



Republic v Cabinet Secretary Ministry of Information, Communication and Technology & another; Ondiek (Exparte) (Judicial Review Application E031 of 2023) [2024] KEHC 1514 (KLR) (12 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E031 OF 2023
RE ABURILI, J
FEBRUARY 12, 2024
IN THE MATTER OF THE APPLICATION FOR JUDICIAL REVIEW
ORDERS OF MANDAMUS**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CABINET SECRETARY MINISTRY OF INFORMATION,
COMMUNICATION AND TECHNOLOGY 1ST RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

MAURICE OCHIEG ONDIEK EXPARTE

RULING

1. The exparte applicant is Maurice Ochieng Ondiek. He obtained leave to institute these Judicial review proceedings vide HC JR Application No. E009 of 2023 on 18th May, 2023, to compel the Cabinet Secretary, Ministry of Information, Communication and Technology to settle Decree in Nyando SPM CC No. 334 of 2013.
2. The exparte applicant filed this substantive application on 8th June, 2023 within the 21 days of the date of leave. What the exparte applicant forgot was that leave can only be sought and obtained against a relevant accounting officer of the Ministry or Government office and not against just any other person and that even if leave is obtained, it can still be faulted at the substantive stage.



3. Section 21 of the [Government Proceedings Act](#) provides as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

“(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.”emphasis added]

4. It is evident from section 21(3) above that the person who is responsible for the payment of any damages or costs awarded against the Government is the accounting officer of the Ministry or public body concerned, who is the one under a statutory duty to satisfy a judgment made by the Court against that Ministry or body. This position was explained in [Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security](#) [2012] e KLR by Githua J. 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.[emphasis added]

5. The Respondents in these proceedings did not have to dispute the procedure adopted by the ex parte Applicant. It is the duty of the ex parte applicant to file proper proceedings upon which this court can grant appropriate orders against the Government in proceedings of this nature. It is the Accounting officer and not the Cabinet Secretary of the Attorney General who ought to be served with the demand for payment in claims against the government. It appears that the Respondent has conflated the issue of liability and duty to pay, with that of the procedure to be applied in a claim for payment of decretal sum made against the Government. See Judicial Review Miscellaneous Application 502 of 2018, [Republic v Principal Secretary, State Department of Interior Ex parte Li Wenji & 2 others](#).
6. In [James Samuel Mburu v Attorney General & Another](#), [2017]eKLR this Court held that that:

“ Although the Attorney General was sued as the primary party in that suit, he was sued in a representative capacity, and the person who was liable and would be compelled to settle that decree was the person disclosed in the pleadings and judgment of the trial court, who was the Principal Secretary, State Department of Finance and the National Treasury.
7. Similarly in [Republic v Attorney General & 2 others ex parte Associated Architects And 3 others](#), [2018]eKLR, I did explain the legal position as regards the liability vis-vis procedure for payment of debts due from the Government, in so far as the Attorney General and Accounting officers of Ministries are concerned as follows:
 - “ 31. The Attorney General is not an Accounting Officer and is only sued in civil litigation as the principal legal advisor to the Government on behalf of the respective Government Ministries and Departments. He cannot be held liable to settle decree which is issued against him on behalf of other Government Ministries/Department.
 32. It therefore follows that mandamus cannot issue against the Attorney General in matters where he is sued in a representative capacity unless the subject litigation directly affects his office.



33. It is for that reason alone that I would find and hold that mandamus cannot in this case, issue against the Attorney General as enjoined to these proceedings and neither can it issue against the Cabinet Secretary of the Ministry who is not the Accounting Officer of the Government Department.
34. The Principal Secretary is under a duty to satisfy decree in HCC 488/2013 and decree is principal sum, costs and interest as decreed by the court. That is what Section 21(3) of the *Government Proceedings Act* contemplate that once a certificate of Order Against the Government is served on the Attorney General, the Accounting Officer must pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”
8. The above judicial pronouncements are clear on the position that liability for Government debts lies with the Accounting officers of the Ministries or public bodies concerned, while the procedure to be followed is that the Attorney General must be served with the Certificate of Costs against Government, in his capacity as the principal legal adviser and representative of the national government.
9. In this case, the person disclosed and pleaded as being liable for the decretal sum due to the Applicants is the Cabinet Secretary responsible for the Ministry of Information, Communication and Technology, who is not the Accounting Officer of the Ministry and therefore not liable for, and has no legal duty to pay the said decretal sum.
10. As earlier stated, the procedure required to be followed for payment of damages or costs due from the Government to be effected by the Accounting Officer, is provided in section 21 (1) and (2) of the *Government Proceedings Act*. The decree holder is in this regard only required to serve the Certificate of Order Against the Government on the Attorney General, as the legal representative of the accounting officer, who then advises and arranges for the accounting officer to make the payment. This position was reiterated in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza*.
11. Article 156(4) provides as follows:
- 4) The Attorney-General—
- (a) is the principal legal adviser to the Government;
 - (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
 - (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
12. The *Office of the Attorney General Act* No 49 of 2012 in this respect specifically provides in section 5(1) that one of the functions of the Attorney General is representing the national Government in all civil and constitutional matters in accordance with the *Government Proceedings Act*.
13. In other words, neither the Attorney general nor the Cabinet Secretary in this instance can be compelled to settle a decree as is the case herein, wherein the Cabinet Secretary was the main defendant/ Judgment debtor.



14. Accordingly, the Application dated 26th may, 2023 is hereby dismissed on account that no orders of mandamus can issue against the Cabinet Secretary or the Attorney General who are not accounting officers.
15. I make no orders as to costs.
16. This file is closed.
17. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE

