 1st February, 2020 and a subsequent Certificate of Order served to them to satisfy the said decree but the Respondent have failed to comply leading to the institution of these proceedings to compel them to pay.

10. He argued that the respondent have not furnished this Court with any evidence to affirmed that indeed they have factored in the ex-parte applicant's decree for payment in 2021/2022 financial year therefore they are reluctant to rely on the Respondents' promise, as allowing the respondent's submissions without proof would be tantamount to baby siting them as was held in **Republic –v-v Attorney General, Ex-parte James Alfred Kosoro (2013) eklr** and urged this court to allow the application and compel the Respondents to pay the decretal sum.

Respondents' submissions.

11. The respondents submitted that for a Judicial Review Order to issue, the applicant must demonstrate that the respondent's actions were marred by illegality, irrationality and procedural impropriety as was held in **Ernest B.M Oranga –v- Kakamega county commissioner of Cooperatives and 6 others [2016] eklr**.

12. It was submitted that the respondents being a county Government are governed by the Government proceedings Act, which provides under section 21 that a certificate of order against the government has to be issued within 21 days from the date of the Judgment which was not the case in this suit as the ex-parte Applicant served he respondent with the certificate of Order on 11th December, 2020 when budgetary allocations had already been made , nevertheless he argues that the applicant shall be paid in the 2021/2022 financial year.

13. He thus submitted that the respondents have not deliberately failed to satisfy the decree but the payment has to be budgeted for and since the Certificate of Order was served late the same is to be paid in the next financial year as the budget for the current financial year is exhausted.

14. On who should bear costs of this suit, it was submitted that this Court has unfettered discretion to grant and decline to award costs under section 27 of the Civil Procedure Act and reinforced in the decision of the court in **Cecilia Karuru Ngayu –v- Barclays Bank of Kenya Limited and another [2016] eklr** and implored upon this court not to condemn them to pay costs as the circumstances surrounding this case could not have allowed the Respondent pay the Applicant immediately as anticipated.

15. I have examined the averments of both parties herein. From the respondent's averments they admit being aware of this Judgment and decree passed by this court in ELRC 141/2015 ON 13/12/2019.

16. They have also intimated their willingness to pay the entire decretal sum as ordered by court of kshs.6,737,654/=.

17. There being an admission of the decree, I find the application is merited and is allowed as follows:-

a. That an Order of MANDAMUS be issued to compel the 2nd Respondent to pay the Applicant as sum as hereunder shown;

i. The decretal amount of Kshs. 6,737,654.00/-

ii. Interest to run from date of this Judgment until payment in full.

b. The respondents to pay costs of this application.

DATED AND DELIVERED IN OPEN COURT THIS 1ST DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kinuthia holding brief for Litunda for respondent – present

No appearance for applicant

Court assistant - Wanyoike