



**Republic v County Government of Uasin Gishu & 2 others; Jedrom Building and Civil Engineering Limited (Exparte) (Judicial Review Miscellaneous Application E002 of 2021) [2022] KEHC 3175 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3175 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2021**

**RN NYAKUNDI, J**

**MAY 20, 2022**

**IN THE MATTER OF AN APPLICATION BY JEDROM BUILDING AND CIVIL ENGINEERING LIMITED  
JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ENVIRONMENT AND LAND COURT AT ELDORET IN KENYA E&L CASE NO. 227 OF 2014**

**CORAM: HON. JUSTICE R. NYAKUNDI**

**KARIUKI MWANIKI & CO. ADV**

**KALYA & CO. ADV**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF UASIN GISHU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY COUNTY GOVERNMENT OF UASIN GISHU ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY COUNTY GOVERNMENT OF UASIN GISHU ..... 3<sup>RD</sup> RESPONDENT**

**AND**



**JUDGMENT**

1. By a Notice of Motion Application dated 7/4/2021 and filed on 8/4/2021, the ex-parte applicant through the firm of M/S Kariuki Mwaniki & Co. Advocates seeks the following orders: -
  - i) That the Honourable Court be pleased to grant an order of mandamus directed to the Respondents, their agents, servants and officers compelling them to paying the Ex parte Applicant a sum of Kshs. 11, 783,040 ( Eleven Million Seven Hundred and Eighty Three Thousand and Forty) currently owed arising from Kshs. 4,000,000 ordered to be paid as from the 29<sup>th</sup> September 2014 at twelve (12) percent interest per annum from that time together with rental income of Kshs. 56,000 per month from that time of filing suit till settlement in full and the amount owed due to the summary judgment entered against the 1<sup>st</sup> respondent in the Environment and land court of Kenya at Eldoret E & L case No 227 of 2014.
  - v) That the costs of this application be borne by the Respondent.
2. The application is based on grounds (a) - (i) appearing on the face thereof and is supported by the Affidavit Verifying the facts of William Kipkorir Kipkurui , the director of the ex-parte applicant sworn on 7<sup>th</sup> August 2021.
3. According to the ex-parte applicant, he is the registered owner of parcel of land No. Eldoret Municipality Block 10/2052 and the 1<sup>st</sup> respondent had threatened the Ex parte applicant with a view of interfering with his ownership of parcel No. Eldoret Municipality Block 10/ 2052 by taking over possession of the same.
4. Consequently, the ex-parte applicant's case is that it filed E & L case No. 227 of 2014 at the Environment & Land Court at Eldoret and an injunction was issued against the 1<sup>st</sup> respondent's employees, servants or agents. It is contended that despite an injunction order being in force, the respondents in contempt proceeded to destroy the Ex parte Applicant's property including a building valued at Kshs. 4,000,000 and he further incurred a further loss of monthly rental income of Kshs. 56,000 per month.
5. The Ex- parte applicant stated that it filed an amended plaint reflecting the loss suffered after the illegal and unconscionable demolition undertaken by the 1<sup>st</sup> respondent's employees. It is contended that on 24<sup>th</sup> July 2017, summary judgment was entered in favour of the Ex parte Applicant in the sum of Kshs 4,000,000 costs and interest being compensation for the demolished building and a further Kshs. 56,000 per month for the loss of rental income.
6. According to the Ex-parte Applicant, there is no appeal pending on the ruling and therefore the respondents are compelled to settle the amount; that the amount owed has ballooned to greater proportions and continue to attract interest at court rates and if allowed to continue will be unmanageable to the detriment of the Ex parte applicant who has not been assured of payment. Further that the Ex parte applicant has demanded payment once again and advice the respondent that the amount owed attracts interest at twelve(12) per cent per annum which is the court rate from the date of filing the amended plaint computed annually and the amount currently stands at Kshs 11,783,040 and continues to attract interest till settlement in full.



