



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 29 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 16,37,51 AND 52 OF THE WORK INJURY BENEFITS ACT AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**COUNTY SECRETARY,**

**COUNTRY GOVERNMENT OF KIAMBU.....1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER, FINANCE ICT AND**

**ECONOMIC PLANNING.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant herein was the plaintiff in Kiambu CMCC. NO. 175 in which she sued the County Government of Kiambu and she obtained a judgment and decree of the court of over Ksh. 17,000,000. Upon demand the decree was not settled and sought leave of this court to bring these proceedings to compel the concerned officers of the said judgment debtor to settle the decree passed by the trial court. She therefore brought the Notice for Motion dated 24.12.2018 seeking the following :

(1) An Order of Mandamus be issued directed to the Respondents herein namely; the County Secretary Finance, ICT and Economic Planning Kiambu County Government and Chief Officer Finance, ICT and Economic Planning Kiambu County government to move into the Honourable forthwith and without delay cause to be paid to the Ex-part Applicant the sum of Kshs. 17,201.96/- being the decretal sum as per the decree dated 8th October, 2018 in CMCC No. 175 of 2016 pursuant to the judgment by Honourable Kituku of 11th April, 2018 and in respect to the Applicant’s certificate of costs arising from the aforesaid suit.

(2) The accrued interest from date of the decree to payment in full be borne by the respondents

(3) The costs of this application and the chamber summons dated 9th October, 2018 be borne by the respondents.

2. The Application premised on the grounds and facts set out in the statement dated 9.20.2018 and the supporting affidavit sworn by the applicant on the same date. In brief the applicant averred that she is the administratrix of the estate of Anthony Mungai Kirika who was employed as Town Treasurer by the judgment debtor and died on 10.5.2013 while in the course of his employment in an accident involving M/v. No. KBA 144 W; that after the accident, the County Occupational safety and Health Officer assessed compensation for the deceased as Kshs. 12,862,848; that the employer failed to pay the said compensation after demand necessitating the filing of CMCC. No. 175 of 2016 at Kiambu Law Courts; that after the hearing, the court entered judgment in terms of the said assessment of Kshs. 12,862,848 plus costs and interest; that again the employer (judgment debtor) failed to pay the decreed sum upon demand and hence the instant suit for enforcement of the trial court decree plus costs.

3. The respondent filed Replying Affidavit sworn by John W. Wanjohi on 25.7.2019. In brief, the respondents contended that they were aware of the Civil Suit no. 175 of 2016 which was primarily handled by Intra Africa Insurance Ltd and her own appointed lawyers; that the said insurer and her lawyers never notified the respondents about the judgment by trial court and the respondents only learnt of the existence

of the said judgment after being served with the process herein. They objected to the suit herein on ground that the applicant did not serve prior notice as required by the Section 13 of Government Proceedings Act. They, however contended that they have not refused to pay or satisfy the judgment and decree in issue and explained that they had not been informed of the same.

### Submissions

4. The Applicant submitted that the judgment in CMCC. 175 of 2016 has not been set aside or appealed against and what remains is for the judgment debtor to settle it. She further submitted that the grievance between the respondents, their insurer and their counsel in CMCC. 175 of 2016 should not deny him the fruit of his judgment.

5. As regards the objection under Section 13 of the Government Proceedings Act, the applicant submitted that the respondents were served with notice before filing the primary suit number CMCC 175 of 2016. She therefore contended that there is no merits in the objection because the instant matter is only a miscellaneous application for enforcement of the decree in CMCC. 175 of 2016.

6. The applicant relied on **Raphael vs The Principal Secretary, State Department of Interior and another, Exparte Salim Awadh Salim and 11 others [2018] eKLR**, in which the High Court allowed a similar motion compelling the respondents to pay the judgment debt plus accrued interest.

7. The respondents reiterated their averments in the Replying affidavit that they have not deliberately refused to pay the judgment-debtor and blamed the failure to settle the judgment on the lawyers who represented them before the trial court. They therefore cited **Belinda Muras & 6 others v Amos Wainaina [1978] KLR** to support their view that a mistake of their counsel should not be penalized on them.

8. On the other hand the respondents contended that the Section 13A of the Government Proceedings Act applied to County Governments like the judgment-debtor herein and maintained that the instant suit is incompetent because it was brought before serving the requisite notice and Section 13a supra.

9. Finally, the respondent submitted that the order of mandamus should be no issued because the applicant has not satisfied the threshold for granting the same.

### Issues for determination

10. There is no dispute that the claimant obtained judgment and decree against the County Government of Kiambu in CMCC 175 of 2016 and the decree is not yet settled. The issues for determination are:

(a) Whether the application herein is incompetent for offending Section 13A of the Government Proceedings At.

(b) Whether the application meets the threshold for granting an order of Mandamus sought against the respondent.

### Whether the application is incompetent

11. The Respondent objected to application on grounds that the applicant did not serve the mandatory notice required under Section 13A of the Government Proceedings Act. However the applicant contended that she served the notice before filing the primary suit, CMCC 175 of 2016. Section 13A (1) provides that :

***“No proceedings against the Government shall be or be instituted until after expiry of a period of thirty days after a notice in writing in the prescribed form has been served on the Government in relation to those proceedings.”***

12. The above objection, in my view, does not have merits because it is trite that judicial review proceedings under Order 53 of the Civil Procedure are proceedings *sui generis* and it does not depend on any other procedural law outside Order 53 and the rules thereunder. I therefore, dismiss the said objection for lack of proper basis.

### Threshold for grant of order of mandamus

13. The Respondent urged the court, to dismiss the application because the application has not discharged her burden of establishing the required basis for granting the orders of mandamus. The applicant have contended that there is a valid decree in force against the Government of Kiambu County which has not yet been settled. She has further contended that no good cause has been shown as to why the judgment debtor has not settled the said decree. Indeed the respondents have contended that they have not refused to pay the decreed sum and blamed their lawyer in CMCC 175 of 2016 for the failure to pay because he never notified them of the said judgment.

14. I have considered the submission by both parties and I am satisfied that the respondents were indeed made aware of the judgment by the applicant through the letter dated 16.4.2018 (**Exhibit ‘LKM2’**). There is also no dispute that the 2<sup>nd</sup> Respondent is the Accounting Officer Finance Department of the judgment debtor. He/she has the legal duty to pay the debts on behalf of the Government of Kiambu County like the instant judgment debt.

15. However, the 1<sup>st</sup> Respondent is not the Accounting Officer, and I suspect that the applicant did not get the job title right. County Secretary, does not play the role of finance under the County Government Act. Mandamus cannot therefore issue against a person or officer who is not duty bound to do what the order compels him to do. For emphasis, I rely on **Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & others [1977] eKLR** when the court held that:

***“ These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”***

16. In view of the foregoing precedent and my finding that the 2<sup>nd</sup> Respondent is the Accounting Officer of the judgment debtor within the duty he pay genuine debts like the court decree in issue, I return that the application meets the threshold for granting the order of mandamus sought against the 2<sup>nd</sup> Respondent.

17. Consequently, I allow the Notice of Motion dated 24.12.2018 by entering judgment for the applicant against the 2nd respondent as per the prayer 1, 2 and 3 of the motion. I, however, dismiss the application as against the 1<sup>st</sup> Respondent with no costs.

**Dated, signed and delivered in open court at Nairobi this 7th day of February, 2010**

**ONESMUS N. MAKAU**

**JUDGE**