



Republic v District Land Registrar - Thika & 3 others; Viewland Investments Company Limited (Exparte Applicant) (Judicial Review Application E004 of 2023) [2024] KEELC 5410 (KLR) (9 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW APPLICATION E004 OF 2023**

**BM EBOSO, J
JULY 9, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE DISTRICT LAND REGISTRAR - THIKA 1ST RESPONDENT
THE CHIEF REGISTRAR OF TITLES 2ND RESPONDENT
MINISTRY OF ROADS AND PUBLIC WORKS 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

AND

VIEWLAND INVESTMENTS COMPANY LIMITED EXPARTE APPLICANT

JUDGMENT

- Through a judicial review motion dated 12/6/2023, the ex-parte applicant seeks an order of mandamus compelling the four respondents to satisfy the Decree of this Court [Gacheru J] dated 8/11/2019, together with the taxed costs comprised in the Certificate of Taxation dated 5/8/2022. The motion is supported by an affidavit sworn on 12/6/2023 by Michael Kamau Kinga, and a statutory statement dated 12/6/2023. The motion was canvassed through written submissions dated 6/12/2023.
- The case of the ex-parte applicant is that it obtained Judgment against the respondents in Thika Environment and Land Court Case No 90 of 2018 [Formerly Nairobi ELC Case No. 822 of 2010]. The ex-parte applicant further contends that it was awarded costs of the said suit and the said costs were subsequently taxed at Kshs 440,429/=. It is the case of the exparte applicant that despite the foregoing, the respondents have failed to satisfy the decree and the certificate of taxation. The ex-parte applicant urges the court to grant the order of mandamus.



3. The respondents oppose the application through grounds of opposition dated 19/12/2023, filed by J. Motari Matunda, a Principal State Counsel in the Office of the Attorney General. Further, the respondents oppose the application through written submissions dated 19/12/2023, filed by J. Motari Matunda.
4. The case of the respondents is that the application is frivolous, vexatious, and an abuse of the court process. The respondents argue that orders of mandamus cannot issue against parties that are not accounting officers in Government departments. They add that the applicant has not obtained and served on them a certificate of order issued against them under Section 21 of the Government Proceedings Act. The respondents further contend that they have not refused to pay the decretal sum, adding that they need the certificate of order for the purpose of including the claim in the relevant departmental budget in order to satisfy the court decree and the certificate of taxation. They further argue that given that the decretal sum was awarded towards the end of the previous financial year, the claim can only be included and considered in the 2024/25 budget which will come into effect in July 2024.
5. The court has considered the motion; the response to the motion; and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. The key question that falls for determination in the application is whether the applicant has satisfied the criteria for grant of an order of mandamus in the circumstances of the application.
6. An order of mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty. The test for grant of an order of mandamus was outlined in *Apotex Inc. v Canada (Attorney General)* and was also discussed in *Dragan v Canada (Minister of Citizenship and Immigration)*. The key elements that must be present for the writ to issue are:-
 - a. there must be a public legal duty to act;
 - b. the duty must be owed to the applicant;
 - c. there must be a clear right to the performance of that duty, meaning that:
 - i. the applicant must have satisfied all conditions precedent; and
 - ii. there must have been: a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay;
 - a. there should be no other adequate remedy available to the applicant;
 - b. the order sought must be of some practical value or effect;
 - c. there should be no equitable bar to the relief sought;
7. Has the ex parte applicant met the above threshold? Neither the Judgment nor the decree giving rise to the plea for an order of mandamus has been exhibited. All that the ex parte applicant exhibited is the certificate of taxation dated 5/8/2022. In the absence of the judgment and the decree in relation to which the court is invited to issue an order of mandamus, the court has no basis upon which to issue the order. If not for any other reason, the above omission would attract an order striking out the judicial review motion. This is, however, not the only omission.
8. A party seeking to enforce a judgment against an accounting officer within Government is required to comply with the mandatory requirements of the Government Proceedings Act. Among the mandatory requirements is that the decree-holder should exact and serve a certificate of order under Section 21



of the Act. Service of the certificate of order serves as a formal demand for the performance of a legal duty by the accounting officer.

9. For avoidance of doubts, Section 21 of the [Government Proceedings Act](#) provides as follows:

21.

- (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, or against a Government department, or against an officer of 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.
- (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

10. The court in the case of [Republic v Attorney General; Kenya Joinery Limited \(Exparte\)](#) [2023] eKLR held that:

“It is apparent from section 21(2) that the certificate of order against government may only be served upon the Attorney General but under section 21(3) the obligation to pay and settle the amount specified in the certificate of order against government is upon the accounting officer of the government department concerned.

It follows that if the obligation to pay is on the accounting officer, then the right party to be named in proceedings such as these is the accounting officer and not the Attorney General.



According to section 21(3), the accounting officer is the person upon whom the public duty to pay has been bestowed and, therefore, he is the proper person against whom the order of mandamus would be directed in the event of failure to perform the public duty. It is also the accounting officer, and not the Attorney General, who would be subjected to contempt of court proceedings in the event that the order of mandamus is granted and not complied with.

11. The court in the case of *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

12. In the present judicial review application, the respondents contend that they were not served with the certificate required under Section 21 of the *Government Proceedings Act*. The ex-parte applicant has not bothered to provide evidence to show that indeed the certificate was served in accordance with the requirements of the *Government Proceedings Act*. In the above circumstances, there is no proper basis, to warrant grant of the order of mandamus at this point in time. Consequently, it is the finding of this court that the present application was brought pre-maturely. For the above reasons, the application under consideration stands to be struck out for having been brought prematurely. It is so ordered.
13. On costs, the need for execution arose because the relevant Department of Government did not deem it necessary to honour the decree of the court without the post-judgment coercive instruments of the court. Put differently, the Department decided to ignore the Judgment. In the circumstances, the Department will not be awarded costs for disregarding the Judgment of the court.



14. The other respondents are government officers that are funded by the public coffer. In the circumstances, the court takes the view that there should be no award of costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF JULY 2024

B M EBOSO

JUDGE

Court Assistant: Melita

