



**Republic v County Government of Siaya & 2 others; Otieno & 5 others
(Exparte) (Environment and Land Judicial Review Case E001 of 2022)
[2022] KEELC 4886 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022
AY KOROSS, J
SEPTEMBER 22, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF SIAYA 1ST RESPONDENT

COUNTY SECRETARY, SIAYA COUNTY 2ND RESPONDENT

CHIEF FINANCE OFFICER, SIAYA COUNTY 3RD RESPONDENT

AND

PETER HESBON ODHIAMBO OTIENO EXPARTE

WILLIS OCHIENG ONYANGO EXPARTE

PAUL ABUNDA OBONYO EXPARTE

JOHN OWINO NDEGE EXPARTE

JOHN WILSON MARAMBA EXPARTE

GEORGE OCHIENG' EXPARTE

JUDGMENT

- The background to this judgment can be traced to a judgment rendered in Siaya PM ELC Case No 148 of 2018 where the *ex parte* applicants were the plaintiffs while the 1st respondent and one Jenipher Otieno Chama were the defendants. In the lower court, the *ex parte* applicants were partly successful in their claim and they were awarded one half of costs. A consent of an all-inclusive sum of the costs payable of Kshs 2,580,000/= was entered into between the *ex parte* applicants' counsel and the 1st



respondent's counsel Wasuna & Co Advocates. A decree and certificate of costs dated 2/09/2020 were subsequently issued.

Ex parte applicants' case and submissions

2. Upon being granted leave by this court, the *ex parte* applicants filed a motion dated 9/02/2022. The court was moved pursuant to the provisions of section 8 and 9 of the [Law Reform Act](#) and order 53 rules 3 and 4 of the [Civil Procedure Rules](#) and it was premised on the grounds on the face of the supporting affidavit of the 1st *ex parte* applicant Peter Hesbond Odhiambo Otieno. The motion sought the following orders;
 - a. An order of mandamus directed at the 1st, 2nd and 3rd respondents compelling them to pay the sum of kshs 2,580,757 being the decretal sum arising from Siaya PM ELC 148 of 2018; and
 - b. The costs of the motion be provided for.
3. In the 1st *ex parte* applicant's affidavit, he asserted that all efforts to be paid the decreed costs by the respondents had come to a nought and the 1st respondent's assets could not be the subject of an attachment.
4. As directed by the court, the 1st *ex parte* applicants' Counsel Mr Ochanyo filed written submissions dated February 9, 2022. Counsel submitted that by virtue of article 47(1) and (2) of the [Constitution](#), the *ex parte* applicants were entitled to the orders sought. He asserted that the legal procedure for executing decrees against the government was outlined by sections 21(1), (3) and (4) of the [Government Proceedings ACT](#).
5. Counsel cited the case of [Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & Others](#) Civil Appeal Number 266 of 1996 (CAK) [1997] eKLR where the court stated that an order of mandamus compels 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 had failed to perform their duty to the detriment of a party who had a legal right to expect the duty to be performed.
6. Counsel opined that in order for one to realise the fruits of a judgement against the government, a party ought to be issued with a certificate of costs and order. On this, reliance was made on the case of [Republic v the Attorney General & another ex parte James Alfred Koroso](#) Judicial Review Miscellaneous Application Number 44 of 2012. Counsel asserted that the 2nd and 3rd respondents were joined in the proceedings by the creation of their respective offices by virtue of sections 44(1) and 45 of the [County Government Act](#) with the former being the head of the county executive and the latter being head of the county treasury. It is unfortunate that despite counsel citing several authorities, none was tendered to this court.

The Respondents' case and submissions

7. The attorney general entered appearance for the respondents, however, despite service, it did not file written submissions and in essence, the motion is unopposed. However, this court is called upon to determine the motion on its own merits.

Analysis and determination

8. I have carefully considered the *ex parte* applicants' motion, supporting affidavit and their submissions. Because copies of the authorities cited were not proffered to this court, this court will not belabour much in considering them. It is the considered view of this court that the only issue falling for determination is whether the motion is merited.



