



**Republic v Nairobi City County & 2 others; Musyoka Mogaka
& Company Advocates (Exparte) (Application E182 of 2022)
[2023] KEHC 22838 (KLR) (Judicial Review) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW
APPLICATION E182 OF 2022**

**J NGAAH, J
SEPTEMBER 29, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

**NAIROBI CITY COUNTY CHIEF EXECUTIVE COMMITTEE MEMBER FOR
FINANCE 2ND RESPONDENT**

CHIEF OFFICER FOR FINANCE 3RD RESPONDENT

AND

MUSYOKA MOGAKA & COMPANY ADVOCATES EXPARTE

JUDGMENT

1. The applicant’s application is a motion dated February 7, 2023. It is brought under sections 8 and 9 of the [Law Reform Act](#), cap. 26 and Order 53 Rule 3(1) of the [Civil Procedure Rules](#). There is only one main prayer for the order of mandamus and it is phrased as follows:
 1. ‘That a mandamus order does issue compelling the respondents to pay the applicant the sum of Kshs 137,550, 243.20 plus compound interest at the rate of 14% per annum from February 25, 2021 until payment in full.’
2. The application is based on a statutory statement dated December 13, 2022 and an affidavit, sworn on even date by Mr Stephen M Mogaka, verifying the facts relied upon.



3. According to the Mr Mogaka, the amount of Kshs 137,550, 243.20 he is seeking from the respondents is his legal fees as taxed in an advocate-client bill of costs he filed in this court's Miscellaneous Application No E1265 of 2020. He later obtained a judgment and extracted a decree for this sum in High Court Commercial and Tax Division Miscellaneous Application No E026 of 2021.

4. He also obtained a certificate of order against the government which he served upon the respondents.

5. In paragraph 7 of his affidavit Mr Mogaka has sworn as follows:

'7. That despite a valid judgment by a court of competent jurisdiction, a decree, certificate of order against the Government and numerous reminders to the respondents to settle the decretal sum plus accrued interest, the respondents have failed, refused and or neglected to settle the decretal sum plus accrued interest to the detriment of the applicant. (annexed hereto and marked SMM6 is a copy of the applicants' letter dated November 11, 2022 addressed to the respondents forwarding to them the consent judgment, decree and certificate of order against the Government).'

6. It is the applicant's case that the 2nd and 3rd respondents are legally bound by the decree and certificate of order against the government to settle the amount due.

7. The respondent did not file any response to the application despite having been granted opportunity to respond.

8. On March 15, 2023, Mr Ngare, the learned counsel for the respondents informed the court that no response had been filed ostensibly because of an audit that was being undertaken at the County Government of Nairobi.

9. According to section 21(4) and (5) of the *Government Proceedings Act*, the County Government is insulated from execution by attachment and sale of its property in execution of a decree. This provision of the law is better understood in the context of the entire section 21. It reads as follows:

2. 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.

10. In the absence of any other mode to execute a decree against the Government, the only other alternative available to the applicant would be an order of mandamus to compel the accounting officer for the Government or 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 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.'



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.

12. As noted, besides the respondents' counsel submitting from the bar that there is some sort of audit being undertaken at the County Government, it has not been denied that that the accounting officer was served with the certificate of order against Government. 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.
13. In the absence of any reason why he has not complied and paid the decretal sum, 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 waived his right to costs and therefore no costs will be awarded. It is so ordered.

SIGNED DATED, AND DELIVERED ON 29 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE

