



**Republic v County Secretary, County Government of Meru & another;
Tom Ojienda & Associates (Exparte Applicant) (Judicial Review
E008 of 2022) [2023] KEHC 1523 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW E008 OF 2022
TW CHERERE, J
FEBRUARY 23, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU 1ST
RESPONDENT**

**CHIEF OFFICER FINANCE, COUNTY GOVERNMENT OF
MERU 2ND RESPONDENT**

AND

PROF. TOM OJIENDA & ASSOCIATES EXPARTE APPLICANT

JUDGMENT

1. Before the court is the applicant’s notice of motion dated 07th October, 2022 and filed on October 12, 2022 brought under Order 53 Rule 3 of the *Civil Procedure Rules*. The motion seeks orders that:
 1. An Order of *Mandamus* be issued compelling the County Secretary of the County Government of Meru and Chief Officer Finance of the County Government of Meru to the Applicant the decretal sum as per the Certificate of Costs issued on June 16, 2022 made up as follows:
 - i. Party and Party costs plus 14% interest from August 6, 2020 KES. 70,998.588.18
 - ii. Attendances KES. 30,000.00
 2. In default, Notice to Show Cause do issue against Chief Officer Finance of the County Government of Meru yoshow cause why he should not eb committed for contempt of court



3. Costs be borne by the Respondents
2. The motion is founded on the following grounds: -
 - a. The applicant filed advocate-client Bill of costs in respect to the following files having represented the Respondents.
 - i. Bill of costs dated March 19, 2019 being Misc. Civil App No. 75 of 2018 Prof Tom Ojienda & Associates –v-County Government of Meru arising from Constitutional Petition No. 8 of 2015, Patiala Distillers Limited versus County Government of Meru
 - ii. Bill of costs dated March 14, 2019 being Misc. Civil App No.76 of 2018 Prof Tom Ojienda & Associates –v-County Government of Meru arising from Constitutional Petition No. 32 of 2014, Meru Bar, Wines & Spirits owners Self Help group (suing through its secretary, Ibrahim Mwika versus County Government of Meru
 - iii. Bill of costs dated March 19, 2019 being Misc. Civil App No.77 of 2018 Prof Tom Ojienda & Associates –v-County Government of Meru arising from HCC Constitutional Petition No. 1 of 2016, Bonface Koome & Others Versus County Government of Meru & others
 - iv. Bill of costs dated March 14, 2019 being Misc. Civil App No. 78 of 2018 Prof Tom Ojienda & associates –v-County Government of Meru arising from ELC Case No. 44 of 2015 David Keli Kiilu & others versus County Government of Meru.
 - b. That the Deputy registrar of the High court of Kenya at Meru in four separate Rulings dated 16th July, 2020, taxed the Bills of Costs as follows:
 - i. Kshs. 10,505,441.40/= in Misc. Civil App No. 75 of 2018 Prof Tom Ojienda & Associates –v-County Government of Meru
 - ii. Kshs. 10,533,281.40/= in Misc. Civil App No. 76 of 2018 Prof. Tom Ojienda & Associates –v-County Government of Meru
 - iii. Kshs. 26,157,228.60/= in Misc. Civil App No. 77 of 2018 Prof. Tom Ojienda & Associates –v-County Government of Meru
 - iv. Kshs. 8,781,910.50/= in Misc. Civil App No. 78 of 2018 Prof. Tom Ojienda & Associates –v-County Government of Meru.
 - c. That the deputy registrar also issued four separate certificates of Taxation dated July 23, 2020 as follows:
 - i. Kshs. 10,505,441.40/- in Misc. Civil App No. 75 of 2018 Prof. Tom Ojienda & Associates –v-County Government of Meru
 - ii. Kshs. 10,533,281.40/= in Misc. Civil App No. 76 of 2018 Prof Tom Ojienda & Associates –v-County Government of Meru,
 - iii. Kshs. 26,157,228.60/= in Misc. Civil App No. 77 of 2018 Prof Tom Ojienda & Associates –v-County Government of Meru
 - iv. Kshs. 8,781,910.50/= in Misc. Civil App No. 78 of 2018 Prof Tom Ojienda & Associates –v-County Government of Meru



- d. Respondents references challenging the Rulings of July 16, 2020 were dismissed by Rulings delivered on March 19, 2021 with costs at Kshs. 30,000/- stating that there was no justification to
 - e. That on May 25, 2022, the court entered judgement in favour of the Applicant allowing Miscellaneous Application No. E005of 2022(consolidated with No's. 75,76,77 and 78 of 2018 as follows:
 - i. Meru Misc. Application No. 75 of 2018 Kshs. 10,505,441.40/-
 - ii. Meru Misc. Application No. 76 of 2018 Kshs. 10,533,281.40/-
 - iii. Meru Misc. Application No. 77 of 2018 Kshs. 26,157,228.60/-
 - iv. Meru Misc. Application No. 78 of 2018 Kshs. 8,781,910.50/-
 - v. Interests at 14% from 6TH August, 2020 till payment in full
 - vi. Disbursements and attendance costs at Kshs. 30,000/= to cover all the four files.
 - f. The applicant extracted a certificate of stated costs dated June 16, 2022 wherein the respondents have been ordered to pay Kshs. 71,028,588.18/-
3. This application is supported by the supporting affidavit of Prof. Tom Ojienda SC, sworn on October 7, 2022, the verifying affidavit and the statement of facts which all reiterates the grounds on the face of the application.
 4. The application is opposed vide a replying affidavit sworn on December 13, 2022 by Joseph Rufus Miriti Mwereria, the 1st respondent. He avers that the costs owed to the exparte were not budgeted and seeks time for the new administration to address this huge financial obligation.
 5. The matter was canvassed by way of written submissions. applicant by submissions dated October 24, 2022, emphasized that it has been established overtime that mandamus is an equitable remedy that serves to compel a public authority, a person or a body of persons who have failed to perform their duty to the detriment of a party who has a legal right to expect the duty to be performed to perform its public legal duty to avoid procedural delays.

