



Republic v Chief Officer, Finance, the County Government of Mombasa & another; Kenya Trucks & Tractors Limited (Exparte Applicant) (Judicial Review Application E003 of 2024) [2025] KEHC 5037 (KLR) (17 March 2025) (Judgment)

Neutral citation: [2025] KEHC 5037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E003 OF 2024**

OA SEWE, J

MARCH 17, 2025

**IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF SECTIONS 8 & 9 OF THE
LAW REFORM ACT, CAP 26, LAWS OF KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHIEF OFFICER, FINANCE, THE COUNTY GOVERNMENT OF
MOMBASA 1ST RESPONDENT**

THE COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

AND

KENYA TRUCKS & TRACTORS LIMITED EXPARTE APPLICANT



JUDGMENT

1. Before the Court for determination is the Notice of Motion dated 20th May 2024. It was filed by the ex parte applicant pursuant to the leave granted herein on 15th April 2024 for the following orders:
 - (a) That an Order of Mandamus be issued directed to the respondents compelling them to comply with the Decree dated 30th May 2023 by paying the applicant the principal sum of Kshs. 46,524,120/= being the amount awarded by the High Court in Mombasa High Court Civil Suit No. E002 of 2020 together with interest thereon until payment in full.
 - (b) That the costs of the application be provided for.
2. The application was premised on the grounds that the applicant obtained judgment in its favour in Mombasa High Court Civil Case No. E002 of 2020 in the sum of Kshs. 46,524,120/= together with interest and costs. The applicant averred that it duly furnished the respondents with all the documents pertaining to the said judgment but that the respondents have persisted in their refusal to pay. The applicant contended that it is being unlawfully denied the fruits of its judgment; and therefore that it will only take an Order of Mandamus to compel payment.
3. In response to the application, the respondents filed Grounds of Opposition dated 19th June 2024, contending that:
 - (a) The application offends Section 21 of the *Government Proceedings Act*, Chapter 40 of the Laws of Kenya.
 - (b) The application is inconsistent with Order 29 of the Civil Procedure Rules, 2010.
 - (c) The respondents have not been served with the judgment, the decree, the Certificate of Order against the Government or the Certificate of Costs as the matter was being dealt with by an external advocate.
 - (d) The applicant has sued the wrong party.
 - (e) The application is premature and ought to be struck out.
4. The application was canvassed by way of written submissions, pursuant to the directions given herein on 22nd May 2025. Accordingly, the applicant duly filed its written submissions dated 4th September 2024. The applicant reiterated the factual background of the application and echoed its stance that all the requisite documents were served on the respondents in compliance with the requirements of Section 21 of the *Government Proceedings Act*.
5. The applicant submitted that since the respondents opted to file Grounds of Opposition, they did not challenge the factual basis of the application. The applicant relied on *Faustina Njeru Njoka v Kimunye Tea Factory Limited* 2022 eKLR to buttress this argument. Accordingly, the applicant urged the Court to ignore the assertions of fact set out in the Grounds of Opposition and added that the existence of the predicate judgment has not been denied.
6. The applicant also submitted that, since Section 21(4) of the *Government Proceedings Act* prohibits execution against the Government, it has no other means of realizing the fruits of its judgment other than through an Order of Mandamus. It placed reliance on *Republic v The Attorney General & another, Ex Parte James Alfred Koroso* 2013 eKLR and *Republic v Attorney General & another, Ex Parte Stephen Wanyee*.



