



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW CASE NO. 12 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY

OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

EX PARTE

SAMWEL MWANGI GATOTO T/A DIANI FARMERS DAY &

NIGHT CLUB AND T/A GOMBATO GUEST HOUSE

JUDGMENT

(Ex parte applicant having obtained judgment against the Government in a separate suit which judgment has not been satisfied by the Government; ex parte applicant now seeking orders of mandamus; respondents arguing that they have filed an appeal; an appeal does not stay satisfaction of a judgment unless there is an order of stay pending appeal; respondents having an obligation to satisfy the judgment; order of mandamus issued)

1. Through an application dated 3 September 2019, the ex parte applicant sought leave to commence judicial review proceedings in the nature of mandamus to compel the respondent to pay him the sum of KShs. 57,905,054/= as ordered by the court in *Mombasa ELC No. 82 of 2009, Samwel Mwangi Gatoto t/a Diani Farmers Day & Night Club and also t/a Gombato Guest House vs The Attorney General*, together with interest to date, within 30 days of the Honourable Court's order. The leave was granted on 4 September 2019, upon which the ex parte applicant filed the substantive motion on 11 September 2019, seeking the above order of mandamus. The application is opposed by the respondent who filed Grounds of Opposition.

2. The facts as demonstrated by the ex parte applicant are that the ex parte applicant filed the suit *Mombasa ELC No. 82 of 2009* against the 1st respondent. This was a suit vide which the ex parte applicant claimed compensation for loss suffered as a consequence of the 2007-2008 post-election violence. The ex parte applicant ran two businesses called Diani Farmers Day & Night Club and Gombato Guest House. He sought damages for his destroyed buildings and loss of business. The matter proceeded for hearing and judgment was delivered on 12 March 2018 vide which the ex parte applicant was awarded the sum of KShs.

20,837,310/= as special damages together with costs and interest from the date of judgment till payment in full. On 23 April 2018, the ex parte applicant applied for review of the said judgment. In a ruling delivered on 20 September 2018, the court allowed for the award of KShs. 20,837,310/= to attract interest from the date of filing of the suit till payment in full. The court also made an additional award of KShs. 6,750,000/= as damages for some mature oranges burnt during the incident in issue with the said sum to attract interest from 30 July 2014. The ex parte applicant subsequently taxed his bill of costs at KShs. 2,2662,612.33/= on 22 November 2018. He has disclosed that the respondent filed a Notice of Appeal but has averred that the respondent has never filed its record of appeal nor obtained any order of stay of execution. He has averred that a Certificate of Order against the Government was served but the State has failed to settle the decretal sum and that is why he has filed this action. He has stated that the 2nd respondent is in charge of revenue/finance management and thus obliged in law to satisfy the judgment.

3. The respondents filed Grounds of Opposition to oppose the application. They are drawn in the following fashion :-

1. That the application is misconceived, frivolous and vexatious.

2. That the respondents being dissatisfied with the judgment of this court in Mombasa Environment and Land Case No. 82 of 2009 filed a Notice of Appeal dated 26th March, 2018 and a letter seeking typed proceedings to enable the respondents prepare a Record of Appeal.

3. That the respondents are still desirous of pursuing their appeal but for the fact that they have not been supplied with certified typed proceedings and grant of the orders sought herein will render their appeal nugatory.

4. That respondents have an arguable appeal as Mombasa Environment and Land Case No. 82 of 2009 being a claim for negligence was brought 2 years after the cause of action arose contrary to Section 3 of the Public Authority Limitation Act.

4. It was agreed that this motion can be dispensed with through written submissions. I have seen the submissions of both Mr. Gikandi, learned counsel for the ex parte applicant, and Mr. Makuto, learned State Counsel, appearing for the respondents. I have taken these submissions into consideration before arriving at my decision. In a nutshell, Mr. Gikandi submitted that the Government has a duty to pay under Section 21 (3) of the Government Proceedings Act and the common law duty to satisfy the decree. He submitted that the respondents have not obtained any order of stay pending appeal. On his part, Mr. Makuto in his submissions, gave a history of the previous suit ending with the submission that his clients have filed a Notice of Appeal and intend to pursue the appeal. He also submitted that the claim was barred by Section 3 of the Public Authority Limitation Act, Cap 39, Laws of Kenya for being filed more than one year after the incident and thus his client has a good appeal. He submitted that the order of judicial review is discretionary and should not be allowed in this instance.

5. I have considered the matter alongside the above submissions. The fact of the matter is that the ex parte applicant has judgment in his favour against the Government. There is no stay of execution of the judgment although the respondents contend that they are keen to appeal. Order 42 of the Civil Procedure Rules is clear that an appeal does not operate as a stay of execution. That provision of the law is drawn as follows :-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

6. It is thus apparent, that just because the respondents have filed a Notice of Appeal, does not give them a licence not to satisfy the decree. An appeal by itself does not stop the judgment debtor from satisfying the judgment unless there is an order for stay pending appeal. If the respondents wished to have the satisfaction of the judgment stayed, to await the outcome of the appeal, there would have been nothing easier than to file an application for stay pending appeal. It is as simple as that. There is therefore nothing that bars the ex parte applicant from seeking enforcement of the decree.

7. The respondents indeed have a duty to satisfy the judgment. It is not good practice for the Government to take successful litigants on a wild goose chase in order for the Government to satisfy decrees against it. It is in fact embarrassing for a Government not to

satisfy decrees against the very public that it serves. The Government has a duty to the public to make prompt payment of decrees passed against it and it is an abdication of public duty for Government officers to fail to satisfy such debts. In my view, the ex parte applicant is perfectly in order to seek the order of mandamus to compel the respondents to satisfy the decree. I have no reason to deny him this order. I therefore allow this motion and issue the order of mandamus as sought by the ex parte applicant. The ex parte applicant shall also have the costs of this suit.

8. Judgment accordingly.

DATED AND DELIVERED THIS 12TH DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA



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