



REPUBLIC OF KENYA



KENYA LAW
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Gikandi & Company Advocates v County Government of Tana River (Judicial Review Application E035 of 2023) [2024] KEHC 1127 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1127 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E035 OF 2023

A. ONG'INJO, J

FEBRUARY 8, 2024

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT

CAP 40

AND

**IN THE MATTER OF: AN APPLICATION BY GIKANDI & COMPANY
ADVOCATES FOR JUDICIAL REVIEW ORDER OF MANDAMUS TO
COMPEL PAYMENT OF A DECREE ISSUED IN MSA CMCC NO. 630 OF 2021**

BETWEEN

GIKANDI & COMPANY ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF TANA RIVER RESPONDENT

RULING

1. By a Notice of Motion application dated 26th October 2023, the applicant sought leave to apply for judicial review order of mandamus to compel the County Government of Tana River, through the Governor or the County Executive for Finance or any other authorized officer, to pay to the Applicant Kshs 23,992,280.00 as stated in the Certificate of Order Against Government dated 21st February 2023, issued in Mombasa CMCC No. 630 of 2021, within 14 days from the date of the order, or such other period as the court may deem fit.



2. That this court does grant the applicant leave to apply for judicial review order of Mandamus to compel the County Government of Tana River, through the Governor or the County Executive for Finance or any other authorized officer, to pay to the applicant interest on the sum of Kshs 23,992,280.00 at the rate of 12% per annum from 21st February 2023 until payment in full, within 14 days from the date of the order, or such other period as the court may deem fit.
3. This application is supported by grounds on its face and the verifying affidavit of Jackson Gikandi Ngibuini sworn on 24th October 2023.
4. The grounds and verifying affidavit are to the effect that a judgment and decree issued in Mombasa CMCC No. 630 of 2021 was entered against the Respondent for Kshs 19,500,000.00 plus interest at 12% per annum from 26th April 2021, and that the costs awarded were assessed at Kshs 623,900.00. That as at 21st February 2023, the amount due stood at Kshs 23,992,280.00 and continues to accrue interest per annum.
5. That the Respondent's two (2) attempts at setting aside the judgment were dismissed vide rulings delivered on 18th August 2022 and 23rd January 2023.
6. That the applicant has caused to be issued a Certificate of Order against the government dated 21st February 2023 and that the respondent has refused to satisfy it contrary to Section 21 (3) & (5) of the Government Proceedings Act. That it is therefore necessary that the order of mandamus sought does issue to compel the Respondent to discharge its statutory duty.
7. Annexed to the application are: -
 - a. Annexure JG-1 – a copy of the decree and certificate of costs issued on 1st September 2022;
 - b. Annexure JG-2 and JG-3 – copies of the rulings delivered on 18th August 2022 and 23rd January 2023;
 - c. Annexure JG-4 – a copy of the Certificate of Order against the Government dated 21st February 2023; and
 - d. Annexure JG-5 – a copy of the applicant's letter dated 24th February 2023.
8. The application was filed alongside the applicant's Statutory Statement dated 24th October 2023 outlining reliefs sought and the grounds for seeking the relief.
9. The applicant filed written submissions dated 7th November 2023 that the order of mandamus should issue by relying on the case of Greenwood Printers & Stationers Ltd v Independent Electoral and Boundaries Commission (2022) eKLR for guidance.
10. That on the contrary, the case of Republic v County Government of Kiambu Ex Parte Laban J. Macharia Muiruri (2021) eKLR, the same procedure applies to county governments. The applicant contended that if the decree is to be complied with, the interest ought to continue accruing at 12% from the date of the Certificate of Order against Government to the date the payment is made in full.

Analysis and Determination

11. Having considered the Notice of Motion application dated 26th October 2023 and written submissions by the applicant dated 7th November 2023, the issue for determination is whether the order of mandamus should be issued against the Respondent.



12. In *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* (2018) eKLR, Mativo, J. outlined the requirements for an order of mandamus to issue as follows: -

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. v Canada (Attorney General)*, and, was also discussed in *Dragan v Canada (Minister of Citizenship and Immigration)*. The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. 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;
 - iv. No other adequate remedy is available to the Applicants;
 - v. The Order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought;
 - vii. On a balance of convenience, mandamus should lie

13. Githua, J. in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) eKLR, held as follows on an order of mandamus against the government:

“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.”

14. This court has established that the decretal sum due from the County Government of Tana River together with costs and interests have not been disputed as the applicant annexed a copy of the decree and certificate of costs, and a certificate of order against the government awarded in his favour in Mombasa CMCC No. 630 Of 2021. The applicant further annexed a letter dated 24th February 2023 to show that he made a request for payment which has not been honoured by the Respondent, and therefore an implied refusal on their part to pay the demanded sums.
15. This court finds that the applicant’s Notice of Motion application dated 26th October 2023 is merited. The order of mandamus compelling the County Government of Tana River through the County Executive for Finance to pay to the ex parte applicant decretal sum of Kshs 23,992,280.00 together with interest on the said sum at the rate of 12% per annum from 21st February 2023 until payment in full. The respondent shall also pay costs of the application to be assessed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 8TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Cheruiyot Advocate H/B for Mr. Kongere Advocate for Applicant

County Attorney for the County Government of Tana River