- 7 In response to the contention by the respondents that it did not comply with the prerequisites set out in Section 21 of the *Government Proceedings Act*, the applicant referred the Court to the averments set out at paragraphs 9 and 18 of the Supporting Affidavit and the documents annexed thereto, marked Annexures “SMM-2”, “SMM5” and “SMM-8”. It was therefore the applicant’s submission that it has demonstrated that the respondents were duly served with the Decree dated 30th May 2023, the Notice of Taxation dated 30th May 2023 and the Notice of Objection to the Taxation Ruling dated 15th August 2023.
- 8 The applicant also refuted the respondent’s assertion that it has sued the wrong parties and relied on Section 103 of the *Public Finance Management Act*, No. 18 of 2012, which establishes the County Treasury and the cases of Republic v Independent Electoral and Boundaries Commission, Ex Parte Nyabaro Onditi 2021 eKLR, Republic v The Attorney General & another, Ex Parte James Alfred Koroso (supra) and Republic v City Council of Nairobi & another, Ex Parte Kepha O. Maobe & 365 others 2017 eKLR to shore up its contention that the respondents are the proper parties for the purposes of the instant suit.
- 9 It was therefore the submission of the applicant that the Court has the statutory authority to compel the respondents to perform their duty to satisfy the decree passed in Mombasa High Court Civil Suit No. E002 of 2020.
- 10 The respondents relied on their written submissions dated 7th October 2024. They proposed for determination the following issues:
- (a) Whether the applicant has fulfilled the requirements of the law as per Section 21 of the *Government Proceedings Act*;
 - (b) Whether the County Secretary is an accounting officer for purposes of Section 21 of the *Government Proceedings Act*.
- 11 The respondents submitted that, since judicial review is a special procedure, the applicant was under obligation to satisfy the prerequisites laid down for the issuance of the prerogative Order of Mandamus, namely:
- (a) That a prior demand for performance had been made;
 - (b) That a reasonable time for compliance with the demand had been given; unless there was outright refusal; and,
 - (c) That the respondent expressly or by implication refused to pay.
12. In the submission of the respondents, the applicant failed to demonstrate any of the elements aforementioned; and is therefore not entitled to reliefs sought herein. In particular, the respondents submitted that the respondents did not serve a Certificate of Order against the Government as required under Section 21 of the *Government Proceedings Act*, either on them or on the Attorney General.
13. The respondents argued that Mandamus is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for it exist. In this regard, reliance was placed on Abdalla A. Hassan v County Government of Mombasa 2020 eKLR and Republic v County Government of Kwale; Charpenel Enterprises Limited (Ex Parte) (Judicial Review Application No. 020 of 2021 2021 KEHC 200 (KLR) (9 November 2021) (Judgment).
14. On whether the Chief Finance Officer is an accounting officer for purposes of Section 21 of the *Government Proceedings Act*, the respondents made reference to Section 103 of the *Public Finance*



Management Act and the case of Republic v County Secretary, Nairobi City County and another, Ex Parte Mohamed Tariq Khan 2017 eKLR and submitted that the Chief Finance Officer is not the Accounting Officer for the 2nd respondent; and therefore that it would be improper to have the 1st respondent herein compelled to pay as proposed by the applicant. They therefore prayed for the dismissal of this suit.

15. From the foregoing summary, there appears to be no dispute that the applicant obtained judgment in its favour in the sum of Kshs. 46,524,120 together with interest thereon as well as costs in Mombasa High Court Civil Case No. E002 of 2020. There is also no dispute that the costs awarded in that Petition were thereafter taxed and a Certificate of Taxation issued in that regard. Copies of the Judgment, Decree and Certificate of Taxation were annexed to the applicant's Verifying Affidavit.
16. There being no indication that either the said Judgment or the Certificate of Taxation was set aside on appeal or review, I find as a fact that the sums aforementioned are indeed owing from the 2nd respondent to the applicant. And, as correctly pointed out by the applicant, Section 21(4) of the Government Proceedings Act forbids attachment of government property. It states:
 - (4) ...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."
17. Section 21 of the Government Proceedings Act, also sets out the procedure preceding payment of a debt owed by the Government. It stipulates thus in Sub-Sections (1) and (2):
 - (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."
18. Further to the foregoing, Subsections (3) of Section 21 of the Government Proceedings Act states:
 - (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.

19. That the aforesaid provisions apply to County Governments such as the 2nd respondent is not in doubt; for Subsection (5) of Section 21 is explicit that:

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.”

20. The rationale for this stringent procedure was well captured in *Kisya Investments Ltd v Attorney General & Another* 2005 1 KLR 74 thus:

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 judgements 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 authorised by statute, and any unauthorised payment may be recovered. SEE Halsbury’s Laws Of England 4th Edn Vol. 11 Para 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 VS.R (1924) AC 318, 326*. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets



day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property." (also see Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandih, supra)

21. Where, as in this case, the accounting officer fails to pay as required, an order of Mandamus would be the most appropriate remedy. The remedy is provided for in Article 23(3)(f) of the Constitution and Order 53 of the Civil Procedure Rules. Its scope was well explicated in Halsbury's Laws of England, 4th Edition, Volume 1 thus:

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..."

22. That the remedy is particularly efficacious in situations where a decree or Certificate of Costs has been issued against the Government was well-explicated by Hon. Githua, J. in Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza 2012 eKLR thus:

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."

23. Similarly, in the case of Republic v the Attorney General & Another, Ex parte James Alfred Keroso 2013 eKLR the point was made that:

...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the



people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya..."

24. In connection with the Certificate of Order against the Government provided for in Section 21(1) of the *Government Proceedings Act*, Order 29 Rule 3 of the Civil Procedure Rules, requires that:

Any application for a certificate under section 21 of the *Government Proceedings Act* (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require."

25. Accordingly, the only issues for consideration are:

- (a) Whether, in this instance, the applicant has complied with the provisions of Section 21 of the *Government Proceedings Act*.
- (b) Whether the applicant has sued the right person.

A. On whether the applicant complied with the provisions of Section 21 of the *Government Proceedings Act*:

26. I have perused the documents annexed to the applicant's Verifying Affidavit and noted that, indeed the applicant annexed, inter alia, copies of the Decree and Certificate of Costs. However, no Certificate of Order against the Government for purposes of Section 21(2) of the *Government Proceedings Act* was exhibited by the applicant. It is manifest therefore that the application has been prematurely brought in that there was no proof that a prior demand by way of service of the Certificate of Order against the Government as envisaged by Section 21(1) was served on the Accounting Officer.

B. On whether the applicant has sued the wrong parties:

27. Apart from the judgment debtor, the County Government of Mombasa (the 2nd respondent) the applicant brought this suit against the 2nd respondent's Chief Finance Officer as the 1st respondent. In this regard, Section 21 of the *Government Proceedings Act*, is explicit as to the duty bearer. It states as follows in Sub-Section (3):

- (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..."

28. The applicant relied on Section 103 of the *Public Finance Management Act* to support their contention that the Chief Finance Officer is the Accounting Officer for all intents and purposes. That provision states:

- (1) There is established for each county government, an entity to be known as County Treasury.
- (2) The County Treasury shall comprise—
 - (a) the County Executive Committee member for finance;



- (b) the Chief Officer; and
 - (c) the department or departments of the County Treasury responsible for financial and fiscal matters.
- (3) The County Executive Committee member for finance shall be the head of the County Treasury.
29. It is plain that the assertion of the applicant cannot be true because Subsection (3) stipulates that the County Executive Member for Finance, as opposed to the Chief Officer, Finance, is the head of the County Treasury. As to who the Accounting Officer should be, the subject was discussed exhaustively in *Council of Governors & Others v The Senate 2015 eKLR*, at paragraphs 134 to 137 by a three judge bench of the High Court. Here is what the Court had to say:
134. The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of *the Constitution* provides;
- (1) Act of Parliament shall provide for –
 - (a)
 - (b) The designation of an accounting officer in every public entity at the national and county level of government
 - (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.
- Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;
- 1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
 - 2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.
135. It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the *Public Finance Management Act*. Indeed, Section 148(3) of the *Public Finance Management Act* mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of *the Constitution*.
136. As regards the accounting officer for the County Assembly, Section 148(4) of the *Public Finance Management Act* provides that;
- The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.



137. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”
30. Similarly, in *Republic v County Secretary, Nairobi City County & Chief Officer, Finance/Nairobi City County Treasurer ex-parte Mohamed Tariq Khan (supra)* it was held: -
8. It must however be remembered always that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the Respondent ought to have been the Accounting Officer who is the County Executive Member for Finance.”
31. In the premises, it is plain that the applicant has not only failed to comply the conditions precedent to the grant of the order of Mandamus in this instance, but has also filed this suit against the wrong person. It would follow that the duty to pay on the part of the respondent is yet to arise; and therefore the application is premature.
32. In the result, it is hereby ordered that the Notice of Motion dated 20th May 2024, having been prematurely filed, be and is hereby struck out with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF MARCH 2025.

OLGA SEWE

JUDGE

