



Abetter v County Government of Busia (Environment & Land Case 12 of 2016) [2022] KEELC 3252 (KLR) (4 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 12 OF 2016**

**AA OMOLLO, J
AUGUST 4, 2022**

BETWEEN

JOE DAVID ABETTER APPLICANT

AND

COUNTY GOVERNMENT OF BUSIA RESPONDENT

RULING

1. The Applicant/Decree holder brought the application dated June 25, 2021 premised on the provisions of Section 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act, Article 159(2)(d) of the Constitution of Kenya seeking for the following orders;
 - a) ...
 - b) That the Honourable Court do issue an order for the County Secretary Busia County Government and Chief Officer, Ministry of Health, County Government of Busia to show cause why they should not be committed to civil jail for failing to comply with court order in vacating the land or settlement of the value at Kshs.57,000,000/=.
 - c) That the Honourable Court do order for the Officer Commanding Police Station Busia, to provide security to the Applicant and/or his appointed agent qualified valuer as he enters on his property Bukhayo/Mundika/3644 to re-occupy in default of being paid Kshs.57,000,000/= valued.
 - d) That in the alternative and without prejudice to (c) above, the Honourable Court do order that the Applicant be granted security by O.C.S. Busia Police Station or any other police officers as he repossesses his property per court judgment.
 - e) That the Honourable Court do issue any and such orders as to ensure compliance with its decree of 20/4/2018 and to bring sanctity to court order.



2. The application was supported by the annexed affidavit of Joe David Abetter and on the following grounds;
 - (i) That there is a decree from this court which has not been implemented because of the Respondent's agents, Ministry of Health occupying his land.
 - (ii) That the previous attempts by applicant to re-enter and repossess his property has been thwarted by direct and veiled threats from the Respondents' employees with Ministry of Health occupying and using his property without compensation and in total disregard of court judgment.
 - (iii) That the Respondents have refused, failed and or ignored to pay the value of the said land now valued at Kshs.57,000,000/=.
 - (iv) That there is no appeal and/or review of judgment of this court issued on 20/4/2018.
3. The Respondent opposed the application by filing their Grounds of Opposition on July 2, 2021 imploding that;
 - (i) That the said Notice of Motion is defective and incompetent for failure to comply with the provisions of Section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya, relating to execution of decrees or orders against government.
 - (ii) That proper procedure for execution against Government is by way of an application for Judicial Review for an Order of Mandamus.
 - (iii) That the requirement for compliance with the law is a duty incumbent upon the parties and hence mandatory.
 - (iv) That there is no order of court for valuation of the subject land or payment to the decree-holder of Kshs.57,000,000/= or any part thereof.
 - (v) That the said Notice of Motion seeking to issue in persona against the County Secretary and the Chief Officer, Department of Health and Sanitation is a desperate attempt to extort and defraud not merely the Busia County of money not owed but also to deny and deprive the community of Matayos sub-county of the benefit and services of a health facility due for elevation to a sub-county hospital.
 - (vi) That the decree-holder title No. Bukhayo/Matayos/3644 is a subject of investigation by Government Agencies including the Directorate of Criminal Investigations and the Ethics and Anti-Corruption Commission and no payment can be made to the decree holder until the determination of the results of those investigations.
4. Additionally, the Respondent filed a replying affidavit dated June 30, 2021 and sworn by Dr. Isaac Omeri, the Chief Officer, Department of Health and Sanitation of Busia County Government. Dr Omeri deposed to matters law already stated in the grounds of opposition.
5. The Applicant/decree-holder put in a further affidavit dated July 5, 2021 stating that the decree by this court gave the Respondent the option of getting out of his land if for any reason they were unable, to compensate him for his land. He deposed that if the Chief Officer was candid with this court, they should have disclosed why it is taking them years to settle the matter as decreed and or as now valued since he is not out to profit from anything but out for true assessed value of his land upon which they



have constructed and have been continuing constructing on even after the court's judgment in sheer disobedience and show of misplaced bravado.

6. The applicant deposed to being unaware of any investigations being carried on in respect of his ownership of the land and wondered why it was taking longer than necessary for any decision to be made. That it is wrong to invoke the name of other state agencies such as Ethics and Anti-Corruption Agency among others as involved in this land issue which is purely a private land. He continued that the judgment-debtor has not prosecuted any appeal and/or review and or even alternative valuation report on the property they have illegally constructed on to show the actual value of the property compared to his. He further stated that the court can issue an order for security as he repossesses his land if the County Government believes that what he is interested in is only compensation and they can take away all and any developments on his land and supplant them elsewhere.
7. The parties agreed to dispense with the hearing of the application by way of written submissions. The Respondent put in their submissions on 4/10/2021 and submitted that they are a government in terms of Article 6(2) of *the Constitution* of Kenya and has all the privileges, immunities and protection accorded to the Government (national or county). They submitted that the proper procedure for executing against the Respondent is by way of an application for Judicial Review for an order of mandamus and the requirement for compliance with the law thereof is a statutory duty incumbent upon the parties, and is mandatory hence, binding. They said the orders sought herein by the applicant are completely flawed and bad in law for failure to comply with the due provisions of Section 21(4) of the *Government Proceedings Act*, Cap 40, Laws of Kenya, regarding execution against the government. Order 53 Rule 1 sub-rule (1)(2) of the *Civil Procedure Rules* further makes it a mandatory requirement for the applicant to first apply and obtain leave of court before proceeding to apply for an order of mandamus and therefore the application is premature, fatally defective and a pure abuse of the court process for blatant failure to comply with due statutory requirement regarding execution against the Government.
8. He relied on the case of; *Republic v County Secretary Migori County Government & Another* [2019] eKLR where Justice Mrima held thus;

