



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. E003 OF 2021

IN THE MATTER OF THE APPLICATION FOR AN ORDER FOR JUDICIAL REVIEW

(MANDAMUS)

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF ORDER 53 (10 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ARTICLES 1 (1), (2), 2(1)(2), 10(1) (B), 20(1), 211, 231, 271,

28, 73, 156 AND 165 OF THE CONSTITUTION OF KENYA 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. COUNTY SECRETARY COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

2. CHIEF OFFICER FINANCE COUNTY GOVERNMENT OF UASIN GISHU..2ND RESPONDENT

3. COUNTY GOVERNMENT OF UASIN GISHU.....3RD RESPONDENT

AND

PAUL GICHERU t/a GICHERU & COMPANY ADVOCATES.....EX-PARTE APPLICANT

RULING

INTRODUCTION

1. The Ex-parte Applicant herein filed Notice of Motion Application dated 5th October, 2021 seeking orders that;

a) The Ex-parte Applicant be granted an order of mandamus compelling the Respondents to settle the decretal amount/costs plus interests in the following matters;

Eldoret HC Misc. Application No. 160 of 2019 Kshs. 45, 691, 288.00

Eldoret HC Misc. Application No. 116 of 2019 Kshs. 99,870.00

Eldoret HC Misc. Application No. 117 of 2019 Kshs. 105, 180.00

Eldoret HC Misc. Application No. 122 of 2019 Kshs. 992, 730.00

Eldoret HC Misc. Application No. 124 of 2019 Kshs. 201, 886.00

Eldoret HC Misc. Application No. 127 of 2019 Kshs. 115, 950.00

Eldoret HC Misc. Application No. 128 of 2019 Kshs. 209, 931.00

Eldoret HC Misc. Application No. 129 of 2019 Kshs. 141, 600.00

Total Less Interest Kshs. 47,567,435.00

b) The Applicant be awarded the costs of this application.

APPLICANT'S CASE

2. The motion is premised on the grounds set out therein and is supported by the verifying affidavit sworn by Paul Gicheru on 30th August 2021. The deponent depones inter alia that the Ex-parte Applicant and the 3rd Respondent entered into an agreement dated 28th October, 2014 to govern the Advocate/Client relationship that exists between them, and the terms of the agreement were adopted by consent in **ELD HC MISC APPL No. 160 of 2013**. The said agreement was recorded as order of court by consent of the parties and an order to that effect was issued on 10th September, 2015 and related to several other matters which the Ex-parte Applicant has been handling on behalf of the 3rd Respondent.

3. The Applicant further averred that in agreement dated 28th October, 2014, the parties agreed on the amount of the Advocate/Client costs due in **ELD HC PET No. 18 OF 2011** at the sum Kshs. 60,000,000.00 and by a Certificate of Costs against the County Government of Uasin Gishu dated 8th January, 2020 the Court certified that the sum of **Kshs. 45, 691, 288.00** was still outstanding from the Respondents to the Applicants on account **ELD HC PET No. 18 of 2011** which amount remains unpaid to date.

4. The Applicant further averred that in line with the agreement dated 28th October, 2014 and the consent order issued pursuant thereto, the Ex-parte Applicant continues to conduct matters referred to in paragraph (g) of the agreement and several other matters not covered by the agreement and has numerously forwarded the relevant fee notes to the Respondents who have deliberately failed to settle the same notwithstanding the fact that the said matters have almost entirely been successfully prosecuted and or defended by the Applicant and the majority of the court decisions have ended up in favour of the 3rd Respondent.

5. According to the Applicant it is clear from clause (c) of the agreement dated 28th October, 2014 that the parties herein held several meetings and undertook due diligence in respect of the matters which were the subject matter of the agreement before the

same was signed and which confirms that the Applicant's firm undertook the work it had been instructed to undertake with utmost diligence. The Applicant further alleges that the process of authentication went through a thorough audit as evidenced by documents on record and that the Respondents have all along been aware of the non-payment of pending fees.

6. Due to the Respondents' deliberate refusal to comply with their obligation as to the payment of fees, the Applicant decided to subject the following other matters for taxation and the court has issued decisions and Certificates of Costs and fees payable to the Ex-parte Applicant in the following matters as follows;

Rulings/Orders

Ruling in Eldoret HC Misc. Application No. 129 of 2019 On 31/1/2020

Ruling in Eldoret HC Misc. Application No. 117 of 2019 On 21/2/2020

Ruling in Eldoret HC Misc. Application No. 116 of 2019 On 17/4/ 2020

Ruling in Eldoret HC Misc. Application No. 124 of 2019 On 17/4/2020

Ruling in Eldoret HC Misc. Application No. 127 of 2019 On 17/4/2020

Ruling in Eldoret HC Misc. Application No. 128 of 2019 On 17/4/2020

Certificate of Costs

Eldoret HC Misc. Application No. 116 of 2019 Kshs. 99,870.00

Eldoret HC Misc. Application No. 117 of 2019 Kshs. 105, 180.00

Eldoret HC Misc. Application No. 122 of 2019 Kshs. 992, 730.00

Eldoret HC Misc. Application No. 124 of 2019 Kshs. 201, 886.00

Eldoret HC Misc. Application No. 127 of 2019 Kshs. 115, 950.00

Eldoret HC Misc. Application No. 128 of 2019 Kshs. 209, 931.00

Eldoret HC Misc. Application No. 129 of 2019 Kshs. 141, 600.00

7. The Ex-parte Applicant contends that the Respondents have neither challenged the consent order or any of the decisions relating to the taxation of costs in court and are therefore under a legal obligation to honour them. According to the Applicant it is only an order of Mandamus that can compel the Respondents to pay debts when they fail to do so.

