



**Republic v County Government of Mombasa & another; Omar (Exparte Applicant)
(Judicial Review E004 of 2023) [2023] KEHC 21199 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW E004 OF 2023
OA SEWE, J
AUGUST 4, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

HAMID MOHAMED OMAR EXPARTE APPLICANT

JUDGMENT

1. Upon being granted leave on the 6th March 2023, the ex parte applicant, Hamid Mohamed Omar, (hereinafter, “the applicant”) filed his substantive judicial review application by way of the Notice of Motion dated 20th March 2023. The application was filed pursuant to Articles 2, 10, 19, 20, 21, 22, 23, 47 and 48 of the Constitution of Kenya, Sections 4, 7 and 11 of the Fair Administrative Action Act, No. 4 of 2015, Sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya; and Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules for the following orders;
 - (a) That the applicant, Hamid Mohamed Omar, be granted an order of Mandamus directed to the 1st respondent, the County Government of Mombasa, to pay to the applicant the sum of Kshs. 773,380.84 being the decretal amount in Mombasa Chief Magistrate’s ELRC Cause No. 199 of 2020 together with Kshs. 116,800/= being the certified costs thereon with interest at 12% per annum from the date of filing suit until payment in full;
 - (b) That the Court do grant such further orders and or consequential orders, writs and declarations for the purpose of enforcing the applicant’s judgment or decree;
 - (c) That the costs of the application be costs in the cause.



2. The application was premised on the grounds that the applicant filed an employment cause against the 1st respondent and judgment was on 17th February 2022 entered against the 1st respondent for the sum of Kshs. 773,380.84, while costs were thereafter assessed at Kshs. 116,800/= . The applicant further contended that despite several reminders, the 1st respondent has completely failed to settle the decretal amount. Thus, he instituted these judicial review proceedings against the 1st respondent, seeking an order of Mandamus to compel the 1st respondent to pay the decretal sum.
3. The grounds were expounded on in the applicant’s Supporting Affidavit sworn on 20th March 2023 in addition to the Statutory Statement filed therewith. The applicant asserted therein that the 1st respondent is under a public duty to make the said payment but is unlawfully neglecting or refusing to do so. The applicant further averred that the 1st respondent has acted and is continuing to act in excess of its powers in refusing to carry out its aforesaid public duty to make the payment to the applicant.
4. In response to the application, the 1st respondent filed a Notice of Preliminary Objection contending that it was never served with any pleadings, Notice of Entry of Judgment, Decree or Certificate of Costs. In addition, the 1st respondent asserted that it was never served with the Certificate of Order as stipulated under Section 21(1) and (2) of the [Government Proceedings Act](#), Chapter 40 of the Laws of Kenya. Thus, the 1st respondent prayed for the dismissal of the substantive application.
5. On his part, Mr. Makuto, counsel for the 2nd respondent, applied on the 22nd March 2023, that the 2nd respondent be excused from these proceedings, granted that no specific prayers were made touching on the 2nd respondent. Hence, leave was duly granted to the 2nd respondent to disengage from these proceedings. Directions were thereafter that the application be canvassed by way of written submissions; pursuant to which Ms. Wambani filed her written submissions dated 17th May 2023. She proposed the following two issues for determination:
 - (a) Whether the 1st respondent was duly served with process; and,
 - (b) Whether the orders sought ought to be granted.
6. On service, Ms. Wambani submitted that the 1st respondent was duly served with all the pleadings pertaining to Mombasa ELRC No. 199 of 2020, including a Certificate of Order dated 17th February 2022. Accordingly, counsel urged the Court to dismiss the 1st respondent’s Preliminary Objection in so far as it raises issues of fact as opposed to pure points of law. She relied on [Peter Mungai v Joseph Ngaba Kuria & Another; Leah Njeri Ndichu \(Interested Party\)](#) [2022] eKLR in support of her submissions.
7. On the prayers sought, counsel submitted that despite service of all the pleadings and requisite documents, the respondent has failed to settle the decretal sum; and therefore that an order of Mandamus is the most appropriate remedy in the circumstances. She relied on [Republic v Jomo Kenyatta University of Agriculture & Technology, Ex parte Elijah Kamau Mwangi](#) [2021] eKLR and [Republic v Principal Secretary Ministry of Internal Security & Another, Ex Parte Schon Nooran & Another](#) [2018] eKLR and urged the Court to grant the orders sought herein.
8. On behalf of the 1st respondent, Ms. Omboga submitted that these proceedings are unique and primarily procedural. Hence, it was imperative for the applicant to comply with Section 21 of the [Government Proceedings Act](#). She reiterated the 1st respondent’s stance that there neither the Decree nor the Certificate of Costs was served on the 1st respondent. Counsel submitted that Mandamus can only issue where it is clear that there is willful refusal or unreasonable delay; and therefore that the application is premature. She therefore urged for the dismissal of the application with costs.