“Odunga, J. in Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi [2014] eKLR also had the following to say of the matter:

33. It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See *The District Commissioner Kiambu v R* and



Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs The Brecknock And Abergavenny Canal Co. 111 ER and R vs. The Bristol and Exeter Railway Co 114 ER 859.

34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.....”
9. The Applicant filed his submissions on 7/6/2022 and said that what the he is seeking is a security order in enforcing its decree issued on 20/4/2018 whose terms are clear and remain in force. He submitted that the Respondent has been given a chance to appear in court and show cause through its officials known to be directly affected by the decree’s implementation. It is his submission that the sanctity of court orders and decrees should be protected by all and sundry and since there is no appeal and/or review filed to vacate the court orders intended to be implemented he urged the application be allowed in any of the limbs that is easier for the Respondent – vacate the land and/or settle the value.
10. Having carefully considered the application and rival submissions, the issue that comes up for determination is whether the application as filed is merited. The applicant has premised his application on Section 63(e) of the *Civil Procedure Act* which provided that court may, if it is so prescribed, make such interlocutory orders as may appear to the court to be just and convenient. The applicant wants the judgment-debtor to show cause why they should not be committed to civil jail for refusing to honour the decree of this court. He said that costs in this particular suit were taxed and a certificate of costs was issued and same was served upon the judgment-debtor but they have failed to make good the settlement. He annexed to the application copies of certificate of costs and certificate of order against the government served upon the county government.
11. The Respondent/judgment-debtor has faulted the application for not complying with the provisions of Section 21(4) of the *Government Proceedings Act* in relation to execution of decrees and orders against the government. Section 21(4) of the *Government Proceedings Act* Cap 40 of the Laws of Kenya provides as follows: -
- “Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Government of any money or costs, 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.”
12. The applicant wants the County Secretary and Chief Officer, Ministry of Health, County Government of Busia to show cause why they should not be committed to civil jail for failing to comply with the court order. Justice Odunga expounded on Section 21(4) of the *Government Proceedings Act* as such in the decision of *Republic vs- Otieno Kajwang & Another Exparte Mohamed Muhumed Sirat* (Nairobi HC Misc Application No. 316 of 2008);
- “The above provision clearly bars individual liability for orders of payment by the Government, Government Department or Government Officer and further bars execution or attachment against the Government. It is my view that where the Government is found to be liable in Civil proceedings, the only mode of realizing the fruits of Judgment is by way of an order of mandamus...”.



13. It is not in doubt that there is a decree in favour of the applicant and that a Certificate of Order against the Government was served against the judgment-debtor herein which was done in compliance with Section 21 of the Government Proceedings Act. The defendants/judgment-debtor have however not fulfilled the terms of the decree. However, Section 21(3) of the Government Proceedings Act prevents the government from being executed against in order to fulfil a decree. The rationale of Section 21(3) was explained in *Kisya Investments Ltd v Attorney General & Another* [2005] 1KLR 74, as follows:-

“Order 28, Rules 2(1) (a), 2 and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the Courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the Court, the application of any written law cannot amount to an abuse of the process of the Court, however much its effect is harsh or even undesirable. History and rationale of Government’s immunity from execution arises from the following: - Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i) the Raising of revenue-(by taxation or borrowing); (ii) its expenditure; and (iii) The audit of public accounts. The satisfaction of decrees or Judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that Section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary Control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. See Halsbury’s Laws of England 4th Edition Vol 11 Paragraph 970, 971 and 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947(Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or Judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. See *Auckland Harbour Board v R* [1924] AC 318, 326”

14. Since the gist of the application is to have the order of this court executed against the judgment-debtor herein who is a government, the same has been brought to court prematurely. The law does not allow execution against the government unless an order of mandamus is sought and the applicant which has not been done in this instance. The NTSC should be undertaken once the judicial review orders have been granted.
15. Consequently, the court finds the application dated June 25, 2021 as premature and is hereby struck out with costs to the defendant/judgment-debtor.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 4TH DAY OF AUGUST 2022.

A. OMOLLO

JUDGE

