



**Republic v Managing Director, Kenya Railways Corporation Kenya Railways Corporation;
Telkom Kenya Limited (Exparte Applicant) (Judicial Review Application 428 of 2018)
[2022] KEHC 15568 (KLR) (Judicial Review) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 428 OF 2018
AK NDUNG'U, J
NOVEMBER 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**MANAGING DIRECTOR, KENYA RAILWAYS CORPORATION KENYA
RAILWAYS CORPORATION RESPONDENT**

AND

TELKOM KENYA LIMITED EXPARTE APPLICANT

*(Arising from the judgment and decree issued in Nairobi HCCC No
621 of 2015, Telkom Kenya Limited v Kenya Railways Corporation)*

JUDGMENT

1. The ex parte applicant in its application dated February 11, 2019 seeks one mandatory prayer as follows;

“That this honourable court be pleased to issue an order of *mandamus*, to compel the 1st respondent to make payment to the ex-parte applicant of the principal sum of Kshs 217,100,360.92 awarded on February 2, 2018, costs of Kshs 4,478,173.00 awarded on July 18, 2018 and interest thereon at court rates until payment in full, being the amount awarded in the judgment and decree issued in Nairobi HCCC No 621 of 2015, *Telkom Kenya Limited v Kenya Railways Corporation.*”
2. The application is supported by a statutory statement filed in court on October 26, 2018 and verified by the affidavit of Robert Irungu, legal counsel for the applicant.



3. The grounds upon which the above relief is sought are that in a judgment entered in favour of the *ex parte* applicant in HCCC No 621 of 2015, [*Telkom Kenya Limited v Kenya Railways Corporation*](#) the court directed the respondent herein to pay to the *ex parte* applicant the sum of Kshs 217,100,360.92. In addition to this the *ex parte* applicant also filed a bill of costs against the Respondent and the same was taxed at Kshs 4,478,173.00 and a Certificate of Taxation issued on July 18, 2018.
4. The *ex parte* applicant contends that despite issuing a letter dated July 31, 2018 to the respondent's Managing Director seeking payment the respondent is yet to settle the decretal sum.
5. The respondent in its replying affidavit sworn on February 27, 2019 by David Njogu, the Manager Legal Services states that dissatisfied with the court's judgement in HCCC No 621 of 2015, [*Telkom Kenya Limited v Kenya Railways Corporation*](#) it filed a Notice of Appeal on February 8, 2018 and that the same was served on the *ex parte* applicant.
6. Further that on November 23, 2018 the Court of Appeal granted the respondent leave to lodge and serve its Record of Appeal within 7 days of the Ruling. The respondent is said to have filed the Memorandum and Record of Appeal on November 28, 2018 and that the same at the time of swearing the replying affidavit was pending for hearing and determination.
7. The respondent also contends that it filed an application for stay of execution in Civil Application No 38 of 2019 (UR 44 of 2019); [*Kenya Railways Corporation v Telekom Kenya Limited*](#) on February 6, 2019 and that the court directed for the same to be heard on priority basis. The same was set down for Case Management directions and fixing of suitable hearing date on March 13, 2019.
8. Learned counsel for the *ex parte* applicant submits that the order of *mandamus* is well grounded on the provisions of section 88(a) of the [*Kenya Railways Corporation Act*](#) which provides that whereas a decree holder may not execute its decree against the assets of the corporation, the Managing Director of the corporation shall without delay cause to be paid the decretal amount to the decree holder from the revenue of the corporation.
9. Counsel also cites several cases among them [*Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others*](#) [1997] eKLR where the courts have set out the scope of application of an order for *mandamus*. It is also argued that the respondent is well aware of the amount owing to the *ex parte* applicant and that as was held in the case of [*Republic v Attorney General & another ex parte Khimji Bhimji Seyani & 2 others*](#) [2017] eKLR any difficulty in obtaining the funds to satisfy the decree and costs awarded in Nairobi HCCC No 621 of 2015; [*Telkom Kenya Limited v Kenya Railways Corporation*](#) cannot be relied upon as a ground to prevent an order for *mandamus* to be issued against it.
10. The respondent in its written submissions dated April 22, 2022 contends that for an order of *mandamus* to be issued a party must first satisfy the conditions stipulated under section 21 of the [*Government Proceedings Act*](#) and order 29 of the [*Civil Procedure Rules, 2010*](#).
11. It is contended that there is no evidence from the pleadings filed before this court by the *ex parte* applicant evidencing that the *ex parte* applicant obtained and served a certificate of order on the respondent as was held in the case of [*Republic v Permanent Secretary Office of the President Ministry of Internal Security & another Ex parte Nassir Mwandishi*](#) [2014] eKLR.
12. The provision for issuance of a certificate of costs is meant to give adequate notice to the government departments to make arrangements to satisfy the decree. It is contended that the sum of over Kshs 217,000,000 awarded to the *ex parte* applicant requires to be budgeted and approved as an expenditure by parliament and must also be scrutinized and further approved by the Ministry of Finance.



13. The *ex parte* applicant also filed further submissions in response to the respondent's submissions. In the submissions the *ex parte* applicant contends that the *ex parte* applicant cannot purport to raise the issue of compliance with section 21 of the [Government Proceedings Act](#) in its submissions yet the same was not raised in its replying affidavit. It was contended that as was held in the case of [Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another](#) [2014] eKLR in the absence of a specific pleading the Respondent cannot present its case through its submissions.
14. It is also submitted that section 21 is not intended to relieve a party from its statutory and legal obligations but rather intended to ensure that the party against whom an order for mandamus is sought has sufficient notice of the decree which is the subject of the application. The respondent is also accused of deliberately failing to comply with the order issued in Civil Application No Nai 38 of 2019- [Kenya Railways Corporation v Telkom Kenya Limited](#) where the court in its Ruling dated April 23, 2021 directed as follows;
- “(i) There shall be an order for stay of execution of the judgement of the High Court dated February 2, 2018, pending the hearing of the applicant's appeal on condition that the applicant shall deposit a sum of Kenya shillings sixty million (Kshs 60,000,000.00) in an interest earning account in the joint names of the two parties' advocates within 30 days from the date of this order.
- (ii) Costs of the motion shall be in the appeal.
- (iii) The applicant having already filed the appeal, the Registrar of the court is directed to ensure that the same is listed for case management and subsequent hearing without undue delay.”
15. According to the *ex parte* applicant the respondent having failed to comply with order No 1 twelve months later there is no order barring this honourable court from issuing the mandamus orders as sought by the *ex parte* applicant.
16. I have considered the arguments advanced by the parties herein and the and the issue for determination is whether the Respondents have a legal duty to satisfy the decree subject of these proceedings and whether the Applicants have satisfied the conditions precedent to warrant the orders of this court. It is not in contention that there is a judgement of the court pending fulfilment by the respondent herein together with costs awarded to the *ex parte* applicant upon taxation of its bill of costs.
17. The court in the case of [Republic v Kenya National Examinations Council ex parte Gathenji and 9 others](#) (1997) eKLR discussed the nature of the remedy of mandamus, wherein it was held as follows:
- “The next issue we must deal with is this: What is the scope and efficacy of an order of *mandamus*? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: -
- “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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of *mandamus* will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”

18. It is not disputed in the present application that judgment for costs was entered in favour of the applicants in Nairobi HCCC No 621 of 2015, [Telkom Kenya Limited v Kenya Railways Corporation](#). In addition, the applicant has also provided evidence of the said judgment, a decree and certificate of taxation issued on July 18, 2018.
19. Section 21 of the [Government Proceedings Act](#) provides as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

“(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.”

20. The respondent in its written submissions has raised the issue of having not been served with a certificate of order against Government as is required under the above section. The *ex parte* applicant challenges this position on grounds that as the same was not raised in the respondent’s replying affidavit this court ought not to consider the said issued.
21. Although I am in agreement with the Court of Appeal’s position in the case of *Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR that submissions cannot take the place of evidence it is obvious from the *ex parte* applicant’s pleadings filed before this court that indeed it did not serve the respondent herein with a certificate of order against government.
22. All that was forwarded to the respondent as seen in the letter dated July 31, 2018 was a judgement issued on February 2, 2018, decree issued on July 18, 2018 and a certificate of taxation issued on July 18, 2018. There is no evidence of service of a certificate of order against Government as is required under section 21 of the *Government Proceedings Act* which I would like to maintain is couched in mandatory terms.
23. The court in the case of *Republic v County Secretary Nairobi City County & 2 others Ex parte Koceyo & Company Advocates* [2021] eKLR held as follows;
- “The applicant has not disputed the respondent’s contention that the applicant did not obtain the certificate or order against the County Government of Nairobi City; indeed, the only way this contention could be rebutted is by exhibiting a copy thereof to the affidavit in support of the motion. But none has been given in which event it is safe to conclude that the certificate or certificate were never obtained.
- The manner in which this provision of the law has been framed suggests that the certificate of order or the certificate of order for costs against the government must be obtained and served before enforcement of payment.
- Perhaps to underscore the importance attached to this document, order 29 rule 3 of the *Civil Procedure Rules, 2010* specifically make reference to section 21 of the *Government Proceedings Act* and prescribes to whom the application for the certificate should be made. It says that the application for any of the two certificates should be made to a registrar or to the court itself if the case is in a subordinate court.”
24. This court takes judicial notice that the respondent herein is well aware of the decretal sum that remains outstanding. It has failed to satisfy the decree in a considerably long period of time. Naturally, the *ex parte* applicant is spot on in taking steps to enforce the decree through the instant application for the judicial review order of mandamus. The *ex parte* applicant has, however, omitted a crucial mandatory step in execution of a decree against the Government or a Government agency. There is no evidence, and it is admitted as much, that the Respondent was never served with a Certificate of Order against the Government as prescribed in law. This omission is fatal to this application.



25. In the foregoing I find that the *ex parte* applicant's application for an order of *mandamus* is premature and I strike it out. The *ex parte* applicant shall be at liberty to institute a proper application should they so desire. Each party shall bear their costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY NOVEMBER 2022

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AK NDUNG'U

JUDGE