7. The application is opposed. The respondents filed a replying affidavit on August 24, 2021 which was sworn on August 23, 2021 by Mr S.K. Lel the County Attorney. Mr Lel averred that the ex parte applicant is not deserving of any orders sought in the application dated 7<sup>th</sup> April 2021 which application is fatally incompetent and incurably defective.
8. Mr. Lel raised an issue with regards to leave not having been sought properly. According to Mr Lel, the Ex parte applicant had sought leave to institute judicial review proceedings against the Respondents vide the application dated September 21, 2017 ; that leave sought via application dated September 21, 2017 was granted on November 15, 2018 for a limited period of 21 days ; that the ex-parte applicant lodged the substansive judicial review on November 22, 2018 which motion was struck out by the court on March 5, 2020 for non- compliance with Section 21 of the [Government Proceedings Act](#) and thereafter the ex-parte applicant lodged an application dated March 5, 2020 seeking to review the court's striking out orders issued on 6<sup>th</sup> February 2020 which was withdrawn on March 29, 2021 ; that the court did sui moto on March 29, 2021 in Judicial Review Miscellaneous Application No. 10 of 2018 extended leave granted on November 15, 2018 in Judicial Review Miscellaneous civil application No. 103 of 2017 to allow the ex parte applicant to lodge the current application.
9. It was further contended that in so far as leave was extended ,the grounds upon which one could base an application for judicial review remedies were of common law origin and practice of the court exercising judicial review powers was largely borrowed from the United Kingdom ; that the court lacked the jurisdiction to extend leave granted on November 15, 2018 since the said power is not necessarily provided for under Section 9(b) of the [Law Reform Act](#) and that a reading of Order 53 Rule 1 of the [Civil Procedure Rules](#) confirms that an application for mandamus shall be made only with leave; that a reading of Order 53 rule 1 of the civil procedure rules confirms an application for leave shall be made ex parte and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on; that a perusal of the motion and proceedings herein will confirm no such application or pleadings were lodged by the ex parte applicant prior to the institution of the current motion.
10. According to the respondents, the motion dated April 7, 2021 before the court is incompetent for failure to comply with sections 9 of the [law reform Act](#) and Order 53 Rule 1 of the Civil Procedure Rules, 2010.
11. The deponent further averred that summary judgment having been entered on July 24, 2017 in ELC case No. 227 of 2014, the remedies sought by the Ex parte applicant contravenes Section 3 of the [Public Authorities Limitation Act](#).
12. As regards the issue of payment, it has been contended that the 1<sup>st</sup> Respondent is a public office and is prohibited in law, under Section 196 and 197 of the [Public Finance Management Act](#); that the 1<sup>st</sup> respondent has various competing interests catered for in the budget and the respondents prayed that the ex parte claim should be factored in the forthcoming budget approved by the Uasin Gishu County Assembly since the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cannot discharge money not approved in the budget; that an immediate settlement of the order sought herein would require constitutional or county legislation approval which has not been given to the Respondents because of the already closed budget cycle; that the 1<sup>st</sup> respondent is currently not in a legal position to pay off the decreetal sum since it is in the middle of its financial year and such funds would have to have been provided for in the county budget; that the 1<sup>st</sup> Respondent is ready to pay the ex parte applicant the sums prayed for once the same is allocated for, approved and passed by the Uasin Gishu County Assembly in the 2022-2023 budget as provided for under Section 125 of the [Public Finance](#)



- Management Act; that an order of settlement of the decretal dues in the 2022-2023 budget cycle is necessary and in the best interest of justice.
13. The 1<sup>st</sup> respondent averred that allowing the orders as currently sought will contravene the Public Finance Management Act and occasion great injustice to the 1<sup>st</sup> Respondent.
  14. In a rejoinder, the Ex-parte Applicant filed a further affidavit on February 27, 2022 and stated that; on July 13, 2021, the respondents adjourned the hearing of this application by intimating that they were ready and willing to pay the amount owed. The applicant could not comprehend why the respondents from the replying affidavit were suggesting that the Ex parte Applicant should wait until the county budget of the year 2022-2023 to be passed in order to be paid yet the Ex parte applicant began the proceedings for payment in the year 2017 and since then, several budget cycles have passed without a positive response.
  15. The ex parte applicant denied the respondents claim that the 1<sup>st</sup> respondent is prevented by virtue of section 196 and 197 of the Public Finance Act from paying the Ex parte applicant. It was its view that the respondent misinterpreted the provisions and misdirected themselves as the said provisions do not bar him from settling a judgment against the county government.
  16. The Ex-parte Applicant further averred that this court does not require the approval of the county government in order to enforce payment of court judgment.
  17. According to the Ex-parte applicant, the respondents have never claimed to be unable to settle the decretal sum and that the reasons they are advancing for their refusal to settle are well within their control and they should not deter this court from issuing a writ of mandamus compelling settlement.
  18. As regards the issue of leave raised by the respondents, the ex parte applicant maintained that this court did not err when it extended the leave granted on November 1, 2018 with a view of filing the present application and the same was done in the presence of counsel for the respondents who did not raise any objection and has never appealed from or applied to set aside the orders granting leave to bring the instant proceedings.
  19. It was averred that the orders extending leave are therefore valid orders and the instant application is competently before court.
  20. On May 25, 2021, the court directed the application to be canvassed by way of written submissions. The Ex-parte applicant filed its submissions on 3<sup>rd</sup> July 2021 and further submissions on February 24, 2022. The respondents on the other hand filed their submissions on September 27, 2021.

