



Republic v County Executive Committee Member, Built Environment and Urban Planning Sector, County Government of Nairobi & 2 others; Waas Enterprise (Exparte Applicant) (Miscellaneous Application 22 of 2023) [2023] KEHC 25954 (KLR) (Judicial Review) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 22 OF 2023
JM CHIGITI, J
NOVEMBER 30, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER, BUILT ENVIRONMENT AND URBAN PLANNING SECTOR, COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT

CHIEF OFFICER LANDS, COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

CHIEF FINANCE OFFICER, COUNTY GOVERNMENT OF NAIROBI 3RD RESPONDENT

AND

WAAS ENTERPRISE EXPARTE APPLICANT

JUDGMENT

1. The background of this matter is that by a judgement of the Nairobi Environment and Land Court ELC No. 537 of 2005 on 26th September 2014, the court entered judgment in favour of the Applicant. The reliefs were awarded as follows:(a) That the Plaintiff be and is hereby awarded general damages assessed at Kshs. 1,000,000.00 in a year, to be calculated with the number of years that the suit has been pending in court. (b) That this amount will attract interest at court rates from the date of



judgement until payment in full. (c) That costs are hereby awarded to the Plaintiff, and (d) Costs at Kshs. 1,129,998.00

2. Subsequently, a decree was issued on 22nd October, 2014. That despite the said judgement and resultant Decree, the Respondent, as the accounting officer of the County Government of Nairobi has failed and/or refused to settle the principal sum aforesaid.
3. Notably, that the amount of Kshs. 1,000,000.00 for every year since the suit was filed became due and payable, and ought to be paid to the Applicant. That the amount became payable with interest and costs as ordered by the court, while still continues to attract interest. The Applicant now seeks to execute the decree, and has now instituted judicial review proceedings seeking orders of mandamus against the Respondent; which forms the subject matter of this judgment.
4. Following leave granted, the Applicant by a Notice of Motion dated 14th March, 2023 which was filed on 4th June, 2023 – brought under Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya; Order LIII (sic) Rules 1(1) to (4) and Rule 2 of the Civil Procedure Rules, 2010 – seeks for orders:
 1. That this Honourable Court be pleased to make an order of mandamus directed to the County Executive Committee Member in charge of Built Environment & Urban Planning Sector, County Government of Nairobi, Chief Officer Lands and The Chief Finance Officer of the County Government of Nairobi compelling them forthwith, and without delay, pay the Applicant the decretal sum of Kshs. 1,000,000.00 for every year since the suit was filed plus costs and interest accrued as at the date of payment.
 2. The costs of this Application be provided for.
5. The Application is supported by a Statutory Statement, and a Verifying Affidavit sworn by Mathew Njoroge Kabet, the director of the Applicant company; both dated 14th March, 2023.
6. The Application is based on the grounds that the actions of the Respondents are illegal and offend the constitutional protections on the right to property. The actions also offend the principles and values of public finance and public service requiring prudent use of public finances and efficient use of resources. The Respondents are entreated by law to abide by Court decisions. To deny the Applicant of its lawful entitlement affirmed by the court is inequitable and actionable. An order of mandamus is appropriate.
7. Additionally, that the Respondents having been ordered by to pay Kshs. 1,000,000.00 for every year since the suit was filed to the Applicant; The Applicant acquired a legitimate expectation that the said amount would be paid within a reasonable period of time. As per the Applicant, by failing to pay the said amount to date, the Respondents breach the Applicant's legitimate expectation, necessitating the reliefs sought.
8. On their part, the Respondents opposed the Application by a filed Grounds of Opposition dated 21st June, 2023; on grounds that:
 1. That the application is frivolous, vexatious and an abuse of the Court process and offends the legal process for executing decrees against the County Government.
 2. That the orders sought by the Applicant do not lie against the Respondents in their Individual capacity as there is no statutory duty imposed upon them to act as demanded. The applicant has not stated under what law the cited Respondents derive the duty to act as demanded.
 3. That the Applicant has not obtained a Certificate of satisfaction of Order against the Government and served the same upon the Respondent.



