



Republic v County Government of Narok (Defunct County Council of Narok) & 2 others; Gachara & 9 others (Exparte) (Judicial Review E001 of 2022) [2023] KEHC 17637 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
JUDICIAL REVIEW E001 OF 2022
F GIKONYO, J
MAY 24, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF NAROK (DEFUNCT COUNTY COUNCIL OF NAROK) 1ST RESPONDENT

NAROK COUNTY GOVERNMENT 2ND RESPONDENT

COUNTY EXECUTIVE COUNCIL MEMBER FOR FINANCE ECONOMIC PLANNING, ICT & E-GOVERNMENT; COUNTY GOVERNMENT OF NAROK 3RD RESPONDENT

AND

ANTHONY NDUNG’U GACHARA EXPARTE

SAMUEL NG’ANG’A GITHINJI EXPARTE

AGNES GACHARA EXPARTE

KAMAU GACHARA EXPARTE

KOIKAI OLE KAMOIRO EXPARTE

NAOMI WAIRIMU RAMARE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF RAMARE GATHO - DECEASED) EXPARTE

AMOS WAHOME MUREITHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUREITHI WAHOME - DECEASED) EXPARTE

JOHN KARANJA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SERAH WANJIRU - DECEASED) EXPARTE

JOSEPH NG’ANG’A EXPARTE



JUDGMENT

Background of this case

1. The basis of these proceedings is that the ex parte applicants obtained a judgment in Nakuru CMCC NO. 640 of 2017 against the respondent.
2. The ex parte applicants thereafter obtained a decree, certificate of costs as well as a certificate of order against the government and served them upon the respondents.
3. But despite service of the decree and certificate of costs vide a letter dated 20/09/2021, the respondents are yet to satisfy the decretal sum of Kshs. 320,850/= and the costs of the suit amounting to Kshs. 234,450/=
4. The respondents' inaction prompted the applicants to institute the present judicial review proceedings so as to compel the respondents to satisfy the judgment of the former court.

Directions of the court

5. On 15/3/2023, this court noted counsel for the ex parte applicants had given a more practical and reasonable solution. In light thereof, this court allowed the respondent 7 days to file and serve submission on the main motion. On consequence thereof the application dated 10/3/2023 has been settled.

Pleadings

6. The ex parte Applicants herein filed an application by way of a Notice of Motion dated 14th February 2022, wherein they are seeking for an order of mandamus directed to the Respondents/judgement debtors to pay to the ex parte Applicants the decretal sum of Kshs. 320,850/= and costs of Kshs 234,450/= in satisfaction of the Chief Magistrate court at Nakuru in civil suit No. 640 of 2017. The ex parte Applicants also sought an order that the costs of the leave stage application and substantive motion be provided for.
7. The said application is supported by a supporting affidavit sworn by Anthony Ndung'u Gachara on 14th February 2022. The affidavit is sworn on behalf of all the ex parte applicants.
8. The grounds for the application are that the ex parte applicants are the decree holders in relation to the judgment of the chief magistrate court of Kenya at Nakuru in Civil suit no. 640 of 2017 and the decree and the Certificate of Costs remain unsatisfied to date.
9. The court in Nakuru CMCC No. 640 of 2017 delivered a judgment in relation to the former suit on 24/04/2014, whereupon judgment was entered in favour of the ex parte applicants.
10. In line with order 29(3) of the *Civil Procedure Rules*, 2010 and Section 21 of the *Government Proceedings Act*, the ex parte applicants made an application requesting court to issue a certificate of order as against the respondent.
11. The decree and the certificate of costs in relation to the certificate of costs were forwarded to the respondents' offices for compliance but the same has not been fulfilled.



