



**Republic v County Secretary, County Government of Mombasa & another;
Mwangi Njenga & Co Advocates (Exparte Applicant) (Judicial Review
E024 of 2022) [2023] KEHC 22138 (KLR) (25 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 22138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW E024 OF 2022**

OA SEWE, J

AUGUST 25, 2023

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

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

**IN THE MATTER OF THE GOVERNMENT PROCEEDINGS
ACT, CHAPTER 40 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

BETWEEN

REPUBLIC APPLICANT

AND

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

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

AND

MWANGI NJENGA & CO ADVOCATES EXPARTE APPLICANT



JUDGMENT

- [1] The Notice of Motion dated 8th March 2023 was filed herein by the ex parte applicant, Mwangi Njenga t/a Mwangi Njenga & Co. Advocates. The application was filed pursuant to Sections 7, 8, 9, 10 and 11 of the [Fair Administrative Action Act](#), 2015 and Order 53 Rule 3(1) of the [Civil Procedure Rules](#) seeking that:
- (a) An Order of Mandamus do issue compelling the County Secretary and the Chief Finance Officer of the County Government of Mombasa to satisfy the decrees and costs in the total sum of Kshs. 14,175,499.70 in respect of the following cases:
 - (i) Mombasa HCMA No. 26 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa;
 - (ii) Mombasa HCMA No. 77 of 2022: Mwangi Njenga & Co. Advocates v County Government of Mombasa;
 - (iii) Mombasa ELCMA No. 35 of 2022: Mwangi Njenga & Co. Advocates v County Government of Mombasa;
 - (iv) Mombasa HCJRMA No. E16 of 2022: Mwangi Njenga & Co. Advocates v County Government of Mombasa
 - (b) The costs of the application be provided for.
- [2] The application was premised on the grounds that the applicant obtained various Certificates of Costs against the respondent, the County Government of Mombasa, and applied to convert the Certificates of Costs into decrees in the aforesaid matters, to enable him initiate execution processes following failure by the respondent to satisfy the said Certificates of Costs. The applicant further pointed out that no appeal has been preferred against the Certificates in the primary suits; and therefore that the decretal amounts are due and payable. He added that no execution can issue against the respondent by virtue of the provisions of the [Government Proceedings Act](#), Chapter 40 of the Laws of Kenya. Thus, the applicant asserted that the only available avenue is an order of Mandamus against the County Secretary and the Chief Finance Officer of the respondent compelling them to satisfy the decrees issued in the primary suits.
- [3] The application was supported by applicant's Statutory Statement dated 14th October 2022 and the Verifying Affidavit sworn by the applicant together with the documents annexed thereto. The documents include the Decrees passed in favour of the applicant in the four matters aforementioned. Thus, the applicant averred that it is in the interest of justice that the orders sought herein be granted as prayed.
- [4] The application was resisted by the respondent, to which end Ms. Kuria relied on the Ground of Opposition filed by her on 24th March 2023; namely, that the application offends Sections 45(4) of the County Government Act, 2012 in so far as the applicant elected to sue the wrong parties.
- [5] Directions were thereafter given on 27th March 2023 that the application be canvassed by way of written submissions. Accordingly, Mr. Origi relied on his written submissions dated 17th April 2023. He reiterated the factual basis of his application and proposed a single issue for determination, namely, whether the prerequisites for grant of the judicial review order of Mandamus have been established.



Counsel relied on *Republic v Jomo Kenyatta University of Agriculture and Technology, Ex Parte Elijah Kamau Mwangi* [2021] eKLR as to the purpose of the order of Mandamus.

- [6] Hence, Mr. Origi submitted that there are decrees of the court that are yet to be settled, of which the respondent is fully aware. In his view, the respondents, as the officials of the County Government of Mombasa, are the persons responsible for effecting the payments; and therefore that the omission to do so constitutes failure to perform their legal duties. He added that the applicant has no alternative remedy available as the *Government Proceedings Act* precludes any execution against the County Government. Counsel added that enforcement of the order sought, if granted, will not require the Court's supervision, as the action sought to be mandated is the simple act of making payment. He therefore submitted that the applicant has made out a good case for the issuance of the order of Mandamus and prayed that the application be allowed with costs.
- [7] In response to the respondents' assertion that applicant has sued the wrong parties, Mr. Origi submitted that the issue was conclusively settled in *Republic v County Secretary Migori County & Another, Ex Parte Linet Magambo* [2020] eKLR, in which the Court considered the import of Sections 44 and 45 of the County Government Act and held that County Secretary and a County Chief Finance Officer are the persons charged with the responsibility of making payments. He consequently submitted that the orders sought herein are targeted against the appropriate officials.
- [8] On her part, Ms. Kuria for the respondents relied on her written submissions dated 18th May 2023. She proposed a single issue for determination, namely, whether the application offends Section 45(4) of the County Government Act. She relied on *Soloh Worldwide Inter-enterprises v County Secretary, Nairobi County & Another* [2016] eKLR and submitted that an accounting officer for the County must be appointed in writing by the County Executive Committee member for Finance as stipulated by Section 148 of the *Public Finance Management Act*; and therefore the person who has the overall financial obligation for the purposes of the financial affairs of a County Government is the County Executive member in charge of Finance, unless otherwise shown.
- [9] I have given careful consideration to the substantive Judicial Review application dated 8th March 2023 together with the affidavits filed in respect thereof. I have similarly taken into account the written submissions filed by learned counsel for the parties. Needless to mention that Mandamus is a relief available to litigants under Article 23(3)(f) of the *Constitution* 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..."
- [10] The remedy is particularly efficacious in situations where a decree or Certificate of Costs has been issued against the Government, as is the case herein. Thus, in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza* [2012] eKLR it was held:
- 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*.

[11] That said, the next question to consider is whether the 2nd respondent is the proper officer to look to for payment. This is because Section 21(3) of the *Government Proceedings Act* is 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...”

[12] In the same vein, Section 103 of the *Public Finance Management Act* provides that:

The County Executive Committee Member for finance shall be the head of the County Treasury.”

[13] Moreover, in *Council of Governors & Others v The Senate* Petition No. 413 of 2014 [2015] eKLR the Court considered the meaning of the term “accounting officer” in relation to the County government under the Constitution, the *County Governments Act* and the *Public Finance Management Act*. It observed as follows:

(134) The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of *the Constitution* provides;

(1) Act of Parliament shall provide for -

(a)

(b) The designation of an accounting officer in every public entity at the national and county level of government.

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

(135) It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the *Public Finance Management Act*. Indeed, Section 148 (3) of the *Public Finance Management Act* mandates the County Executive Committee Member for Finance to ensure that each County



government entity has an accounting officer as provided for under Article 226(2) of *the Constitution*.

[14] Likewise, in *Soloh Worldwide Inter-Enterprises v County Secretary Nairobi County & another* (supra) it was held:

...It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose.”

[15] Lastly, in *Republic v Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 others* [2018] eKLR

25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see *Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute* [2003] KLR 582 and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* NBI HC Misc. App. 222 of 2016 [2018] eKLR).”

[16] Accordingly, although counsel for the applicant contended that the two respondents are the duty bearers when it comes to the financial affairs of the County Government of Mombasa, in the absence of proof that either of them has been appointed as the accounting officer for the County Government of Mombasa by the County Executive Committee member for Finance, the submission is without foundation. Accordingly, it is my finding that in the circumstances, the instant application has been brought against the wrong parties.

[17] In the result, it is my finding that the Notice of Motion dated 8th March 2023 as presented is incompetent. The same is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE

