



**Republic v County Secretary, The County Executive Committee for Finance, Chief Officer,
The County Government of Mombasa; Kilonzi (Exparte); Mombasa (Interested Party) (Judicial
Review Application 032 of 2021) [2022] KEHC 28 (KLR) (28 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 28 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 032 OF 2021
JM MATIVO, J
JANUARY 28, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, THE COUNTY EXECUTIVE COMMITTEE
FOR FINANCE, CHIEF OFFICER, THE COUNTY GOVERNMENT OF
MOMBASA RESPONDENT**

AND

JEDIDAH MUNGAI KILONZI EXPARTE

AND

COUNTY GOVERNMENT OF MOMBASA INTERESTED PARTY

JUDGMENT

1. Pursuant to the leave of this court granted on 23rd September 2021, vide the application dated 26th May 2021 expressed under the provisions of Order 53 of the *Civil Procedure Rules, 2010*, sections 8 and 9 of the *Law Reform Act*¹ and all the enabling provisions of the law, the applicant seeks a writ of Mandamus to compel the County Secretary, The County Executive Committee Member for Finance and the Chief Officer, the County Government of Mombasa to forthwith satisfy the decree issued in Mombasa CMCC No 1515 of 2017. She also prays for costs of the application.
2. The application is premised on the grounds that the court in the Chief Magistrates Court, Mombasa issued a decree against the County Government of Mombasa in CMCC No. 1515 of 2017, and that the decree and a Certificate of Order against the Government were served upon the Respondent and

¹ Cap 26, Laws of Kenya



the Interested Party, but the Respondents and the Interested Party have failed, refused and or ignored to satisfy the said decree.

3. The Respondent's filed grounds of opposition dated 17th December 2021 stating:- that the application offends section 21 of the [Government Proceedings Act](#)² and sections 103 and 104 of the [Public Finance Management Act](#)³ which requires the applicant to serve the Accounting Officers with the decree or Certificate of Taxation; that the application was served outside the time frames directed by the court, so it is not properly before the court; and in absence of prior demand there cannot be wilful disobedience.
4. Both parties relied on the pleadings filed and left it to the court to make a determination.
5. Mandamus will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.⁴ Originally a common law writ, Mandamus has been used by courts to review administrative action.⁵ In [Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates](#)⁶ I discussed the tests for granting an order of Mandamus. In particular, I cited [Apotex Inc. v Canada \(Attorney General\)](#)⁷ which followed [Dragan v Canada \(Minister of Citizenship and Immigration\)](#)⁸ which laid down the following tests:-

There must be a public legal duty to act;

- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - I A prior demand for performance;
 - II A reasonable time to comply with the demand, unless there was outright refusal; and
 - III An express refusal, or an implied refusal through unreasonable delay;
- (iv) No other adequate remedy is available to the Applicants;
- (v) The Order sought must be of some practical value or effect;
- (vi) There is no equitable bar to the relief sought;

² Cap 40, Laws of Kenya.

³ Act No. 18 of 2012.

⁴ See [Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others](#) {1997} eKLR.

⁵ W. G. & C. Byse, [Administrative & Review Law, Cases and comments](#) 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

⁶ {2019} e KLR.

⁷ 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

⁸ 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).



(vii) On a balance of convenience, mandamus should lie.

6. I now apply the above tests to this case. There is no contest that the applicant holds a valid court decree which has not been disturbed by way of an appeal or review. There is evidence that the Certificate of Order against the Government was served upon the Respondent's legal officer on 28th September 2020. The judgment in the said case was rendered on 19th December 2018 and it has remained unsatisfied since then. By serving the Decree and Certificate of Order against the Government, the applicant complied with the provisions of section 21 of the [Government Proceedings Act](#).⁹
7. The Respondents owe the applicant a legal duty to satisfy the said decree. There is a clear right to the performance of that duty because the applicant satisfied all conditions precedent. The Respondents were given notice to settle the decretal amount but they refused to pay. One of the tests enumerated earlier is "a reasonable time to comply with the demand." On what constitutes a reasonable notice before Mandamus can issue, I find that from the time the judgment was delivered on 19th December 2018, and subsequently the decree and Certificates of Order against the Government and Certificate of Costs against the Government were served on 28th September 2020, there has been an unexplained delay which is unreasonable.
8. The other test is "an express refusal, or an implied refusal through unreasonable delay." First, as I have concluded above, "unreasonable delay" has been established. Secondly, an express refusal or even implied refusal has also been established. No cause has been shown as to why payment has not been made. Mandamus can issue where it is clear that there is wilful refusal or implied and or unreasonable delay in complying with the court order.
9. The other tests are absence of an adequate remedy to the applicant. The law does not permit execution against the government. Section 21 (5) of the [Government Proceedings Act](#) provides: -
 - (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.
10. The applicant has no other remedy. It is also a requirement that the order sought must be of some practical value or effect. Nothing can be of great practical value than enjoying the fruits of a court judgment. It is also my finding that there is no bar either legal or equitable to the relief sought. Lastly, flowing from the above findings and considering that there is no other available remedy, on a balance of convenience, Mandamus should issue.
11. It is important to point out that the failure by the Government to obey court judgments renders impotent the constitutionally guaranteed right of access to justice. As was held in *Republic v The Attorney General & Another ex parte James Alfred Koroso* access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers.
12. Guaranteeing access to justice without honoring court judgments is a sterile formulation that sows expectations and produces frustrations. Judgment enforcement is a crucial part of the legal process—the due process of the law—and, hence, the State must ensure that the enforcement is carried out within a reasonable time. Also, compliance with the judgment is part and parcel of the right to a fair trial. Enforcement of judgments is an essential element of the right to a fair trial.

⁹ Cap 40, Laws of Kenya.



13. It is my finding that that enforcement of the judgment is part of due process of law. Therefore, the State should ensure that enforcement of court decrees against the Government is completed within a reasonable time. The right of access to justice requires that final settlement of the dispute be accomplished within a reasonable time. It is a mockery of justice for a citizen to spend years and resources in court searching for justice and after obtaining a judgment, it is treated as a worthless piece of paper. The corollary to this is that the Government loses huge sums of money paying accrued interests occasioned by delayed settlement of court decrees which can be avoided and save the tax payer from being burdened by unnecessary expenses which can be avoided. I find and hold that the applicant's application is merited. Accordingly, I allow the application dated 26th May 2021 and order that: -

- a. An order of Mandamus be and is hereby issued compelling the Respondents to pay to the applicant the total decretal sum, costs and interests thereon at court rates in terms of the Decree issued in CMMCC No. 1515 of 2017 dated 24th April 2019 and the Certificate of Order Against the Government dated 24th September 2020 also issued in the said suit.
- b. That the Respondents do pay the applicant the costs of this suit plus interests thereon from date of taxation.

Orders accordingly

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2022

JOHN M. MATIVO

JUDGE

