



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 23 OF 2005

KENYA COUNTY GOVERNMENTS WORKERS' UNIONCLAIMANT

(FORMALLY KENYA LOCAL GOVERNMENT WORKERS' UNION)

VERSUS

TRANS NZOIA COUNTY GOVERNMENT.....RESPONDENT

(Formally KITALE MUNICIPAL COUNCIL)

Mr. Nyamuge for claimant/applicant

Mrs. Yego for respondent

RULING

1. The notice of motion dated 14th March 2017 seeks for orders: -

1. That execution proceedings herein do proceed in the name of County Government Workers' Union against the Trans Nzoia County Government.
2. That the respondent do pay decretal amount to the beneficiaries under the award/decreed as ascertained in the sum of Kshs.56,984,866/= payable to the beneficiaries listed in accordance with the calculations attached to the supporting affidavit.

2. The application is supported by grounds set out on the face of the application as follows: -

1. That the suit herein was filed in the year 2004 against the then Municipal Council of Kitale, a local authority established under the now repealed local government act, chapter 65 of the laws of Kenya.
2. That the Industrial Court made an award on 1st December 2004, but the court did not specify the actual amounts payable to the 145 beneficiaries under the award and it has taken some time to ascertain the actual amounts.
3. That in the year 2013, the County Governments Act, 2012 came into operation [Section (1) thereof] and repealed, by Section 134 thereof, the Local Government Act.

4. That under Section 59 of the Urban Areas and Cities Act, No. 13 of 2011,

“Any legal right accrued, cause of action commenced in any court or law of tribunal established under any written law in force.... Filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.”

1. The Trans Nzoia County Government is a body established by law to carry out the functions of the respondent and hence there is need to do the substitution.

2. That the Trans Nzoia County government has determined the amount due and payable to the beneficiaries under the decree and it is only fair that the court makes an order of payment of the amount ascertained in accordance with the award herein.

3. That the beneficiaries of the award herein have continued suffering in poverty and some have died while waiting for justice to be done.

4. That it is necessary for the court to make the orders sought herein and to give further directions in order for the award to be enforced.

5. That no prejudice will be suffered by the respondent but the ends of justice will be realized.

Response

3. The application is opposed vide a replying affidavit sworn by Pius Munialo, the County Secretary, County Government of Trans Nzoia in which is admitted that county governments are obliged to take over all functions of the former local authorities. that the county government is obliged to first carry out an inventory or ratification of assets and liabilities and that under section 35 of the Transition to Devolved Government Act, a local authority shall not transfer assets and liabilities during transition period.

4. That the transition period ran up to 4th March 2016 but was extended. That the intergovernmental technical committee has not yet given the County government an inventory of assets and liabilities of the defunct Kitale Municipal Council nor transferred those assets and liabilities.

5. That the sum of Kshs.56,984,866/= is disputed as it relates to 148 employees yet the award of the court of 1st December 2005 only related to 3 former employees of the council who had retired and/or attained the age of retirement be paid their full outstanding salary arrears and other benefits calculated only up to the date of retirement. That the application lacks merit and same is time barred upon passage of 12 years from date of judgment.

Determination

6. On the issue as to whether execution proceedings may issue against a county government, I rely on the High Court decision in **Judicial Review Miscellaneous Application No. 44 of 2012 republic –vs- The Attorney General and Another ex parte James Alfred Koroso** where the court held that:-

“.....in the present case, the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized.”

7. Devolved government are part of government and execution proceedings may not issue against their assets. However, *mandamus* against the officers of the county government may issue followed by proceedings for contempt of court for failure to enforce orders of the court, lawfully served on them. This is the proper way for the applicant to proceed against the County Government of Trans Nzoia.

8. As to the question whether the County Government of Trans Nzoia ought to satisfy the judgment of the

court in this matter, the judgment was issued against Kitale Municipal Council in the year 2005. In the year 2013, the County Government Act, 2012 came into operation and under Section (1) thereof, the Act, repealed the Local Governments Act. There is no doubt that the assets and liabilities of Kitale Municipal Council were taken over by the County Government of Trans Nzoia.

9. Once the order of the court is properly served on the responsible officers of the County Government of Trans Nzoia, they are obliged to satisfy the judgment of the court failing which proceedings for contempt of court may issue against them. This is the path the applicant herein ought to follow *moratorium* during transition has lapsed and cannot be used in this case.

10. On the question whether the computation filed by the claimant reflect the correct judgment sum, it is apparently the judgment related to salary arrears and all unpaid benefits for 145 employees who fell in three categories: -

1. One hundred and four (104) who had not yet attained retirement age and were reinstated by the judgment of the court with immediate effect.
2. Thirty three (33) who had attained retirement age and
3. Eight (8) who had since died.

11. Arrear salaries and benefits were to be computed and paid to the three categories of employees from the date of judgment in the sum of Kshs.56,984,866/=. In any event, the County Assembly approved Kshs.95,145,995/= as salary arrears for the employees.

12. With regard to the issue of limitation, it has been argued that in terms of Section 4 (4) for the Limitation of Actions Act, CAP 22, Laws of Kenya, a judgment may not be executed after expiry of 12 years. The Section reads: -

“an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods), the date of the default in making the payment or delivery in question in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

13. The **Court of Appeal in Willis Onditi Odhiambo –vs- Gateway Insurance Company Limited [2014] eKLR** held: -

“In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgment and/or decree is governed by Section 4(4) of the Limitation of Actions Act which is in the following terms: -

4 (4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.

The judgment which the appellant sought to execute was passed on 24th August 1996. The judgment should therefore have been executed on or before 27th August 2008.”

14. In the present case, the court ordered the respondent to compute the amount payable but delayed until pressure was exerted on it by the claimant. Up until now, the exact amount payable has not been ascertained by fact of omission or neglect by the respondent.

15. This is one of the issues for determination by the court in this application. To this end, time will start running from when the judgment sum is ascertained. In any event 12 years period will lapse on 30th November 2017 the date judgment on liability was passed, which judgment has not been quantified to

date.

16. The court finds that time will start running upon quantification of the judgment of the court which we do in the sum of Kshs.56,984,866/= prayed for in this application and in terms of the judgment of the court.

Dated, Signed and Delivered on this 24th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE