



**Republic v Ministry of Labour & Social Protection; Ojienda
& Company Advocates (Exparte) (Application E023 of 2021)
[2024] KEHC 10128 (KLR) (Judicial Review) (15 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW
APPLICATION E023 OF 2021**

**J NGAAH, J
AUGUST 15, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

MINISTRY OF LABOUR & SOCIAL PROTECTION RESPONDENT

AND

OJIENDA & COMPANY ADVOCATES EXPARTE

JUDGMENT

1. The applicant’s application is a motion dated 1 March 2021 seeking orders that:
 1. That this application be certified urgent service be dispensed with and heard ex part in the 1st instance.
 2. That this Honourable Court be pleased to grant and (sic) order of mandamus compelling the ministry of labour and social protection to comply with the court order issued on the 1st October 2019 directed at the respondent to settle the applicants taxed fee of Kshs. 226, 982/= in Civil Application No. 697 of 2009.
 3. That in default, this Honourable Court be pleased to issue notice to show course(sic) do issue(sic) against the cabinet secretary in charge of the Ministry of Labour and Social Protection to show cause why (sic) they should not be cited for contempt of court.
 4. That the cost of this application be borne by the respondent.”



2. The applicant, which is a firm of advocates, has not cited any provision of the law upon which its application is filed. It is, however, based on a statutory statement dated 18 February 2024 and an affidavit verifying the facts relied upon sworn on even date by Seth Ojienda Esq. who has sworn that he is the proprietor of the applicant firm.
3. According to these documents, the applicant's bill of costs against the respondent was taxed at Kshs. 226,982/= in this Honourable Court's Civil Application No. 697 of 2009. A certificate of taxation to that end was extracted on 1 October 2019. Despite the respondent having been served with the certificate of taxation, no payment has been made in satisfaction of the amount due to the applicant. It is for this reason that the applicant seeks the order of mandamus against the respondent.

The respondent did not file any response.

4. Enforcement of orders or decrees against the government is provided for under section 21 of the [Government Proceedings Act](#), cap. 40, which reads as follows:

21. Satisfaction of orders against the Government

- (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.
5. Under section 21(1), an officer of the court whom the law describes as “the proper officer of the court” is enjoined to issue a certificate in a prescribed form containing particulars of an order by the court for payment of costs, among other orders that the court is eligible to make. But the certificate will only be issued upon application by the party in favour of whom the order has been issued. To the extent that “the proper officer of the court” is enjoined to issue the certificate, it is a mandatory document. And since it can only be issued on application by a party in whose favour the order has been made, the application for the certificate is equally mandatory.
 6. According to section 21(2) service of the certificate on the Attorney General appears to be within the discretion of the party in whose favour the certificate has been issued. However, a party in whose favour the order has been issued would not go to great lengths applying for the certificate and, the proper of the court would not be enjoined by the law to issue the certificate for the sake it.
 7. The point is an application for the certificate and its issue are not futile exercises or exercise in vain for, under section 21(3) of the Act, the certificate serves a specific purpose: it is on the basis of the certificate that the accounting officer for the Government department concerned makes the payment due to the person or party in the proceedings in whose favour the order was made and the certificate issued. This is what I understand to be the meaning of “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...”
 8. Apart from providing the particulars of the amount payable, the certificate, in a sense, authorises the accounting officer to make the payment due to the person that holds the order against the government.
 9. It follows that where one invokes section 21 of the *Government Proceedings Act* to enforce payment against the Government, a certificate of order against Government is mandatory and, for that reason, section 21(2) of the Act which appears to leave it to the holder of the certificate to either serve or not serve it to the Attorney General ought not to be read in isolation; it must be read together with section 21(3) in order to give meaning to section 21 (1), on the need for a certificate of order against Government.
 10. That said, the applicant filed the motion for mandamus to compel the respondent to pay the amount due to it before the certificate of order against government was extracted. I say so because while the application was filed in March 2021, the certificate of order against government was issued on 30 April 2024. What this implies is that the motion for mandamus was made prematurely because at the time it was filed, the accounting officer had not been served with the certificate upon which he could make the payment.
 11. According to Halsbury's Laws of England/Judicial Review (volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

“A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”



And in paragraph 706 of the same treatise, it is stated:

“706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)”

12. Thus, the order of mandamus may be issued in circumstances where there is failure to perform a public duty or failure to exercise discretion or to exercise it according to legal principles.
13. In the absence of the certificate of order against government, the accounting of the ministry concerned could not be said to have failed to perform a public duty with which he is charged and, therefore, susceptible to the order of mandamus when the certificate had not been brought to his attention.
14. It is also apparent that even after the certificate of order against government was extracted, albeit, belatedly, it was neither served upon the Attorney General nor the relevant accounting officer. In a further affidavit introducing the certificate in these proceedings, Ojienda esq. swore as follows:
 1. That I am an Advocate of the High Court of Kenya and the proprietor of Ojienda & Co. Advocates, the ex-parte Applicant, fully conversant with the facts herein hence competent to swear this affidavit.
 2. That the Honorable court made an Order taxing the bill of cost dated 5th August 2019 at Kenya Shillings Two Hundred and Twenty Six Thousand, Nine Hundred and Eighty Two (226, 982.00) in Civil Application N0.697 OF 2009.
 3. That as at the time of filing the instant notice of motion, the Certificate of Order for costs against the Government had not been availed to me.
 4. That the certificate of Order for costs against the Government is now available. Annexed and marked SO I is a true copy of the Certificate of stated costs.
 5. That what is deponed to herein is true to the best of my knowledge information and belief cognizant of the offence of perjury.”
15. It is apparent from this affidavit that no attempt was made to serve either the Attorney General or the accounting officer with the certificate of order against Government.
16. One other thing that I note from the applicant's application is that accounting officer who under section 21(3) of the Act would be charged with the responsibility of making the payment to the applicant, has not been joined to this suit. My reading of this section is that the accounting officer is a necessary party by virtue of the fact that he is the public officer charged with public duty of settling payments such as the one due to the applicant and, for this reason, the order of mandamus would be directed at him. The order will not be made against him if he has not been given an opportunity to be heard. Again, in the event an order of mandamus is granted, the accounting officer would, in ordinary circumstances, be the target in contempt of court proceedings if the order is disobeyed.
17. For the reasons I have given, I hereby hold that the applicant's application is incompetent and misconceived. It is hereby dismissed. Considering that the application is not contested, I make no order as to costs. It is so ordered.



SIGNED, DATED AND POSTED ON THE CTS ON 15 AUGUST 2024

NGAAH JAIRUS

JUDGE

