



REPUBLIC OF KENYA



KENYA LAW
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**Republic v County Secretary County Government of Machakos &
another; Mbondo & another (Exparte Applicants) (Judicial Review
E011 of 2021) [2022] KEELC 13426 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW E011 OF 2021**

A NYUKURI, J

OCTOBER 12, 2022

**IN THE MATTER OF THE JUDICATURE ACT, SECTIONS 8 AND 9
OF THE LAW REFORM ACT, ORDER 53 OF THE CIVIL PROCEDURE
RULES AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW PROCEEDINGS FOR THE ORDER OF MANDAMUS**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY COUNTY GOVERNMENT OF MACHAKOS 1ST
RESPONDENT**

**CHIEF OFFICER, FINANCE COUNTY GOVERNMENT OF
MACHAKOS 2ND RESPONDENT**

AND

SERAH MUTHIO MBONDO EXPARTE APPLICANT

**RICHARD MUEMA MBONDO (SUING ON BEHALF OF THE ESTATE OF
ELIJAH MBONDO NTHEKETHA) EXPARTE APPLICANT**



JUDGMENT

Introduction

1. In 2014, Serah Muthio Mbondo and Richard Muema Mbondo (the Plaintiffs) filed suit against the County Government of Machakos (defendants) vide Machakos ELC No. 181 of 2014; Serah Muthio Mbondo & Richard Muema Mbondo vs. The County Government of Machakos. Upon trial of the matter, on September 18, 2020, the court entered judgment in favour of the plaintiffs as against the County Government of Machakos in the following terms;
 - a. That a permanent injunction be and is hereby issued restraining the defendant either by itself, agents or servants from trespassing, interfering, erecting any structures or in any way dealing with land known as L.R No. 11800/93.
 - b. That the defendant do pay to the plaintiffs mesne profits of Kshs. 80,742,353.00 as at 31st December 2016.
 - c. That in addition to the above amount, the defendant to pay to the plaintiff's mesne profits of Kshs. 1,454,231.00 per year from the year 2017 until they vacate the suit property.
 - d. That the defendant to pay the costs of the suit.
2. Having computed the decretal sum together with costs of the suit, as at December 31, 2021, which was amounting to Kshs. 90,850,642/=, the plaintiffs served the defendant with a certificate of order against government in accordance with Order 29 Rule 3 of the *Civil Procedure Rules*. The certificate did not elicit compliance or any manner of response from the County Government of Machakos. The Plaintiffs did not give up, they sought for leave to institute judicial review orders of Mandamus to compel the respondents herein to settle the decree in Machakos ELC 181 of 2014. Leave to apply for judicial review orders was granted on June 16, 2021.
3. On 22nd June 2021, the ex parte applicants filed a Notice of Motion dated June 18, 2021, seeking for the following orders;
 - a. That this Honourable court be pleased to issue an order of Mandamus against the respondent to compel him to pay the ex parte applicant Kshs. 90,850,642 being the decretal sum plus costs and interest arising out of Machakos ELC No. 181 of 2014.
 - b. That the costs of this application be provided for.
4. The application is anchored on the grounds on its face, supporting affidavit, the statutory statement and the verifying affidavits of Serah Muthio Mbondo & Richard Muema Mbondo, all dated June 18, 2021. The ex parte applicants' case is that they filed suit against the County Government of Machakos vide ELC No. 181 of 2014 whereof judgment was entered in their favour for a decretal sum and costs amounting to Kshs. 90,850,642/-. Further that the decree and certificate of costs were served upon the County Government of Machakos, who despite having an obligation to pay, have declined to make the said payment. It is the ex parte applicants' argument that the Respondents' failure to comply with the judgment aforesaid is failure to perform their duty which is irrational and without reasonable cause and that this failure has breached the ex parte applicants' right to enjoy the fruits of their judgment.
5. Despite service of the application on the respondents' counsel on record, no response to the application was filed.



6. The application was canvassed by way of written submissions in accordance with the court's directions made on October 5, 2021. On record are the ex parte applicants' submissions filed on November 1, 2021.

Submissions

7. Counsel for the ex parte applicant submitted that there was a decree in favour of the ex parte applicant as against the County Government of Machakos, vide Machakos ELC No. 181 of 2014, which the Respondent was obligated to settle but had refused to do so. According to counsel, the Respondents' failure to perform their obligation of settling the abovementioned decree was irrational and without any reasonable cause and has breached the Applicants' right to enjoy the fruits of the decree in their favour.
8. Reliance was placed on the cases of *Republic v Attorney General, ex parte Samson Lumadede Shivaji* [2019] eKLR and *Republic v County Secretary- Kericho County Government; Ex- Parte Gideon Waitbaka Ngoko* [2021] eKLR, for the proposition that where a government agency fails to settle a decree against them, the court has discretion to compel them to perform their obligations under the decree by way of an order of Mandamus.

Analysis and determination

9. I have carefully considered the Notice of Motion, supporting and verifying affidavits, statutory statement, submissions and authorities cited. The sole issue that arise for determination is whether the ex- parte applicants have met the threshold for grant of an order of Mandamus.
10. The *Black's Law Dictionary* 11th Edition defines *Mandamus* as follows;
A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body usually to correct a prior action or failure to act.
11. In the case of *Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants* [2007] 2 EA 441, the court stated that an order of Mandamus compels a public officer to act in compliance with the law.
12. The scope and efficacy of an order of Mandamus was extensively elaborated by the Court of Appeal in the case of *Republic v Kenya National Examinations Council ex parte Gathenji & others* (1997) eKLR, 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 Laws 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...”

13. In the Canadian cases of *Apotex Inc v Canada (Attorney General)* and *Dragon v Canada (Minister of Citizenship and Immigration)* the following eight elements that ought to be demonstrated before grant of an order of *Mandamus* were set out;
 - a. There must be a public legal duty to act
 - b. The duty must be owed to the applicants.
 - c. There must be a clear right to the performance of that duty meaning that;
 - i. The applicants have satisfied all conditions precedent; and
 - ii. There must have been;
 - I. A prior demand for performance
 - II. A reasonable time to comply with the demand, unless there was outright refusal; and
 - III. An express refusal or an implied refusal through unreasonable delay.
 - d. No other adequate remedy is available to the applicants;
 - e. The order sought must be of some practical value or effect;
 - f. There is no equitable bar to the relief sought;
 - g. On a balance of convenience, Mandamus should lie.
14. Essentially therefore, an order of *Mandamus* will only issue for purposes of compelling a public officer to perform a public duty as is expected of them under the law, in respect of their office, where there is a defect in justice arising from a situation where a specific legal right lacks a specific legal remedy.
15. In the instant suit, the ex parte applicants have demonstrated that despite having a judgment in their favour against the County Government of Machakos, they are unable to realize the fruits of the said judgment due to the failure of the County Government to settle the decree and hence it is necessary to issue an order compelling the Respondents herein to settle the decretal sum plus costs as ordered vide Machakos ELC 181 of 2014.
16. The right to an effective remedy enhances the right to access to justice, and the latter is an entitlement of every person who comes to court in their quest for justice. A remedy that is not effective has no value to a litigant. In the instant suit, the decree in Machakos ELC 181 of 2014 remains a paper right until the person or body with the legal duty to effect it is compelled to comply with it. I therefore agree with the ex parte applicants’ submissions that although they have a judgment conferring on them a legal right which places a duty on the respondents to settle the decretal sum plus costs and interest, yet that judgment alone is not sufficient to give them an effective remedy. It is my considered view, that the circumstances of this case and the interests of justice call for grant of an order of Mandamus to



compel the respondents to comply with the decree in Machakos ELC No. 181 of 2014. An order of mandamus shall be an effective remedy to the ex parte applicants herein.

17. In the premises, it is my finding that the Notice of Motion dated June 18, 2021 is merited and the same is allowed as follows;
- a. That this Honourable court be and is hereby pleased to issue an order of *Mandamus* against the respondents compelling them to pay the ex parte applicants Kshs. 90,850,642/=, being the decretal sum plus costs and interest arising out of Machakos ELC NO. 181 of 2014.
 - b. That costs of this suit are awarded to the ex parte applicants.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 12TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Othim and Mr. Nzei for the Ex Parte Applicants

No appearance for the Respondents

Ms Josephine Misigo - Court Assistant

