



Republic v Wajir County Government & 3 others; Galeyr Trading Company Limited (Exparte Applicant) (Judicial Review 5 of 2022) [2023] KEHC 27354 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW 5 OF 2022
JN ONYIEGO, J
DECEMBER 21, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE WAJIR COUNTY GOVERNMENT 1ST RESPONDENT

**THE COUNTY SECRETARY WAJIR COUNTY GOVERNMENT ... 2ND
RESPONDENT**

COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE 3RD RESPONDENT

WAJIR COUNTY GOVERNMENT 4TH RESPONDENT

AND

GALEYR TRADING COMPANY LIMITED EXPARTE APPLICANT

RULING

1. The ex parte applicant herein, through the firm of Kinaro Advocates instituted judicial review proceedings by way of a notice of motion dated 07.06.2022 seeking mandamus orders compelling the respondents to implement the judgment awarded in Civil Case Number E003 of 2021 at Wajir Magistrates Court (Galeyr Trading Company Limited v County Government of Wajir). That the trial court had in the said matter ordered the defendant/respondent to pay Kes. 3,727,357.4 being the decretal amount awarded through a consent judgment. Besides, the applicant also sought for the costs and interests of the application to be borne by the respondent.
2. The application is founded on the grounds set out in the statutory statement of facts dated 04.04.2022 and further amplified by averments contained in the verifying affidavit sworn on 04.04.2022 by Abdula Ahmed Mohamed, the managing director of the ex-parte applicant.



3. The ex parte applicant's case is to the effect that on or about the 11.10.2018, it engaged the respondent vide tender number WCG/QT/W/2018 – 2019 for the supply and delivery of collapsible water tanks of 10,000 litres capacity worth Kes. One million, nine hundred, sixty-seven thousand shillings.
4. That the applicant performed its contractual obligation but the defendant/respondent failed to pay for the same thus prompting the applicant to file civil case number E003 of 2021 at Wajir Magistrate's Court. That despite the matter being concluded in his favour, the defendant/respondent has failed to honour the said decree.
5. The respondents filed an affidavit in reply sworn on 22.03.2023 by Naema Ibrahim, the County Attorney of the 1st respondent who deposed that the applicant did not follow the laid down procedures in obtaining the certificate of costs and the certificate of order against the 1st respondent. It was further deposed that the certificate of costs having been issued on 07.12.2021, the same day the bill of costs was filed and taxed, implies that the respondent was not given the opportunity to respond to the same.
6. In the same breadth, counsel stated that it was noteworthy that the principal sum as indicated in the consent judgment and decree dated 06.12.2-21 and 07.12.2021 respectively is Kes. 1,967,000 hence a cost of Kes. 762,695 against such a principal sum in the lower court matter is extremely on the higher side and that the same was taxed without scrutiny and service to the 1st respondent.
7. Additionally, it was argued that in the decree dated 06.12.2021, the interest on the principal sum was at the rate of 14% p.a. from the date of filing the suit until payment in full. That in the certificate of order dated 07.12.2021, it was ordered that the 1st respondent pays an interest at the rate of 16% from 02.11.2018 until full payment. That the said certificate of order thus condemned the 1st respondent to pay the decretal sum at a rate and period that is not provided for in the consent judgment and decree dated 06.12.2021 and 07.12.2021 respectively.
8. It was deposed that the applicant is on a forum shopping spree looking for a favourable court to grant orders of execution against the 1st respondent. That the applicant had previously filed an application of a similar nature seeking a substantive order against the respondents that a notice to show cause be issued against the chief finance officer and the county secretary on why they should not be committed to civil jail for their failure to pay the decretal amount.
9. That pursuant to that application, the trial court had on 28.02.2023 issued an order directing the 1st respondent to settle the said decretal sum within 21 days' failure to which summons automatically issue to the chief officer. It was urged that the respondents will be prejudiced if the orders sought herein are allowed yet the applicant had sought similar orders in the trial court and further seeks to commit the respondents to civil jail. Further, the certificate of order cannot be enforced as it is contrary to the contents of the decree. This court was therefore urged to dismiss the application herein with costs to the respondents as the orders sought were not tenable.
10. The court directed that the application be canvassed by way of written submissions wherein both parties complied with the said direction.
11. The applicant submitted that pursuant to the judgment entered on 08.10.2021 and decree issued in Civil Suit Number E003 of 2021 (Galeyr Trading Company Limited v County Government of Wajir, the respondents jointly and or severally were to pay the applicant a decretal award of Kes. 1,967,000 together with interest and costs as per the consent judgment totalling to Kes. 3,727,357.4.
12. Counsel contended that the applicant had met the conditions precedent to issuance of an order of mandamus. To buttress that position, the court was referred to the case of Republic v County



Government of Kiambu & 2 others ex parte Simon Ndung'u Mungai & Another [2022] eKLR where it was held that:

“whereas the execution proceedings as are known to law are not available against the government, the accounting officer for the government department concerned is nevertheless under a statutory duty to satisfy a judgment made by the court against that department as required by section 21(3) of the Government Proceedings Act.”

