



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Government of Kiambu & another; Ngazi Construction Ltd (Exparte Applicant)
(Judicial Review E012 of 2022) [2023] KEHC 22800 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
JUDICIAL REVIEW E012 OF 2022
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

GOVERNMENT OF KIAMBU 1ST RESPONDENT

COUNTY GOVERNMENT 2ND RESPONDENT

AND

NGAZI CONSTRUCTION LTD EXPARTE APPLICANT

JUDGMENT

1. By a Notice of Motion dated 18th November 2022 and filed in court on 22nd February 2013, the applicant in a nutshell seeks an order of mandamus to issue directed to the Chief Officer, Finance/County Treasurer, Kiambu County Government and County Attorney Kiambu County Government directing them to pay the *ex-parte* applicant the outstanding decretal sum of Kshs 1,873,325/=
2. The motion is supported by the statement of facts and an affidavit sworn by Hillary Kipyegon Sigei on 9th November 2022, wherein he avers that the *ex-parte* applicant was contracted by the 1st Respondent to construct a public ablution block facility in Ndumberi stadium at the costs of Kshs 2,948,030/= The works were carried out and completed and a certificate of completion was issued by the County Government of Kiambu. The *ex-parte* applicant issued the 1st Respondent with an invoice of Kshs 3,296,230/= on 2nd December 2019. The 1st Respondent failed to pay the invoice thus necessitating the filing of Kiambu Civil Case No 364 of 2020, where judgment was entered by consent on 27th September 2021. The deponent states that the 1st Respondent further delayed in payment of the judgment amount necessitating the Applicant to file a certificate of order and certificate of costs against the County Government. The 1st Respondent made a partial payment of Kshs 2,514,000/= leaving a



balance of Kshs 1,873,325/= that despite service of the certificate of costs and the certificate of order the County Government has failed to pay, hence the instant suit.

3. The application is opposed. Grounds of opposition were filed for the 1st and 2nd Respondent, and in a nutshell, they are opposed to the granting of the orders sought. It is admitted that the *ex-parte* applicant was contracted to construct the ablution block at Ndumberi stadium and part payment of Kshs 2,514,000/= was done by the procuring department through its accounting officer as empowered by the *Public Finance Management Act* and the *Public Procurement & Assets Disposal Act*. The outstanding amount of Kshs 1,873,325/= is admitted. It is averred that the 1st and 2nd Respondent have been wrongly enjoined in the suit as they are not accounting officers and cannot be compelled to pay.
4. By the directions of this court, the Notice of Motion application was canvassed by way of written submissions.

***ex-parte* Applicant's submissions**

5. Counsel for the *ex-parte* applicant filed submissions on 29 March 2023, which mirrored the averments in the statement of facts.
6. Counsel submitted that the legal counsel for the Respondents purports to shift the responsibility for the consent, and decree to a department of the Kiambu County Government. He placed reliance in the case of *R v Principal Secretary, Ministry of Internal Security & another ex-parte Schon Nooran & another* (2018) where it was stated that the refusal to honour a court order is an act or conduct that is capable of affecting rights of the *ex-parte* applicant, for which judicial review remedy of mandamus will issue.
7. Counsel urged the court to uphold the law that grants the *ex-parte* applicant the relief prayed for against the respondent.

Respondent's submissions

8. By the submissions filed on 28th April 2023, the Respondents counsel submitted that Section 21(3) of the *Government Proceedings Act* expressly provides that the concerned accounting officer of the Government department shall pay to the person entitled to pay or to his advocate. She submits the proper party to be sued is the Department of Water and Sanitation and not the Respondents herein. She averred that the County Attorney is a legal advisor and cannot be compelled to pay.
9. In conclusion she submitted there is no cause of action against the 1st and 2nd Respondents and the *ex-parte* applicant is not entitled to costs and urged the court to dismiss the notice of Motion.

Analysis of issues

10. Having considered the pleadings and submissions made by the parties, the issues that arise for determination are;
 - i. Whether the 1st and 2nd Respondents are proper parties in these proceedings
 - ii. Whether the order sought is available to the *ex-parte* applicant

Are the 1st and 2nd Respondents the proper parties in these proceedings?

11. It is trite law that execution of decrees against the Government must be in accordance with provisions of the *Government Proceedings Act*. Section 21 (1) thereof provides as follows: - "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.

12. Further Section 21 (3) of the said *Act* goes further to state; “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.”

13. From the foregoing it is apparent that execution proceedings against the government or a public authority can only be as against the accounting officer of the said government or authority. The Accounting Officer is under a statutory obligation to satisfy a decree made by the court against that body.
14. Section 103 of the *Public Finance Management Act*, 2012 establishes the County Treasury comprising the County Executive Member for Finance, the Chief Officer and the departments of the County Treasury responsible for Finance and fiscal matters. Under section 103 (3) thereof, the County Executive Committee member for Finance is the head of the County Treasury.
15. The 1st Respondent is the finance entity of the county Government of Kiambu and is the entity sought to be compelled to settle the decree herein. As evidenced, it paid part of the decretal sum to the *ex-parte* applicant. The *ex-parte* applicant now seeks that it be compelled to pay the outstanding balance. In my opinion, therefore, it is not wrongly enjoined as a party to the suit.
16. On the other hand, the 2nd Respondent is a legal entity and a legal advisor of the 1st Respondent it cannot be compelled to honour the decree. I do agree with counsel that it has wrongly been enjoined as a party. However, it is imperative to note that misjoinder of parties, is not of significance to these proceedings because no miscarriage of justice will ensue.
17. In the spirit of dispensing justice and in accordance with Article 159 (2)(d) of the *Constitution* of Kenya, the court is to administer justice without undue regard to technicalities of procedure. It is my considered view that the reliefs sought by the *ex-parte* applicant will be realized despite there being a misjoinder of the 2nd Respondent in the proceedings.



Is the order sought available to the *ex-parte* applicant?

18. The *ex-parte* applicant has demonstrated the necessary Certificate of Order against the Government which was served upon the County Government of Kiambu on 17th May 2022. The same is not denied and the Respondent acknowledges that part payment was done as per the available budget at the time.
19. As per Section 21 of the [Government Proceedings Act](#), the 1st Respondent enjoys no special privileges with regard to liability arising from the decree.
20. In [Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security ex-parte Fredrick Manoah Igunza](#) [2012] eKLR, Githua, J. expounded the law correctly when she stated; “In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. 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](#). The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the [Government Proceedings Act](#)...which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”
21. Since the 1st Respondent enjoys immunity from execution the only remedy available for the *ex-parte* applicant is an order of mandamus compelling the 1st Respondent to honour the decree.
22. Section 21(3) imposes a statutory duty on the Accounting Officer concerned to pay the sums specified in the Certificate of Order to the person entitled or to his advocate together with any interest accruing thereon. Part payments have been made and there are no reasons adduced as to why the outstanding balance of Kshs 1,873,325 was not cleared, the amount is not disputed by the 1st Respondent and therefore, no doubt the 1st Respondent has a public obligation to honour the decree.
23. I am satisfied that the *ex-parte* applicant has demonstrated it is entitled to the order of mandamus as prayed.

Final Orders:

24. The Notice of Motion dated 18th November 2022 is merited and allowed as follows:



- i. The 1st Respondent to pay the *ex-parte* applicant the outstanding balance of Kshs 1,873,325 together with interest at court rates from 12th May 2022 until payment in full.
- ii. Costs of the application to the *ex-parte* applicant.

It is so ordered

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE

