



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

JUDICIAL REVIEW APPLICATION NO. E001 OF 2021

MUSA TAPEM.....EX PARTE APPLICANT

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The case for the ex parte applicant

By his notice of motion dated 16th February 2021 the ex parte applicant filed the instant application pursuant to the provisions of Order 53 Rules 3 and 4 of the Civil Procedure Rules, sections 8 and 9 of the Law Reform Act (Cap 26) Laws of Kenya and all other enabling provisions of the law seeking the following orders.

1. An order of mandamus directed at The Principal Secretary Ministry of Interior and Co-ordination of National Government to pay the ex parte applicant the sum of shs 740,134/=, being the decretal amount, accrued interest and costs as at 14th day of December 2018 as per the decree issued by the court in Kapenguria PMCC No. 29 of 2016 Musa Tapem v Samson Kadikou and the Honourable the Attorney General.
2. An order directing that the respondents be condemned to pay the costs of this application.

The application is based on the following major grounds. The ex parte applicant filed a suit against Samson Kedikoi and the Attorney General being Kapenguria PMCC No. 29 of 2016. Judgement was entered in favour of the ex parte applicant against the 2nd respondent for a sum of shs 575,000/=, interest in the sum shs 41,309/= as at 14th December 2016 and costs assessed in the sum of shs 123,895/= making a total of shs 740,134/=

The 2nd respondent was served with the decree and notice of payment in respect of the decretal amount, interest and costs of the suit. To date the 2nd respondent has refused or ignored to pay the ex parte applicant the foregoing sums of money. This has denied the ex parte applicant the right to enjoy the fruits of his judgement. He therefore prays that the application be allowed.

In addition to the foregoing the application is supported by the 6 paragraphs supporting affidavit of the ex parte applicant. The ex parte has averred to the following major matters. On 4th February 2021 this court granted the ex parte applicant leave to apply for an

order of mandamus. The said leave was grounded on the statement of particulars and the ex parte applicant's verifying affidavit.

The submissions of the ex parte applicant.

Messrs John Bororio, counsel for the ex parte applicant has submitted that his client obtained judgement against Samson Kadikou (2nd respondent) and The Honourable Attorney General in Kapenguria PMCC NO. 29 of 2016, for the sum of shs 575,000/=, interest in th sum of shs 41,309/= as at 14th December 2018 and cost which were assessed in the sum of shs 123,825/= making a total of shs 740,134/=

Counsel has further submitted that the respondents have not appealed against the said decree nor have they sought review of the same. Counsel has further submitted that the refusal and or failure to pay the sums of money is prejudicial to the ex parte applicant who must enjoy the fruits of his judgement.

Counsel has finally submitted that the respondents have no justification for refusing to pay and therefore the only remedy available to the ex parte applicant is for the court to grant the ex parte applicant an order of mandamus.

Counsel has therefore prayed that the application be allowed with costs.

The case for the respondent.

The respondent filed five (5) grounds in opposition to the application; with the major grounds being as follows. The applicant failed to comply with section 21 of the Government Proceedings Act (Cap 40) Laws of Kenya. The application is an abuse of the court process for it failed to correct or clarify that the ex parte had complied with the requirements set out in the Government Proceedings Act to facilitate the said payment of decretal sum and that the accounting officer in the affected Ministry has failed to comply with the payment.

The respondents written submissions

The respondent has submitted that the execution against Government is not undertaken as in the ordinary civil cases for it has to comply with the provisions of section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules. The provisions of the said section 21 read as follows:

“(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 require 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.”

It is clear that the applicant in whose favour the order (judgement) is made is required by the act to apply for the certificate after the expiry of 21 days from the date of the order and if there is an order for costs an application for the said certificate may be applied for after the costs have been taxed. The said certificate must be in the prescribed form.

