



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR. NO. E045 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**NAROK COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF OFFICER FINANCE,**

**NAROK COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**SEC & M COMPANY LIMITED..... EX PARTE**

**JUDGMENT**

1. Before this Court is the Ex parte Applicant's motion dated 7<sup>th</sup> April, 2021 filed under **Order 53 Rule 1 of the Civil Procedure Rules, Section 8(2) and 9 of the Law Reform Act and Section 21 of the Government Proceedings Act**. The motion seeks the following orders:

(i) An **Order of MANDAMUS** do issue compelling the Respondents to comply with the Certificate of Order against the Government issued on 21<sup>st</sup> June, 2018 compelling payment of the decretal sum arising from the decree issued on 23<sup>rd</sup> September, 2015 by the High Court of Kenya at Nairobi, Milimani Commercial & Admiralty Division, Miscellaneous Civil Case No. 71 of 2014.

(ii) THAT the costs of this application be provided for.

2. The motion is supported by a Verifying Affidavit dated 29<sup>th</sup> March, 2021 sworn by Humphrey Kaburu Michael. According to Mr. Kaburu, the Applicant obtained a decree against Narok County Government for the principal sum of Kshs. 49,435,020.50 and interest at the rate of 14% per annum from the date of the award as well as costs of the proceedings.

3. It is Mr. Kaburu case that other than an appeal (Civil Appeal No.268 of 2015) lodged by Narok County Government which was dismissed on 4<sup>th</sup> December, 2020 there is no further challenge to the decree. The Respondents according to the deponent were duly served vide a letter dated 16<sup>th</sup> February, 2021 and as such the accounting officers of the County ought to be compelled to pay.

4. The Respondents opposed the application and filed a Replying Affidavit sworn on their behalf by Elizabeth Sanangi Lolchoki and dated 30<sup>th</sup> September, 2021, the County Secretary of the 1<sup>st</sup> Respondent. In the affidavit the County Secretary deposes that the application before this court is premature and that it has been brought to defeat the 2<sup>nd</sup> Respondent's right to explore its appeal against the Court of Appeal's decision of 4<sup>th</sup> December, 2020.

5. It was deponed that the 2<sup>nd</sup> Respondent filed a Notice of Appeal dated 9<sup>th</sup> December, 2020 expressing its intention to file an appeal to the Supreme Court and subsequently a Notice of Motion application dated 4<sup>th</sup> January, 2021 seeking leave to appeal to the Supreme Court. Both the Notice of Appeal and Motion were served upon the Ex parte Applicant through the firm of Mwenda Royford & Company Advocates who are on record before the Court of Appeal.

6. It contended that the 2<sup>nd</sup> Respondent was not served with the said Certificate of Order against the Government issued on 21<sup>st</sup> June, 2018

nor the demand letter dated 16<sup>th</sup> February, 2021. It was averred that the Ex parte Applicant has not provided any evidence of service of the said documents and in any case if the service was effected this Honourable Court has the power to suspend the payment of any sums indicated as due.

7. The Application was canvassed by way of written submissions, the Ex Parte Applicant filed written submissions dated 20<sup>th</sup> May, 2021 and supplementary submissions dated 4<sup>th</sup> November, 2021. In the submissions learned counsel cited the case of **Republic vs County Secretary, Machakos County Government & Another Ex Parte Veterans Pharmaceuticals Limited (2019) eKLR** and **Republic vs County Government of Vihiga, Ex Parte Global Exhibitions Incorporated Ltd (2021) eKLR**, on the duty of the County Secretary and Chief Officer Finance to honor a decree.

8. Learned counsel also cited the case of **Republic vs County Government of Vihiga, Ex Parte Global Exhibitions Incorporated Ltd (2021) eKLR** on the grant of Mandamus orders. It was submitted that there is no finding yet that the Respondents intended appeal raises any matters that fall within the jurisdiction of the Supreme Court and as such no appeal is pending before the Supreme Court. Counsel submitted that the filing of an application for certification does not in any manner constitute stay of execution. Further, that the finding in the case **Kisya Investments Limited Vs Attorney General & Anor [2005] eKLR** cited by the Respondents in fact places a duty upon the Respondents to honor judgements as the public and public interest also refers to the Ex parte Applicant's right to realize the fruits of its judgment.

9. The averment by the Respondents that they had not been served with the said certificate of order and demand letter was denied by the Ex parte Applicant and in response it was submitted that the same were served upon the Respondents in a letter dated 23<sup>rd</sup> February, 2021 which bears the stamp of the 2<sup>nd</sup> Respondent herein.

10. The Respondents also filed written submissions dated 4<sup>th</sup> November, 2021 in which 3 issues were identified for determination. On the first issue counsel cited **Section 21(3)** and submitted that this Honourable Court has power to suspend payment until hearing and determination of the Appeal to the Supreme Court.

11. On the second issue it was submitted that execution against the Government can only be mounted after service of a Certificate of Order against Government. To buttress this argument counsel cited the case of **Maggy Agulo Construction Co Ltd v Ministry of Public Health & 4 others [2020] eKLR**, **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR** and **Republic vs. County Secretary Migori County Government & another [2019] eKLR**.

12. It was contended that only the letter dated 16<sup>th</sup> February, 2021 was served upon the 2<sup>nd</sup> Respondent and that it did not contain the alleged documents. This fact, it was submitted, has not been controverted by the Ex parte Applicant. In conclusion it was submitted that the Application before the court should be dismissed with costs.

13. I have considered the arguments advanced by the parties herein. The issue for determination is whether an Order of Mandamus should issue as prayed in the Ex parte Applicant's application.

14. 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.”*

15. 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.”*

16. 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, 4<sup>th</sup> 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."*

17. In this case, the Ex parte Applicant has moved this Court to compel the satisfaction of a judgment already decreed in its favour by a competent Court of law. The applicant has demonstrated by way of evidence compliance with the provisions of **Section 21 of the Government Proceedings Act**. The Respondents have not given any satisfactory reason as to why the decree has not been fulfilled almost seven years later and what is alleged is that they were not served with the Certificate of Order against Government and Demand letter by the Ex parte Applicant as is required by law. A plea is also made that the respondent should be allowed room to prosecute an appeal at the Supreme Court.

18. A cursory look at the application and affidavit filed, and specifically, the letter by the applicant to the respondent dated 16<sup>th</sup> February 2021, tells a different story. Enclosed therein was a copy of the relevant decree, Certificate of order against the Government, Certificate of taxation and the Judgement of the Court of Appeal in the matter. That letter is duly stamped as received by the County Secretary, the 1<sup>st</sup> respondent. Suffice it to note that the letter was a demand letter which clearly stated that in default of payment, judicial review proceedings would be instituted to enforce payment. The respondents are thus less than candid when they claim that a Certificate of Oder against the Government was not served. On the material before court, am satisfied the same was served.

19. The Respondents herein filed an appeal in the Court of Appeal which appeal was dismissed. They have also sought leave to file an appeal against the decision of the Court of Appeal at the Supreme Court. Whereas the respondents have the inalienable right to pursue their appeal to the highest appellate court, the fact of the matter is that there are no orders of stay issued either at the Court of Appeal or at the Supreme Court. The decree herein is therefore due and payable and there is indeed default. The applicant cannot within the law execute the decree against the respondents other than through the procedure in **Section 21 of the Government Proceedings Act**.

20. The Court in the case of **Republic v The Attorney General & Another ex parte James Alfred Koroso (2013) eKLR** held as follows;

*"...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. 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."*

21. In the premises, I am satisfied that the Ex Parte Applicant has made a case for the grant of an order of *mandamus* and I hereby grant the same in terms of prayer (1) of the Notice of Motion dated 7<sup>th</sup> April, 2021. The Ex parte Applicant will also have costs of this application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2022.**

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**A. K. NDUNG'U**

**JUDGE**