12. Despite the decree having been served upon them, the respondents have to date failed to pay the decretal sum of Kshs. 320,850/= and the costs amounting to Kshs. 234,450/= as awarded by court. The ex parte applicants have thus moved the court to compel the satisfaction of the judgment already duly decreed in their favour by a competent court of law, and in accordance to the values enshrined in the Constitution.
13. That it is in the interest of justice that the respondent be compelled by this court to honor the duties bestowed upon them and further to honor the orders of the court by paying the decretal amount together with the costs of the suit as ordered. That as the successful litigants in the former suit, they are entitled to enjoy the fruits of the judgment.
14. That the former suit is a very old case and the respondents looks adamant in delaying this matter further and hence it is of essence that this honourable court comes to the ex parte applicants' aid and compels the respondents to pay the decretal sum and costs awarded.
15. That it is of esteemed juridical heritage that justice delayed is justice denied.
16. That the ex parte applicants are in urgent need of the money to cater for their family and medical needs and having to wait further before it can get justice and enjoy the fruits of the judgment is detrimental and prejudicial to them considering that a majority of them are elderly. That it is in the interests of justice, equity and fairness that this honourable court does intervenes and issue the orders sought herein.
17. The ex parte Applicants annexed the judgment in Nakuru CMCC No. 640 of 2017 and the decree issued pursuant thereto, as well as a certificate of taxation dated 1st September 2021 issued therein in their favour for the decretal sum of Kshs 320,850/= and costs of Kshs. 234,450/=. Copy of the letter forwarding the certificate of taxation to the Respondents and demanding for payment were also annexed.
18. The ex parte applicants have responded to a replying affidavit sworn by one Elizabeth Sanangoi Lolchoki on 27/04/2022 in their supplementary affidavit sworn on 22/06/2022 by Anthony Ndung'u Gachara. However the said replying affidavit is not in the court.
19. I have considered the contents of the supplementary affidavit

The ex parte applicants' submissions

20. The ex parte applicants submitted that a successful litigant is entitled to enjoy the fruits of the judgment instantly and not pursue tedious routes to get what is rightfully theirs. In the interest of justice this court should grant them an order of mandamus to compel the respondents to pay the amount owing to them.
21. The ex parte applicants submitted that they have satisfied all the conditions precedent; they obtained the requisite certificate of order against the government as the law demands and demanded for payment of the decretal sum and the costs.
22. The ex parte applicant relied on the following authorities;
 - i. *Republic Vs Permanent Secretary, Ministry of State of Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* [2012] eKLR.
 - ii. Shah v Aattorney General(No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 cited with authority in the case of *Republic v Attorney Genral & Another Exp arte Orbit Chemicals Limited* [2017] eKLR.



- iii. [Republic vs Principal Secretary, Ministry of Internal Security & Another ex parte Schon Noorani & Another](#) [2018] eKLR where it relied on the case of Apotex Inc. Vs Canada (Attorney General) 1993 (CanLII 3004(FCA)), (1994) 1 FC 742.
- iv. The [Republic Vs The Attorney General & Another ex parte James Alfred Koroso](#) - (2013) eKLR.
- v. [Judicial Hints on Civil Procedure](#), 2nd Edition, (*Nairobi*) Law Africa 2011 at page 101.

Respondents' submissions

- 23. The respondents submitted that the ex parte applicants have not met at least one of the requirements as set out in the test. The ex parte applicants have not demonstrated that there is a clear right to the performance of a duty owed to them.
- 24. The respondents submitted that they have never received any demand in writing from the ex parte applicants .Further that the letter dated 20/09/202 was not addressed to the offices of the persons/ officers of the county government specifically.That the ex parte applicants ought to have served the county executive council member for finance & economic planning, ICT & e- government for the county government of Narok as well as the county secretary with a demand letter in writing and a copy of the signed and certified court judgment, the decree, certificate of costs and certificate of order against the county government of Narok.
- 25. The respondents submitted that it is not possible to compute the time to comply before mandamus is issued in the absence of a prior demand to comply.
- 26. The respondents submitted that there has been no express refusal on the part of the respondents to comply with the judgment.
- 27. The respondents submitted that the application herein is premature, misconceived, lacks merit, frivolous and an abuse of the court process.
- 28. The respondents relied on the following authorities;
 - i. Apotex Inc. Vs Canada (Attorney General) discussed Dragan Vs Canada (Minister of Citizenship and Immigration)
 - ii. [Republic V County Secretary - Nairobi City County & Another ex parte Tom Ojienda & Associates](#) [2019] eKLR.
 - iii. [Abdallah A. Hassan V County Government of Mombasa](#) [2020] eKLR.
 - iv. [Republic V Attorney General & Another ex-parte Stephen Wanyee Roki](#) [2016] eKLR.
 - v. [Republic V County Secretary - Nairobi City County & Another Ex- parte Tom Ojienda & Associates](#) [2019] eKLR.
 - vi. Section 27 of the [Civil Procedure Act](#).
 - vii. MISC CIV Application No. 19 of 2015 quoted the case of Republic V Rosemary Munene , Ex- parte Applicant V Ihuru Dairy Farmers Co-operative society Ltd.

Analysis and Determination

- 29. I have considered the ex parte Applicant's pleadings, and the rival parties' submissions. I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in



Republic vs Kenya National Examinations Council *ex parte* Gathenji and 9 Others, [1997] e KLR. The said Court held as follows in this regard:

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus” Once again we turn to Halsbury’s Law of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean” They mean that an order of mandamus will compel 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....”