### **Determination**

21. I have carefully considered the application, the replying affidavit and the submissions of the opposing parties. It is not in dispute that summary judgement was entered in favour of the ex parte applicant in the sum of Kshs. 4,000,000, costs and interest. The ex-parte applicant has now come to court to simply seek an order of mandamus to compel the respondents to do their public duty and satisfy the decree which they have failed to do to the detriment of the ex-parte applicant.
22. The substantive issues that have been raised by the respondents is with regards to leave which they argue that this court did sui moto in JR Misc Application No. 10 of 2018 extend leave granted on 15<sup>th</sup> November 2018 in Judicial Review Misc Civil Application No. 103 of 2017 to allow the ex parte applicant lodge the current application. According to the respondents, the court lacked jurisdiction to extend leave granted on November 15, 2018 since the said power is not expressly provided for under Section 9(b) of the Law Reform Act and Order 53 Rule 1 of the Civil procedure Rules, 2010.



23. Under Order 53 Rule 3 (1) of the Civil Procedure Rules, when leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.
24. The question that arises in this respect is whether this court has jurisdiction to extend the time prescribed by Order 53, Rule 3(1) of the Rules.
25. In the case of *Republic v Kenya Revenue Authority Ex Parte Stanley Mombo Amuti* [2018] eKLR, Mativo, J in his ruling as regards the discretion of the court in granting such orders held, “ Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit. Discretion must be exercised in accordance with sound and reasonable judicial principles. “

The judge cited The King’s Bench in *Rookey’s Case* which :-

“ Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”

26. Also, in *Raval v The Mombasa Hardware Ltd* [1968] EA 392, the court considered inherent jurisdiction of the court and held that the reason usually given by the court for resorting to its inherent jurisdiction which is not conferred by any statute or constitutional provision is to prevent a miscarriage of justice, especially where the adverse party is not prejudiced in any way if the court extended time.
27. Article 159 (2) (d) of the constitution of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities.
28. Flowing from the foregoing, I am of the view that Order 50 Rule 6 of the Civil Procedure Rules on enlargement of time under the rules is applicable to Judicial Review applications contemplated in Order 53 Rule 3 of the Civil Procedure Rules. As such, this court cannot be faulted for exercising its inherent power to extend the leave limited by Order 53 Rule (3).
29. The other issue is with regards to the settlement of the decretal sum owed to the Ex parte applicant. From the replying affidavit sworn by the County Attorney, Mr S.K Lel, the respondents seem to give a proposal on how they should be allowed to pay the said monies in their own terms. Infact, it is worth noting that is not denied that the Ex parte applicant is owed money by respondents.
30. I have perused the record at length and I note that judgment was delivered way back in 2017. The respondents have not tendered any evidence to show that they have made or shown any good will on their part in settling the decretal sum since judgment was delivered to date. I do not think this court should aid the respondents in denying the applicant enjoyment the fruits of his judgement.



31. In the case of *Republic v Sports Kenya & 2 others Ex-Parte Caroline Mungai & 25 others* [2018] eKLR, Justice G.V Odunga while dealing with a similar issue held,

“...In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle the same. In this case, the 1<sup>st</sup> Respondent may only be indulged if it presents a comprehensive reasonable plan of action on how it intends to comply with the Court order since compliance therewith is a must and there is no other option.”

32. Also, in the case of *Shah vs. Attorney General (No. 3)* Kampala HCMC No. 31 of 1969 [1970] EA 543 where he expressed himself, inter alia, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the *Government Proceedings Act*. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties...With regard to the question whether mandamus will lie, that case falls within



the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the [Government Proceedings Act](#) shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go... In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the [Government Proceedings Act](#). What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are comparatively few...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law



requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory... On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as persona designate to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject... The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of mandamus will issue as prayed with costs."

33. I associate with the said decisions and it is therefore my view that in the instant case, the respondents must settle of the decretal sum owed to the applicant irrespective of the difficulty they allege they will face.
34. In the end, I find that the ex-parte applicant has demonstrated an arguable case to warrant a grant of the order of mandamus sought and the following orders thus issue;
  - i. An order of mandamus is hereby issued directing the Respondents, their agents, servants and officers compelling them to paying the Ex parte Applicant a sum of Kshs. 11, 783,040 ( Eleven Million Seven Hundred and Eighty Three Thousand and Forty) being Kshs. 4,000,000 ordered to be paid as from the September 29, 2014 at twelve (12) percent interest per annum from that time together with rental income of Kshs. 56,000 per month from that time of filing suit till settlement in full and the amount owed due to the summary judgment entered against the 1<sup>st</sup> respondent in the Environment and land court of Kenya at Eldoret E & L Case No 227 of 2014.
  - ii. The Respondents shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 20<sup>TH</sup> DAY OF MAY, 2022.**

**R. NYAKUNDI**

