



Republic v Kisii County Government; Gichana (Exparte Applicant) (Judicial Review 77 of 2022) [2024] KEHC 1368 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
JUDICIAL REVIEW 77 OF 2022**

TA ODERA, J

FEBRUARY 13, 2024

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE KISII COUNTY GOVERNMENT

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KISII COUNTY GOVERNMENTRESPONDENT

EX-PARTE APPLICANT

JAPHET OGAMBA GICHANA

BETWEEN

REPUBLIC APPLICANT

AND

KISII COUNTY GOVERNMENT RESPONDENT

AND

JAPHET OGAMBA GICHANA EXPARTE APPLICANT



JUDGMENT

1. By a Notice of Motion dated 22.9.2022, the Applicant, through the firm of Bosire Gichana & Co. Advocates, sought the following orders:
 1. That this Honourable Court be pleased to issue an order of Mandamus directed to the Respondent to pay the Applicant the sum of KShs.459,000/= and costs with interest at the rate of 14% per annum being the decretal amount in Principal Magistrate's Court Ogembo Civil Case No. 36B of 2018 from 20th November, 2018 until payment in full.
 2. That all necessary and appropriate relief be granted and/or directed to be given by this Honourable Court.
 3. That costs of this Application be provided for.
2. The Application was grounded on the facts stated in the Statement of Facts, affidavit verifying the facts of Kennedy Bosire Gichana filed with the Application for leave to file the instant proceedings.

Background

3. A brief background of the matter is as follows: The Ex-Parte Applicant filed a suit against the Respondent, Ogembo PMCCC No. 36" B" of 2018 seeking compensation for the seizure of his power saw Model 272 Husquavanna. The suit was heard and determined in favour of the Exparte Applicant vide a Judgment rendered on 20.11.2018. A Certificate of Order against the Government, Court proceedings, Decree and a Certificate of Costs were issued and served upon the Respondent on 26.11.2019. The Exparte Applicant thus sought an order of mandamus to compel the Respondent to pay the sum of KShs.459,000/= and costs of KShs.109,850/= together with interest at the rate of 14% per annum until payment in full.
4. Ms. Nyaenya Moraa Lydiah, Counsel practising in the firm of Bosire Gichana & Co. Advocates for the Applicant, also swore a Supplementary Affidavit on 17.8.2022. She deponed that the Applicant had applied, obtained and served the Certificate of Costs, Judgment, Decree and Certificate of Order against Government upon the Respondent 26.11.2019.
5. Pursuant to leave granted on 19.9.2022, the Exparte Applicant filed the instant substantive motion.
6. I have perused the record and save for the Replying Affidavit sworn on 30.5.2022 by Brenda Nyaega, Counsel for the Respondent, in opposition to the Chamber Summons Application dated 22.3.2022, the Respondent has not filed anything in opposition to the Notice of Motion Application dated 22.9.2022.

Submissions

ExParte Applicant' Submissions

7. The Exparte Applicant filed submissions dated 17.11.2023. They cited the case of Republic vs Kenya National Examinations Council ex parte Gathenji and 9 others, [1997] eKLR where the Court described the purpose of the order of mandamus. They also cited the case of Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR where the Court discussed the requirements for an order of mandamus. They quoted Section 21 of the [Government Proceedings Act](#). They submitted that the Applicant had complied with all the



requirements under the law. They further submitted that despite demands, the Respondent had failed to make good the outstanding sum.

Determination

8. I have considered the Application, the annexures thereto and the Ex-parte Applicant's submissions.
9. It is trite law that one cannot execute against the Government as one would against any other entity. Execution against the Government is an elaborate and intricate process. See Miscellaneous Civil Application 350 of 2015, Republic v County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR
10. Section 21 of the *Government Proceedings Act*, Cap 40 of the Laws of Kenya and Order 29 of the Civil Procedure Rules, 2010 provide for the procedure to be followed.
11. The suit herein relates to the County Government of Kisii. The issue of whether the procedure for execution in relation to a County Government is the same as that of the National Government is settled. For starters, Section 21[5] of the *Government Proceedings Act*, Cap 40 expressly provides the same.
12. Secondly, the Government is now at 2 levels, the National and County Governments and the provisions of the *Government Proceedings Act* should be read with the necessary alterations, adaptations, modifications as per Section 7 of the Sixth Schedule of *the Constitution* of Kenya. See Republic v AG and another exparte Stephen Wanyee Roki (2016) eKLR
13. That said, what is the procedure for execution against the Government?
14. Section 21 of the *Government Proceedings Act*, Cap 40 of the Laws of Kenya provides as follows:
 21. Satisfaction of orders against the Government
 - (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 this 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.
15. Order 29 Rule 3 of the Civil Procedure Rules, 2010 provides thus:

Order 29 Proceedings by or against the Government

3. Application for a certificate under section 21 of the [Government Proceedings Act](#) [Order 29, Rule 3]

Any application for a certificate under section 21 of the [Government Proceedings Act](#) [Cap 40] [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 a certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.

