



**Republic v County Government of Wajir & another; Omash Investment Limited (Exparte)
(Judicial Review Application E007 of 2021) [2023] KEHC 326 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW APPLICATION E007 OF 2021
FN MUCHEMI, J
JANUARY 26, 2023
IN THE MATTER OF AN APPLICATION FOR
THE JUDICIAL REVIEW ORDER OF MANDAMUS
AND
IN THE MATTER OF THE RESIDENT MAGISTRATES
COURT AT WAJIR CIVIL SUIT MCCC/E1 OF 2020**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF WAJIR 1ST RESPONDENT

**THE CHIEF FINANCE OFFICER, COUNTY GOVERNMENT OF
WAJIR 2ND RESPONDENT**

AND

OMASH INVESTMENT LIMITED EXPARTE

RULING

Brief Facts

1. The *ex parte* applicant was granted leave to apply for Judicial review on June 29, 2021 following which he filed the substantive Motion dated July 8, 2021, seeking for the following orders:-
 - a) An order of *mandamus* be issued to compel the Chief Finance Officer in the county Government of Wajir to pay the *ex parte* applicant the sum of Kshs 3,981,120/- being the decretal amount owed in Civil Suit MCCC/E1 of 2020 in Resident Magistrates Court at Wajir,



together with interest accrued thereon at the rate of 12% per annum from September 11, 2020 being the date of filing until the date of the judgment November 24, 2020.

- b) That the Chief Finance Officer in the County Government of Wajir do comply by satisfying the judgment and interest in Civil Suit MCCC/E1 of 2020 in the Resident Magistrates court at Wajir within fourteen (14) days from the date of service of the order of this honourable court.
2. The respondents indicated in their submissions that they filed a replying affidavit dated March 23, 2022 and served it on the *ex parte* applicant on March 31, 2022 but there is no copy of such affidavit in the court file and the *ex parte* applicant indicated in their submissions that the application is unopposed despite service.

The Ex parte Applicant's Case

3. The *ex parte* applicant states that it instituted a suit in the Resident Magistrates court in Wajir against the 1st respondent for failure by the 1st respondent to pay for borehole drilling services. Consequently, the *ex parte* applicant obtained judgment against the 1st respondent on November 24, 2020 for a sum of Kshs 3,981,120/- plus interest at the rate of 12% per annum which was calculated and certified at Kshs 79,622.40/-.
4. The *ex parte* applicant avers that it served the 1st respondent with the judgment and the certificate of Order against the 2nd respondent. Despite being served, the respondents have remained adamant and wilfully ignored and undermined the judgment of the honourable court by refusing to pay the decretal award. The *ex parte* applicant states that the Chief Finance Officer is the designated accounting officer and in a position to facilitate the payments but has refused to pay and or sanction payment of the decretal awards despite being served with the judgment.
5. Parties disposed of the application by way of written submissions.

The Ex parte Applicant's Submissions.

6. The *ex parte* applicant relies on the cases of *Republic v Town Clerk of Webuye County Council & another* HCCC No 448 of 2006, *Republic v Kenya National Examinations Council ex parte Gathenji and others* [1997] eKLR and Judicial Review Miscellaneous Application No 44 of 2012 *Republic v Attorney General & another ex parte James Alfred Koroso* and submits that *mandamus* is a prerogative order and is issued to compel an official to perform a public duty. The *ex parte* applicant contends that the respondents' failure to comply with the judgment was illegal and thus the court ought to compel them to perform their duty and comply with the judgment in order for the *ex parte* applicant to enjoy the fruits of their judgment. Furthermore, the *ex parte* applicant submits that it was their legitimate expectation that the respondents would comply with the judgment and undertake its duty to pay the sums owing but they did not do so. As such, the *ex parte* applicant contends that they are entitled to an order of *mandamus* as they have demonstrated that there is a judgment against the respondents and the respondents have failed to satisfy the judgment.

The Respondents' Submissions.

7. The respondent relies on section 13A of the *Government Proceedings Act* and submits that proceedings against the government must commence by way of thirty days' Notice of Intention to Sue and pursuant to article 6(2) and 176 of the *Constitution*, county governments form part of the government. The respondent further contends that the *ex parte* applicant has not demonstrated whether a thirty days' notice of intention to sue was issued nor has the applicant shown that they issued a demand letter before commencement of the suit. As such, the respondents state that, that is the reason why civil suit



CMCC/E1 of 2020 was heard and determined in their absence. The respondents further contend that the affidavit of service annexed is not conclusive evidence as the deponent has not proved that he is a duly gazetted court process server.

