



**Republic v County Government of Mombasa & 2 others; Meru Central Dairy  
Co-operative Union Ltd (Exparte Applicant) (Judicial Review Application  
E025 of 2022) [2023] KEHC 3457 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3457 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E025 OF 2022**

**OA SEWE, J**

**APRIL 26, 2023**

**IN THE MATTER OF ARTICLE 48 OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL  
PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
ORDER OF MANDAMUS**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA .... 2<sup>ND</sup>  
RESPONDENT**

**CHIEF OFFICER FINANCE, COUNTY GOVERNMENT OF  
MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MERU CENTRAL DAIRY CO-OPERATIVE UNION LTD .... EXPARTE  
APPLICANT**



## JUDGMENT

- [1] The *ex parte* applicant, Meru Central Dairy Cooperative Union Ltd, filed the application dated November 4, 2022 upon leave being granted in that regard on October 25, 2022. The application was brought pursuant to Article 47 of the Constitution of Kenya, Sections 7, 9 and 11 of the Fair Administrative Action Act, No 4 of 2015 as well as Order 53 Rule 1 of the Civil Procedure Rules for orders that:
- [a] The application be heard on priority basis noting that the interest of over 30,000 farmers who are members of the Cooperative Union are awaiting their payments and creditors are threatening to commence liquidation proceedings against the *ex parte* applicant;
  - [b] A declaration be made that the respondents, namely, the County Government of Mombasa and its County Secretary and the Chief Officer Finance, are in breach of their statutory duty as mandated under the provisions of Section 21(3) of the Government Proceedings Act;
  - [c] An order of Mandamus be issued compelling the 1<sup>st</sup> respondent through its officers, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, to pay the *ex parte* applicant the decretal amount of Kshs 71,375,787/= plus interest from March 7, 2022;
  - [d] The Court be pleased to set a timeline for the payment of the decretal amount; and,
  - [e] The costs of the application be borne by the respondents.
- [2] The application was premised on the grounds that the *ex parte* applicant (hereinafter, “the applicant”) holds a decree against the 1<sup>st</sup> respondent for the payment of Kshs 71,375,787/= which decree arose out of a consent of the parties recorded and adopted by the Court as its order on July 1, 2022. The applicant averred that the said order was duly served upon the respondents on July 1, 2022 and although they acknowledged receipt by stamping the order, they refused, ignored and failed to settle the amount to date. The applicant further averred that the respondents’ continued failure to settle the decretal amount is detrimental to it, as it puts it on the brink of closure, since farmers no longer supply it with milk. Thus, the applicant posited that, unless the orders sought are granted, the respondents will persist in their course of disobedience; yet they had assured the applicant that budgetary allocations meant to offset the debt had been secured.
- [3] The foregoing grounds were amplified in the applicant’s Supporting Affidavit sworn by Stephen Mwenda Mungania, to which he attached a copy of the Order dated July 1, 2022 as well as a formal extract thereof issued by the Deputy Registrar on September 14, 2022 (Annexures “SM 1 and “SM 2”). At paragraph 4 thereof, Mr Mungania, who is the Finance Manager of the applicant, averred that the respondents were duly served with the Certificate of Order and a demand for payment addressed to the 1<sup>st</sup> respondent and copied to the County Attorney as well as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, in compliance with the provisions of Section 21 of the Government Proceedings Act. Annexures “SM 4a & b” were exhibited to demonstrate that the applicant’s creditors are in the process of making good their recovery claims on account of the 1<sup>st</sup> respondent’s failure to settle the decretal amount.
- [4] In response to the application, the 1<sup>st</sup> respondent’s County Attorney filed Grounds of Opposition on January 9, 2023, contending that:
- [a] The application offends Section 21 of the Government Proceedings Act, Chapter 40 of the Laws of Kenya;