16. The reason for this strict procedure was discussed by the Court of Appeal in the case of *Kisya Investments Ltd vs AG* (2005) 1 KLR 74. The Court said:

“Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the [Government Proceedings Act](#) which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of the justice, the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the questions of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process if the court however much its effect is harsh or even undesirable.... 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 judgments 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 authorized by statute, and any unauthorized payment may be recovered. SEE HALSBURY'S LAWS OF ENGLAND 4TH EDN VOL. II 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 judgments. 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 of judgment 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 judgments 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 paralysed and soon the Government will not only be bankrupt but its 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."

17. The next issue that needs to be addressed is whether the Ex Parte Applicant followed the laid down procedure before filing the instant proceedings.
18. Looking at the application, I am satisfied that there indeed exists a judgment against the Kisii County Government rendered in Ogembo PMCCC No.36" B" of 2018 *Japheth Ogamba Gichana. v Kisii County Government*. There is a Decree, a Certificate of Order Against Government and Certificate of Costs. There is also evidence of service of the same. Again, service and demand for payment has not been disputed.
19. I am persuaded by the decision in Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwadhihi (2014B) eKLR, where the Court held thus:
 33.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. See The



District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs The Brecknock and Abergavenny Canal Co. 111 ER and R vs The Bristol and Exeter Railway Co. 114 ER 859.

20. I am further fortified and persuaded by the decision in Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR where Justice Mativo (as he then was) held 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. vs. Canada (Attorney General)*, 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff’d 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100 and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)* 2003 FCT 211 (Can LII), [2003] 4 F.C. 189 (T.D.), aff’d 2003 FCA 233 (Can LII), 2003 FCA 233). 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 must 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.

21. I am persuaded by the decision in Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR. In that case, the Court held thus:

“As stated earlier, in obtaining a decree against the Government and serving the Attorney General with the certificate of order against the Government, the Applicant acquired a specific legal right which gave rise to the Government’s statutory obligation through the accounting officer of the ministry concerned to pay the decretal amount as specified in the certificate of order against the Government.”



22. It, therefore, follows that service of the certificate of order against the government and certificate of costs constituted a demand and the Respondent had a legal duty to satisfy the amounts therein stated. The Respondent did not dispute service or even dispute the amounts owing. The only condition that the Respondent has placed is that the Exparte Applicant should wait for budgetary, allocation and approval of the settlement of the amounts decreed.
23. I noted that the Respondent vide its submissions dated 27.3.2023, submitted that it was ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for in Section 125 of the *Public Finance Management Act* (2012). That argument does not hold water. The Judgment was delivered on 20.11.2018. This is over 5 years later and the same is yet to be paid. So, while the Respondent seeks an unstated amount of time to make financial appropriations to meet its obligations, the Exparte Applicant is kept away from the fruits of his judgment for an indeterminate time, squarely rested on the Respondent's shoulders. Indeed, one of the considerations for the grant of an order of mandamus is whether there has been an express or implied refusal through unreasonable delay. That is the exact situation in these proceedings. There has been an inordinate delay which constitutes an implied refusal to pay the Exparte Applicant.
24. I am persuaded by the decision in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR. In that case, the Court held as follows:
- “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.
- The Respondent's claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year.
25. I am satisfied that the Exparte Applicant has proved his case. I allow the Application in the following terms:
1. An order of Mandamus is hereby issued against the County Secretary Kisii County Government, Chief Officer Finance Kisii County Government and the County Executive Member for Finance, Kisii County Government, to compel them to proceed and pay out the decretal sum of KShs. 459,000/=, together with costs of KShs. 109,850/= and interest in Ogembo PMCCC No.36” B” of 2018 to the firm of Bosire Gichana & Co. Advocates for the Exparte Applicant.
 2. The Exparte Applicant is awarded the costs of the Application.

DATED, DELIVERED AND SIGNED AT KISII THIS 13TH DAY OF FEBRUARY 2024.

TERESA ODERA

JUDGE



In the presence of:

Miss Bosire for the Applicant

Ms. Nyaega for the Respondent

Oigo-Court Assistant

Nyaega: I seek certified copy of the ruling and 30 days stay.

Miss Bosire: May counsel make a formal application for the same.

Nyaega: I am making an oral of application for stay as I am present today and a formal application will take long.

Order: 30 days stay of execution is granted to enable counsel take appropriate action.

T.A ODERA

Judge

13.2.24

