



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**MISC. CIVIL APPLICATION NO.10 OF 2018**

**IN THE MATTER OF AN APPLICATION BY:**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF NAKURU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE OFFICER IN CHARGE OF FINANCE,**

**NAKURU COUNTY GOVERNMENT..... 2<sup>ND</sup> RESPONDENT**

**EX PARTE**

**JAMES MWANGI MURAYA .....SUBJECT**

**RULING**

The *ex-parte* applicant, James Mwangi Muraya by application dated 19<sup>th</sup> April, 2019 is seeking for orders that;

- a) *That an order of Mandamus directed against the respondents compelling the 2<sup>nd</sup> respondent to fully comply with the decree issued in Nakuru ELRC Cause No.124 of 2016 on 28<sup>th</sup> February, 2018 together with the certificate of costs issued on 4<sup>th</sup> December, 2018.*
- b) *The respondents cater for the costs of this application.*
- c) *Such further and other relief be granted to the ex parte applicant as this court deems fit.*

The application is supported by the *ex parte* applicant's application and on the grounds that in **Nakuru ELRC Cause No.124 of 2016** he was awarded salary arrears, accrued overtime and lap trust contributions all Ksh.617,432.60 and costs of

the suit. A decree has been extracted and served upon the respondent but there is no payment. The respondents have deliberately refused or declined to satisfy the judgement. No explanation has been offered for non-compliance with the judgement herein. The conduct of the respondent is apparent that unless the court intervenes they shall not comply with the judgement and by section 21 of the Government Proceedings Act on execution proceedings contemplated under Order 22 of the Civil Procedure Rules does not sufficiency against the respondents.

The *ex parte* applicant has a monetary decree in his favour and is entitled to enjoy the fruits of the judgement herein.

In his statutory statement and Supporting Affidavit the *ex parte* Applicant avers that he filed Nakuru ELRC Cause No.124 of 2016 claiming his salary arrears from the respondent and judgement was entered in his favour on 7<sup>th</sup> December, 2017 and a certificate of costs was issued on 4<sup>th</sup> December, 2018 and to date the respondents have failed to satisfy the decree of the court.

In reply the respondents filed Grounds of Opposition and on the grounds that the *ex parte* applicant has not complied with Order 21 Rule 6 (2) of the Government Proceedings Act for this court to exercise its discretion in his favour and as such the application is defective and in abuse of the court process.

Both parties made oral submissions in court.

The *ex parte* applicant submitted that he obtained judgement herein on 7<sup>th</sup> December, 2017 and since the respondents have refused and or failed to satisfy the same. The costs have been taxed and a certificate of costs issued and application seeking for the orders of mandamus against the respondents and compelling the 2<sup>nd</sup> respondent to comply with the decree herein.

The respondents were served with the decree of the court which is binding after actively participating in the proceedings and there is a duty to pay per the decree of the court. where the court finds the *ex parte* applicant has not complied with section 21 of the Government Proceedings Act, there is discretion to direct the respondents under the provisions of section 21(3) of the Act.

The respondent submitted that the respondent has no public duty to satisfy the decree and order herein under Article 176 and 6 of the constitution, they are enjoined as part of government and therefrom section 21 of the Government Proceedings Act apply to them. the *ex parte* applicant has not complied with section 21 of the Act.

An applicant must obtain a certificate of Order from the court which must be served on the Attorney General within 21 days from the date of judgement which has not been done in this case. In proceedings against the government there must be an order against the accounting officer. The application should be dismissed for want of statutory requirements.

The *ex parte* applicant's application is premised on the provisions of Order 53 Rule 1 of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act. these provisions allow an applicant to move the court for a relief following the violation of a right(s).

It is common cause that judgement herein was delivered on 7<sup>th</sup> December, 2017, decree dated 7<sup>th</sup> December, 2017, costs have been taxed and a certificate of costs issued. The *ex parte* applicant is keen on execution of the judgement the procedure to be followed in execution of money decrees against government is settled in that before an order of mandamus compelling a county government such as the respondent to pay is issued the elaborate procedure provided for under **Section 21 of the Government Proceedings Act** and **Order 29 of the Civil Procedure Rules** must be strictly complied with. **Section 21** of the Government Proceedings Act provides that;

***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***

The respondent being a County Government and its officer(s) by dint of section 21(5) is bound as a government with modifications as appropriate in **Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwadhihi (2014) eKLR** also had the following to say of the matter: -

*... 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 been 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.*

The procedures outlined under section 21 of the Government Proceedings Act are elaborate and hence meant to give adequate notice to the County Government such as the respondents to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the county from meeting its statutory obligations to satisfy decrees and orders of the Court. see **Republic versus County Secretary Migori County Government & another [2019] eKLR.**

The *ex parte* applicant has a Decree and a Certificate of Costs. There is no Certificate of Order. There is a specific procedure on how the Certificate of Order required is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules.

Upon obtaining the appropriate Certificates of costs and Certificate of Order there must be proof of service upon the respondent(s) thereof.

The court finds the *ex parte* applicant has not fully complied with the legal requirements for an order of mandamus to be issued in this instance. The application is premature.

**the Notice of Motion dated 19<sup>th</sup> April, 2019 is hereby struck out. Each party shall bear own costs.**

Dated and delivered electronically this 27 April, 2020 at 1200 hours.

**M. MBARU JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15<sup>th</sup> March, 2020 and on given consent, the Judgement herein is delivered via e – mail;

Issued electronically this 27<sup>h</sup> April, 2020.

**M. MBARU JUDGE**