



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

MISC. JR APPL. NO.1 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW ORDERS OF MANDAMUS COMPELLING THE

RESPONDENT HEREIN TO COMPLY WITH AND SATISFY THE DECREE OF

THIS COURT AS REGARDS COSTS MADE ON 22ND OF JULY, 2016 AND CERTIFIED

BY THE DEPUTY REGISTRAR ON 20TH OCTOBER, 2016 IN THE PETITION NO.10 OF 2015.

REPUBLIC OF KENYA.....APPLICANT

VERSUS

BARINGO COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

and

***EX PARTE* ZIPPORAH MWANGI & 32 OTHERS**

RULING

The ex-parte applicants moved the court in their application and seeking for orders that the court do issue orders of mandamus compelling the respondents to pay to the applicants the sum of Ksh.2, 592,970.00 being the costs assessed by the Deputy Registrar in ELRC No.10 of 2015 and certified by the Certificate of Costs and Orders issued on 20th October, 2016.

The application is on the grounds that the court delivered judgement on 22nd July, 2016 in Petition No.10 of 2015 and ordered the respondent to pay the petitioners their costs. On 11th October, 2016 the costs were taxed and certificate of costs and orders issued against the respondents and which have been served upon the respondents.

In the affidavit of Zipporah Mwangi for the ex-parte applicants she avers that the respondent is a statutory body responsible for the county public service management and administration. The ex-parte applicants filed Petition No.10 of 2015 eking for orders for the respondents to employ them on permanent and pensionable terms and by judgement such orders were granted and taking effect from 1st July, 2015. Costs were also awarded and have since been taxed and Certificate of Costs issued. Despite the respondents being served they have not paid the due costs at Ksh.2, 592,970.00.

In reply the respondent filed Replying Affidavit sworn by Mark Suge the chairperson of the 1st respondent and who avers that the application by the ex-parte applicants is premature as the persons against whom the orders sought is made have not authorised the same in writing. The application is res judicata in view of the existing decree in Nakuru JR No.4 of 2017 where the orders sought herein were declined and the decree has not been challenged or appealed as issued on 19th December, 2017. The orders sought herein were substantially and directly in issue in the earlier application declined by the court.

Mr Suge also avers that the application and orders sought offend the provisions of section 103 of the Public Finance Management Act, 2012 which vests statutory power of payments on other statutory bodies and not the respondent herein.

The parties filed written submissions.

The ex-parte applicants submit that upon judgement in Petition No.10 of 2015 the costs due to the ex-parte applicants have been assessed and the Certificates issued and served upon the respondents. The costs due amount to Ksh.2, 592,970.00. once such judgement was entered the ex-parte applicants are entitled to execute for the decretal sum. Where judgement is entered against the government and a monetary decree is issued against it, execution follows as held in **Republic versus Permanent Secretary, Ministry of State for provincial Administration and Internal Security ex-parte Fredrick Manoah Egunza [2012] eKLR.**

The application made is not premature as alleged by the respondent as judgement was delivered on 22nd July, 2016 and costs taxed on 11th October, 2016. Certification was done on 20th October, 2016 and despite the respondent being served they have not made well the payments due. JR No.4 of 2017 exists but was not determined on its merits. The court did not allow the application as the ex-parte applicants failed to satisfy that the respondents had been served. Such is not being *res judicata*.

The 1st respondent submits that the application before court is *res judicata* in view of JR No.4 of 2017 which is a replica herein. The orders of 8th December, 2017 declined to allow the application by the *ex parte* applicants. To move the court again on similar prayers and orders is contrary to the provisions of section 7 of the Civil Procedure Act. Such was the finding in **Nairobi JR No.27 of 2018, Charles Kanyi Njagua versus Nairobi County Government & another** that the principles of *res judicata* apply to judicial review proceedings.

The application by the *ex parte* applicants offends the provisions of section 103 of the Public Finance Management Act, 2012 which vests statutory powers of payments on other statutory bodies. Such other statutory bodies sought to be bound by the order of the court should be the respondents as held in **Nairobi JR No. 176 of 2015, Njenga Mwangi Wachira & Partners versus County Secretary, City County of Nairobi [2017] eKLR.**

The ex-parte applicants agree that there exists Nakuru JR No.4 of 2017, a matter similar to the one herein and based on similar substantive orders of mandamus to compel the respondents to comply with and implement the judgement and ruling of the court delivered on 22nd July, 2016 and 11th October, 2016 respectively and arising of judgement in Nakuru Petition No.10 of 2015.

I have since drawn from the above matter and application in Nakuru JR. No.4 of 2017 and indeed the application herein is a replica therefrom.

Whatever the outcome of the earlier matter and Nakuru JR. No.40 of 2017 the same cannot be revived, reviewed or appealed from through the filing of a fresh application seeking similar order sand based on the substance of judgement delivered on 22nd July, 2016 in Nakuru Petition No.10 of 2015. To do so would be to go contrary to the set rules of procedures, good practice and conflate issues. Such would clearly be abusing court process.

The court agrees with ruling in **Nairobi JR No.27 of 2018, Charles Kanyi Njagua versus Nairobi County Government & another** that;

- *where a court has pronounced a final decision on a matter which decision has not been challenged or upset by a superior court, to bring fresh proceedings whether as judicial review of a constitutional petition or otherwise would no doubt amount to an abuse of the court process and therefore the court would not hesitate to decline sitting on appeal of decisions that have concluded such former disputes. ...*

Such findings in the court view are consistent with the cardinal principles of *res judicata*. Where a matter is directly and substantially similar to the former suit and such former suit was between the same parties on the same cause of action, the court is not competent to try the subsequent suit.

There is a final order in Nakuru JR. No. 4 of 2017 and both parties appreciate these facts.

Filing new proceedings similar to the earlier matter on the basis that the substantive issue was not addressed is to seek the court to sit on appeal which jurisdiction this court is denied.

Without the proper mandate, authority or power to revisit a matter already addressed by the court in Nakuru JR. No.4 of 2017 the court must stop.

For these reasons Application by the *ex parte* applicants is hereby found without merit. The same is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nakuru this 8th day of November, 2018.

M. MBARU

JUDGE

In the presence of:

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