



**Republic v County Secretary , the County Government of Mombasa;
EpcO Builders Limited (Exparte) (Judicial Review Application
E049 of 2021) [2022] KEHC 11081 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E049 OF 2021**

**JM MATIVO, J
JULY 28, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY , THE COUNTY GOVERNMENT OF
MOMBASA RESPONDENT**

AND

EPCO BUILDERS LIMITED EXPARTE

JUDGMENT

1. At the outset, a useful starting point is to mention that the dispute in this case as disclosed by the diametrically opposed positions taken by the parties is whether the applicant has sued the wrong party, namely the County Secretary of Mombasa County Government instead of the County Executive Committee Member of Finance. A brief evaluation of the facts of the case and the respective parties' argument is apposite.
2. In its application dated February 2, 2022, the applicant prays for a writ of mandamus to compel the County Secretary, Mombasa County Government to pay to it the decretal sum of Kshs 1,103,433.4 plus costs of Kshs 136,332.53 pursuant to court decree issued in the applicant's favour in Mombasa CMCC No 3027 of 2007. The existence of the decree is not disputed. Pursuant to Order 29 Rule 3 of the Civil Procedure Rules, 2010, the applicant extracted a Certificate of Order Against the Government dated August 22, 2019 for Kshs 1,103,433.42 together with interests at court rates until payment in full plus costs. The applicant states that the order was made in the presence of the parties, but despite requests to pay, the Respondent has not paid.



3. The application is opposed. The Respondent filed grounds of opposition dated February 24, 2022 stating that the application offends section 45 (4) of the County Government Act¹ (CGA) in that it cannot found a cause of action by suing a wrong party.
4. Both parties filed written submissions.
5. In its submissions dated March 9, 2022, the applicant cited section 44 of the CGA and submitted that the application is competent contrary to the Respondent's contention. It argued that section 103 of the Public Finance Management Act² (PFMA) provides for the establishment of county treasuries, while section 103(3) of the said act provides for the establishment of the County Executive Committee Member of Finance. It argued that the County Secretary is also responsible for finance matters in the county. To buttress its argument, it cited Republic v County Secretary, Nairobi City County & 2 others ex parte Koceyo and co advocates³ and Republic v County Secretary, Trans Nzoia County Government & another ex parte Veteran Pharmaceuticals Limited⁴ which held that the County Secretary and the County Executive Member of Finance are jointly responsible for satisfaction of court orders. Additionally, the court held that the County Secretary who is the Accounting Officer or the Chief Officer has a statutory duty to satisfy court decrees. It cited Republic v Permanent Secretary, Ministry of State for provincial Administration and Internal Security.⁵ Also, the applicant argued that the judgment is not disputed and that the Respondent has a public duty to satisfy the decree. Lastly, the applicant argued that it has satisfied the requirements of section 21 of the Government Proceedings Act.⁶
6. The Respondent cited section 45(4) of the CGA and submitted that the applicant sued the wrong party. It cited Soloh Worldwide Inter-enterprises v County Secretary, Nairobi County & another⁷ which cited Council of Governors & others v The Senate⁸ which held that the accounting officer is provided for under section 148 of the PFMA and argued that an accounting officer for a County Government is the person designated as the County Executive Committee Member for Finance under the said section. It submitted that the person who has the overall financial obligation is the County Executive in Charge of Finance who it argued is the accounting officer and not the County Secretary.
7. I will start my determination by addressing the Respondent's argument that the applicant has sued the wrong party. This line of argument, as I see it is premised on the provisions of section 148 of the PFMA which provides: -

Responsibilities of accounting officers of county governments and county government entities

148. Designation of accounting officers for county government entities by the County Executive Committee Member for finance

¹ Act No 17 OF 2012.

² Act No 18 of 2012.

³ [2018] e KLR.

⁴ [2019] e KLR.

⁵ [2012]

⁶ Cap 40, Laws of Kenya.

⁷ [2016] e KLR.

⁸ [2015] e KLR.



- (1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
 - (2) Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.
 - (3) A County Executive Committee member for finance shall ensure that each county government entity has an accounting officer in accordance with Article 226 of the *Constitution*.
 - (4) The Clerk to the county assembly shall be the accounting officer of the county assembly.
 - (5) A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralized county financial management service.
8. Buoyed by the above provision and the authorities it cited, the Respondent argued that the right person to be sued is the County Executive Committee Member in charge of finance. However, this line of thought was adequately answered by the High Court in *Republic v County Secretary, Trans Nzoia County Government & another Ex parte Veteran Pharmaceuticals Limited*⁹ which held: -
11. As regards who the accounting officers of the Trans Nzoia County are, section 44 of the County Government Act establishes the office of the County Secretary who is secretary to the County executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service. Section 103 of the *Public Finance Management Act* also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters.
 12. Under section 103(3) of the *Public Finance Management Act*, the County Executive Committee Member for Finance is the head of Treasury and is thus the responsible for finance matters in the County. Therefore, both the 1st and 2nd Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the Trans Nzoia County by virtue of their roles and functions.
9. In my view, the above decision eloquently addresses the argument raised by the Respondent. Perhaps I should add that Article 226 (1) (b) of the *Constitution* designates an accounting officer in every public entity at the national and county level. As if to accentuate the importance, seriousness and high calling of the office of an Accounting Officer, the drafters of the *Constitution* at Article 226 (5) imposed personal liability couched in no nonsense words as follows: - 'If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.'

⁹ [2019] e KLR.



10. The general rule is thus that the accounting authority approves and oversees finances. The accounting authority is in charge of a public entity's general expenditure and finances. The long title of the PFMA provides that it seeks to 'ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively.' This is in accordance with Article 225 of the Constitution, which envisages national legislation establishing a National Treasury and prescribing measures to ensure that both transparency and expenditure control in each sphere of government are attained.
11. While enacting the provisions of CGA, Parliament was not writing on a clean slate in the sense of taking an unprecedented step. On the contrary, it had before it several cognate Articles of the Constitution governing public finance, management and expenditure. These are Articles 201, 225 and 226 which deal with Principles of Public Finance, Financial Control and personal liability on the part of an accounting officer if he approves the use of public funds contrary to law or instructions respectively. Additionally, Parliament also had before it, Article 232 of the Constitution which prescribes the Values and Principles of Public Service which include efficient, effective and economic use of resources, accountability for administrative acts and transparency and provision to the public of timely, accurate information. The Constitution meticulously provided for enactment of legislation to operationalize the above constitutional edicts. So, in interpreting the provisions of section 148 of the PFMA, we are required to bear in mind the above Articles of the Constitution particularly Articles 232 and 10 of the Constitution and look at the Respondent's right in the eye and ask him whether its failure to comply with a court order can be read in a manner that conforms with the Constitution and the rule of law and whether the noncompliance with the court order can be construed in a manner which promotes these constitutional values and purposes.
12. Viewed from the above constitutional imperatives and the purposive interpretation of the Constitution and the governing statutes, it becomes clear that the Respondent's argument should never find its way into a court room. This is because, the County Secretary has an obligation to comply with court orders. There is evidence that the Respondents are fully aware of the court decree and have failed to settle the decree. The desperate attempt to evade the responsibility to pay by arguing that the right party has not been sued not only goes against the earlier cited high court decision, but also flies on the face of the long title to the PFMA which provides that the act seeks to 'ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively.' The refusal to pay the debt and the attempt to avoid responsibility clearly offends the statutory ordained duty to manage liabilities efficiently and effectively. Avoiding a debt by passing the burden to a workmate is the most ineffective way of managing a public debt. It flies on the face the obligation to obey court orders and a recipe to for interests and costs to accrue against a public entity.
13. The Constitution speaks its values and commands to a variety of public officials and to the public at large. The Constitution does not say if one occupies a public office as that of a County Secretary, he can disobey a court order by purporting to pass the burden to another person. As the Secretary, he not only has a duty to ensure compliance with court orders, but also to abide by the rule of law. Our Constitution is a carefully balanced document. It is designed to provide for a public service sufficiently strong and flexible to meet the needs of the Republic, yet sufficiently limited and accountable to the Constitution and the people of Kenya. In fact, a common thread in the entire Constitution is the emphasis on accountability for all actions done or omitted to be done by public officers while in office. The Constitution also in an uncompromising manner hoists high the requirements for integrity. The drafters were careful to balance between the society's needs to be provided with efficient services by authorizing expenditure where lawfully required but at the same time emphasizing on prudent use of government resources and the requirement for value for money to curb wastage and misuse of public funds. I find and hold that the Respondent by virtue of his statutory duties, is obligated by law to



comply with the court order. The argument that the Respondent has been wrongfully impleaded collapses.

14. I now address the question whether the applicant has established tests to merit orders sought. 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.¹⁰ Originally a common law writ, Mandamus has been used by courts to review administrative action.¹¹ In *Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates*¹² I discussed the tests for granting an order of Mandamus. In particular, I cited *Apotex Inc v Canada (Attorney General)*¹³ which followed *Dragan v Canada (Minister of Citizenship and Immigration)*¹⁴ which laid down the following tests:-
15. 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. The judgment in the said case remains unsatisfied. The existence of the judgment is not disputed. The non-payment is not disputed. The applicant complied with the provisions of section 21 of the *Government Proceedings Act*.
16. The Respondent owes 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, and subsequently

¹⁰ See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

¹¹ WG & 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.

¹² {2019} e KLR.

¹³ 1993 Can LII 3004 (FCA), [1994] 1 FC 742 (CA), aff'd 1994 CanLII 47 (SCC), [1994] 3 SCR 1100.

¹⁴ 2003 FCT 211 (CanLII), [2003] 4 FC 189 (TD), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

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



the decree and Certificate of Order against the Government and Certificate of Costs, there has been an unexplained delay which is unreasonable.

17. 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.
18. 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.
19. 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.
20. It is important to point out that the failure by the Respondent 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.
21. 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. 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.
22. 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 agencies lose 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 February 2, 2022 and issued the following orders: -
 - a. An order of Mandamus be and is hereby issued compelling the Respondent to pay to the applicant the total decretal sum of Kshs 1,103,433.40 and costs of Kshs 136,332.53 being the principal sum and costs awarded in CMCC No 3027 of 2007 plus interests as decreed therein until payment in full.
 - b. That the Respondent do pay to the applicant the costs of this suit plus interests thereon from date of taxation.

Orders accordingly

SIGNED, DATED AT MOMBASA THIS 27TH DAY OF JULY 2022



JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022

OLGA SEWE

JUDGE

