



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Republic v Attorney General & another; Kivusyu (Exparte Applicant) (Judicial Review Application E50 of 2021) [2023] KEHC 20194 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E50 OF 2021**

OA SEWE, J

JUNE 30, 2023

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

AND

**IN THE MATTER OF EXECUTION OF THE DECREE DATED 23.07.2021
ISSUED IN MOMBASA CHIEF MAGISTRATES CIVIL CASE NO. 929 OF 2019**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE FAIR ADMINISTRATIVE
ACTION ACT NO. 4 OF 2015; SECTION 20 AND 21 OF THE GOVERNMENT
PROCEEDINGS ACT, CAP 40 OF THE LAWS OF KENYA AND
ORDER 52 RULE 3(1) OF THE CIVIL PROCEDURE RULES, 2010**

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING AND
DEVELOPMENT 2ND RESPONDENT**

AND

ELIZABETH NDUKI KIVUSYU EXPARTE APPLICANT

JUDGMENT

1. The Notice of Motion dated 7th March 2022 was filed by the Ex Parte applicant, Elizabeth Nduki Kivusyu, (hereinafter, “the applicant”) under Sections 8 and 9 of the *Fair Administrative Action Act*,



No. 4 of 2015, Sections 20 and 21 of the [Government Proceedings Act](#), Chapter 40 of the Laws of Kenya, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and Order 53 Rules 1, 2 and 3 of the [Civil Procedure Rules, 2010](#). The applicant thereby seeks orders that:

- (a) An order of Mandamus be issued to compel the respondents to forthwith pay the sum of Kshs. 6,460,414/= to the applicant as ordered by the court on 26th October 2021 in Mombasa Chief Magistrate Civil Case No. 929 of 2019: Elizabeth Nduki Kivusyu v Ministry of Lands, Housing and Urban Development together with interest to date, within thirty (30) days of the Court's Order.
 - (b) That the costs of the application be provided for.
2. The application was premised on the grounds that the applicant filed Mombasa CMCC No. 929 of 2019 vide a Plaint dated 6th May 2019 seeking special damages of Kshs. 4,877,570 against the respondents herein citing negligence in the manner the respondents handled a land transaction leading to the applicant suffering damage. The respondents filed a Defence dated 10th November 2020 opposing the prayers sought by the applicant in that suit and the matter proceeded for hearing. The applicant further averred that, in a judgment delivered on 23rd July 2021 by Hon. Lesootia Saitabau, the court found in her favour and awarded her Kshs. 4,877,570/= together with costs and interest from the date of judgment till payment in full.
3. The applicant further averred that, a Decree and Certificate of Order were thereafter issued against the Government on 15th October 2021 and 26th October 2021, respectively, and service thereof was duly effected on the respondents. He accordingly contended that the accounting officer of the 2nd respondent was thereupon bound in law to satisfy the decree, but has failed or ignored to do so. She added that, as the chief legal advisor of the Government, the 1st respondent has a duty to ensure that judgments and court decrees arising therefrom are promptly complied with.
4. The application was also supported by the Statement of Facts as well as the Verifying Affidavit filed herein in which the grounds aforementioned were explicated. Annexed to the Verifying Affidavit were copies of the judgment dated 23rd July 2021, the Decree issued on 15th October 2021, the Certificate of Order dated 26th October 2021 as well as a copy of the letter dated 29th October 2021 by cover of which counsel for the applicant forwarded the Decree and Certificate of Order.
5. The application was resisted by the respondents vide their Grounds of Opposition dated 18th January 2023. They thereby contended that:
 - (a) The application has introduced a party who was not in the proceedings before the lower court in Mombasa CMCC No. 929 of 2019.
 - (b) Section 26 of the [Civil Procedure Act](#) is clear that interest is only payable on the principal sum and not on the advocate's costs unless specifically ordered by the trial court.
 - (c) Interest on costs is only payable per Section 27(2) of the [Civil Procedure Act](#) if interest on costs was specifically awarded and the interest rate stated by the trial court.
 - (d) Interest on costs was not awarded by the trial court and is therefore not payable.
 - (e) Interest is only payable on the principal sum of Kshs. 4,877,570/= awarded by the trial court on 23rd July 2021 and not on the sum of Kshs. 6,460,414 as stated by the applicant.
 - (f) Thirty (30) days is not sufficient time to undertake the processes required to pay the decretal sum noting that the amount has to be budgeted for if the funds are to be made available.



