



**Republic v County Secretary, County Government of Kiambu & another;
Githunguri Dairy Farmers Co-operative Society (Exparte) (Judicial Review
E002B of 2021) [2023] KEHC 17631 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
JUDICIAL REVIEW E002B OF 2021**

PM MULWA, J

MAY 24, 2023

BETWEEN

REPUBLIC APPLICANT

AND

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

**EXECUTIVE COMMITTEE MEMBER FOR FINANCE, COUNTY
GOVERNMENT OF KIAMBU 2ND RESPONDENT**

AND

GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY EXPARTE

JUDGMENT

1. The ex parte Applicant herein, Githunguri Dairy Farmers Co-operative Society filed a notice of motion dated April 29, 2021, seeking an order of mandamus directed to the Respondents; the County Secretary, County Government of Kiambu and the Executive Committee Member for Finance, County Government of Kiambu to pay them a sum of Kshs 2,504,312/= plus interest at 12% per annum from September 6, 2018 till payment in full. The sum is the certified costs in Nairobi High Court Constitutional and Human Rights, Miscellaneous Application No. 353 of 2016.
2. The application is supported by a statutory statement dated March 5, 2021, and a verifying affidavit sworn on the same date by George Kinyanjui, the chairman of the management committee of the *ex parte* applicant. The main issue in contention is that the respondents have failed to honour the certificate of costs issued on December 4, 20220 for the sum of Kshs 2,504,312/= despite several demands. Unless this court intervenes by compelling the respondents to pay the decretal amount the ex-parte applicant will be prejudiced.



3. On June 16, 2022, Ms Cheserek informed the court that the respondents had filed a replying affidavit and a notice of preliminary objection, however despite the court calling for the same to be placed in the court file, that was not done and the court proceeded to fix a date for judgment.
4. The application was canvassed by way of written submissions. Only the ex parte applicant's submissions are on record.

Ex parte applicant's submissions

5. In the submissions filed on March 14, 2022, counsel submits that the Preliminary Objection is misplaced and should be struck out. The County Government of Kiambu is the successor of the defunct County Council of Kiambu and as such it is duty-bound to satisfy the decree entered against the former.
6. Counsel urged the court to find the averments in the supporting affidavit in the Notice of Motion as true since they have not been contravened through a replying affidavit by the respondent. He cited the case of *Punch Nigeria Ltd v Attorney General 1966 1 Commonwealth Human Rights Law Digest* at page 46:

“ where facts had been proven that prima facie showed an infringement, it was for the person alleged to have infringed that right to justify such infringement and in the absence of a counter affidavit, the averment contained in the supporting affidavit must be taken as true.”
7. Counsel submits the only remedy available to a successful litigant against the government is the institution of judicial proceedings against the accounting officer of the County Government of Kiambu to enforce a decree/order as the litigant is barred from executing against the government.
8. In the interest of justice, the ex-parte applicant will be allowed to enjoy the fruits of the judgment delivered on May 21, 2015 without further delay, it was submitted. And that the respondents' actions contravene Article 10 of *the Constitution* and erode public confidence and believe in the rule of law.
9. In awarding costs counsel urged the court to look at the issues surrounding the filing of the suit and urged the court to allow the application with costs in its favor.

Analysis and determination

10. After due consideration of the application and the submissions as filed the issue for determination is whether this court ought to issue the Judicial Review remedy for mandamus
11. Mandamus was defined in the case of *Republic v Principal Secretary, Ministry of Internal Security & Another ex parte Schon Noorani & Another* [2018] eKLR thus:

“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.”
12. The *ex parte* applicant has demonstrated to this court that it obtained a decree in Nairobi High Court Constitutional and Human Rights, Miscellaneous Application No. 353 of 2016 against the respondents, and proceeded to obtain a certificate of costs which was served upon the respondents who have failed to honour the decree.



13. In *Republic v The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere*, Nairobi High Court Misc. Application No 395 of 2012 the court stated: -

“that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any form”.

14. A remedy of *mandamus* is issued where an applicant has no other available remedy. In the instant case the *ex parte* applicant obtained a decree against the respondent, a government body and thus the only remedy available in execution of the decree is to file a judicial review remedy for mandamus. The *ex parte* applicant has no other remedy to pursue in the execution of the decree.

15. In the case of *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) the court 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 regard 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* 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.”

16. It is the court’s duty to protect a successful litigant and ensure that their rights to enjoy the fruits of the judgment are not thwarted. In *Ayub Muramba Kakai v Town Clerk of Webuye County Council & Another* Nairobi High Court Judicial Review Application No 448 of 2006 (2014) eKLR, Majanja J stated as follows:

- i. “...a decree holder’s right to enjoy the fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favour 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*. In my view and taking into account



the legal provisions I have cited; the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment.”

17. According to the *ex parte* applicant the County Government of Kiambu is the successor of the defunct County Council of Kiambu and as such it is duty-bound to satisfy the decree entered against the former County Council of Kiambu.

18. In the *Ayub Murumba Kakai* case (supra) the court addressed the issue of the repealed Local Government Act as thus: -

“The applicant was unsuccessful in enforcing the decree against the Town Council prompting the filing of an application seeking an order of mandamus. Since the application was filed, the legal landscape concerning the liability of local authorities and their officers under the Local Government Act (Repealed) has changed. *The Constitution* has introduced devolved government through Counties to replace local authorities...Despite the statutory lacunae in the County Government Act and the *Urban Areas and Cities Act*, the rights accrued as a result of the litigation are preserved upon the repeal of the Local Government Act by *the Constitution*. Section 33 of the Sixth Schedule to *the Constitution* provides for the succession of institutions upon promulgation...that an office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

19. I have reproduced all the above authorities to illustrate that the present case is one where an order of mandamus can issue.

20. In the instant case, the *ex parte* applicant has moved this court to compel the satisfaction of a judgment already decreed in its favour by a competent court of law. The applicant has demonstrated by way of evidence compliance with the provisions of Section 21 of the *Government Proceedings Act*.

21. Further, the respondents have not given any satisfactory reason as to why the decree has not been fulfilled almost five years later. This court takes great exception with the conduct of the respondents herein.

22. In the premises, the court believes that the *ex parte* applicant’s Notice of Motion dated April 29, 2021 is merited.

23. I accordingly grant the following orders:

- i. An order of *mandamus* to compel the County Secretary, County Government of Kiambu and the Executive Committee Member for Finance, County Government of Kiambu to pay the *ex parte* applicant a sum of Kshs 2,504,312/= being the certified costs awarded to the *ex parte* applicant in Nairobi High Court Constitutional and Human Rights Miscellaneous Application No 353 of 2016 together with interest thereon at 12% per annum from September 6, 2018 until payment in full.
- ii. The *ex parte* applicant shall have the costs of the application.

DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 24TH DAY OF MAY, 2023

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P. M. MULWA

JUDGE

In the presence of

Mr. Kinyua/Mr. Duale – Court Assistants

Mr. Ndung'u - For ex parte applicant

N/A - For respondents, though served

