



Republic v County Executive Committee Member, Finance & Economic Planning, Nairobi City County; Njenga (Exparte) (Application E014 of 2023) [2023] KEHC 24098 (KLR) (Judicial Review) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E014 OF 2023
J NGAAH, J
OCTOBER 27, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE & ECONOMIC PLANNING, NAIROBI CITY COUNTY RESPONDENT

AND

KENNEDY WAINAINA NJENGA EXPARTE

JUDGMENT

1. Before court is the applicant's motion dated 13 February 2023 in which he seeks the following orders:
 - a). An order of Mandamus to direct and compel the County Executive Committee Member, for Finance and Economic Planning of the Nairobi City County Government to satisfy the Certificate of Order against Government dated 11th October 2022, issued in Nairobi High Court Civil Case No. 63 of 2017; Kennedy Wainaina Ngenga v County Government of Nairobi, within 14 days of service of the judgment and order of court herein.;
 - b) an order for costs.
2. That accrued interest from the date of decree to payment in full be borne by the Respondents.
3. The costs of this application and the Notice of Motion dated 2nd May 2019 be borne by the Respondents."



2. The application is expressed to be brought under order 53 Rule 1 of the Civil Procedure Rules, Article 48 of the *Constitution*, section 148 of the *Public Finance Management Act*, No. 18 of 2012, and, section 21(2) and (3) of the *Government Proceedings Act*, cap. 40.
3. It is based on the statutory statement dated 8 February 2023 and an affidavit verifying the facts relied upon sworn by the applicant on even date.
4. According to the statement and the affidavit, the applicant is the decree-holder in Nairobi High Court Civil Case No. 63 of 2007, Kennedy Wainaina Ngenga v County Government of Nairobi. At the time of filing the instant application, the decretal sum stood at Kshs. 101, 712,657.53 while costs stood at Kshs. 1,020,000/=.
5. The applicant obtained not only the decree but also a certificate of order against the Government both of which he served upon the respondent. The applicant has neither settled the decretal sum and costs nor has he responded to the applicant in any manner whatsoever.
6. It is the applicant's case that it is only through an order of mandamus directed at the respondents, that he can enjoy the fruits of his judgment. Payment of the decretal sum would also mitigate the losses the tax payer is bound to bear since the decretal amount attracts interest of Kshs. 540,000/= every month.
7. The respondents opposed the application and filed grounds of objection. The grounds upon which the application is opposed are that the respondent has not refused or neglected to satisfy the decretal sum. It is contended that any liability or expenditure incurred against the County Government can only be defrayed from the money provided for that particular purpose by the National Government and, so far, the national government has not provided funds to settle outstanding court decrees, including the applicant's.
8. In particular, the satisfaction of the decree that the applicant holds is deemed to be the expenditure by Parliament and must be justified in law, and the County Government can only be accountable for what it has received from the National Government.
9. It is also contended that pursuant to Gazette notice no. 6299 dated 15 May 2023, the respondent has been undertaking a legal audit and the Governor (of the Nairobi City County Government) extended the term of what I understand to be a committee scrutinizing and verifying legal bills for a period of four months with effect from 17 May 2023. Finally, the respondent urges that the applicant's claim is capable of being settled amicably, out-of-court and reiterated that the respondent has not disregarded the orders of the court and has every reason of complying with those orders save that it should be given more time.
10. Section 21 of the *Government Proceedings Act* generally deals with the manner and procedure of enforcement of orders and decrees against Government. This section 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.

11. Execution of orders and decrees against the County Government would be covered under this section by virtue of section 21(5) which is clear that it applies to County Governments as much as it does to the National Government, with such modifications as may be necessary.
12. Turing to the applicant's application, there is no doubt that the applicant has complied with subsections (1) and (2) and obtained the certificate of order against Government which was duly served upon the office of the County Attorney and the County Secretary. Depending on the government structure of Nairobi City County Government, both or any of those offices may be assumed to be similar to the office of the Attorney General at the National Government level or, at least, undertake functions that would ordinarily be performed by the Attorney General.
13. According to subsection (3), the accounting officer whom the applicant has identified as the County Executive Committee Member, Finance and Economic Planning was enjoined to settle the decree as per the certificate. At least, the respondent has not disputed that he is the accounting officer responsible.
14. Subsection (4) is clear that the Government is exempted from ordinary process of execution of decrees thus reinforcing the obligation on the accounting officer to settle any sums due from the government in proceedings to which the government is a party.
15. The respondent's answer that the decree cannot be satisfied merely because a budgetary allocation was not made for satisfaction of the decree and that there is some committee which the Governor has put together to verify pending bills including the applicant's decree is also not plausible. It is not plausible



because section 21(1) does not say that settlement of a decree is subject to a budgetary allocation to a county government in any particular financial year. It is also not plausible because the obligation on the accounting officer to settle a valid and unchallenged court decree is not subject to any sort of scrutiny or verification by the County Government. If such exceptions were necessary, the legislature would have stated so in clear and unambiguous terms.

16. And even if it was to be assumed that such verification was a precondition, the term of the committee that was to undertake the verification has expired. No explanation has been proffered why the payments have not been made in accordance with the certificate of order against government after the expiry of the term of the committee.
17. In the absence of any reason or any valid reason why the applicant's decree cannot be settled, there is every reason to compel the respondent, by way of a mandatory or mandamus order to pay.
18. The order of mandamus is the only means through which the applicant's decree can be satisfied because, as noted, the Government is protected from the ordinary process of execution of decrees or orders. The accounting officer has to be compelled to perform his statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant.
19. According to *Halsbury's Laws of England*/Judicial Review (volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”

20. This is reiterated in paragraph 703 which states:

A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

21. And with particular reference to public officers who, like in the instant case, fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

"706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)”

22. The applicant has demonstrated, and it is not in dispute, that he duly extracted a certificate of order against government and that the same was duly served upon the relevant officer or officers in the County Government.



23. A demand for payment having been made, and the accounting officer having failed to pay, no other evidence is required to demonstrate that the accounting officer has failed to perform a public duty with which he is charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.
24. Accordingly, I hereby allow the applicant's motion dated 13 February 2023 in terms of prayer (a). The applicant will also have costs of the application. It is so ordered.

SIGNED, DATED AND DELIVERED AT WAJIR ON 27 OCTOBER 2023

Ngaah Jairus

JUDGE

