



**Republic v County Secretary, County Government Of Mombasa & another; Stephen Kiunga
T/A Kanjau Building Contractors (Exparte Applicant) (Judicial Review Miscellaneous
Application 71 of 2018) [2022] KEHC 13018 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 71 OF 2018
JM MATIVO & OA SEWE, JJ
SEPTEMBER 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA 1ST
RESPONDENT**

**CHIEF OFFICER, FINANCE/ COUNTY TREASURER, COUNTY
GOVERNMENT OF MOMBASA 2ND RESPONDENT**

AND

**STEPHEN KIUNGA T/A KANJAU BUILDING CONTRACTORS EXPARTE
APPLICANT**

JUDGMENT

1. Vide the amended Notice of Motion dated April 9, 2019 expressed under of Order 53 Rules 3 of the *Civil Procedure Rules*, 2010 and sections 8 (2) & 9 of the *Law Reform Act*, the applicant seeks an order of Mandamus to compel the County Secretary, County Government of Mombasa and the Chief Officer, Finance/County Treasurer, County Government of Mombasa to pay him Kshs. 5,889,186.54 being the principal sum of Kshs. 1,889,333.40 plus interests at 14% court rate from September 16, 2003 until payment in full. He also prays for costs of the application.
2. The grounds in support of the application are that on 16th September 2003, he obtained a judgment in his favour in Mombasa CMCC No. 3768 of 2003 for the sum of Kshs 1,758,833.40 plus costs of Kshs. 130,500/= and interests from the date of the judgment. He states that even though the Respondent's appeal against the said judgment was dismissed on February 24, 2017, the decretal sum remains unpaid, hence, the reason the writ of mandamus ought to issue.



3. The respondents' response is contained in the replying affidavit dated January 18, 2019. The substance of the Response is that after the establishment of County Governments, the Intergovernmental Relations Technical Committee under the Intergovernmental Relations Act established institutional structures to facilitate the verification and transfer of assets and liabilities belonging to the defunct local authorities vide Gazette Notice Nos. 858, 2701 and 4370 of January 27, 2017, March 24, 2017 and May 11, 2018 which provided inter alia, for verification of all liabilities of the defunct local authorities. The Respondents contends that the question of who was to pay the debts is yet to be resolved, so, the Respondents cannot be called upon to pay.
4. The applicant filed written submissions dated April 25, 2022. He cited section 33 of the Urban Areas and Cities Act in support of his submission that this suit should continue in the same manner as against the County Government of Mombasa. He urged this court to be guided by the Sixth Schedule to the Constitution and relied on Njroroge & Co Advocates v County Secretary, Olkejuado County Government (Sued as the Successor of Ol-kejuado County Council).
5. The respondents did not file submissions but counsel for the Respondent stated that they would rely on thereplying affidavit.
6. I start by addressing a pertinent question the parties did not address, which is whether the applicant complied with the provisions section 21 of the Government Proceedings Act which provides as follows: -

21. Satisfaction of orders against the Government

- (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.
7. The above section has been the subject of interpretation by our superior courts. In *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* the High Court expressed itself as follows: -

“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....” [Emphasis mine].

8. Also relevant is Order 29 Rule 3 of the *Civil Procedure Rules, 2010* which provides for the application for a certificate under section 21 of the *Government Proceedings Act* in the following words:

“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.”

9. As was held 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 requirement 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.

10. The applicability of section 21 of the Government Proceedings Act to County Governments is not in doubt. Section 21 (5) provides that:- 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. I have perused the entire file. There is nothing to show that the Certificate of Order Against the Government was obtained and served as required. Worse still, none of the parties addressed this issue. A reading of section 21 leaves no doubt that it lays down a clear procedure which must be followed. The law says the Certificate must be served before the obligation to pay can arise.
11. The import of the failure to comply with section 21 creates a hurdle for the applicant to qualify for *Mandamus*. It means that the applicant has failed to satisfy the very first test for mandamus to issue, which is the existence of a duty to pay. My reading of section is that it is peremptory for the Certificate of Order against the Government to be served before an enforcement action such as the mandamus sought in this application is sought. In *Republic v County Secretary, Nairobi City County & another ex parte Tom Ojienda & Associates* I discussed in detail the 8 tests for granting an order of Mandamus which were set out in *Apotex Inc. v Canada (Attorney General)* citing *Dragan v Canada (Minister of Citizenship and Immigration)* which are:
There must be a public legal duty to act;
 - a. The duty must be owed to the Applicants;
 - b. There must be a clear right to the performance of that duty, meaning that:
 - i. The Applicants have satisfied all conditions precedent; and
 - ii. There must have been:
 - a. A prior demand for performance;
 - b. reasonable time to comply with the demand, unless there was outright refusal; and
 - c. An express refusal, or an implied refusal through unreasonable delay;
 - c. No other adequate remedy is available to the Applicants;
 - d. The Order sought must be of some practical value or effect;
 - e. There is no equitable bar to the relief sought;
 - f. On a balance of convenience, mandamus should lie.
12. I find that the first requirement is that there must be a public legal duty to act. This duty cannot arise before the legal prerequisites are met. Closely tied to this first test is the requirement for an applicant to satisfy all conditions precedent. My reading of the law is that compliance with section 21 of the Government Proceedings Act is a condition precedent. It follows that the writ of mandamus cannot issue in the circumstances of this case, so, the applicant's application is fit for dismissal. Accordingly, I dismiss the applicant's Notice of Motion dated April 9, 2019 with no orders as to costs.

Orders accordingly



SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2022.

JOHN M. MATIVO

JUDGE

SIGNED AND DATED VIRTUALLY AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022.

OLGA SEWE

JUDGE

