



**Republic v The County Secretary, The County Government Of Kisumu
& 2 others; Otieno Ragot & Co Advocates (Exparte) (Judicial Review
E011 of 2021) [2022] KEHC 13192 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW E011 OF 2021
RE ABURILI, J
SEPTEMBER 29, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY, THE COUNTY GOVERNMENT OF
KISUMU 1ST RESPONDENT**

THE COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

**THE COUNTY EXECUTIVE MEMBER FOR FINANCE, COUNTY
GOVERNMENT OF KISUMU 3RD RESPONDENT**

AND

OTIENO RAGOT & CO ADVOCATES EXPARTE

JUDGMENT

1. The ex parte Applicant herein is the firm of Otieno, Ragot & Company Advocates (herein referred to as “the Applicant”), and the claim vide their Notice of Motion dated December 1, 2021 as amended and dated April 28, 2022 is that the applicant advocate rendered legal services to the now defunct Municipal Council of Kisumu Chief Magistrate’s Court Civil Suit No. 537 of 2007 between *Rashid Wambura Akal & 3 others v Daniel Atieno Agola & Municipal Council of Kisumu*, the 3rd Respondent herein being the successor in title to the defunct Municipal Council of Kisumu.
2. It is averred and deposed that the said client failed to pay to the advocate the legal fees thereby compelling the advocate to file its advocate client bill of costs dated which bill was taxed on September 12, 2019 vide Kisumu High Court Misc Cause No. 88 of 2019 which was taxed on February 20, 2017 and a Certificate of Costs issued, upon which judgment was entered in favour of the advocate/



- applicant, adopting the Certificate of costs and a decree issued on July 27, 2017 followed by a Certificate of Order Against the Government on September 18, 2019.
3. The Applicant/Advocate claims that despite service of the said decree and Certificate of Order Against the Government upon the Respondents, they have refused failed and/or neglected to comply with the court orders and or satisfy the decretal sums.
 4. The Applicant advocate therefore consequently filed an application for leave dated June 2, 2021 to institute judicial Review orders of mandamus to compel the respondents to settle decree of the court and vide Kisumu HC MIC Application No. E095 of 2021, leave was granted on November 24, 2021 (as shown by the original file housed in this matter) after which this substantive Notice of Motion dated 1st December, 2021 was filed on December 2, 2021 and amended on April 28, 2022.
 5. The applicant urges this court to issue judicial review orders of mandamus compelling the Respondents to comply with their statutory and constitutional duty to obey court orders and settle the sums due, against the County Secretary and County Executive Committee Member in charge of Finance as well as the 3rd Respondent County Government of Kisumu respectively, as the said Respondents are the ones vested with the statutory duty to pay funds owed by the Kisumu County Treasury. The Applicant is seeking the following specific orders against the Respondents:
 - 1) An Order of Judicial Review by way of *Mandamus* do issue to compel the County Secretary for the County Government of Kisumu, The County Executive Member for Finance, County Government of Kisumu and the County Government of Kisumu, the 1st, 2nd and 3rd Respondents herein respectively to pay to the applicant the sum of Kenya shillings two hundred and thirty four thousand, eight hundred and ninety two and forty six cents only (234,892.46) together with interest at court rates of 14% per annum from 24.03.2016 in accordance with the decree dated July 27, 2017 and Certificate of Order Against the Government dated September 18, 2019 given in Kisumu High Court Miscellaneous Cause No. 317 of 2015 between *Otieno Ragot & Co. Advocates v Municipal Council of Kisumu*.
 - 2) The Respondents be condemned to pay costs of these proceedings.
 6. The Applicant relied on the statement of facts dated June 2, 2021 and a verifying affidavit sworn on the same date by David Otieno Advocate, the firm's Partner, to which he annexed the Certificate of Order Against the Government, Certificate of costs and Decree.
 7. The 1st, 2nd and 3rd Respondents did not oppose the application despite service of the same upon them as evidenced by the Affidavit of service duly filed in court.

Determination

8. The application was argued orally and only the applicant submitted as the Respondents did not appear for the hearing. Mr. Otieno David Advocate submitted on behalf of the applicant firm reiterating the contents of the application.
9. I have considered the Applicant's application as argued orally. The issues for determination are whether the Respondents are under a public duty and obligation to satisfy the decree and order issued in favour of the Applicant, and if so, whether the Applicant is entitled to the relief of mandamus sought to compel the Respondents to settle the amount due.



10. Execution proceedings against the National and County Governments is governed by Section 21 of the *Government Proceedings Act*, which provides that:

“(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.”

11. In *Republic v Kenya National Examinations Council ex parte Gathenji and Others*, (1997) eKLR the Court of Appeal rendered itself as follows regarding judicial review orders of *Mandamus*:

“The order of mandamus is of a most extensive remedial nature, and is, in form, 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.”

12. Thus, for a court to grant an order of mandamus, the applicant must demonstrate to court that the Respondent has a public and statutory duty which duty the Respondent has failed or neglected to fulfill. The decision in *Republic v Kenya National Examinations Council ex parte Gathenji and Others*, (*supra*) clarifies the nature of the remedy of mandamus. In *Soloh Worldwide Inter-enterprises v County Secretary Nairobi County and Another* (2016) eKLR, it was held that the person who had the overall financial obligation for the purpose of the affairs of the county government must be the county executive in charge of finance and unless he shows otherwise, he is the one under the obligation to pay funds in the capacity as the accounting officer. Further, that jurisprudence on the subject of the order of mandamus demands that where there is a breach of public duty or power, the Court must compel the public authority to perform the duty imposed by statute.
13. It is not in doubt that the law bars the applicant herein from executing against the Government. This is the stipulation in section 21 of the *Government Proceedings Act* Cap 40 Laws of Kenya. The above section has been interpreted by the Courts in various decisions. In *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoaah Egunza* [2012]eKLR, the High Court stated as follows on the issue:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon....”



14. Order 29 Rule 3 of the *Civil Procedure Rules*, 2010 provides for the application for a certificate under section 21 of the *Government Proceedings Act* as follows:

“Any application for a certificate under section 21 of the *Government Proceedings Act* (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of form Nos. 22 and 23 of Appendix A with such variation as circumstances may require.”

15. As correctly observed in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* (*supra*), the Certificate of Order against the Government is not only a statutory requirement for a public statutory duty to crystalize, but it is also a condition precedent to the satisfaction or enforcement of decrees issued against the Government. Section 21 of the *Government Proceedings Act* provides that the Certificate of Order against the Government should be issued by the court after the expiry of 21 days from the date of entry of the judgment. Once the Certificate of Order against the Government is served, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereto.
16. It therefore follows that the only effective remedy for a decree holder, in proceedings against the government, where there is default in settlement of decree, is that of judicial review order of mandamus. See also in the cases of *Republic v Attorney General & Another Ex parte James Alfred Koroso* (2013) eKLR, *Republic v County Secretary, Nairobi City County & Another Ex parte Wachira Nderitu Ngugi & Co Advocate* (2016) eKLR, and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi* (2017) eKLR where similar holdings were made.
17. In the instant case, there is uncontroverted evidence that on June 7, 2021, the County Government of Kisumu was served with the Certificate of Order Against the Government, Decree and Certificate of Costs in KSM HC MISC APPL No. 317 of 2015 as required under Section 21 of the *Government Proceedings Act*. The County Government of Kisumu is one of the Counties established under Article 6 of the *Constitution* and the First Schedule to the Constitution, and is constitutionally recognized as a distinct government by the said Article. In addition, the *Government Proceedings Act* as amended adding sub section (5) makes reference to the application of the *Act* to county Governments with necessary modifications.
18. Therefore, as to whether the Respondents herein are under a duty to pay the decreed sum of money as per the Certificate of Order Against the Government, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Further, execution proceedings against a government or public authority under the *Government Proceedings Act* can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment rendered by the Court against that body. This was the holding in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* [2012] eKLR that:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is



sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

19. Section 44 of the *County Government Act* establishes the office of the County Secretary who is the head of the county public service. On the other hand, Section 103 of the *Public Finance Management Act* No 18 of 2012 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. Under section 103(3) of the said *Act*, the County Executive Committee Member for Finance is the head of Treasury, and is thus the one responsible for matters finance in the County.
20. In view of the above legal provisions, I find and hold that in the instant case, the 1st and 2nd Respondents are in law, jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the County Government of Kisumu by virtue of their roles and functions. In addition, the decretal sum due from the Respondents in the present application has not been disputed, and the Applicant in this respect annexed served copies of the Certificate of Order against the Government, decree and Certificate of costs as taxed and awarded in the named KSM HC Misc Cause No 317 of 2015 which is the subject of this application.
21. With uncontroverted evidence that the Respondents were served with a Certificate of Order against the government and demand for settlement of the taxed and decreed costs being legal fees awarded to the applicant advocate for the services rendered to the Respondent being the successor in title to the defunct Municipal Council of Kisumu, which Certificate of Order against the government was sufficient to alert the Respondents that the debt is due to facilitate payment; and if the Respondents were in doubt as they have the office of County Attorney, they could have verified the details from the available court records, I find that there is no reason given by the Respondents as to why they have not settled the outstanding decree in favour of the Applicant advocate, which settlement is the 1st and 2nd Respondent’s statutory obligation to satisfy decrees and orders of the Court as decreed against the 3rd Respondent.
22. The *Government Proceedings Act* imposes a statutory duty on the 1st and 2nd Respondents to satisfy the decretal sums due to the Applicant upon compliance with the procedure set out in section 21 of the *Act*. That duty is not discretionary. It is mandatory in nature and there is no exemption. Not even the lack of budgetary allocation can absolve the 1st and 2nd Respondents of their duty to pay the decretal



sum as was stated in the case of *Republic v Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau & 9 Others*, (*supra*) and I concur that:

- “19. ..it is therefore my view that settlement of decretal sum by the Government and its agencies does not necessarily depend on the availability of funds. This position was appreciated by this Court in *Wachira Nderitu, Ngugi & Co. Advocates v The Town Clerk, City Council of Nairobi* Miscellaneous Application No. 354 of 2012 in which this Court pronounced itself as follows:
- “I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”
20. 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 a sum decreed by the Court to be due from it.
21. In my view it is the obligation of the government department concerned in conjunction with the Treasury to ensure that funds are allocated towards the settlement of the liabilities owed by the Government. The failure to do so amounts to failure to perform a statutory obligation hence warrants the grant of an order of mandamus. Whereas difficulties in the settlement of decretal sum may be a basis for seeking accommodation with respect to settlement, such difficulties cannot be a basis for seeking that an otherwise merited application for mandamus ought not to be granted.”
23. In conclusion, this Court finds that as judgment was already entered in favour of the Applicant advocates with respect to the demanded decretal amount and costs; the procedure stated in section 21 of the *Government Proceedings Act* having largely been followed; and there having been service of the decree, Certificate of Order Against the Government and demand for payment made, there is a duty upon the 1st and 2nd Respondents who are the relevant accounting officers for the 3rd Respondent, to pay a debt as decreed by a competent Court of law to be due and payable by them on behalf of the 3rd Respondent.
24. In the premises, I find that the Applicant’s Notice of Motion dated December 1, 2021 as amended on April 28, 2022 is merited. I allow it and make the following orders:
- a. That Judicial Review Order of Mandamus is hereby issued directing the County Secretary to the County Government of Kisumu and the County Executive member in charge of Finance, County Government of Kisumu compelling the said 1st and 2nd Respondents to comply by paying to Otieno, Ragot & Company Advocates the decretal sum of Kenya shillings two



hundred and Thirty Four Thousand, eight hundred and Ninety Two and forty six cents only (234, 892.46) together with interest thereon at 14% as awarded by this Court as contained in the Certificate of Order Against the Government dated September 18, 2019 in Ksm HC Misc Cause No. 317 of 2015 from 24.2.2016 until payment in full.

- b) The Applicant shall have the costs of the Notice of Motion dated December 1, 2021 as amended on April 28, 2022 which costs I hereby assess at Kshs 20,000, to cover their disbursements.
- 25. This file is closed as enforcement proceedings can only be conducted in a separate file where separate orders of contempt of Court orders may be sought where there is noncompliance with these orders.
- 26. This file is closed.
- 27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU 29TH DAY OF SEPTEMBER, 2022.

R.E. ABURILI

JUDGE

