



Republic v Machakos County Government; Ecta (K) Limited (Exparte) (Application E186 of 2022) [2023] KEHC 22871 (KLR) (Judicial Review) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E186 OF 2022
J NGAAH, J
SEPTEMBER 29, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

MACHAKOS COUNTY GOVERNMENT RESPONDENT

AND

ECTA (K) LIMITED EXPARTE

JUDGMENT

1. The applicant's application is a motion dated May 26, 2023 expressed to brought under Order 53 Rule 3 of the [Civil Procedure Rules](#). There is only one main prayer for the order of mandamus and it is phrased as follows:
 1. An order of judicial review by way of mandamus to compel the County Executive Committee member for finance and economic planning as the accounting officer of the Machakos County Government to make payment of the sum of Kshs 13,942,214.44 at the rate of 12% per annum from April 13, 2022 until payment in full."
2. The applicant has also sought for costs.
3. The application is based on a statutory statement dated 19 December 2022 and an affidavit, sworn on even date by Mr. Peter Kimathi, verifying the facts relied upon.
4. According to the Mr Kimathi, on 13 April 2022, the applicant obtained a judgement against the respondent in Milimani Chief Magistrates Court Civil Case No E061 of 2022 for the sum of Kshs 12, 854, 321/= and costs of Kshs 440,572.78



5. On November 9, 2022, the respondent was served with a copy of the certificate of order against government and the statement of accounts showing the outstanding amount as at 31 November 2022 being Kshs 14, 269,536.17. However, as at the date of filing the instant application, the respondent had not settled these amount.
6. The applicant's case is that there is no alternative remedy available to the applicant to enforce payment considering that the Machakos County Government is exempt from execution or attachment except as provided under the *Government Proceedings Act*. It is for this reason that the present application has been filed so that the relevant accounting officer can be compelled to perform his statutory duty under section 21(3) of the *Government Proceedings Act* and pay the sums due.
7. The respondent was served with the application with the notice that the application would be heard on 26 June 2023. An affidavit of service to that effect was filed. However, the respondent did not appear and neither was any document filed in response to the application.
8. Section 21 of the *Government Proceedings Act* prescribes how orders against the Government may be satisfied. It reads as follows:

21. Satisfaction of orders against the Government

- (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.

- (5) 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.

9. According to section 21(4) and (5) of the Act, County Governments are insulated from execution and attachment in enforcement of a decree.
10. In the absence of any other mode by which a decree may be executed against the Government, the only alternative available to a decree holder such as the applicant would be an order of mandamus to compel the accounting officer for the Government department concerned to undertake his public duty under section 21 (1) and pay the decree-holder the sum due or the amount appearing in the certificate as due to him together with interest, if any, lawfully due.
11. The scope of the mandamus order was explained by the Court of Appeal in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR where the court noted as follows:

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.’

12. 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.
13. There is evidence that the applicant has satisfied the pre-requisites for the order of mandamus under section 21. It has not been denied that that the Attorney General or the accounting officer was served with the certificate of order against Government within the prescribed time. Having been so served,



the accounting officer is enjoined to perform the public duty placed upon him under section 21(3) of the *Government Proceedings Act* and pay the amount stated in the certificate.

14. In the absence of any reason why he has not complied and paid, I am persuaded that the applicant has made a case for the grant of the order of mandamus. Accordingly, I allow the applicant's application in terms of prayer 1. The applicant will also have costs of the application. It is so ordered.

SIGNED DATED, AND DELIVERED ON 29 SEPTEMBER 2023

Ngaah Jairus

JUDGE