4. That all the expenditures by the County government are appropriated by the County Assembly and not the Respondents independently in each financial year.
5. That the County Government has competing interests including settling outstanding decrees to the public but has limited resources and has statutory process it must abide by before the settlement of the same.
6. That the alleged contemnors are not the proper parties against whom execution proceedings against the County Government should lie, and as such, they are unsuited in this Application.
7. That the Applicant's Application as it stands, is defective for flouting the [Government Proceedings Act](#) on the steps and the procedures of seeking to execute a decree against a County Government.
8. That we therefore urge the Honourable Court to dismiss the Application as it is unmeritorious and noncompliant with the strict, mandatory, and well laid down legal provisions on the procedure of execution against a County Government.
9. The Application was canvassed by way of written submissions. The Applicant filed their written submissions dated 7th June, 2023 supporting the Application; While the Respondents filed their written submissions dated 25th July, 2023 opposing the Application.
10. The issues for determination that arises in this matter are: Whether the Application meets the threshold to granting of judicial review order of mandamus sought; and Who bears the costs of the application
11. It is settled law that before an order of mandamus is issued, an Applicant must abide by the procedure in Section 21 of [Government Proceedings Act](#) which provides:

“(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.”

12. Section 21 (3) of the said Act on the other hand provides:

“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. The circumstances under which judicial review order of mandamus are issued were discussed in the case Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, Halsbury’s Law of England, 4th Edition. Vol. 7 p. 111 para 89 thus:

“The order of mandamus is of most extensive remedial nature and is in form, of 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.”...These principles mean that an order of mandamus compels 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.”

14. Turning back to the instant case, the Applicant has moved this Court to compel the satisfaction of a judgment already decreed in its favour by a competent Court of law.
15. From the record filed in the court, it is evidently clear that the Applicant obtained and served the Respondent with the Certificate of Cost against Government. The service is proved by a duly stamped as received by the Respondents on the face of it.
16. The question then that begs is, who is the accounting officer whom statutory duty is imposed upon to satisfy the decree. The Respondents have contended that they are wrongly joined in this suit as the orders sought cannot issue against them since they are not the accounting officer of the county.
17. Section 21(3) of the *Government Proceedings Act* which imposes a statutory duty on the Accounting Officer of the Government to pay the money specified in a Certificate of Order against Government to the person so entitled or to his advocate.
18. Further, pursuant to Section 103 (2)(a) and (3) and Section 148 (2) and (3) of the *Public Finance Management Act*, No.8 of 2012 (PMFA), a County Executive Committee Member for Finance is the Accounting Officer of a County Government. Section 103 stipulates:

103. Establishment of county treasuries

1. There is established for each county government, an entity to be known as County Treasury.
2. The County Treasury shall comprise—
 - a. the County Executive Committee member for finance;
 - b. the Chief Officer; and
 - c. the department or departments of the County Treasury responsible for financial and fiscal matters.



3. The County Executive Committee member for finance shall be the head of the County Treasury.

While, Section 148, provides:

148. Designation of accounting officers for county government entities by the County Executive Committee Member for finance
 1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
 2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.
 3. A County Executive Committee member for finance shall ensure that each county government entity has an accounting officer in accordance with Article 226 of *the Constitution*.
 4. The Clerk to the county assembly shall be the accounting officer of the county assembly.
 5. A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralized county financial management service.
19. The position has been affirmed in various authorities such as; in the case of Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi [2018] eKLR it was observed as follows;

“It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the person against whom the contempt proceedings ought to be commenced is the County Executive in Charge of Finance of the Nairobi County Government who is mentioned as one of the persons against whom the order is sought.”

20. Further, in as regards who the accounting officers of the Nairobi City County are, Nyamweya J (as she then was) in Judicial Review Miscellaneous Application No.375 of 2018 Republic v. The County Secretary, Mombasa County Government and The Chief Officer, Finance, Mombasa County Government stated;

“ 11 section 44 of the County Government Act establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the County Public Service. Section 103 of the *Public Finance Management Act* also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County treasury responsible for finance and fiscal matters.



12. Under section 103(3) of the *Public Finance Management Act*, the County Executive Member of Finance is the head of Treasury and is thus responsible for finance matters in the county. It follows then therefore that both the 1st and 2nd Respondents are jointly responsible for the satisfaction of court orders and decrees on payment of money owed by the Nairobi City County by virtue of their roles and functions.”

21. Flowing from the above, and in agreement with the learned judge, I find the 3rd Respondent herein, Chief Finance Officer County Government of Nairobi responsible for the satisfaction of the court order and decree, in this matter.

Order

The Applicant has made a case for the grant of an order of mandamus and I hereby grant the same as prayed to the extent of being against the 3rd Respondent herein. The cost shall be to the Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

.....

J. CHIGITI (SC)

JUDGE