9. I have given careful consideration to the substantive Judicial Review application dated 10th August 2022 together with the affidavits filed in respect thereof. I have similarly taken into account the written submissions filed by counsel for the parties and note that, a preliminary objection was raised by the 1st respondent as to the competence of the application from the standpoint of Section 21 of the [Government Proceedings Act](#) and Order 29 Rule 3 of the [Civil Procedure Rules](#), on the ground that the requisite notice by way of Certificate of Order against the Government was not served.
10. It is now settled that a preliminary objection must be confined to points of law and should not be blurred by factual details, particularly if the facts are disputed. Hence, in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 it was held that:
- “... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
11. Sir Charles Newbold, P. added thus:
- “...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
12. The averments set out herein clearly show that, while the 1st respondent denied service of process, including the Certificate of Order provided for under Section 21 of the [Government Proceedings Act](#), the applicant took the posturing that all the pleadings and requisite notices and certificates were duly served. Since it would therefore require investigation by the Court to determine the issue of service one way or the other, I would agree with counsel for the applicant that the preliminary objection was improperly taken. Indeed, in [Oraro v Mbaja](#) [2005] 1 KLR 141 by Hon. Ojwang, J. (as he then was) thus:
- “...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”
13. Accordingly, I find no merit in the 1st respondent’s preliminary objection and dismiss it accordingly.



14. On the merits of the application, needless to say 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...”

15. The remedy is particularly efficacious in situations where a decree or Certificate of Costs has been issued against the Government. This was well-explicated by Hon. Githua, J. in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza* [2012] eKLR thus:

“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*.

16. Moreover, an elaborate procedure has been set out, not only under Section 21 of the *Government Proceedings Act*, but also under Order 29 Rule 3 of the *Civil Procedure Rules* for compliance before an order of Mandamus can issue. For instance, Section 21 of the *Government Proceedings Act*, 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.”



17. Further to the foregoing, Subsections (3) and (4) of Section 21 of the [Government Proceedings Act](#) state:

“(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.”

18. That the aforesaid provisions apply to County Governments such as the 4th respondent is not in doubt, for Subsection (5) of Section 21 is explicit that:

“This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

19. The rationale for this stringent procedure was well captured in [Kisya Investments Ltd v Attorney General & Another](#) [2005] 1 KLR 74 thus:

History and rationale of Government’s immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the [Government Proceedings Act](#) provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. See [Halsbury’s Laws Of England](#) 4th Edn Vol. 11 Para 970, 971 and 1370. As a result of the foregoing, which was borrowed from the [Crown Proceedings Act, 1947](#) (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. See [Auckland Harbour Board v R](#) [1924] AC 318, 326. The second



situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.” (also see *Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandibi, supra*)

20. A perusal of the documents annexed to the Notice of Motion dated 20th March 2023 shows that one of them is a Certificate of Order Against the Government for purposes of Order 29 Rule 3 of the *Civil Procedure Rules*, issued by the Chief Magistrate on 24th March 2022 and which was duly served on the Attorney General on 24th March 2022. There is likewise a Certificate of Order for Costs Against the Government annexed to the application. There is however no indication that the 1st respondent was served with the said documents. In this regard, I am in total agreement with the position taken by Hon. Mativo, J. (as he then was) in *Republic v Principal Secretary, Ministry of Internal Security & Another, Ex Parte Shon Noorani & Another* [2018] eKLR that:

“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. v Canada (Attorney General)*, [23] and, was also discussed in *Dragan v 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.”

21. Having found that the applicant has not complied with all the conditions precedent to the grant of the order of Mandamus, it would follow that the duty to pay on the part of the respondent is yet to arise; and therefore the application is premature.
22. In the result, it is hereby ordered that the Notice of Motion dated 22nd March 2023 having been prematurely filed, be and is hereby struck out with no order as to costs. I further note that the application, having arisen from the decision of the lower court in ELRC Case No 199 of 2020 ought to have been filed before the Employment and Labour Relations Court; a court with equal status as the High Court and with the jurisdiction to grant judicial review orders for purposes of Article 23(3) (f) of the Constitution .

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE

