



**Republic v National Land Commission; Wainaina & 2 others
(Exparte Applicants) (Judicial Review Miscellaneous Application
E050 of 2022) [2023] KEELC 20176 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E050 OF 2022**

JG KEMEL, J

SEPTEMBER 27, 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF MANDAMUS BY DOMINIC MBUGUA WAINAINA & JULIUS KIIRU MWAURA & VERONICA MBUTU NJUNGE FOR THE ENFORCEMENT OF COURT DECREE IN ELC NO. 94 OF 2018 -THIKA-AND-IN THE MATTER OF ARTICLES 20, 22, 23, 47, 48, 50, 67, 165, 250(12), 253 & 260 OF THE CONSTITUTION OF KENYA , 2010-AND-IN THE MATTER OF SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT-AND-IN THE MATTER OF SECTION 20 (3) & (4) OF THE NATIONAL LAND COMMISSION ACT-AND-IN THE MATTER OF SECTIONS 3,4,5,6,7, & 8 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO 4 OF 2015 AND ALL ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

DOMINIC MBUGUA WAINAINA EXPARTE APPLICANT

JULIUS KIIRU MWAURA EXPARTE APPLICANT

VERONICA MBUTU NJUNGE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM NGUGI) EXPARTE APPLICANT

RULING

1. Having been granted leave to institute Judicial Review proceedings on 22/7/2022, the ex-parte, Applicant took out a Notice of Motion dated 1/8/2022 craving for Orders That;



- a. The Honorable Court be pleased to issue an *order of mandamus* directed to the Secretary of the Respondent (NLC) as its accounting officer compelling him/her to pay the ex-parte Applicants herein the decretal sum at KES.38,914,300.80 in Thika ELC Case No. 94 of 2018, Dominic Mbugua Wainaina & 2 others v the National Land Commission & another.
 - b. The Honorable Court be pleased to grant such further Orders that it may deem just and expedient in the circumstances.
2. The Application is based on the grounds on the face of it *inter alia* that pursuant to Judgment delivered herein in Thika ELC Case No. 94 of 2018 on 15/6/2020, the Respondent was ordered to pay the Applicants a sum of Kshs. 26,048,525/= together with costs and interests of the suit.
 3. Accordingly, the Applicants' Party and Party Bill of Costs was taxed at Kshs. 362,483.80 on 11/5/2021 and Certificate of Taxation issued on 28/2/2022. On 16/5/2022 a Certificate of Order against Government for the of sum KES 38,914,300.80 was issued in favor of the Applicants and despite the Respondent being aware of the said Order, it has refused/failed to settle the decretal amount.
 4. That according to Section 21b (4) of the [Government Proceedings Act](#), no execution can issue against a state organ hence the instant Application for an order of mandamus against the Respondent's Accounting officer pursuant to Section 20 (4) of [National Land Commission Act](#) (NLC).
 5. The Application is supported by the Affidavit of even date of the 1st ex parte Applicant Dominic Mbugua Wainaina. At the risk of repetition of the above grounds it suffices to state that he annexed the authority to swear the Affidavit on behalf of the two ex parte co -Applicants as DMW1 and copies of the Judgement delivered on 15/6/2021, Decree and Certificate of Taxation as DMW - 2 a & b and DMW-3 respectively. The demand letter dated 16/5/2022 and the certificate of even date to the Respondent were also attached as DMW - 4 a & b respectively urging the Court to order the Respondent to pay the decretal sum since no appeal or stay of execution of the subject Judgement has been preferred. That the prolonged failure to satisfy the decretal award amounts to violation of the law and breach of legitimate expectation for the Applicants' right to enjoy the fruits of the Judgement hence the Application.
 6. The Application is opposed by the Respondent. The Respondent filed its Replying Affidavit through its Director of Legal Affairs, Brian Ikol on 2/11/2022. He outlined the establishment and functions of the 1st Respondent under Article 67(1) [Constitution](#) of Kenya, [National Land Commission Act](#) and [Land Act](#). He averred that the ex parte Applicants contended that the Respondent acquired the suit land on behalf of Kenya Rural Roads Authority (KeRRA) which was a defendant in Thika ELC 94 of 2018. That during the hearing, KeRRA stated that by the time the demolitions were done on the ex parte Applicants' properties, the mandate over the link Road that was being constructed had already been handed over to the County Government of Kiambu. That as per Section 107 (1) of the [Land Act](#) the Respondent commences compulsory acquisition on instruction of national or county government and further under Section 111 (1A) of the same [Act](#) funds related to compulsory acquisition including compensation sums are to be deposited with NLC for onward transmission to the intended persons. That no evidence has been tendered to show that the County Government of Kiambu instructed the Respondent to acquire the suit land to warrant compensation as claimed. Therefore, the order for mandamus cannot issue without the Respondent receiving compensation funds from the County Government of Kiambu and since the Respondent did not participate in the acquisition of the suit land, it intends to file an application to Review the Judgement delivered on 15/6/2020.
 7. In a rejoinder the 1st ex parte Applicant filed a further Affidavit sworn on 16/2/2023. He deposed that the averments contained in the Replying Affidavit were raised and determined in the original suit and the ultimate Judgement has never been challenged by way of appeal, setting aside and or vacated. That



