



Republic v County Secretary, Nairobi City County & another; Wayrren Enterprises Limited (Interested Party/Exparte Applicant) (Judicial Review Application 98 of 2020) [2023] KEHC 263 (KLR) (Judicial Review) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 98 OF 2020
AK NDUNG'U, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, NAIROBI CITY COUNTY 1ST RESPONDENT
CHIEF OFFICER, FINANCE/COUNTY TREASURER NAIROBI CITY
COUNTY 2ND RESPONDENT**

AND

**WAYRREN ENTERPRISES LIMITED INTERESTED PARTY/EXPARTE
APPLICANT**

JUDGMENT

1. Pursuant to leave of this court granted on June 8, 2022, the *ex-parte* applicant by way of a notice of motion dated June 28, 2022 - under order 53 of the *Civil Procedure Rules*, 2010 - sought for orders:
 - i. That this honourable court be pleased to issue an order of *mandamus* directed to the respondents compelling them to satisfy the decree and certificate of costs in Milimani CMCC No 5591 of 2018 together with interest thereto at the rate of 25% pa from September 13, 2013 until payment in full.
 - ii. That the costs of this application be in the cause.
2. The application was supported by a statutory statement dated May 12, 2020, and a verifying affidavit sworn by Berline Adhiambo, evenly dated.



3. The *ex-parte* applicants case was that a decree and certificate of cost was issued on May 7, 2019. On May 3, 2019 the respondents were duly served with notice of entry of judgment, together with a certified copy of decree, and certificate of costs.
4. Further, that on January 28, 2020 the lower court issued a certificate of order against the respondents which was duly served upon them [respondents]; however, that despite notice being issued to them, the respondents have failed to satisfy the certificate of order issued. The *ex-parte* applicant sought to have the orders be issued as prayed so as to enforce the judgment and decree.
5. In response, and opposing the application, the respondents filed their replying affidavit dated July 29, 2022, sworn by Abwao Eric Odhiambo, the Nairobi city county solicitor-general. The respondents averred that they have neither been served – with notice of entry of judgment, nor decree, nor received any demand for payment of the decretal sum - by the *ex-parte* applicant.
6. However, and notably, the respondents also conceded to the fact that the certificate of order, under order 29 rule 3, taken out in March 2020, was served upon them [respondents] in May 2020. That the service was done when the application for leave to institute judicial proceedings was already made. To the respondents, that service did not comply with section 21 of the [Government Proceedings Act](#).
7. The respondent held the position that the purpose of order 29 [Civil Procedure Rules](#), and section 21 of the [Government Proceedings Act](#) was to give adequate time to the government to pay, which they were not allowed time, in this instant case; thus, that they cannot be said to have refused to pay. That in this case, there was no such demand after issuance of certificate of order, but the *ex-parte* applicant only made service without further explanation.
8. After a careful consideration of the parties' arguments, the issue for determination that arises is: whether the orders of *mandamus* should issue as prayed by the *ex-parte* applicant.
9. It is settled law that before an order of *mandamus* is issued, an applicant must abide by the procedure in section 21 of [Government Proceedings Act](#) which provides:

“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.”

10. Section 21 (3) of the said Act on the other hand provides:

“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.”

11. The circumstances under which judicial review order of *mandamus* are issued were discussed in the case *Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others* Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, Halsbury’s Law of England, 4th Edition. Vol 7 p 111 para 89 thus:

“The order of *mandamus* is of most extensive remedial nature and is in form, of 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.”...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 has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

12. In the instant matter, the *ex-parte* applicant moved this court to compel the satisfaction of a judgment already decreed, in its favour by a competent court of law.
13. From the record filed in the court, there is evidence that certificate of order against the government dated January 28, 2020, was obtained. Additionally, the *ex-parte* applicant maintained that they served the respondents with all the necessary documents. The respondents conceded to having being served with the certificate of order against the government, decree, and the judgment; despite also contradicting the same, in their response.
14. From the foregoing, it is clear that the applicant fully complied with section 21 of *Government Proceedings Act*. In the premises, I am satisfied that the *ex-parte* applicant has made a case for the grant of an order of *mandamus* which I hereby grant the same as prayed in the notice of motion dated June 28, 2022.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023

.....
A. K NDUNG’U

JUDGE