- [b] The application is inconsistent with Order 29 of the *Civil Procedure Rules*, 2010;
  - [c] The application offends Section 103 of the *Public Finance Management Act* No 18 of 2012 more particularly in relation to the 1<sup>st</sup> and 2<sup>nd</sup> respondents;
  - [d] The 1<sup>st</sup> respondent has been severally discharged from proceedings relating to matters to do with finance;
  - [e] The application is unfounded, frivolous and vexatious and is a waste of the Court's time.
- [5] Thus, the respondent prayed that the application be dismissed with costs.
- [6] In response to the respondents' Grounds of Opposition, the applicant filed a Supplementary Affidavit on January 18, 2023, sworn by Mr Mungania. He deposed that the Grounds of Opposition are nothing but an attempt at clutching at straw with a view of delaying the conclusion of this suit. At paragraph 7, Mr Mungania deposed that it is preposterous and a show of ineptitude on the part of the respondents for them to claim that the applicant did not comply with the applicable law before filing the instant application. To augment this assertion, the applicant attached a Certificate of Order and forwarding letters to his Supplementary Affidavit as Annexures "SM 5", "SM 6" and "SM 7".
- [7] The applicant also explained that this entire suit is premised on a debt agreement entered into voluntarily by the applicant and the respondents after a mediation conference chaired by the Kenya Dairy Board pursuant to Regulation 7(3) of the Dairy Industry (Milk Sales Contract) Regulations, 2021. The applicant further deposed that, embedded in the consent was a Repayment Plan, which the 1<sup>st</sup> respondent committed to, but which it ignored; thereby necessitating the Court's intervention *vide* Miscellaneous Application No 118 of 2022 in which the Debt Acknowledgment Deed was adopted by consent of the parties as an order of the Court for enforcement purposes. Thus, the applicant annexed copies of the Deed and the Consent Order as Annexures "SM 8" and "SM 9" to demonstrate that the technicalities raised in the Grounds of Opposition are indications that the respondents have no intention of repaying the debt and are merely out to obstruct the course of justice.
- [8] The application was canvassed by way of written submissions, pursuant to the directions given herein on December 13, 2022. Thus, learned counsel for the applicant, Ms. Kamoing', relied on her written submissions dated February 13, 2023. She proposed the following issues for determination:
- [a] Whether a declaration ought to issue to the effect that the respondents herein are in breach of Section 21(3) of the *Government Proceedings Act*;
  - [b] Whether by way of an order of Mandamus the respondents ought to be compelled to pay the decretal sum, being Kshs 71,375,787/= plus interest from the date of the Debt Acknowledgment Deed;
  - [c] Whether a timeline ought to be set for the payment of the decretal sum.
- [9] On whether the respondents are in breach of Section 21(3) of the *Government Proceedings Act*, Ms. Kamoing' submitted that a Certificate of Order against the 1<sup>st</sup> respondent was issued on September 14, 2022, prepared in the prescribed form and format, and served as required, yet the amount remains unpaid to date. On that account, counsel urged the Court to find that the applicant has proved compliance with Section 21(3) of the *Government Proceedings Act*. She further submitted that, the applicant having thus complied, the 1<sup>st</sup> respondent was duty bound to comply and pay the sums due. Counsel relied on *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County, Ex Parte Stanley Muturi* [2017] eKLR and *Teachers Service Commission v Kenya National Union of*



Teachers & 2 Others, among other authorities, for the proposition that court orders are not meant for cosmetic purposes, but are serious decisions meant to be complied with strictly.

- [10] On whether the applicant is entitled to an order of Mandamus, Ms Kamoing' reiterated the contention that the 1<sup>st</sup> respondent owes the applicant a sum of Kshs 71,373,787/= plus interest by dint of a Debt Acknowledgment Deed dated March 7, 2022; and therefore that an order of Mandamus is the most appropriate remedy in the circumstances. She relied on Order 53 of the Civil Procedure Rules and the case of Republic v Kenya National Examination Council, Ex Parte Gathenji & Others [1997] eKLR as well as Republic v County Secretary Migori County & Another, Ex Parte Linet Magambo [2020] eKLR to augment her submissions. She added that, in the circumstances, timelines ought to be fixed within which the payment ought to be made.
- [11] On his part, Mr Tajbhai for the respondents proposed the following issues for determination *vide* his written submissions dated February 27, 2023:
- [a] Whether the *ex parte* applicant fulfilled the requirements of Section 21 of the Government Proceedings Act, to be granted the orders sought; and,
  - [b] Whether the County Secretary or the Chief Officer is an accounting officer for purposes of matters to do with finance.
- [12] Counsel relied on Section 21 of the Government Proceedings Act and submitted that for an order of Mandamus to issue, the applicant had to demonstrate:
- [a] A prior demand for performance;
  - [b] A reasonable time to comply with the demand, unless there was outright refusal;
  - [c] An express refusal, or an implied refusal through unreasonable delay;
  - [d] That no other adequate remedy is available to the applicant;
  - [e] The order sought is of some practical value;
  - [f] There is no equitable bar to the relief sought;
  - [g] On a balance of convenience, mandamus should lie.
- [13] Mr Tajbhai then proceeded to submit that the applicant had not served the accounting officer of the 1<sup>st</sup> respondent with the Certificate of Order or decree or certificate of taxation before instituting this suit; and that the applicant did not serve a copy of the Certificate of Order on the Attorney General. He relied on Republic v County Secretary, Nairobi City County & Another, Ex Parte Tom Ojienda & Associates [2019] eKLR and Abdalla A. Hassan v County Government of Mombasa [2020] eKLR to convince the Court that the instant application fails to meet the threshold for an order of Mandamus.
- [14] Mr Tajbhai also took issue with the fact that the accounting officer of the 1<sup>st</sup> respondent, namely, the County Executive Committee member in charge of Finance, was not enjoined to the application. He cited Section 103 of the Public Finance Management Act, No 18 of 2012 and Republic v County Secretary, Nairobi City County & Another, Ex Parte Mohamed Tariq Khan [2017] eKLR to support his argument that an order of Mandamus can only be issued against the person who is bound to comply with it. Thus, counsel submitted that it would be improper and irregular to compel the County Secretary and the Chief Officer Finance to pay the sums in question herein. He consequently prayed for the dismissal of the application.



