



**Mwenda t/a Mwenda & Company Advocates v Coounty Secretary, Tharaka
Nithi County Government & 3 others (Miscellaneous Civil Application
E032 of 2023) [2024] KEHC 11538 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 11538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS CIVIL APPLICATION E032 OF 2023**

LW GITARI, J

AUGUST 22, 2024

**IN THE MATTER OF: ORDER 53 RULE (1) (2) OF THE CIVIL PROCEDURE
RULES AND SECTION 8 OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA**

AND

**IN THE MATTER OF: APPLICATION FOR LEAVE
TO APPLY FOR AN ORDER OF MANDAMUS**

AND

IN THE MATTER OF APPLICATION BY:-

BETWEEN

**CICILIO MURANGO MWENDA T/A MURANGO MWENDA & COMPANY
ADVOCATES EXPARTE APPLICANT**

AND

**THE COOUNTY SECRETARY, THARAKA NITHI COUNTY
GOVERNMENT 1ST RESPONDENT**

**THE CHIEF OFFICER FINANCE, THARAKA NITHI COUNTY
GOVERNMENT 2ND RESPONDENT**

THARAKA NITHI COUNTY GOVERNMENT 3RD RESPONDENT

**THE CHIEF ACCOUNOTANT, THARAKA NITHI COUNTY
GOVERNMENT 4TH RESPONDENT**



RULING

1. The background of this matter is that the *ex-parte* applicant filed an advocate client Bill of Costs *vide* High Court Miscellaneous Application No.E004/2022 which proceeded before the Deputy Registrar as the Taxing Master of this court. The bill was taxed at Ksh.14,859,368/- on 22/12/2022. A certificate of costs was issued by the Deputy Registrar and the applicant served the respondent and demanded the respondent pay the taxed costs. The 1st respondent failed to pay the taxed costs prompting the applicant to file Judicial Review proceedings for an order of Mandamus compelling the 1st respondent to pay.
2. On 12/2/2024 this court issued an order of Mandamus compelling the respondents herein to pay to the *ex-parte* applicant the sum of Ksh.14,859,368/- together with interests at 14% per annum from 22/12/2022 as per the certificate of Taxation issued by the Deputy Registrar in High Court Miscellaneous Application No.E004/2022 within thirty days of the issuance of the order and in default the respondents shall be held to be in contempt of the court orders.
3. This order was entered by consent on 12/2/2024 between the applicant and the County Attorney in the Notice of Motion dated 23/11/2023 where it was agreed that an order of mandamus be issued compelling the respondents herein to pay Ksh.14,859,368/- together with interests at 14% from 22/12/2022 as per the certificate of taxation within 30 days from the date of issuance of the order and in default the respondent shall be held in contempt.
4. The applicant then moved the court to issue a notice to show cause against the respondents to show cause why they should not be committed to civil jail for failing to comply with the orders of this court. The respondents failed to attend court and the applicant applied for warrants of arrest. The application was opposed and the counsel for the respondents informed the court that they were willing to pay and had already paid a substantial amount of Ksh.3,000,000 to the applicant. The court declined to issue warrants of arrest and ordered that they be served with summons to appear in court. The respondents appeared in court on 30/7/2024 and the applicant applied that they be committed to civil jail for failing to comply with orders of this court. The respondent opposed the application and stated that the money is not held by the officers of the respondents but is held in the accounts of the County. That they expected some disbursements when the consent order was entered and had expected to settle the Judgment. He submitted that it was improper for the counsel to enforce contempt of the court orders. He further submitted that he had instructions to vary the consent orders to enable the respondents pay installments of Ksh.500,000 and present the bank statements. The counsel for the applicant opposed the proposal and urged the court to stamp its authority and compel the respondent to comply with the consent orders.
5. I have considered the application. The issue for determination is whether the officials of the County Government are individually liable to settle the money owing to the applicant. The respondents against whom the notice to show cause is addressed are officers of the Tharaka Nithi County who hold the Offices of County Secretary, Chief Officer Finance and the Chief Accountant. Tharaka Nithi County is one of the counties in Kenya established under Article 6 of *the Constitution* and the 1st schedule of the Constitution. Execution against the Government must be done in accordance with the *Government Proceedings Act*. The question as to whether the *Government Proceedings Act* applies to



County Government was considered by Justice Ondunga (as he then was) in *Republic –v- Attorney General and Another Exparte Stephee Wanyee Roki* (2016) eKLR and he held as follows:-

"Although the provisions of the *Government Proceedings Act* do not expressly refer to County Government Section 7 of the 6th Schedule to *the Constitution* (Transitional and Consequential Provisions) provides that:

Law in force immediately before the effective date continue in force and shall be construed with alterations, adaption, qualification and exceptions necessary to bring it into conformity with the this constitution. It follows that the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with *the constitution*. One such construction would be the reality that the Government is now at two level and Article 189 (1) (a) of *the Constitution* requires the constitutional status and institutions of Government at both the National and County levels be respected. In my view, such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings."

