



Republic v Attorney General; Muslims for Human Rights & another (Exparte Applicants) (Judicial Review Application E023 of 2022) [2024] KEHC 16879 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 16879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E023 OF 2022**

OA SEWE, J

JULY 26, 2024

**IN THE MATTER OF AN APPLICATION TO APPLY FOR
ORDERS OF JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

**IN THE MATTER OF THE COSTS TAXED IN
MOMBASA HIGH COURT PETITION NO. 19 OF 2015**

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS EXPARTE APPLICANT

HAKI AFRICA EXPARTE APPLICANT

JUDGMENT

1. Upon being granted leave on the 20th September 2022, the ex parte applicants (hereinafter, the applicants) filed the Notice of Motion dated 3rd October 2022. The application is expressed to have been filed pursuant to Sections 1A and 1B of the *Civil Procedure Act* and Order 53 Rules 3, 4, 5 and 6 of the Civil Procedure Rules for the following orders:
 - (a) That the Court do grant the applicants an Order of Mandamus compelling the Attorney General, the respondent herein, to pay the applicants their costs awarded in Mombasa High Court *Petition No. 19 of 2015*: Muslims for Human Rights & another v the Inspector General



of Police & others amounting to Kshs. 9,621,022.60 plus interest from the date of the award to the date of payment.

- (b) That the costs of the application be provided for.
2. The application was premised on the grounds that on 12th November 2015 the Court pronounced its judgment in respect of Mombasa High Court Petition [No. 19 of 2015](#): Muslims for Human Rights & another v the Inspector General of Police & others in which the Court directed the Inspector General of Police, the Cabinet Secretary, Ministry of Interior and Coordination of National Government, the Director of Public Prosecutions and the Central Bank of Kenya to pay the ex parte applicants the costs of their petition through the Office of the Attorney General, who was the 3rd respondent in the petition aforementioned and is the respondent in the instant application.
 3. The applicants further averred that the costs were duly taxed by the Taxing Officer of the Court at Kshs. 9,621,022.60 vide a ruling dated 30th June 2016. The ex parte applicants further stated that, in spite of several demands for payment of the said amount, the same remains unpaid to date; hence the instant application.
 4. The application was supported by the affidavit of Mr. Yusuf Mahmoud Aboubakar, an Advocate of the High Court, who had conduct of the petition on behalf of the applicants. He essentially reiterated the grounds aforementioned and exhibited, as annexures to his affidavit, copies of the documents filed in support of the application for leave. The documents include a copy of the judgment in Petition [No. 19 of 2015](#), the Ruling on Taxation delivered on 30th June 2016 by the Deputy Registrar, the Certificate of Costs in the sum of Kshs. 9,621,022.60 as well as a copy of a demand letter date 23rd July 2016.
 5. The application was opposed by the respondent. The respondent relied on the Grounds of Opposition dated 31st October 2022, and contended that:
 - (a) the application is scandalous, vexatious and an abuse of the court process;
 - (b) The Court in Mombasa High Court Constitution Petition [No. 19 of 2015](#): Muslims for Human Rights & another v the Inspector General of Police and others did not award cost against the respondents.
 - (c) The Court in Mombasa High Court Constitution Petition [No. 19 of 2015](#): Muslims for Human Rights & another v the Inspector General of Police and others did not award interest on costs.
 - (d) Interest on costs is not awardable unless specifically ordered by the trial cost that awarded costs.
 6. The application was canvassed by way of written submissions, pursuant to the directions given herein on 24th May 2023. Accordingly, the applicants filed their written submissions dated 29th May 2023 in which they reiterated their stance that they were awarded costs in Petition [No. 19 of 2015](#) and that the costs were thereafter taxed in the sum of Kshs. 9,621,022.60. The applicants invoked Sections 17 and 20 of the [Government Proceedings Act](#) as the provisions that give the Court the power and jurisdiction to award costs and interest in civil proceedings against the Government.
 7. The applicant also relied on Section 21(4) of the [Government Proceedings Act](#), Order 29 Rule 2(2) of the Civil Procedure Rules and HCJRA No. E009 of 2021: Harry Kitula Mumo v The County Executive Member in charge of Finance & Economic Planning, County Government of Mombasa & Others, to demonstrate that the application is warranted; and that the applicants have met the requirements for the grant of the orders sought.



8. In the written submissions dated 28th June 2023, the respondent did not deny that costs were awarded to the applicants in Petition No. 19 of 2015. The respondent's contention is that the costs were awarded against the 1st, 2nd, 4th and 6th respondents, save that the costs were to be paid through the respondent (the 3rd respondent in the Petition). The respondent further submitted that, since the trial court did not order for interest on costs, the same cannot be claimed in this suit, which is essentially an enforcement action.
9. I have given due consideration to the application, its supporting affidavit and the documents relied on by the applicants. I have similarly considered the response by the respondent as well as the written submissions filed by the parties. There is no dispute that the applicant obtained judgment in its favour in Mombasa Constitutional & Human Rights Petition No. 19 of 2015. One of the orders made in that Petition was for the payment of costs. It reads:
- “(5) The First, Second, Fourth and Sixth Respondents shall bear the Petitioners’ costs through the Office of the Third Respondent.”
10. Likewise, there is no dispute that the costs were thereafter taxed and certified by the Taxing Officer of the Court. A copy of the ruling and the Certificate of Costs were exhibited as annexures to the applicant's Supporting Affidavit. There being no indication that the said Certificate of Taxation was set aside on appeal or review, I find as a fact that the sums aforementioned are indeed owing from the 1st respondent to the applicant.
11. Needless to say that Mandamus is a relief available to litigants under Article 23(3)(f) of the Constitution as well as Order 53 of the Civil Procedure Rules. Its scope was well explicated in Halsbury's Laws of England, 4th Edition, Volume 1 thus:
- “The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual...”
12. As was pointed out in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza* [2012] eKLR, the applicants have no other way of realizing their costs. In that case, Hon. Githua, J, aptly stated:
- “Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon



Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

13. Hence, the issues arising for determination are whether the applicant has fulfilled the requirements of Section 21 of the *Government Proceedings Act*; and whether the Attorney General is the correct party to look to for the payment of costs.

14. Section 21 of the *Government Proceedings Act*, sets out the procedure preceding payment of a debt owed by the Government. It stipulates thus in Sub-Sections (1) and (2):

“(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.”

15. Further to the foregoing, Subsections (3) and (4) of Section 21 of the *Government Proceedings Act* state:

“(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.”

16. In addition, Order 29 Rule 3 of the Civil Procedure Rules states:

“Any application for a certificate under section 21 of the *Government Proceedings Act* (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.”

17. The rationale for this stringent procedure was well captured in *Kisya Investments Ltd v Attorney General & Another* [2005] 1 KLR 74 thus:

“History and rationale of Government’s immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. See Halsbury’s Laws of England 4th Edn VOL. 11 P 970, 971 and 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. See *Auckland Harbour Board v R* [1924] AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The



Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.” (also see Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandishi, supra)

18. It is significant therefore that no such certificate was attached to the instant application. Such a serious omission only goes to show that the application was prematurely filed.

19. It is also plain from Section 21(3) of the *Government Proceedings Act* that the person responsible for ensuring payment is the Accounting Officer of the government entity concerned. I find succor in this posturing in Republic v Attorney General & another Ex parte Orbit Chemicals Limited [2017] eKLR, wherein Hon. Odunga, J. (as he then was) had occasion to consider the provisions of Section 21 of the *Government Proceedings Act* with a view of ascertaining who is under a legal obligation to satisfy a judgment against the Government. Here is what the learned Judge had to say:

“ 27. It is therefore clear that in applications for mandamus seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the fact that the said officer was not a party to the trial proceedings and that in fact the only defendant therein was the Attorney General.... that it is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client and that being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf; I however do not subscribe to the view that if any costs or liability accrues from his representation, he is obliged to pay the same and that if a particular organ refuses to pay he will be responsible on behalf of his agent.”

20. Similarly, in James Samuel Mburu v Attorney General & another [2017] eKLR, it was held: -

“ 31. I agree with the respondent's counsel's submissions on this issue entirely for reasons that unless the Attorney General is sued for acts or omissions committed or omitted to be done by his office as established under Article 156 of *the Constitution* and as operationalised by the Office of the Attorney General Act, the Attorney General being the Principal Legal advisor to the Government remains just that in all representative legal proceedings where other Government or State Department are sued but in the name of the Attorney General.

21. Indeed, the Court in *Petition No. 19 of 2015* ordered that the costs be paid by the 1st, 2nd, 4th and 6th respondents in that Petition through the 3rd respondent. The Court did not say that the costs be paid by the 3rd respondent. It is therefore plain that by seeking an order of Mandamus against the respondent the applicant's application is misconceived.

22. In the premises, the Notice of Motion dated 3rd October 2022 is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF JULY 2024

OLGA SEWE



JUDGE

