



**Hardi Enterprises Limited v County Secretary, Nairobi City County Government
& 2 others (Judicial Review Miscellaneous Application E015 of 2023)
[2023] KEHC 27072 (KLR) (Judicial Review) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E015 OF 2023
JM CHIGITI, J
DECEMBER 20, 2023**

BETWEEN

HARDI ENTERPRISES LIMITED APPLICANT

AND

**THE COUNTY SECRETARY, NAIROBI CITY COUNTY
GOVERNMENT 1ST RESPONDENT**

**THE CHIEF OFFICER WATER AND SEWERAGE, NAIROBI CITY COUNTY
GOVERNMENT 2ND RESPONDENT**

**THE CHIEF OFFICER FINANCE, NAIROBI CITY COUNTY
GOVERNMENT 3RD RESPONDENT**

JUDGMENT

1. Pursuant to leave of court granted, the Applicant filed a Notice of Motion dated 3rd March, 2023 said to be brought under Order 53 Rule 1 of the [Civil Procure Rules](#); Section 8(2) of the [Law Reform Act](#); and Section 21 of the [Government Proceedings Act](#). The Application seeks for orders:
 1. That the court issues Order of Mandamus to command and compel the Respondents to settle the decretal sum arising from the decree issued on 29/7/2021 by the High Court of Kenya at Nairobi Milimani Commercial & Admiralty Division, Civil Case No El40 of 2020, Hardi Enterprises Limited Versus Nairobi City County Government as adopted in the Certificate of Order against the Government issued on the 15/8/2022.
 2. That the costs of this Application be provided for.



2. The Application is accompanied by the Statutory Statement, and Verifying Affidavit deponed by Anthony Ng'ang'a Mwaura, director of the Applicant – both dated 27th February, 2023. Also, by a Supporting Affidavit dated as the Application, and same deponent.
3. The Applicant's case is that on 24th June, 2021 the Honourable court delivered a Ruling/Judgment in the Plaintiff's [Applicant] favour against the Defendant [Respondent's] in Nairobi High Court Commercial and Tax Case No E140 of 2020 in which Ruling the Plaintiff/Applicant's application of 23rd September, 2020 was allowed with costs.
4. Subsequently, the Deputy Registrar of the High Court of Kenya at Nairobi taxed the Bill of Costs dated 31st August, 2021 at Kes 4,306,620.97 in a Ruling delivered on 5th November,2021; and also issued a Certificate of Taxation of Kes 4,306,620.97 on 12th November, 2021.
5. It is maintained that the Applicant sought, obtained, extracted, and served the Certificate of Order against Government dated 15th August, 2022 - wherein the Respondents have been ordered to pay the Applicant the sum of Kes 539,557,548.69.
6. The Applicant contends that they had issued requests and demands for payment of the sums due; and made several efforts - meetings and letters - to have the Respondents settle the amount, but the Respondents have refused to settle the sums, to date.
7. In response to and opposing the Application, the Respondents filed their Grounds of Opposition dated 30th March, 2023 on the grounds that:
 1. The application is fatally incompetent, vexatious and does not raise triable issues. It is only amenable to dismissal with costs.
 2. The ex-parte Applicant has sought orders compelling payment arising from a decree that seeks a colossal amount of money for a contested service allegedly rendered by the ex-parte Applicant to the Nairobi City County.
 3. The application has been filed against the 1st Respondents who were neither parties to the suit nor in any way involved in the proceedings leading to issuance of the decree which is sought to be enforced.
 4. The amount sought by the ex parte applicant has to firstly be provided by the National Government and factored in the budget for the Nairobi City County. There has been no refusal to pay the decretal sum only that there are no funds at the moment to satisfy the decree.
 5. The ex-parte applicant being well aware that parties had been engaging and exchanged correspondences has acted in bad faith in commencing these proceedings yet proceed to rely on the said letters from the office of the County Attorney. This renders the application and these proceedings to have been commenced in bad faith.
8. The Application was canvassed by way of written submissions. The Applicant's submissions are dated 27th March, 2023; While the Respondents' submissions are dated 7th November, 2023.
9. In sum, the Applicant submits that the Respondents as the respective accounting officers of the Nairobi City County Government are responsible for/with the obligations of settling the said decretal sums; but have - despite receipt of requests and demands for payment of the sums due under the certificate of order against the Government - defied/failed/refused or neglected to comply with the said demands.



10. Resultantly, that it is necessary the said persons in their capacity as the accounting officers of the County be compelled by way of an order of mandamus to settle the sum as in the Certificate of Costs against Government.
11. In Rebuttal to the Applicant, the Respondents submit that the Applicant has not established grounds for the court to issue the orders of Mandamus sought. Thus, this court should refuse to grant the discretionary remedy.
12. Additionally, that the Respondents are unable to settle the decretal sums as the amounts have not yet been considered and budgeted for as per the provisions of Part IV of the [Public Finance Management Act](#). Put differently, that the Applicant is to wait for availability of funds.
13. Further, it is submitted that the Respondents have not refused to settle the decree; but that they need more/reasonable time to comply and settle the amounts. Also that in the intervening period, the Respondent had to deal with other emergencies such as the covid-19, which made it difficult to settle the colossal decretal amount.
14. I have considered the Application, the response thereto, annexures, the submissions by learned counsel, and cited authorities. I find the issue for determination that crystallizes as:

Whether this Application meets the legal threshold to warrant granting of the judicial review orders of mandamus sought?

Analysis and Determination

15. Regarding the law, section 21 of the [Government Proceedings Act](#) which generally deals with the manner and procedure on enforcement of orders and decrees against Government states 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.”

16. The 1st Respondent has advanced two (2) reasons why the decree has not been settled; being, first, that the Applicant has not met the threshold to warrant granting the orders of mandamus sought in the circumstances; and, secondly, that no budgetary allocation in the annual budget was made for payment of the decretal sum.
17. It is not in doubt that the Applicant served the Respondents with the Judgment, decree, and the Certificate of Costs against Government. The same has been admitted by the Respondents in their responses. It is thus safe to state that the Applicant complied with order 21 of the [Government Proceedings Act](#).
18. On the second limb, Section 21(1) of the Act does not say that settlement of a decree is subject to a budgetary allocation to any ministry or government department in any particular financial year.
19. The only available route that is open to the Applicant to pursue her claim is under section 21(3) of the [Act](#) through the order of mandamus. 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 at 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 Respondents argument that they are unable to pay as a result of lack of a budgetary allocation has no place in Judicial review cases, and I dismiss that argument. This court is guided by the case of [*Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitbaka*](#) [2019] eKLR where Odunga J in his ruling of 12th February 2018 extensively dealt with the defence as follows:

“As regards lack of budgetary allocation, Githua, J in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR expressed herself as follows:

“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* (hereinafter referred



to as the 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.” [Emphasis mine].

Disposition:

23. The whole purpose of the order of mandamus is to enforce settlement of an existing decree as expressed in the certificate of order against Government issued on 15th August, 2022.
24. A demand for payment having been made, and the Respondent having failed to pay, no other evidence is required to demonstrate that the Respondents have failed to perform a public duty with which they are charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.

Order:

25. The Notice of Motion dated 3rd March, 2023 is allowed as prayed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DECEMBER, 2023

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J. CHIGITI (SC)

JUDGE