6. I am persuaded by the decision and well guided as it is well established that Kenya now has two levels of Government at the National level and at the County level. The office of the County officers is established under Section 45 of the County Government Act which provides as follows:-

“ The Governor shall-

- a. Nominate qualified and experienced County Chief Officers from among the persons competently sourced and recommended by the County Public Service Board, and
- b. With approval of the County Assembly appoint County Chief Officers.”

7. The 1st, 2nd 3rd & 4th respondents are officers of the County Government. As to whether the applicant can execute or enforce the orders against the respondents, Section 45(2) of the *County Government Act* provides that-

The office of the County Chief Officer shall be an office in the County Public Service.

- 3) A County Chief Officer shall be responsible to the respective County Executive Committee Members for the administration of a County Department as provided under Section 46. The County Chief Officer shall be authorized officer in respect of the exercise of the delegated power.”

8. These are the officers of the County in charge of the operations of the Public Service and the Treasury, See Section 103 of the *Public Finance Management Act* No.18/2012. The respondents are therefore responsible for satisfaction of court orders and decree on payment of money owed by the County of Tharaka Nithi. However the law does not impose liability to pay on any of the officers individually. Section 21(4) (5) of the *Government Proceedings Act* provides:-

"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) Provides for application of the section with necessary modifications to apply to any Civil Proceedings by or against the County Government or in any proceedings in connection with any arbitration in which a County Government is a party. The procedure for payment is laid down under the section and the section gives the court discretion to suspend any amount payable. Section 21(1) (2) & 3 of the [Government Proceedings Act](#) provides:

- (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."

The Court of Appeal in [Kisya Investment Ltd -v- AG](#) (2005) 1 KLR 74 stated as follows:-

Order 28 rules 2(1) (a) (2) (4) of the [Civil Procedure Rules](#) subject themselves to the provisions of the [Government Proceedings Act](#) which includes provisions



prohibiting execution against Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written Law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.....

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 three fold 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.
9. The satisfaction of a decree is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in Government 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 deputed out of moneys provided by Parliament Parliamentary Control over expenditure is based upon the principle that all expenditure must rest upon legislature authority and no payment of public funds is legal unless it is authorized by Statute and any authorized payment must be recovered The second situations that one once a decree or Judgment is obtained against the Government it would be required some reasonable time to be forwarded to the Ministry of Finance the Treasury, Controller and Auditor General etc for scrutiny and approval for it to be paid from consolidated fund.....”
10. The law as it prohibits execution against the Government by attachment of assets and property. It also prohibits execution of the decree against the officers of the government. The procedure for obtaining orders of *mandamus* serves to give adequate notice under the [Government Proceedings Act](#) for the entity to make arrangements to satisfy the decree. The order of *Mandamus* is a command issuing from the High Court directed to a person, an entity to do a particular thing as specified in the order. In this case the order of mandamus was directed to the County Government of Tharaka Nithi.
11. The respondents are officers of the County Government and Section 21(4) of the [Government Proceedings Act](#) and Order 29 rule 2(2) (b) [Civil Procedure Rules](#) prohibits the execution of the decrees against the officers of County Government and the Government. The Notice to show cause and the application for their warrants of arrests was not properly made. The application for the officers to show cause why they should not be committed to civil jail was irregular and illegal as it is contrary to law. It would therefore be irregular to order the respondents to be committed to civil jail when the law prohibits their being held individually liable. For these reasons I find that the notice to show cause and application to commit them to civil jail cannot be well grounded as it is contrary to the law. I therefore decline to issue the orders sought by the applicant. The applicant should follow the laid down provisions of the law to have the monies paid to him.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF AUGUST 2024.

L.W. GITARI

JUDGE



22/8/2024

Mr. Murango for Applicant

Mr. Mwendani for Respondent

Ruling has been read out in open court.

L.W. GITARI

JUDGE

22/8/2024

