



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

JUDICIAL REVIEW NO. E003 OF 2021

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY ,

NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT

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

AND

EVANSON MBUGUA WAWERU.....EX-PARTE APPLICANT

JUDGMENT

1. The Ex-parte Applicant herein filed Notice of Motion application dated 22th February, 2021 on even date 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. 899,288.00/-

ii. Interest on the amount above from the date of default (That is 30 days of November, 2019) 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, suing as the administrator of the estate of **Jamleck Karanja Waweru** who sued the respondent in ELRC Cause No. 300 of 2015 and obtained a decree of Kshs. 899,280.20/- in favour of the claimant as against the respondents.

b) That the applicant served the respondent with the certificate of order against the government dated 3rd February, 2019 and issued on 30th July, 2020 together with several reminders but the respondents have failed to comply with the said Orders.

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

3. The application is also supported by the verifying Affidavit of the ex-parte Applicant **Evanson Waweru Mbugua** deposed upon on 17th 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 respondent 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 each financial year which procedure was followed in this case.
5. That the applicant served them with the execution document sometimes in December, 2020 when the budget for that financial year had already been made.
6. 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.
7. The according to section 21 of the Government proceedings Act, the respondent were to be served with Certificate of Order to enable them 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.
8. They therefore urged this court dismiss the application as the decree has been budgeted for and is to be paid in the new financial year.
9. This suit was disposed by written submissions with the applicant filing on 27th April, 2021 and supplementary submissions on 7th May, 2021 while the Respondent filed on 5th May, 2021.

Ex-parte Applicant's Submissions.

10. The gist of the applicant's submissions are that a decree was issues in ELRC Cause number 300 of 2015 in favour of the claimant as against the respondents, requiring the Respondents to pay the claimant Kshs. 899,288.20 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.
11. 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 babysitting them as was held in **Republic –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 Ex-parte applicant, his decretal sum.

Respondents' submissions.

12. 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**.
13. 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.
14. 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.
15. 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 case of **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 them to pay the Applicant immediately as anticipated.
16. I have examined the averments of both parties herein. From the averments of the respondents, they admit being aware of this Judgment and decree passed in ELR Cause No. 141/2015 on 13/12/2019. They have also intimated their willingness to pay the entire decretal sum as ordered by court of kshs.899,288/=.
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. 899,288.00/-.

ii) Interest on above amount to run from the date of this Judgment.

b) The respondent to bear costs of this application.

RULING DELIVERED VIRTUALLY THIS 1ST DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kinuthia holding brief Litunda for respondent – present

No appearance for applicants

Court Assistant - Wanyoike