



**Republic v County Secretary County Government of Tharaka Nithi & 3 others;  
Kingdom Developers Merchants Ltd (Exparte Applicant) (Judicial Review  
E001 of 2021) [2024] KEHC 12332 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12332 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
JUDICIAL REVIEW E001 OF 2021  
LW GITARI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY SECRETARY COUNTY GOVERNMENT OF THARAKA  
NITHI ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE MEMBER OF FINANCE- COUNTY GOVERNMENT OF  
THARAKA NITHI ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER, FINANCE- COUNTY GOVERNMENT OF THARAKA  
NITHI ..... 3<sup>RD</sup> RESPONDENT**

**THARAKA NITHI ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KINGDOM DEVELOPERS MERCHANTS LTD ..... EXPARTE APPLICANT**

**RULING**

1. This is a matter that has taken quite some time in this court as parties tried to settle the matter by consent. The parties failed to reach a meaningful settlement and this has necessitated a decision by this court in the matter.
2. The background of this matter is that sometimes in 2016 applicant was awarded a tender by the County Government of Tharaka Nithi Tender No TNG/39/RDS/2015-2016 for the improvement of Mugwe roads by the County Government of Tharaka Nithi in the sum of Kshs 20,652,872/- The applicant performed his part of the contract by carrying out the Civil Engineering works which were required under the said tender. He was then issued a completion certificates of the said works but the County



Government only paid Kshs 4,576,009.20 of the tender sum leaving a sum of Kshs 16,131,323/- unsettled. The applicant filed a suit in the Chief Magistrate's Court at Chuka claiming the balance of Kshs 16,131,322/- together with costs and interests. The applicant proceeded in the Chief Magistrate's Court and in the end Judgment was entered for the applicant in the sum of Kshs 16,176,722.80 and interests which came to a total decretal sum of Kshs 20,061,274.23. The applicant then moved to this court to enforce the Judgment after the respondents failed to settle the decretal sum.

3. On 23/3/2023 this court allowed the applicants application and issued an order of mandamus directed at the respondents to pay the applicant the sum of Kshs 20,061,274.23 together with interests at 12% per annum from 19/2/2021 till payment in full. What is now pending before this court is a notice of motion dated 6/6/2023 seeking orders that:
  1. That this Honourable court be pleased to commit the respondents herein to civil jail for contempt of court orders issued on 23/3/2023 by this Honorable court.
  2. That costs be in the cause.
4. The applicant seek orders of execution of the orders issued by this court. In Misc. Civil Application No E032/2023 Cicilio Murango Mwenda T/A Murango Mwenda & Co. Advocates v County Secretary Tharaka Nithi County Government & others the issue as to whether the officials of the County Government are individually liable to settle money owing to the applicants was considered and I stated as follows:-

Tharaka Nithi County is one of the counties in Kenya established under Article 6 of the Constitution and the 1<sup>st</sup> 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 Ex parte 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 6<sup>th</sup> 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.”

5. 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.”
6. The 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> 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.”
7. 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 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.

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 defrayed 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.....”

8. The law as it is 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.
9. 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. It therefore follows that the rules applicable to normal execution proceedings are not applicable to the Government. The application which seeks to commit the respondents to civil jail for failing to satisfy the decree issued against the County Government amounts to holding them personally liable to settle the debt.
10. To this end I find that the application is irregular and illegal as it is contrary to the law. For these reasons I find that the application is without merits and is declined. I dismiss the application.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**L.W. GITARI**

**JUDGE**