9. The legal framework of executing a civil order against the government is provided for under section 21 (1) of the [Government Proceedings Act](#). In summary, a capacitated court officer may after 21 days have lapsed, and upon an application by a person in whose favour an order has been made, issue the person with a certificate of order.
10. Section 21 (3) then goes on to state that if the order is for a monetary sum, a certificate shall state the amount payable and the accounting officer shall pay the person entitled to the amount as appearing in the certificate together with interest (if any). Such payment is subject to any further orders of the court.
11. Therefore, in order for a successful litigant to reap the fruits of his or her judgment against the government following the inaction of the government body to fulfil its mandate under section 21 (1) and (3) of the [Government Proceedings ACT](#), they must move the court for an order of mandamus compelling the government to settle the decretal sum and or certificate of costs. This is because section 21 (4) of the [Government Proceedings ACT](#) prohibits execution against the Government thus leaving a party with no other appropriate remedy except mandamus.
12. The 2nd respondent's office is a creature of section 44 of the [County Government Act](#) and under section 103 of the same Act he or she is the secretary of the county executive committee and head of the county public service. This office has been properly joined in this case together with the 3rd respondent whose office is created by section 103 of the [Public Finance Management ACT](#). These two offices among others settle decrees and orders on behalf of the county governments.
13. Further, order 29 rule 2(2) of the [Civil Procedure Rules](#), provides that:

“No order against the Government may be made under- (a)Order 14, rule 4 (Impounding of documents);(b)Order 22 (Execution of decrees and orders);(c)Order 23 (Attachment of debts);(d)Order 40 (Injunctions); and (e)Order 41 (Appointment of receiver)”.
14. Rule 3 of the same Order provides that any application for a certificate under section 21 of the [Government Proceedings ACT](#) shall be made to a deputy registrar or subordinate court and any application for direction that a separate certificate be issued on costs shall be in the mode of “form 22 and 23 of appendix A with such variations as circumstances may require”
15. My understanding of section 21 of the [Government Proceedings Act](#) and order 29 of the [Civil Procedure Rules](#) is that they are mandatory and a party must strictly comply with the laid down procedures before an order of mandamus is issued by a court. In arriving at this I am persuaded by the decision of Odunga J in [Republic v Permanent Secretary Office Of The President Ministry Of Internal Security & another Ex-Parte Nassir Mwandibi](#) [2014] eKLR (See also [Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza](#) [2012] eKLR) where the learned judge elaborately stated thus;

“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” [Emphasis added]

16. The rationale for these stringent provisions of law was because government is incapable of making immediate payments upon issuance of a decree. Lack of elaborate procedures would create situations where the government would be inundated with executions and attachments of its assets day in, day out thus leading to a chaos, anarchy and the breakdown of the rule of law (See *Kisya Investments Ltd v Attorney General & another* [2005] eKLR).
17. Bearing in mind the provisions of law and the three persuasive authorities that I have mentioned, I am not satisfied that the *ex parte* applicants met the mandatory provisions of law. One, there is no evidence that they applied to the subordinate court for the issuance of either a certificate of order or a certificate of order for costs against the government and if at all such a certificate was ever extracted of which there is no evidence, the *ex parte* applicants have not demonstrated that it was served. What they have annexed to the motion is a decree and certificate of costs and unfortunately, too, there is no evidence that it was ever served. I find that the *ex parte* applicants have not met the mandatory provisions of law and for that reason I am unable to grant the orders.
18. Though I sympathize with the *ex parte* applicants that they have been denied their costs for close to two years, I cannot overlook the mandatory provisions of law. It behooves upon them to first comply with the well laid out procedure before they approach the sit of justice. Ultimately, I hereby strike out the motion with no orders as to costs.

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

22/9/2022

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING THE PRESENCE OF:**

Mr. Ochanyo for *ex parte* applicants

N/A for the applicants

N/A for the respondents

Court assistant- Ishamel orwa