8. The respondents submit that the *ex parte* applicant has not come to the court with clean hands since they have annexed a ruling on an application under Order 10 Rule 8 but they have not stated how they arrived at the said ruling thus concealing facts. Further, the respondents submit that pursuant to section 25 of the *Civil Procedure Act*, the *ex parte* applicant ought to have extracted a decree before a certificate of order. The respondents reiterate that they were never served with a notice of intention to sue, summons to enter appearance, an application for judgment in default against the government, a copy of the judgment, decree, certificate of order and certificate of costs against the government. The respondents contend that only the process server can prove that there was service although the respondents state that the alleged process server who swore the annexed affidavit of service is not a certified court process server. As such, the respondents state that the application is premature and an abuse of the court process as they have not deliberately failed to comply with the decree.

The Law

9. The Court of Appeal discussed the nature of the remedy of mandamus in *Republic v Kenya National Examinations Council ex parte Gitbinji & 8 others* [1997] eKLR citing with approval Halsbury's Laws of England 4th Vol 7 p 111 para 89:-

The order of *mandamus* is the 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 remedy, yet that mode of redress is less convenient, beneficial and effectual..."These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons had failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

10. In the instant case, the *ex parte* applicant has moved this honourable court to compel the respondents satisfy a judgment already decreed in its favour by a competent court of law. It is not disputed that judgment was entered in favour of the *ex parte* applicant in CMCC No MCCC/E1 of 2020 on November 24, 2020 for the sum of Kshs 3,981,120/- plus interest at court rates from the date of filing the suit to the date of judgment. The issues therefore that require to be determined are whether the respondents are under a public duty and obligation to satisfy the decree and orders in favour of the *ex parte* applicant in the said judgment and if so, whether the *ex parte* applicant is entitled to the relief it seeks.
11. The procedure required to be followed for payment of damages or costs due from the government in civil proceedings are elaborated in section 21 of the *Government Proceedings Act*. It 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.

- (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.

12. Evidently, section 21(3) above provides that the person responsible for the payment of any damages or costs awarded against the government is the accounting officer of the Ministry or public body concerned, who is the one under a statutory duty to satisfy a judgment made by the court against that ministry or body. This position was explained in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* [2012] eKLR as follows:-

In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. 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 Honourable 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 Honourable 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. Although the respondents state that, the process server who swore the annexed affidavit of service is not licensed, but did not annex any evidence to that effect. The court will put that issue to rest and hold that the allegation has not been proved.
14. It was also contended by the respondents that in the suit in the court below, they were not served with the intention to sue, summons to enter appearance, application for judgment in default against the Government, copy of judgment, decree, certificate of costs and certificate of order. Most of the documents mentioned are relevant to the trial suit and not to these judicial review proceedings. However, perusal of the record shows an annexure of the affidavit of service sworn on September 21, 2020 for service of the plaint and the summons to enter appearance on the respondents. These issues of service were addressed in the ruling of the magistrate delivered on 26/10/2020.
15. The relevant documents in these proceedings are the decree, the certificate of costs and the certificate of order. The affidavit of service sworn by the process server on 23/2/2021 shows that service of the certificate of order was served on the Secretary of the County Secretary in his office on February 22, 2021. The applicant deposes that the decree and the certificate of order were served accordingly. However, the said certificate of order was not annexed to the application to prove that it existed in the first place. This omission causes some uncertainty on whether the certificate of order was served. The decree and certificate of costs were also not annexed to the pleadings.
16. In my humble view, the applicant has not demonstrated that he complied with the procedure set out in Section 21 of the Government Proceedings Act and must face the consequences of such omission.
17. It was held in the case of Republic v County Secretary Migori County Government & another [2019] eKLR that:-

Once a party obtains the Certificate of Order and Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the decree, then such a party must satisfy the court of service of those documents upon the party named in the certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the respondents on their advocates.

I therefore have no difficulty in finding that the ex parte applicant has not fully complied for an order of mandamus to be availed. The application is premature and cannot stand.

18. Similarly in the case of Republic v County Secretary, the County Government of Siaya & another ex parte Desh General Traders [2020] eKLR cited the case of Republic v County Government of Nakuru & Another; James Mwangi Muraya (ex parte) [2020] eKLR and stated:-

The *ex parte* applicant has a Decree and a Certificate of Costs. There is no Certificate of Order. There is a specific procedure on how the Certificate of Order required is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules.

Upon obtaining the appropriate Certificates of Costs and Certificate of Order there must be proof of service upon the respondent(s) thereof.



The court finds the *ex parte* applicant has not fully complied with the legal requirements for an order of *mandamus* to be issued in this instance. The application is premature.

19. It is my considered view that the applicant has not met the threshold of granting an order of mandamus. The judicial review application is therefore premature.
20. The notice of motion dated July 8, 2021 is hereby struck out with costs.
21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT GARISSA THIS 26TH DAY OF JANUARY, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 26TH DAY OF JANUARY, 2023.