Furthermore, counsel for the respondent submitted based on the decision of this court (Odunga, J) *Republic v. Permanent Secretary Office of the President, Ministry of Internal Security & Another ex parte Nassir Mwandu* [2004] eKLR and *Republic v. County Secretary Migori County Government & Another* [2019] e-KLR, that the procedures in seeking an order of mandamus under the Government Proceedings Act, must comply with the issuance of a certificate for costs and a certificate for the order. That court further observed that the elaborate procedure that is set out in that act is not meant to relieve the Government from its obligations to satisfy the decrees and orders of the court.

In *Republic v. County Secretary Migori County Government & Another, supra*, that court cited with approval the decision of the High Court (Visram and Ibrahim, JJ) which in turn cited *Auckland Harbour Board v R (1924) AC 318 326*, and observed in part that claims and decrees may be known to the ministries and departments, but they have to notify the Ministry of Finance and Treasury so that payment is arranged for or provision made in the Government expenditure. Those ministries and departments may not be having their own funds to satisfy the decree. Additionally, the court observed that once decree and or order is forwarded for payment to Treasury, scrutiny and approvals may be sought for the payments to be made from the Consolidated Fund. Finally, the court also observed that execution and attachment of Government properties is not allowed for if this was allowed Government operations will ground to a halt and this will lead to chaos and anarchy.

I may add here that the bureaucratic set up of the concerned Ministries and departments might result to delays in satisfying court decrees.

Counsel further cited Order 29 Rule 3 of the Civil Procedure Rules which require the issuance of a certificate for costs upon an application to the Deputy Registrar or the subordinate court. In addition to the certificate for costs there has to be a certificate of the order of the court.

Counsel has submitted that since the ex parte failed to comply with the law, his application should be dismissed with costs.

Issues for determination.

I have considered the affidavit of the ex parte applicant and submissions of both parties in light of the applicable law. As a result, I find the following to be the issues for determination.

1) Whether the ex parte applicant has complied with the provisions of section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules.

2) Who bears the costs of this application"

Issue 1

I find that the ex parte applicant has not complied with the provisions of section 21 and Order 29 Rule 3 of the Civil Procedure

Rules, which require the issuance and service of the certificate of costs and the order in respect of the judgement sought to be enforcement. Counsel for the ex parte applicant has not even addressed the issuance and service of the certificate of costs and the order sought to be enforced in his written submissions.

Instead counsel for the ex parte applicant has submitted that the respondents have neither appealed nor sought review of the judgement that is sought to be enforcement. I find that counsel's submissions appear to be attractive, but they miss the point that the provisions of section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules, have not been complied with as required of the ex parte applicant.

In this regard, I further find that the elaborate procedural requirements of the foregoing statutory provisions are intended and do promote transparency in the management of public finance, which is a constitutional requirement as set out in article 201 of the 2010 Constitution which reads as follows:

“The following principles shall guide all aspects of public finance in the Republic-

(a) There shall be openness and accountability, including public participation in financial matters;.....”

The transparency that is required is intended to promote public confidence in the management of public finance in this sensitive branch of Government.

I have to point out that in the instant application the issue of public participation is inapplicable; for this is an application in which the decree holder is enforcing the judgement rendered by the court in his favour.

I further find as persuasive the decision of this court in *Republic v. Permanent Secretary Office of the President, Ministry of Internal Security & Another ex parte Nassir Mwandu* [2004] eKLR and *Republic v. County Secretary Migori County Government & Another* [2019] e-KLR, *supra*, that compliance with section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules is not meant to relieve the Government from its obligations to satisfy the decrees and orders of the court.

In the premises, I find that the application is incompetent and is hereby struck out.

Issue 2

The ex parte applicant has failed in his application. It therefore follows that the respondent will have the costs of this application.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT KAPENGURIA THIS 19TH DAY OF JULY 2021.

J. M. BWONWONG'A

JUDGE

In the presence of:

Mr Bororio for the ex parte applicant,

And in the absence of Mr Gathi Magwi for and on behalf of the Attorney General for the respondents



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