Analysis and Determination

6. I have duly considered the application and the submissions of the exparte applicant and that of the 1st Respondent.
7. Execution of decrees against the Government is not undertaken as in the ordinary civil cases but must be in accordance with Provisions of the *Government Proceedings Act* which applied to both the National and County Governments as was aptly put by J. Odunga (as he then was) in *Republic v AG and another exparte Stephen Wanyee Roki* (2016) eKLR.
8. The establishment of the County Secretary and County Secretary offices and their functions were considered by Nyamweya J (as she then was) in *Republic v County Secretary Nairobi City County and 3 others ex parte Koceyo Advocate* (*supra*) where the judge stated as follows;

“Section 44 of the County Government Act in this respect establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service, Section 103 of the functions include being head of the county public



service. section 103 of the [Public Finance Management Act](#) No. 18 of 2012 also establishes the County Treasury responsible for finance and fiscal matters.

9. Under section 103 (3) of the Act, the County Executive Committee Member for Finance is the head of Treasury, and is thus the responsible for finance matters in the County. Arising from these provisions, the 1st and 2nd Respondents are under a statutory duty to satisfy a judgment made by court against the County Government of Meru by virtue of their roles and functions. (See [Greenwood Printers & Stationers Ltd v Independent Electoral and Boundaries Commission](#) [2022] eKLR).
10. The circumstances under which judicial review order of Mandamus are issued were discussed in the case of [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.”

11. On whether respondents ought to be compelled to settle the sums due, I am guided by the case of [Republic v Attorney General & another Ex parte James Alfred Koroso](#) [2013] eKLR where Odunga J with approval cited [Shah v Attorney General](#) (No. 3) Kampala HCMC No 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

“Mandamus is a prerogative order issued in certain cases to compel the performance of a duty..... Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy.....With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, Mandamus will lie on the application of a person interested to compel them to do so. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do.”

12. 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.”

13. 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.”

14. It is also trite that execution against the Government can only be mounted after service of a Certificate of Order against Government. (See *Maggy Agulo Construction Co Ltd v Ministry of Public Health & 4 others* [2020] eKLR, *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza*(supra) and *Republic v County Secretary Migori County Government & another* [2019] eKLR).
15. Applicant has annexed copies of the judgments and decrees awarded in the various cases that are the subject of this application. The applicant also annexed copies of the Certificates of Costs issued in its favour after taxation of its Bills of Costs in the various suits. Respondents have neither denied the fact that demand for payment has been made nor that the decretal sum is owing.
16. Section 21(1) and (2) of the *Government Proceedings Act* does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. (See *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* (supra) and *Jaribu Credit Traders Limited v Nairobi County Government* [2018] eKLR,).
17. From the material placed before this court, I find that applicant has demonstrated by way of evidence, compliance with the provisions of section 21 of the *Government Proceedings Act*. The Respondents on their part have not given any satisfactory reason as to why the decree has not been satisfied.
18. Applicant has no other option of realising the fruits of its judgement since it is barred from executing against the Government. It is for the above reasons that I find that an order of *Mandamus* is merited to enforce the judgments in favour of the Applicant or else it would be left babysitting on what Odunga J (as he then was) referred to as a barren decree. (See *Republic v Attorney General & another ex parte James Alfred Koroso* (supra).



19. Accordingly, it is hereby ordered:

1. The County Secretary, County Government of Meru and The Chief Officer Finance, County Government of Meru to pay the Applicant within 30 days the sums contained in:
 - i. Meru Misc. Application No. 75 of 2018 Kshs. 10,505,441.40/-
 - ii. Meru Misc. Application No. 76 of 2018 Kshs. 10,533,281.40/-
 - iii. Meru Misc. Application No. 77 of 2018 Kshs. 26,157,228.60/-
 - iv. Meru Misc. Application No. 78 of 2018 Kshs. 8,781,910.50/-
 - v. Interests at 14% from 6TH August, 2020 till payment in full
 - vi. Disbursements and attendance costs at Kshs. 30,000/= to cover all the four files.
2. Costs shall be borne by the respondents

DATED IN MERU THIS 23rd DAY OF February 2023

WAMAE. TW. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Applicant - Pro. Ojienda for Prof. Ojienda & Associates

For Respondents - Mr. Atheru for Thurania Atheru & Co. Advocates

