



**Samic Construction Co Limited v County Government of Kisumu & another
(Judicial Review E021 of 2022) [2023] KEHC 298 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW E021 OF 2022**

JN KAMAU, J

JANUARY 25, 2023

N THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF JUDICIAL REVIEW FOR ORDERS OF MANDAMUS

BETWEEN

SAMIC CONSTRUCTION CO LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

RULING

INTRODUCTION

1. In its Notice of Motion dated October 31, 2022 and filed on November 8, 2022, the *Ex parte* Applicant herein sought an order of mandamus to compel the Respondents to pay the decretal sum of Kshs 4,394,080/= together with Kshs 100,000/= general damages, costs of Kshs 789,501/= and interest in Kisumu Chief Magistrate's Court Civil Case No 558 of 2019.
2. In the Supporting Affidavit of its Director, Samwel Otieno Boy that was sworn on October 31, 2022 June 2022, the *Ex parte* Applicant averred that at the instruction of the 1st Respondent herein, it constructed Mosque Usodho Corner Mbuta Road (sic) at a cost of Kshs 4,394,080/=. It contended that despite raising an invoice for the said sum, the 1st Respondent refused to pay the said amount as a result of which it filed Civil Case No 558 of 2019 at Kisumu Chief Magistrate's Court.
3. It added that Judgment was entered in its favour against the 1st Respondent herein for Kshs 4,394,080/= together with Kshs 100,000/= general damages, costs of Kshs 789,501/= and interest which the 1st



- Respondent had refused to pay despite several demands that it pays the same and being served with the Decree.
4. On December 15, 2022, this court directed both parties to file their respective Written Submissions. It directed the *Ex parte Applicant* to extract the order for service upon the Respondents herein. On January 11, 2022, Richard Otieno Okungu swore a Return of Service on behalf of the *Ex parte Applicant* evidencing service of the said order of December 15, 2022 upon the Respondents herein.
 5. The Respondents did not file their Written Submissions and/or attend court either physically or virtually. On its part, the *Ex parte Applicant* filed undated Written Submissions on January 10, 2022. The Ruling herein is based on the said Written Submissions which the *Ex parte Applicant* relied upon in its entirety.

Legal Analysis

6. The *Ex parte Applicant* sought an order for mandamus to compel the Respondent to pay Kshs 4,394,080/= together with Kshs 100,000/= general damages, costs of Kshs 789,501/= and interest that was awarded in Kisumu Chief Magistrate's Court Civil Case No 558 of 2019.
7. As was held in the case of *Kenya National Examination Council vs Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR, orders of mandamus and prohibition are issued where a person or body of persons had failed to perform the duty to the detriment of a party who had a legal right to expect the duty to be performed.
8. Notably, the *Ex parte Applicant* did not attach any documents to demonstrate that it had in fact filed suit against the 1st Respondent herein and/or that the Trial Court had entered judgment in its favor against the 1st Respondent in Civil Case No 558 of 2019 Kisumu Chief Magistrate's Court as it had contended.
9. It did not also provide proof that it had extracted and served the Decree upon the 1st Respondent and/or that there was a decree in the first place. It did not also annex any documentary proof to show that it had in fact demanded the said amounts from the 1st Respondent and that it had refused to pay.
10. In the absence of proof that judgment had been entered against the 1st Respondent and that the 1st Respondent had refused to pay the *Ex parte Applicant's* claim, this court came to the firm conclusion that the *Ex parte Applicant* did not prove its case on a balance of probabilities. This court had due regard to the case of *Alfred S Mdeizi t/a Memicare Nursing & Maternity Home vs National Hospital Insurance Fund (NHIF)* [2016] eKLR wherein the plaintiff's claim was dismissed for failure to prove its case on a balance of probabilities.

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated June 22, 2021 and filed on 23d June 2021 was not merited and the same be and is hereby dismissed.
12. For the avoidance of doubt, this decision does not bar the *Ex parte Applicant* from filing another application with proof of claim for consideration by the court.
13. In view of the fact that the 1st Respondent is a government institution, it would be punitive to award the government costs against its citizen. Consequently, each party will bear its own costs of this application.
14. It is so ordered.



DATED and DELIVERED at KISUMU this 25th day of January 2023

J KAMAU

JUDGE

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