



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**JUDICIAL REVIEW NO. 2 OF 2020**

**IN THE MATTER OF P.M.C.C. NO. 90 OF 2016, NKUBU**

**IN THE MATTER OF JUDICIAL WRIT MANDAMUS BETWEEN**

**SABINA ZAVERIO MASA KU .....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY, COUNTY**

**GOVERNMENT OF MERU.....1<sup>ST</sup> RESPONDENT**

**THE LEGAL OFFICER, MERU COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE FINANCE SECRETARY**

**COUNTY GOVERNMENT OF MERU .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The ex parte applicant seeks judicial review orders of mandamus by notice of motion dated 17.2.2020 filed after leave was granted on 30.2.2020 to compel the respondents to honour a decree for KShs. 1,674,875 issued in **Nkubu PMCC No. 9/2016** on 18/7/2018.
2. The application is based on the statement of facts dated 5.2.2020, a supporting affidavit sworn on 17.2.2020 attaching a decree thereof, certificate of costs dated 9.12.2019, certificate of order against the County Government and a notice to execute dated 11.10.2019 respectively.
3. By a replying affidavit of **Irah Nkuubi** sworn on 22.7.2020 on behalf of the 2<sup>nd</sup> respondent the motion is opposed on the grounds that though aware of the decree, the reason for not honouring was lack of budgetary allocation during the financial year 2019/2010; that the same would be factored and honoured in the next financial year upon authorization by the County Assembly in line with the **County Government Act**.
4. **Order 53 Rule (1) 2** requires a chamber summons shall be accompanied by a statement, and an affidavit verifying the facts relied upon.
5. Upon grant of leave **Order 53 rule 4** requires the statement and copies of any affidavit accompanying the application for leave be supplied to the parties. **Order 53 Rule (1) (2)** has also been amended by **LN. 22 of 26<sup>th</sup> February 2020** in which the verifying affidavit has to include details as to whether there are any pending suits between the parties.
6. In **Commissioner General, Kenya Revenue Authority thro' Republic –vs- Silvano Onema Owaki T/A Marenga Filling Station**, the Court of Appeal held it is a verifying affidavit which is of evidential value in an application for judicial review, as per **Order 53 rules 1 (2) & (4)**.
7. My understanding is that facts must exclusively be contained in a verifying affidavit and whose omission makes the application and proceedings fatally defective as was held in **Tana River Pastoralists Development Organization & 4 Others –vs- National Environment Management authority & 6 Others [2009] eKLR**.
8. However, it should also be noted the **Tana River Pastoralists cases (supra)** was determined pre-2010 Constitution and before judicial review was elevated into a constitutional right governed by **Article 22, 23 and 47 of the Constitution**.

9. In light of the above developments and given a constitution must under Article 259 be interpreted, as if law is always speaking. I am constrained to find the omission curable under **Articles 22 and 159 of the Constitution** as read together with **Section 1A and 1B of the Civil Procedure Act**. The supporting affidavit to the motion sworn on 17.2.2020 suffices under the circumstances.

10. Turning to the merits of the application in ***Kenya National Examination Council –vs- Republic [1997] eKLR***, the Court of Appeal held an order of mandamus is of remedial nature, as a command requiring a particular thing to be done in a nature of a public duty.

11. Applying the above law, a valid decree of the lower court was issued and has not been honoured for alleged reasons that there was lack of budgetary allocation during the FY 2019/20.

12. The respondents have admitted indebtedness to the exparte applicant. The decree is dated 9.12.2019. The replying affidavit is sworn on 22.7.2020, which is in another government financial year. There is no indication when the decree shall be honoured.

13. The 1<sup>st</sup> & 3<sup>rd</sup> respondents are the ones statutorily required to pay and have not specifically responded to the motion. The 1<sup>st</sup> and 3<sup>rd</sup> respondent have shown no steps to honour the decree as per **Section 44 (3) of the County Government Act 2012**.

14. The exparte applicant has pleaded compliance with the requirements of **Order 29 of Civil Procedures Rules and Section 21** of the Government Proceedings Act by supplying all the necessary documents to the respondents.

15. Liability is not disputed, as held in ***Mwinyi Swaleh Mwarika –vs- County Secretary, County Government of Mombasa & 2 Others [2021] eKLR***, and hence there are no good reasons given for the lack of payments.

16. In the circumstances I find the motion merited. The same is allowed with costs to the exparte applicant.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

**NO APPEARANCE FOR PARTIES**

**COURT CLERK: KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**