



Republic v County Secretary, County Government of Nairobi; Waas Enterprises Limited (Exparte) (Miscellaneous Application E047 of 2021) [2023] KEHC 261 (KLR) (Judicial Review) (19 January 2023) (Judgment)

Neutral citation: [2023] KEHC 261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E047 OF 2021
AK NDUNG'U, J
JANUARY 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF
NAIROBI RESPONDENT**

AND

WAAS ENTERPRISES LIMITED EXPARTE

JUDGMENT

1. Pursuant to leave of court granted on April 10, 2021, the *ex parte* Applicant by way of a Notice Notice of Motion under Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya; Order LIII Rules 1 (1), (2), (3), (4) and 2 of the Civil Procedure Rules, 2010, sought for the orders:
 - i. That this Honourable Court be pleased to make an order of mandamus directed to the County Secretary of the County Government of Nairobi compelling him forthwith, and without delay, pay the Applicant the decretal sum of Kshs 1,000,000.00 for every year since the suit was filed plus costs and interest accrued as at the date of payment.
 - ii. The costs of this application be provided for.
2. The Application is based on a statutory statement dated April 7, 2021 and verifying affidavit dated April 7, 2021, and a further affidavit dated March 17, 2022, both sworn by Matthew Njoroge Kaberu, the director of the *ex parte* Applicant company.



3. It is averred that by a judgement delivered on September 26, 2014, by Honourable Lady Justice Gitumbi, entered judgment in favour of the Applicant against the County Government of Nairobi in the sum of Kshs 1,000,000.00 for every year since the suit was filed with interest payable at court rates until payment in full. However, that despite the said judgement and resultant Decree dated October 22, 2014 delivered to the Respondent, the Respondent, as the accounting officer of the County Government of Nairobi has failed and/or refused to settle the principal sum aforesaid.
4. Additionally, on its Further Affidavit, the Applicant averred that by the judgement delivered on September 26, 2014, by the Hon Lady Justice Gitumbi, the Applicant was awarded the sum of Kshs 17,689,998.00 as the amount payable on account of the decree. Also, that it has since extracted the Certificate of Order against Government dated March 14, 2022.
5. In response, and opposing the Application, the Respondent filed its Grounds of Opposition dated May 23, 2022, on the grounds:
 - i. That the application is frivolous, vexatious and an abuse of the court process and is a mere publicity suit by the Applicant.
 - ii. That the orders sought by the Applicant do not lie against the Respondents as there is no statutory duty imposed upon them to act as demanded. The applicant has not stated under which law the cited Respondents have duty to act as demanded.
 - iii. That under part: IV the County Government Responsibilities with respect to management and control of public finance under the *Public Finance Management Act* cap 412c of the laws of Kenya, the statutory duty to pay out from the county Treasury vest in the County executive committee member in charge of finance and not the Respondent herein thus the Respondent herein is wrongly suited.
 - iv. That all the expenditure by the County Government are appropriated by the County Assembly and not the Respondent in each financial year.
 - v. That the County Government has competing interests including settling decree to the public but has limited resources and has statutory process it must abide by before the settlement of the same. The services provided by the County Government serve approximately Five Million Nairobi residents yet no adequate resources are available.
 - vi. That the alleged contemnors are currently not in a position to pay off the order since the County Government is in the middle of its financial year and such funds would have been provided for in the County budget.
 - vii. That the alleged contemnors are willing to pay once the same is allocated for, approval and passed by the County Assembly as provided for in section 125 of the *Public Finance Management Act* (2012)
 - viii. That we therefore seek the indulgence of the Court and the Applicant to allow for the budgeting, allocation and approval of the amounts decreed through the right procedures provided under the *County Government Act*.
6. In advancing its case, the Applicant in its written submission dated July 22, 2022 stated that the grounds upon which the reliefs are sought are illegality of Respondent's actions, and breach of legitimate expectations.



7. That the Respondent's actions are illegal and offend the constitutional protections on the rights to property enshrined under Article 40 of the Constitution, the right to fair administrative action under Article 47 of the Constitution, and also offend the principles and values of public finance and public service set out under Articles 201 and 203 of the Constitution.
8. That by failing to pay the decretal amount, to date, the Respondent breached and continues to breach the Applicant's legitimate expectation; and the decision is also unreasonable. There is no basis for refusal to pay the decretal amount. That the Respondent is the accounting officer of the County Government of Nairobi, as established under Section 44 of the County Government Act.
9. The Applicant concedes that the applicable law on execution proceedings against the National and County Governments is Section 21 of the Government Proceedings Act. The Applicant holds the position that the main purpose of the procedure in section 21 of the Government Proceedings Act is to notify the Respondents that the debt is due to facilitate payment.
10. That the purpose is not meant to relieve the Respondents from meeting their legal and statutory obligation to satisfy decrees and orders of the Court, and it's not subject to the availability of funds. That the lack of funding to pay the decretal sum does not extinguish the existence and nature of the Respondent's duties, and only affects the mode of performance of that duties. Reliance was placed on the cases of Republic vs Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau & 9 Others (2018) eKLR; Shah vs Attorney General (No 3) Kampala HCMC No 31 of 1969 [19701] EA 543; and, Republic V Kenya revenue Authority ex parte LAB International Kenya Limited. High Court Civil Application No 82.
11. The Respondent, in opposition to the Application, filed its written submissions dated October 21, 2022, and submitted that the Applicant has not complied with the laws on executions against the government, the Government Proceedings Act, CAP 40 as well as Order 29 of the Civil Procedure Rules.
12. That in the instant Application, the Applicant has not obtained and/nor served a certificate of order against the government as required under section 21 of the Government Proceedings Act which is a critical step in execution against the government, thus renders the Application incompetent and premature; hence ripe for dismissal. The cases of Jamleck Waweru Karanja v County Government of Nakuru [2020] eKLR; Permanent Secretary Office of the President, Ministry of Internal Security & Another ex parte NASSIR MWANDIHI (2014) eKLR; Republic v County Government of Vihiga Ex parte Global Exhibitions Incorporated Ltd [2021] eKLR, and, Republic v County Government of Vihiga Ex parte Global Exhibitions Incorporated Ltd [2021] eKLR were relied upon.
13. Additionally, the Respondent posited that the County Secretary, County Government of Nairobi is not the Accounting Officer of the County Government of Nairobi. That considering the nature of the Application, were the orders to be granted, the County Secretary would be compelled to perform a duty [of settling the decretal amount], a role and duty that lies with the County Executive Committee member for Finance mandate. Further, that the office of the County Secretary does not control the budgetary allocation or appropriation for the County Government of Nairobi and, therefore, has been wrongly suited in the instant Application.
14. After careful consideration of the parties' arguments, the issue for determination that arises is whether the orders of mandamus should issue as prayed by the Applicant.
15. 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:



- (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.”

16. 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.”

17. 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.”

18. In the matter at hand, the Applicant has moved this Court to compel the satisfaction of a judgment already decreed in its favour by a competent Court of law.
19. From the record filed in the court, there is evidence that Certificate of Order against the Government was obtained and its dated March 14, 2022. However, there is no evidence that the Applicant has served the Respondent with the same [Certificate of Order against the Government].



20. From the foregoing, it is clear that the Applicant did not comply with Section 21 of [Government Proceedings Act](#) for failure to serve a Certificate of Order against the Government, on the Respondent, despite obtaining the required certificate. For clarity, it is not only sufficient to obtain the necessary certificate, but the same obtained documents must also be served upon the proper party.
21. I further note that the applicant has sued the County Secretary, County Government of Nairobi. The Respondent is improperly sued as he by law is not the Accounting officer of the County government. The question of who is the Accounting officer in a County Government was discussed in the case of [Council of Governors & Others vs The Senate](#) Petition No 413 of 2014 [2015] eKLR where the Court expressed itself as follows:

“The Petitioners have also sought the interpretation of the term ‘Accounting Officer’. In that regard, Article 226 of the [Constitution](#) provides;

- (1) Act of Parliament shall provide for -
 - (a)
 - (b) The designation of an accounting officer in every public entity at the national and county level of government
- (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the [Public Finance Management Act](#). The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that [Act](#), as follows;

A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the [Public Finance Management Act](#). Indeed, Section 148 (3) of the [Public Finance Management Act](#) mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the [Constitution](#).

As regards the accounting officer for the County Assembly, Section 148(4) of the [Public Finance Management Act](#) provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”



22. It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose.
23. In the premises, and for the reasons above stated the Applicant has not made a case for the grant of an order of mandamus. The application is dismissed with no orders as to costs with the Applicant at liberty to initiate the necessary application within the procedure allowed by law.

Dated signed and delivered at Nairobi this 19th Day of January 2023

.....

A.K. NDUNGU

JUDGE

JR. MISC. NO. E047 OF 2021 JUDGMENT 3 | Page