8. The Applicant urged court to compel the Respondent to pay the outstanding balance Kshs. 47,567,435.00 plus interest since the delay in doing so is inordinate, is unjustifiable and is wholly attributable to the Respondents. The Applicant further averred that according to the demand letter dated 30th June, 2020 the outstanding amount of costs plus interest as on that date is at the sum of Kshs. 77,576,930.00

RESPONDENTS' CASE

9. The application was opposed through an affidavit sworn on 18th October, 2021 by Silas Rono, the Respondents' Director for Payments. He averred that the Ex-parte Applicant is empaneled by the 3rd Respondent as one of the external legal service providers and was also acting for the defunct Municipal Council of Eldoret and Wareng County Council. In the course of acting for those Councils as well as the Current Uasin Gishu County Government, the Applicant has raised its fees notes for settlement and the same have been settled over time.

10. According to the Respondents vide a Consent agreement dated 28th October, 2014, the Ex-parte Applicant and the 3rd Respondent entered into a contract for the payment of legal services that the Ex-parte Applicant had offered the now defunct Municipal Council of Eldoret to a tune of Kshs.60,000,000.00. The Respondents further contend that the aforementioned agreement dispensed off with all the other matters that the Ex-parte Applicant was handling on behalf of the defunct Municipal Council of Eldoret and was adopted as an order of the Court on 10th September, 2014.

11. According to the Respondents, in compliance with the orders of 10th September, 2014, on 4th November, 2014 the Respondents paid the Ex-parte Applicant a sum of Kshs. 15,000,000.00. vide the Applicant's Trans- National Bank Account Number 1000004274. Further that on 14th January, 2015 the Respondents made a further payment of Kshs. 15,000,000.00 to the Ex-parte Applicant's Trans- National Bank Account.

12. The Respondents further contend that vide a letter dated 9th February, 2015 the Ex-parte Applicant acknowledged and confirmed receipt of Kshs. 30,000,000.00 from the Respondent and demanded the balance of Kshs. 30,000,000.00 together with an interest of Kshs. 1,429,249.00.

13. The Respondents further averred that on 20th February, 2015 a further payment of Kshs. 15,000,000.00 was made to the Ex-parte Applicant's Trans- National Bank Account. The Respondent further averred that on 22nd February, 2016 a sum of Kshs. 7,000,000.00 was paid to the Ex-parte Applicant's Trans-National Bank Account. On 14th March, 2016 a final payment of Kshs.7,000,000.00 was paid to the Ex-parte Applicant's Trans-National Bank Account.

14. It is the Respondents' case that the certified amount owed to the Ex-parte Applicant being Kshs. 45,691,288.00 has already been settled as demonstrated above and that the terms of the agreement have been fulfilled and there is nothing owing to the Ex-parte Applicant arising from that consent. The Respondents urged court not to dismiss the application.

15. Both parties filed written submissions.

DETERMINATION

16. I have carefully considered the application, the affidavits and the submissions filed as well as the authorities relied upon.

17. The requirements for an order of mandamus to issue were explained by Mativo J. in **Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another** [2018] eKLR as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General), [23] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).^[24] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

i. A prior demand for performance;

ii. A reasonable time to comply with the demand, unless there was outright refusal; and

iii. An express refusal, or an implied refusal through unreasonable delay;

iv. No other adequate remedy is available to the Applicants;

v. The Order sought must be of some practical value or effect;

vi. There is no equitable bar to the relief sought;

vii. On a balance of convenience, mandamus should lie

18. The issue therefore that require to be determined is whether the Respondents are under a legal duty and obligation to pay the sums certified in the various certificates of costs which are in favour of the *Ex- Parte* Applicant. An order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed.

19. In the present case, the Ex-parte Applicant alleges that the decretal sum due from the Respondents being Kshs. 47,567,435.00 is still outstanding on account of **ELD HC PET NO. 18 of 2011** which amount remains unpaid to date. The Applicant has further submitted that in line with the agreement dated 28th October, 2014 and the consent order issued pursuant thereto, the Applicant continues to conduct matter referred to in paragraph (g) of the agreement and several matter not covered by the agreement and has numerously forwarded the relevant fee notes to the Respondents who have deliberately failed to settle the same notwithstanding the fact that the said matters have almost entirely been successfully prosecuted and or defended by the Applicant and the majority of the court decisions have ended up in favour of the 3rd Respondent.

20. The Respondents on the other hand, contend that the amount owed to the Respondent being Kshs. 45,691,288.00 has already been settled as demonstrated. The Respondent has produced payment vouchers as proof of payment.