13. It was submitted that despite the consent judgment entered by the parties, the respondents have failed to honour the same. That the applicants obtained the said decree on 07.12.2021 together with a certificate of order and a certificate for costs against the Wajir County Government which were duly served upon the respondents herein vide a letter dated 17.09.2022.
14. It was the applicant's case that the applicants' advocate on record served the respondents a letter dated 15.01.2021 requesting for payment of the decretal award to be made as decreed by the magistrate's court at Wajir but to date, no payment nor response has been made.
15. The applicants contended that having met the conditions precedent to the enforcement of decree for money against the government, this court has no choice but to grant the orders sought.
16. As stated, the respondent filed submissions dated 01.08.2023. The respondent drew the attention of the court to the definition of what a mandamus order means thereby placing reliance in the case of Republic v Kenya National Examinations council ex parte Gathenji & 9 Others [1997]e KLR where the court defined a mandamus order as a command issued from the High Court of Justice directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing specified which appertains to their office and is in the nature of public duty...[.
17. It was urged that the applicant was undeserving of the prayers sought as the certificate of costs was obtained in contravention of Order 21 Rule 9A. Further, it was urged that the defendant/respondent was not served with the statement of costs. Counsel submitted that the certificate of Order contradicted the decree issued on 26.08.2021 by the lower court which provided that the interest rate is 12% from 26.03.2019 to 27.09.2021 and the total amount of costs payable is provided as Kes. 997,662.
18. That in the certificate of order issued on 25.10.2021, the interest was captured as 12% p.a. payable from 26.03.2019 until the date of payment contrary to the judgment and the decree itself. That the certificate of order thus condemned the defendant/ respondent to pay interest for a longer period than what is provided for in the judgment and the decree issued on 26.10.2021.
19. That the 1st respondent was not served with any bill of costs or written request, statement of costs and supporting documents as required before the applicant's bill of taxation and certificate of costs issued. It was contended that the amount demanded by the applicant is exaggerated and way above the acknowledged amount allegedly owed.
20. That the applicant deliberately failed to serve the 1st respondent with any bill of costs or written request, statement of costs nor supporting documents so as to come up with an absurd figure contrary to the rules of practice and procedure. This court was therefore urged to dismiss the application herein with costs.
21. I have considered the application before me and the annexures thereto. I have equally considered parties' submissions. The applicant is seeking an order of mandamus to compel compliance with the lower court order directing payment of the outstanding decretal sum. This is because, execution process by way of mandamus is the preserve of the high court.



22. It is trite that an order of mandamus is always issued so as to 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.
23. It is not in dispute that judgment was entered by consent in favour of the applicant against the 1st respondent. The respondents also did not deny that fact. The only issue in contestation by the respondents is the fact that the amount demanded by the applicants did not tally with the said amount they deem owed to the applicants. This is basically the issue of arithmetics based on what interest.
24. The argument that the respondents were not served with the bill of costs is not for this court to determine at this stage. If there was any dispute regarding service of the bill of costs, it was up to the respondents to challenge it before the taxing master or file a reference.
25. In reference to the above, the issue which this court ought to determine is whether the respondent is under a public duty and obligation to satisfy the said decree, and if so, whether the applicant is entitled to the reliefs sought.
26. Section 44 of the County Government Act of 2012 establishes the office of the County Secretary who is; Secretary to the County Executive Committee; is answerable for the operations of the County Executive, and being the head of the county public service.
27. Section 103 of the *Public Finance Management Act* of 2012 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. Under the said section, the County Executive Committee Member for Finance is the head of Treasury and is thus responsible in finance matters in the County.
28. Section 21(5) of the *Government Proceedings Act* Cap. 40 Laws of Kenya recognises the application of Section 21 to 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.
29. It is trite that where a decree for payment of money or costs has been issued against Government in favour of a litigant, and the same remains unsatisfied, it can be enforced only by way of an order of mandamus. [See Republic v Principal Secretary, Ministry of Internal Security & Another ex parte Schon Noorani & Another [2018] eKLR].
30. The only requirement which serves as a condition precedent to the satisfaction or enforcement of such decrees for money issued against Government is found in Section 21(1) and (2) of the *Government Proceedings Act*. Under the said provisions, the applicant ought to obtain a certificate of order from the court which issued the decree. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment or where 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.
31. Once the above requirement has been met and/ or complied with and the decree is not satisfied, the decree holder can then proceed to seek orders of mandamus.
32. In the instant case, it was stated that on 17.01.2022, the applicant's advocate served the respondents a letter dated 15.02.2021 together with certificate of order of judgment and certificate of costs requesting for payment of the decretal award to be made as decreed by the trial court but the same was not heeded to.



33. Having perused the record herein, this court notes that the letter dated 15.01.2021 was duly acknowledged through stamping of the same hence the element of non-service of the decree and certificate of costs does not arise. However, I have taken note of the discrepancy in terms of interest payable. The correct position should be the interest ordered in the judgment calculated from the time the suit was filed till full payment. In case of any omission, the same should be amended before any execution is carried out. As to the question of taxation, that is not for this court to determine at this stage. The respondent should have filed a reference challenging the same before the high court.
34. Regarding the existence of the lower court execution process for contempt of court, the application before me is different. The court has not been moved to execute the application by way of contempt proceedings. When that stage comes, the court will definitely make appropriate orders.
35. In view of the foregoing, I am satisfied that the applicant has demonstrated that he is deserving of the relief sought subject to the stated amendment. It is trite that a litigant should not unnecessarily be hindered from enjoying the fruits of his judgment. See RWW Vs EKW (2019) e KLR.
36. In view of the above finding, the application is hereby allowed subject to computation of the correct interest based on the interest ordered in the judgment. For those reasons, each party shall bear own costs.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF DECEMBER 2023

J. N. ONYIEGO

JUDGE