6. The application was canvassed by way of written submissions, pursuant to the directions made herein on 19th January 2023. Accordingly, Mr. Gikandi for the applicant filed his written submissions on 23rd January 2023. In his submission, the judgment delivered in Mombasa CMCC No. 929 of 2019 speaks for itself; and that the said judgment provided that interest be paid from the date of judgment until full payment; and therefore that the debt will continue to accrue interest until finally settled. Counsel added that there is no doubt that the Principal Secretary, as the accounting officer in the Ministry of Lands, Housing and Urban Development, is under a legal duty to ensure that money decrees issued by the court are settled. He pointed out that in so far as the respondents have chosen to ignore the Decree and Certificate of Order issued in favour of the applicant, the instant application is merited and ought to be allowed with costs.
7. On his part, Mr. Makuto for the respondents relied on his written submissions dated 18th January 2023. He pointed out that over time, the Chief Justice has given guidance by way of Practice Notes as to the reasonable rate of interest. He therefore made reference to the Practice Note No. 1 of 1982 by which it was advised that a reasonable rate of interest would thenceforth be 12% per annum; which was later increased to 14% by Statute Law (Miscellaneous Amendment Act No. 19 of 1985. Counsel also relied on *Lata v Mbiyu* [1965 EA 592 as to the justification for an award of interest on the principal sum, namely, to compensate a plaintiff for the deprivation of any money through the wrongful act of the defendant. Counsel also quoted from *B.O.G. Tambach Teachers Training College v Mary Kipchumba* [2018] eKLR to buttress his submission that, in the instant matter, interest is only payable at 6% on the principal sum; and that no interest is due on costs as no order was made by the lower court in that regard.
8. Needless to say that Mandamus is a relief available to litigants under Article 23(3)(f) of the *Constitution*, Sections 8 and 9 of the *Fair Administrative Action Act*, Sections 7 and 8 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*. Its scope was well explicated in *Halsbury's Laws of England*, 4th Edition, Volume 1 thus:

“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...”
9. There is no dispute that applicant filed Mombasa CMCC No. 929 of 2019: Elizabeth Nduki Kivusyu and obtained a Decree in her favour for Kshs. 4,877,570/= together with costs and interest. The applicant thereafter 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.”

10. Annexed to the applicant’s Verifying Affidavit is a Certificate of Order issued on 26th October 2021 setting out the sums due to the applicant. It is common ground that the Certificate of Order was duly served on the respondents as envisaged by Section 21 of the *Government Proceedings Act*. Accordingly, it was expected that the Accounting Officer of the 2nd respondent would proceed and settle the Decree; for Subsections (3) and (4) of Section 21 of the *Government Proceedings Act*, are explicit that:

- “(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.”

11 In the premises, 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...”

12. As the principal adviser of the Government, it was the responsibility of the 1st respondent to ensure compliance by the 2nd respondent. Hence, in Peter Anyang' Nyong'o & 10 Others v Solicitor General [2011] eKLR, Hon. Warsame J. (as he then was) took the following view:

“...It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client. Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf. Clearly, it is the duty and the function of the Attorney General to advise his client and if a particular organ refuses to pay he will be responsible on behalf of his agent...”

13. There was a disputation as to whether interest is due and if so at what rate. In fact, this issue formed the key subject of the respondents' Grounds of Opposition. I need not go there, because the remit of judicial review is limited.

14. In the result, I find merit in the application dated 7th March 2022. The same is hereby allowed and orders granted as hereunder:

- (a) An order of Mandamus be and is hereby issued to compel the respondents to forthwith pay the sum of Kshs. 6,460,414/= to the applicant as ordered by the court on 26th October 2021 in Mombasa Chief Magistrate Civil Case No. 929 of 2019: Elizabeth Nduki Kivusyu v Ministry of Lands, Housing and Urban Development together with interest to date, within ninety (90) days of the Court's Order.
- (b) That the costs of the application be borne by the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE, 2023

OLGA SEWE

JUDGE