21. Both the Applicant and the Respondents have provided evidence of an order dated 10th September, 2015 issued in **ELD HC MISC. APPL NO. 160 of 2013**. The question that therefore needs to be answered is whether the certificate of costs that were made after the consent order that was made on 10th September, 2015 should be imposed on the Respondents.

22. It is not disputed that in the present case the parties herein on 28th October 2014 entered into an agreement for the payment of legal fees emanating from legal services that the Ex-parte Applicant had offered the Respondents herein to the tune of Kshs.60,000,000.00.

23. It is also not disputed that the aforementioned consent was adopted as an order of the court on 10th September, 2014.

24. In **Hirani V. Kassam [1952] 19 EACA 131** the Court of Appeal held;

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no

suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

25. The Respondents have argued that all the outstanding monies owed to the Ex-parte Applicant in the **Certificate of costs** issued in **Eldoret HC Misc. Application No. 160 of 2019** being **Kshs. 45,691,288.00** were paid in full vide bank cheques that were deposited to the Ex-parte Applicant’s account in Trans-National Bank Limited under Account No. 10xxxxxxx an assertion that the Ex-parte Applicant has denied stating that Trans- National Bank Ltd no longer exists as it now operates under the name Access Bank Plc where he holds an account currently. In fact, Trans National Bank has written a letter to the Ex-parte applicant stating that they do not have Account No.10xxxxxxx in the name of the Ex-parte applicant. However, there is prima facie evidence that certain payments were made by the Respondents to the Ex-parte Applicant, but which the Ex-parte Applicant vehemently denies receipt of.

26. In my view, mandamus order can only apply where there exists a legal duty to pay a decretal sum. That duty, once discharged by the Respondents, is extinguished and cannot be done again.

27. On the other hand, the Exparte applicant is entitled to be paid his fees. There is no other way of extinguishing the right of the Ex-parte Applicant except by an Order f Mandamus where the duty to pay has not been satisfied.

28. Clearly, one of the parties is not telling the Court the whole truth. The amount of money involved is huge; if the Respondent has indeed already paid it, it cannot pay it twice; and if the Ex-parte applicant has not been paid, he cannot loose it. The only way to deal with this issue is to separate the certificates of costs in this application and direct payment for certificates which should be paid. As for the certificate in Eldoret Misc. Appl. No.160 of 2019 for kshs.45,691,288/- there is a need to verify the alleged payments and how they were made, and to whom, when. The denial of receipt of payment by the Ex-parte Applicant must also be subjected to scrutiny. Therefore, in order to determine the dispute arising from the Certificate of costs issued in **Eldoret HC Misc. Application No. 160 of 2019** being **Kshs. 45,691, 288.00**, parties are hereby required to establish the same by way of *viva voce* evidence and cross-examination of witnesses, and filing of further or supplementary affidavits and documents, if need be.

29. The Ex-parte applicant has also annexed copies of certificate of costs issued in; **Eldoret HC Misc. Application No. 116 of 2019, Eldoret HC Misc. Application No. 117 of 2019, Eldoret HC Misc. Application No. 122 of 2019, Eldoret HC Misc. Application No. 124 of 2019, Eldoret HC Misc. Application No. 127 of 2019, Eldoret HC Misc. Application No. 128 of 2019 and Eldoret HC Misc. Application No. 129 of 2019**. It is noted that although the Respondents disputed these certificates, that fact is irrelevant at this stage. Those certificates went through the due process of taxation, and the Respondents cannot now challenge them. Further, there is no allegation or evidence that those certificates have been paid. The only remedy available to the Ex-parte Applicant is that of mandamus to compel the County Government of Uasin Gishu to settle the said certificates.

30. I am alive to the provisions of Section 21 (3) of the Government Proceedings Act, Cap 40, Laws of Kenya which in this case, impose a statutory duty on the Accounting Officer of the 3rd Respondent to pay the amount of money specified in the said certificate of costs to the person so specified or his Advocate, together with any interest that may have accrued. I am satisfied that in the circumstances of this case, that the Ex-parte applicant is entitled to the orders sought.

31. I therefore make the following orders:

a. An order of Mandamus is hereby issued to the Respondents compelling them to pay the Ex-parte applicant the decretal sum of Kshs. 1,876,147.00 awarded to him in Eldoret HC Misc. Application No. 116 of 2019, Eldoret HC Misc. Application No. 117 of 2019, Eldoret HC Misc. Application No. 122 of 2019, Eldoret HC Misc. Application No. 124 of 2019, Eldoret HC Misc. Application No. 127 of 2019, Eldoret HC Misc. Application No. 128 of 2019 and Eldoret HC Misc. Application No. 129 of 2019.

b. Interest at court rates as from date of the respective rulings, until payment of the decretal amounts in full; and

c. The Certificate of Costs issued in Eldoret HC Misc. Application No. 160 of 2019 being Kshs. 45,691,288.00 to be determined by way of *viva voce* evidence and cross-examination of witnesses.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF DECEMBER 2021.

E. O. OGOLA

JUDGE



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