the Respondent's allegations have no nexus with the instant Application and are a mere afterthought, a feeble attempt to argue an appeal but at the wrong forum.

8. On 11/10/2022 directions were taken and parties agreed to canvass the Application by way of written submissions.
9. The Applicants through the firm of Kimathi Wanjohi Muli Advocates filed submissions and List of Authorities both dated 17/10/2022. Two issues were drawn for determination; whether the Respondent is under a public duty to satisfy the Court decree and who bears the instant costs.
10. The first issue was answered in the affirmative. That the Applicants have followed the laid down procedure in seeking the award of Kshs. 38,914,300.80 and only a writ of mandamus can now issue to compel the Respondent's Secretary who doubles as its Accounting officer under Section 20 of the National Land Commission (NLC Act), to satisfy the Judgement of the Court. Reliance was placed on the case of Vivo Energy Ltd (formerly Kenya Shell Ltd) v National Land Commission [2020] eKLR on the application and efficacy of the writ of mandamus. That failure to pay the decretal award amounts to breach of the Respondent's statutory mandate and granting the instant Application is the only way for the Applicants to enjoy fruits of their Judgement.
11. Secondly that costs follow the event. That having served the Respondent with a 21 days' notice which was ignored, it is only fair that the Respondent be condemned to pay the costs of the Application.
12. The Learned Commissions Counsel, Ms Masinde Cecilia filed submissions dated 20/3/2022 on behalf of the Respondent. A singular issue was drawn for determination; whether the Application is merited.
13. Acknowledging the Judgement delivered in favor of the Applicants, the Respondent submitted that under Section 11 (1) (f) Fair Administrative Actions Act (FAA) the Court may grant an order to compel performance of a public duty owed in law and an *order for mandamus* under Section 11 (2) (a) FAA. That under the Constitution of Kenya and Land Act, compulsory acquisition of land is undertaken by NLC upon being instructed to do so either by national or county Governments. That Section 111 (1A) of the Land Act provides that the acquiring authority shall deposit with the Commission the compensation funds before such acquisition is undertaken. Consequently, that the Respondent did not commence the subject acquisition on its own and thus cannot satisfy the decretal award without receiving funds from the acquiring entity.
14. The Respondent went ahead to draw the issues for determination during the hearing of the suit and argued that since the land was acquired at the instance of the County Government of Kiambu, the compensation funds can only be obtained from the said County and the Applicants have failed to enjoin it in these proceedings. That the Respondent did not receive instructions to acquire the suit lands on behalf of the County Government and no evidence has been tendered to the contrary. Hence, that the Application is fatally flawed and an order of mandamus cannot issue unless it's proven that the Commission was involved in the acquisition of the land and it has received compensation funds owed to the Applicants by the County Government of Kiambu.
15. On the 17/5/2023 the Court directed the parties to address it on interalia whether the provisions of Section 21 of the Government Proceedings Act (GPA) apply to the Respondent; whether the assets of the Respondent are protected in law with respect to execution of Judgements and Court decrees and whether there are other available methods of execution of such decrees.
16. The Applicants filed further written submissions on the 2/6/2023 in which they argued that the provisions of Section 21 of the GPA apply to the Respondent. That the Respondent being an independent Commission is a body corporate with perpetual succession and a seal capable of suing and being sued. In addition that constitutional Commissions are one of the state organs as provided



for under Article 260 of *the Constitution* of Kenya. Reliance was placed on the case of *Okiya Omtatah Okoiti & Anor v AG & 7 Others* [2023]eKLR where the Court stated as follows;

“... Article 248 of *the Constitution* creates Commissions and Independent Offices ... one cannot reasonably fail to note that Commissions and independent offices are part of the national government structure of the state of Kenya and to say otherwise would be absurd”

17. In the case of *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014]eKLR the need for independence of a Commission was explained as follows;

“Independence, therefore, is crucial; and of this concept we had thus remarked, in Re the matter of the Interim Independent Electoral Commission (IEBC); Sup. Ct.Advisory Opinion No. 2 of 2011; [2011] eKLR at (paragraphs 59 and 60):

“It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under *the Constitution*, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government...

The several independent Commissions and offices are intended to serve as “people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the ‘independence clause’.

“For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest...”[emphasis supplied].

Therefore, “independence” is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.”

18. The Applicants concluded that the Respondent is a government department and is therefore subject to the provisions of the *GPA* and for that reason the assets of the Commission are protected under the said *Act*. Further that execution against the Respondent is made against the accounting officer or the chief executive officer whichever is appropriate and in this case the Secretary of the Respondent is the accounting officer as set out in the Section 20 of the *NLC Act*.
19. The Respondent agreed with the Applicants that it is a constitutional Commission created under Article 67 of *the Constitution* of Kenya. The Respondent associated itself with the decision of the Court in *Retirement Benefits Scheme v Attorney General & 3 Others* [2017]eKLR which cited the decision in the *Indian Supreme Court case in Shetty v Airport Authority of India & others* [1979] 1 SRC 1042 in appreciating that the Respondent passes the test set out therein; the Respondent draws its funding from the state coffers; its mandate is to manage public land on behalf of national and county Governments hence its functions are closely tied governments functions. That the Respondent is a government body and hence subject to the provisions of Section 21 of the *GPA*.



20. Further the Court was informed that the accounting officer of the Respondent is responsible for the satisfaction of the Judgement against the Respondent.

Analysis and determination

21. The key issue for determination is whether the application is merited.
22. It is not in dispute that the Respondent is created under Article 253 of *the Constitution* of Kenya as a body corporate with perpetual succession and a seal and capable suing and being sued in its corporate name. Article 260 defines a state organ means a Commission, office, agency or body established under *the Constitution*.
23. It is not in dispute that though the Respondent is an independent Commission it is part and parcel of the state organs of the Government of Kenya. I say so because it draws its funding from the exchequer and its mandate is of a public nature. I am guided by the decision of the Court in *Okiya Omtata and the Communication Commission of Kenya* (supra) which state that Commissions though independent are part of the national governmental structure of the state of Kenya and that its independence is majorly to protect it from interference in carrying out its mandate. My reading of the *NLC Act* does not provide how execution against the Respondent should be carried out.
24. The execution procedure therefore falls within the one provided for in Section 21 of the *GPA* which states as follows;

“(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 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.”

25. The Court finds that the procedure set out in the above law applies to the Respondent.
26. Section 20 (3) and (4) provides for the office and appointment of the Secretary of the Commission who shall be the accounting officer of the Commission and responsible for the discharge of the duties of the Commission. It states as follows;
- “(3) The secretary shall—
- (a) be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission;
 - (b) serve on such terms and conditions as the Commission may determine; and
 - (c) before, assuming office, take and subscribe to the oath or affirmation of office set out in the Second Schedule.
- (4) The secretary, shall be the accounting officer of the Commission and shall be responsible to the Commission for—
- (a) all income and expenditure of the Commission;
 - (b) all assets and the discharge of all liabilities of the Commission; and
 - (c) the proper and diligent implementation of Part IV of this *Act*.”
28. It is on record that the Judgement of the Court was delivered on the 15/6/2020 in favour of the Applicants. On the 11/5/2021 party and party bill of costs was taxed at the sum of Kshs 362,483.80 in favour of the Applicants. On the 16/5/2022 the certificate of taxation was issued in the sum of Kshs 38,914,300/80 against the Respondent.
29. The Respondent has stated that it was not responsible for the acquisition of the land and as such no funds have been availed to it to satisfy the Judgement. The Court finds that these are issues that ought to have been canvassed at the hearing of the suit and as such are being raised too late in the day. It suffices to note that the Judgement of the Court has not been appealed set aside and or vacated and further that it remains outstanding.
30. The justice of the matter is to allow the application so that the Applicants are availed the fruits of their long awaited Judgement.
31. The application has merit it is granted as prayed.
32. Final orders for disposal
- a. It is hereby ordered that an *order of mandamus* directed to the Secretary of the Respondent (NLC) as its accounting officer compelling him/her to pay the ex-parte Applicants herein the decretal sum at KES.38,914,300.80 in Thika ELC Case No. 94 of 2018, *Dominic Mbugua Wainaina & 2 others v National Land Commission & another*.
 - b. The costs shall be in favour of the Applicants



33. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of

Ms. Njunge HB Kimathi for 1st, 2nd and 3rd Applicants

Ms. Masinde for Respondent

Court Assistants – Phyllis/Lilian

