



**Republic v County Secretary Kilifi & 2 others; Fleetwood ENT. Limited (Exparte)
(Judicial Review 8 of 2021) [2022] KEELC 3698 (KLR) (17 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW 8 OF 2021
MAO ODENY, J
AUGUST 17, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY SECRETARY KILIFI 1ST RESPONDENT

THE CHIEF OFFICER FINANCE 2ND RESPONDENT

COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT

AND

FLEETWOOD ENT. LIMITED EXPARTE

RULING

1. This ruling is in respect of a Notice of Motion dated November 9, 2021 by the ex- parte applicant seeking the following orders: -
 - a) That the applicant be granted an order of mandamus directed and compelling the respondents; the Chief Officer Finance to pay the applicant the sum of five million (Kshs 5, 000,000) being the decretal amount in Malindi ELC No. 100 of 2011.
 - b) That the costs of this application be borne by the respondents.
 - c) Any other relief the Honourable Court deem fit and expedient.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.



Ex- parte Applicant's Submissions

3. Counsel gave a brief background to the case and relied on the affidavit of the ex - parte applicant Juma Ali Mohamed, director of Fleetwood Enterprises Limited who stated that following a trespass Case No. 100 of 2011, against the 3rd Respondent over a property Plot No. 514R Malindi, judgment was entered in favour of the ex -parte applicant on May 13, 2020 where the court declared that it is the bonafide owner of the suit property and awarded damages at Kshs. 5,000,000/-. That despite the exparte Applicant obtaining and serving a decree and certificate of order, the respondents have refused to pay the damages awarded.
4. Counsel for the applicant identified three issues for determination as follows: -
 - a) Whether the respondents are truly indebted to the ex-parte applicant.
 - b) Whether the ex -parte applicant meets the standard for grant of a mandamus order.
 - c) Whether this Honourable Court has power to grant the mandamus order.
5. Counsel relied on the case of *Re Mugoya Construction & Engineering Company Limited* [2015] eKLR, and submitted that pursuant to the judgment and decree issued by this court on May 13, 2020, the respondents remain indebted to the applicant.
6. On the issue as to whether the ex-parte applicant meets the standard for grant of an order of *Mandamus*, counsel relied on section 21(1) and (3) of the *Government Proceedings Act* and the cases of *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security exparte Fredrick Manoah Egunza* [2012] eKLR; *Permanent Secretary Office of the Presidnet Ministry of Internal Security & another exparte Nassir Mwadbihi* [2014] eKLR; and *Republic v Attorney General & another exparte James Alfred Koroso*.
7. Mr. Gicharu submitted that the Applicant has complied with the statutory provisions and that section 21 of the *Government Proceedings Act* empowers this court to grant an order of mandamus so long as the statutory requirements had been complied with. Counsel relied on the case of *Jamleck Waweru Karanja v County Government of Nakuru* [2020] eKLR where the court held that first start by securing a certificate of costs and certificate of order against the Government.

Respondent's Submissions

8. Counsel relied on the grounds of opposition dated January 19, 2022 and a replying affidavit sworn by Bibi Fondo the Attorney, Kilifi County Government who deponed that the application was fatally defective for failure to comply with the *Government Proceedings Act* on the ground that the respondents have never been served with any bill of costs for taxation as such, the exparte applicant could not have been issued with a certificate of costs which was not attached to the application.
9. It was counsel's submission that the only issue for determination is whether the Applicant assessed its costs before execution and that the procedure is that costs should be taxed and a certificate of costs issued before execution except in circumstances where the court may order that execution comes before the amount of costs is taxed as per section 94 of the *Civil Procedure Act*.
10. Counsel further submitted that from the certificate of order against government it shows that the only amount is the decretal sum which does not include costs which means that the costs have not been taxed. That failure to seek the court's leave to execute the decree before taxation of costs, rendered the present application premature and that it should be dismissed. Counsel relied on the case of *Commercial Bank of Africa v Lalji Karsan Rabadia & 2 others* [2012] eKLR.



Analysis and determination

11. This is a Judicial Review application for Mandamus to compel the respondents' Chief Finance Officer to pay the Ex parte Applicant Kshs 5million being decretal amount in Malindi ELC No. 100 of 2011.
12. In the case of *Republic v Attorney General & another exparte James Alfred Koroso* [2013] eKLR where the court held that; -

“.....public officers are held in trust for the people of Kenya and must carry out their duties for the benefit of the people of Kenya.....to deny a citizen his lawful rights which have been decreed by a court of competent jurisdiction is unacceptable. *Mandamus* cannot be equated with execution proceedings as in seeking an order for Mandamus, the applicant is seeking not a relief against the government, but to compel a government official to do what the government through the parliament has directed him to do. The relief is not sought to make a person individually liable...”

13. The respondent raised an issue that the application is premature as the applicant has not taxed costs hence no certificate of costs has been attached. Counsel also submitted that the applicant has not complied with section 94 of the *Civil Procedure Act* where leave has to be sought and granted for a party who desires to execute a decree before taxation.

Section 94 of the *Civil Procedure Act* provides that: -

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

14. This Section provides that the court has the discretion to allow a party to execute a decree before ascertainment of costs vide taxation which application can be formal or informal. The Applicant has attached a Certificate of Order against the government pursuant to Order 29 Rule 3 of the *Civil Procedure Rules 2010* which the Deputy Registrar has certified that the amount payable to the plaintiff by the defendant in respect of the judgment/ decree is Kshs five Million. That is the only amount that is payable by the defendant as no other amount in terms of costs has been mentioned for payment now or in future.
15. What is the import of a party applying for Mandamus for payment of a decretal amount before taxation and obtaining a certificate of costs? In my view where a party opts to execute before taxation and issuance of certificate of costs in an application for mandamus where he/she wants to compel the government to pay a decretal sum in the Certificate of Order against the Government, such a party is deemed to have forfeited the costs and cannot be allowed to claim them.
16. In this case the applicant has forfeited costs as the procedure as per section 94 of the *Civil Procedure Act* requires that if a party wants to execute a decree before taxation of costs then leave of the court must be sought and obtained either by an application or informally (orally). This was not done, therefore the applicant cannot be heard claim costs as procedure was not complied with. The applicant also stated that they are not pursuing costs therefore they are only interested in the amount awarded as damages which is stated in the Certificate of Order against the government.



17. In the case of *Republic v Attorney General & another exparte James Alfred Koroso* [2013] eKLR (supra)the court held that; -

“...In the present case the ex parte applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized...”

18. It is also my considered view that the applicant having complied with section 21 (1) of the *Government Proceedings Act* is entitled to the orders sought in the application.

19. I therefore make the following specific orders that an Order of *Mandamus* do and is hereby issued compelling the respondents’ Chief Officer to pay to the applicant the sum of Kshs. 5,000,000/. with interest from the date of judgment till payment in full.

20. The payment to be made within 30 days and in default, unless there is an order to the contrary, a Notice to Show Cause do issue against the respondents’ Chief Finance Officer why he should not be cited for contempt of court. The ex parte applicant will also have the costs of this application.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF AUGUST, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