- [15] I have given due consideration to Article 47 of the *Constitution* as well as Sections 7, 9 and 11 of the *Fair Administrative Action Act*. I have likewise given thought to the provisions of Order 53 Rule 1 of the *Civil Procedure Rules* pursuant to which the application was filed. It provides thus in Sub-rules (1), (2) and (3):
- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
  - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
  - (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
- [16] The record shows that the applicant applied for and was granted leave on October 25, 2022 to file a substantive Judicial Review application. Thereupon, the applicant filed the instant application dated November 4, 2022. I am therefore satisfied that the Notice of Motion dated November 4, 2022 is competent from the standpoint of Rule 1 of Order 53, *Civil Procedure Rules*.
- [17] Granted the respondent's Grounds of Opposition and the written submissions made herein, it is a critical issue for the Court to determine whether the applicant complied with the requirements of Section 21 of the *Government Proceedings Act*, which stipulates thus in Sub-Sections (1) and (2):
- “(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.
  - (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney General.”
- [18] I note that, in support of the instant application, several documents were annexed to the Supporting Affidavit sworn on November 4, 2022 by Stephen Mwenda Mungania. The 1<sup>st</sup> document is the Order resulting from the adoption by the Court of the Debt Acknowledgment Deed dated March 7, 2022 between the applicant and the 1<sup>st</sup> respondent. It confirms that the document was the result of a mediation exercise that the 1<sup>st</sup> respondent participated in voluntarily; and that the 1<sup>st</sup> respondent voluntarily acknowledged its indebtedness to the applicant in the sum of Kshs 71,375,787/=.



- [19] The 2<sup>nd</sup> document is a Certificate of Order issued pursuant to Section 21(1) of the [Government Proceedings Act](#) as read with Order 29 Rule 3 of the [Civil Procedure Rules](#). Annexures “SM 3” and “SM 4” are letters to confirm that both the 1<sup>st</sup> respondent and the Attorney General were served with the Certificate of Order, in compliance with Section 21(1) and (2) of the [Government Proceedings Act](#).
- [20] Accordingly, the Accounting Officer of the 1<sup>st</sup> respondent was under obligation to proceed and settle the decree in the manner envisaged by Subsection (3) of Section 21 of the [Government Proceedings Act](#). The provision states:
- “(3) 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.
- [21] Further to the foregoing, Subsection (4) of Section 21 of the [Government Proceedings Act](#), is explicit that:
- (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”
- [22] It follows therefore that an Order of Mandamus is the only efficacious remedy available to the applicant; and in this regard, I fully associate myself with the position taken in [Republic v The Attorney General & Another, Ex-Parte James Alfred Koroso](#) that:
- “...In the present case the *ex parte* applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the [Constitution](#) which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the [Constitution](#) executive authority derives from the people of Kenya and is to be exercised in accordance with the [Constitution](#) in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...”



[23] While it is true that the responsible accounting officer was not enjoined to these proceedings, I am not persuaded that that omission is necessarily fatal to the application. I find succor for this posturing in *Republic v Attorney General & another Ex parte Orbit Chemicals Limited* [2017] eKLR, in which such proceedings were commenced against the Attorney General as opposed to the accounting officer concerned. It was held that:

“... the failure to commence judicial review seeking the orders of mandamus against the accounting officer, though an irregularity, is not fatal. Considering the role of the Attorney General in such proceedings, the same ought not to be determined simply on non-joinder or misjoinder of parties. This was the position adopted in *Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute* Nairobi HC Misc Appl No 594 of 2002 [2003] KLR 582, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.”

[24] In the light of the foregoing, and granted that what is sought to be enforced is a consent order by the parties, I find merit in the application dated November 4, 2022. The same is hereby allowed and orders granted as hereunder:

- [a] A declaration be and is hereby made that the respondents, namely, the County Government of Mombasa and its County Secretary and the Chief Officer Finance, are in breach of their statutory duty as mandated under the provisions of Section 21(3) of the *Government Proceedings Act*;
- [b] An order of Mandamus be and is hereby issued compelling the 1<sup>st</sup> respondent through its Accounting Officer to pay the ex parte applicant the decretal amount of Kshs 71,375,787/= plus interest from March 7, 2022;
- [c] The costs of the application be borne by the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26<sup>TH</sup> DAY OF APRIL 2023**

**OLGA SEWE**

**JUDGE**