30. The requirements for an order of mandamus to issue were further explained by Mativo J. in Republic vs Principal Secretary, Ministry of Internal Security & another *ex parte* Schon Noorani & Another [2018] eKLR as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - i. A prior demand for performance;



- ii. A reasonable time to comply with the demand, unless there was outright refusal; and
- iii. An express refusal, or an implied refusal through unreasonable delay;
- iv. No other adequate remedy is available to the Applicants;
- v. The Order sought must be of some practical value or effect;
- vi. There is no equitable bar to the relief sought;
- vii. On a balance of convenience, mandamus should lie

31. It is not disputed in the present application that judgment was entered in favour of the ex parte Applicants in Nakuru Civil Suit No. 640 of 2017. The issues therefore that require to be determined are firstly, whether the Respondent is under a public duty and obligation to satisfy the judgment in favour of the ex parte Applicants, and secondly, if so, whether the ex parte Applicants are entitled to the relief they seek.
32. Section 21 of the *Government Proceedings Act* in this regard provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(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.
- (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.

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.”
33. Narok County is one of the Counties established by Article 6 of *the Constitution* and the First Schedule to *the Constitution*, and is constitutionally recognized as a distinct government level of county governments by the said Article. Government in *the Constitution* of Kenya, 2010, refers to ‘governments at the national and county levels (article 6(2) of *the Constitution*). As an existing law, reference to “Government” in the *Government Proceedings Act* refers to the “government at national and county levels’ (section 7 of the Sixth Schedule to *the Constitution* (Transitional and Consequential Provisions). See also Odunga J. in Republic v Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR on the application of the *Government Proceedings Act* to County Governments.
34. As to whether the Respondent herein is under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Execution proceedings against a government or public authority under the *Government Proceedings Act* can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body.
35. This was also the holding in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) where Githua J. held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory



duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

36. The decretal sum due from the Narok County government has in this respect not been disputed by the Respondents, and the ex parte Applicants in this respect annexed copies of the judgment and decree for costs against the said County awarded in their favour in Nakuru Civil Suit No. 640 of 2017, The ex parte Applicants also annexed a copy of the Certificate of Taxation issued in their favour against the Narok County Government for the decretal sum of Kshs. 320,850/= and costs of the suit of Kshs, 234,450/=.
37. Section 103 of the *Public Finance Management Act* No 18 of 2012 establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters. Under section 103(3) of the Act, the County Executive Committee Member for Finance is the head of Treasury, and is thus responsible for finance and fiscal matters in the County.
38. This Court therefore finds that arising from these provisions, the Respondent is jointly responsible with the County Executive Committee Member of Finance for the satisfaction of Court orders and decrees on payment of money owed by the Narok County Government by virtue of their roles and functions. On this I am content to cite Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 wherein Majanja J. addressed the role of the Court in ensuring that the right of a successful litigant to enjoy the fruits of his judgement is not thwarted, as follows:
- “...a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of *the Constitution* particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of *the Constitution*.
39. The ex parte Applicants have adduced evidence which show that it made a demand for payment and served all relevant legal as well as accountable documents required for payment by government, but the Respondent failed to pay. See annexed copy of letter dated 20th September 2021 wherein the decree, Certificate of Costs was also enclosed. Failure to pay such claim is dereliction of duty by the concerned government or government officer.
40. As to the actual amount of costs due from the Respondent, I have perused the judgment delivered on 27/04/2020 in Nakuru Civil Suit 640 of 2017 and Certificate of Taxation dated 1/09/2021, I note that there was an award of interest made therein. Section 26(2) of the *Civil Procedure Act* in this respect provides that where a decree for the payment of money is silent with respect to the payment of interest on the aggregate sum from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

The Disposition

41. In the premises, I find that the ex parte Applicants’ Notice of Motion dated 14th February 2022 is merited.
42. I accordingly grant the following orders:
- a. An order of mandamus to compel the County Government of Narok, and the County Chief Officer Finance to pay to the ex parte Applicants the sum of Kshs 320,850/= being the decretal



sum and costs of the suit amounting to Kshs. 234,450/= awarded to the ex parte Applicants in Nakuru Civil suit no. 640 of 2017 together with interest thereon at 6% per annum from 1st September 2021 until payment in full.

b. The ex parte Applicants shall have the costs of the Notice of Motion dated 14th February 2022.

43. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
24TH DAY OF MAY, 2023**

F. GIKONYO M.

JUDGE

In the Presence of:

1. Mr. Kasaso – CA
2. Kibet for Ex parte Applicant
3. Ms. Tuya holding brief for Ms. Martim for Respondents

