



**Samic Construction Co Limited v County Government of Kisumu & another
(Judicial Review E022 of 2022) [2023] KEHC 329 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW E022 OF 2022
JN KAMAU, J
JANUARY 25, 2023**

BETWEEN

SAMIC CONSTRUCTION CO LIMITED APPLICANT

AND

THE COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

**THE CHIEF FINANCE OFFICER COUNTY GOVERNMENT OF
KISUMU 2ND RESPONDENT**

RULING

Introduction

1. In its Notice of Motion dated 31st October 2022 and filed on 8th November 2022, the Ex parte Applicant herein sought an order of mandamus to compel the Respondents to pay the decretal sum of Kshs 614,394/= together with Kshs 100,000/= general damages, costs of Kshs 288,201/= and interest in Kisumu Chief Magistrate's Court Civil Case No 558 of 2019 (sic).
2. In the Supporting Affidavit of its Director, Samwel Otieno Boy that was sworn on 31st October 2022 June 2022, the Ex parte Applicant averred that at the instruction of the 1st Respondent herein, it constructed Kilo Picadily Road at a cost of Kshs 614,394/=. 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 559 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 614,394/= together with Kshs 100,000/= general damages, costs of Kshs 288,201/= 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 15th December 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 11th January 2022, Richard Otieno Okungu swore a Return of Service on behalf of the Ex parte Applicant evidencing service of the said order of 15th December 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 10th January 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 614,394/= together with Kshs 100,000/= general damages, costs of Kshs 288,201/= and interest that was awarded in Kisumu Chief Magistrate's Court Civil Case No 559 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 559 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 22nd June 2021 and filed on 23^d 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

