



Republic v County Secretary and the Chief Finance Officer County Government of Nairobi; Kinyanjui & 4 others (Exparte Applicants) (Judicial Review Application 5 of 2021) [2023] KEELC 17842 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17842 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW APPLICATION 5 OF 2021**

BM EBOSO, J

MAY 24, 2023

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SECRETARY AND THE CHIEF FINANCE OFFICER COUNTY GOVERNMENT OF NAIROBI RESPONDENT

AND

AK KINYANJUI EXPARTE APPLICANT

DANSON NJOROGE EXPARTE APPLICANT

DANIEL MUCHERU EXPARTE APPLICANT

JOSEPH NGURE EXPARTE APPLICANT

ESTHER WAMBUI EXPARTE APPLICANT

JUDGMENT

Background

1. Over three decades ago, the five ex-parte applicants initiated separate suits against the City Council of Nairobi alongside M/s Strabag – Bau – AG and M/s Lima Limited. The City Council of Nairobi and the two companies had been involved in the construction of the 3rd Nairobi Water Project [Ndakaini Dam] in the present day Muranga County. The claim of the ex-parte applicants was that they had suffered various forms of injury as result of the trio’s construction activities in their neighbourhood in Muranga. The various suits were subsequently consolidated.



2. Upon the establishment of the Environment and Land Court at Thika in 2017, the consolidated suits which had been pending stayed in the High Court at Nairobi for more than two decades were transferred to Thika Environment & Land Court. They were subsequently heard by this Court [Gacheru J] at Thika.

3. On 14/6/2019, this court [Gacheru J] rendered a Judgment in favour of the five ex-parte applicants against the three defendants, jointly and severally, in the following verbatim terms:

For the above reasons, the Court enters Judgment for the Plaintiffs against the Defendants jointly and severally in the following terms;

- a) Each of the Plaintiffs is awarded general damages of Kshs.2, 000,000/=.
- b) Plaintiffs are entitled to costs of the suit and interest at court rate from the date of filing of the suits to the date of payment in full.
- c) Each of the Plaintiffs herein is awarded incidental damages of Kshs.100,000/=”

4. The ex-parte applicants’ costs were subsequently taxed on 7/5/2020 at Kshs 335,694.52. A certificate of taxation was eventually issued on 20/7/2020. It does emerge from the evidence presented in this suit that the three defendants did not, and have not satisfied the award.

Application

5. The ex-parte applicants subsequently initiated judicial review proceedings in the High Court at Nairobi, seeking an order of mandamus to compel the respondent to satisfy the decree and the certificate of costs. The application was subsequently transferred to this court.

6. On 13/10/2022, this court granted the ex-parte applicants leave to bring a substantive motion for judicial review. Subsequently, the ex-parte applicants brought a notice of motion dated 24/10/2022, seeking an order of mandamus compelling the respondent to satisfy the award. The application was supported by a statement of facts dated 9/10/2020 and a verifying affidavit sworn on 9/10/2020 by M/s A K Kinyanjui & Company Advocates. The application was canvassed through written submissions dated 7/12/2022, filed by M/s Kingoo Wanjau & Company Advocates.

7. The respondent opposed the application through grounds of opposition dated 28/11/2022 and written submissions dated 13/12/2022, filed by M/s Babu Law Firm Advocates. The gist of the respondent’s case is that the ex-parte applicants have not extracted and served a certificate of order as required under Section 21 of the *Government Proceedings Act*. The respondent further contend that the material Judgment was entered against the three defendants jointly and severally. The respondent add that they are waiting for budgetary allocation from the National Treasury to enable them satisfy the award. Lastly, they contend that their inability to satisfy the award is a result of inadequate budgetary allocation.

Analysis and Determination

8. I have considered the motion, the response to the motion, and the parties’ respective submissions. The single question to be answered in this motion is whether the ex-parte applicants have made out a proper case for grant of the judicial review order of mandamus.

9. An order of mandamus is a command by a superior court compelling a public body or a public office to perform a mandatory duty. It is a discretionary remedy. Our superior courts have umpteen times



outlined the procedure that must be followed whenever an order of mandamus is sought to compel a public body or public office to satisfy a money decree.

10. In *Permanent Secretary Office of the President Ministry of Internal Security & another Ex-parte Nassir Mwachibi* [2014] eKLR, Odunga J [as he then was] emphasized the following procedure:

“It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the court issues an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as prerequisite to the granting of an order, though there are exceptions to the rule”.

11. Emphasizing the need to comply with the above procedure, Mrima J observed as follows in *R v County Secretary Migori County Government & another* [2019] eKLR:

“I need not re-emphasize the need for strict compliance with Section 21 of the Act being the law of the land. In this matter I can gather from the record that a decree and a certificate of costs in the suit was drawn and issued. I did not set my eyes on any certificate of order. There is a specific procedure on how the certificate of order required under the Act is obtained. The procedure is contained in Order 29 of the *Civil Procedure Rules*. Under Rule 3 thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a certificate of costs in the event it is separately issued.

Once a party obtains the certificate of order and the certificate of costs, in the event the certificate of costs is obtained separately, together with the decree, then such a party must satisfy the court of service of those documents upon the party named in the certificates.”

12. For avoidance of doubt, Section 21 of the *Government Proceedings Act* provides as follows:

21(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”.

13. There is no gainsaying that it is now settled law in Kenya’s civil legal system that a party seeking to execute a money decree against the Government through the instrument of an order of mandamus must first comply with the mandatory requirements of Section 21 of the [Government Proceedings Act](#). A key requirement of Section 21 of the Act is that the decree holder must extract and serve the certificate of order. An invitation to a superior court to issue an order of mandamus before complying with the procedure set out in Section 21 of the Act is an invitation to the superior court to exercise its judicial review jurisdiction prematurely.
14. In the present motion, the ex-parte applicants have exhibited the judgment, the decree, and the certificate of taxation of costs. They have not exhibited evidence of the certificate of order. Similarly, they have not exhibited evidence relating to service of the certificate of order together with the certificate of costs. Without evidence of issuance and service of the certificate of order, the plea for an order of mandamus is premature.
15. The result is that the notice of motion dated 24/10/2022 is struck out for having been brought prematurely. For avoidance of doubt, if the award is not voluntarily satisfied by the judgment debtors, the ex-parte applicants will be at liberty to bring a fresh application once they comply with the mandatory requirements of Section 21 of the [Government Proceedings Act](#).
16. On costs, these are proceedings which would not have been necessary had the County Government of Nairobi taken its legal obligations seriously. They did not appeal against the Judgment. They are therefore obligated to satisfy the decree without further commands from courts of law. For this reason, there will be no award of costs to them.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF MAY 2023.

B M EBOSO



JUDGE

In the Presence of: -

Mr Nyamweya for the Exparte Applicant

Mr Mwangi for the Respondent

Court Assistant: Hinga/Osodo

