



**Republic v County Secretary, County Government of Kisii & another;
Exteta Equipment Company Limited (Exparte Applicant) (Judicial Review
E003 of 2022) [2024] KEHC 1396 (KLR) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
JUDICIAL REVIEW E003 OF 2022
TA ODERA, J
FEBRUARY 12, 2024
IN THE MATTER OF AN APPLICATION BY EXETA EQUIPMENT
COMPANY LIMITED FOR LEAVE TO APPLY FOR AN ORDER OF
MANDAMUS
AND
IN THE MATTER OF KISII CMCC NO. 247 OF 2018
AND
IN THE MATTER OF SECTIONS 8 &9 OF THE LAW REFORM ACT**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY, COUNTY GOVERNMENT OF
KISII 1ST RESPONDENT**

**CHIEF OFFICER, FINANCE/ COUNTY TREASURER, COUNTY
GOVERNMENT OF KISII 2ND RESPONDENT**

AND

EXTETA EQUIPMENT COMPANY LIMITED EXPARTE APPLICANT

JUDGMENT

1. By a Notice of Motion dated 28.4.2023, the Applicant, through the firm of Ondabu & Co. Advocates, sought the following orders:



1. That this Honourable Court be pleased to grant an Order of Mandamus directed to the Respondents compelling them to satisfy the Certificate of Order in Kisii CMCC No. 247 of 2018 together with interest thereto at the rate of 25% p.a. from 30th September until payment in full.
 2. The Honourable Court be pleased to make further or such further order as it may deem fair and just.
 3. That the costs of this application be in the cause.
2. The Application was based on the grounds that the Applicant had a Certificate of Order against the Respondents which remained unsatisfied since 5.8.2022. The Respondents were not willing to satisfy the Certificate of Order issued by the Lower Court on 5.8.2022.
 3. The Application was supported by an affidavit sworn on 28.4.2023 by Isaac Lumumba, the Managing Director of the Ex-Parte Applicant. He deponed that on or about June 2016, the Applicant won tender No. KCG/RDS/2016-2017 Hire of Plant and Equipment in which its machines were hired for building roads in Kisii County at various rates per day depending on the type of machine.
 4. The Respondents hired five machines being Motor Grader KHMA 103G, Motor Grader KHMA 339F, Excavator KHMA 552E, Excavator KHMA 220F and Excavator KHMA 317H at the rate of KShs. 72,320/= for the excavator and KShs.46,560/= for the Motor Grader while the Machine Operator would be paid KShs.3,500/= per day. The Applicant subsequently filed a suit at the Chief Magistrate's Court at Kisii to recover the said sums of money vide Kisii CMCC No. 247 of 2018. Judgment in favour of the Exparte Applicant was entered on 22.6.2022. On 5.8.2022, a Certificate of Order was issued against the Respondents. The Respondents have failed to satisfy the said Certificate of Order hence the instant proceedings.
 5. The Respondents filed the following Grounds of Opposition dated 5.7.2023:
 1. That the Application is ill-timed, misconceived and unmeritorious at this moment and time.
 2. That the Application does not meet the threshold warranting issuance of an order of Mandamus.
 3. That the Application seeks to contradict a clear provision and principal (sic) of law, the Separation of Powers Principal (sic), and is as such an abuse of Court process.
 4. That the Application offends the provisions of the *Government Proceedings Act*, Cap 40 of the Laws of Kenya, as against the Respondents and that the reliefs sought cannot issue.

Submissions

Applicant's Submissions

6. The Applicant filed its submissions dated 29.5.2023.
7. It was submitted that the Ex-parte Applicant has no other option of realizing fruits of its judgment since it is barred from executing against the Government.
8. They relied on the decision in *Nduku Mutiso v Conty Secretary, Nairobi City County & 2 Others* [2019] eKLR where the Court Justice Mativo (as he then was) listed 8 factors that must be present for the writ of mandamus to issue.



9. They also relied on the decision in Nairobi JR No. E045 of 2021 (R vs County Secretary, Narok County Government & Anor).

Respondents' Submissions

10. Despite asking for time, as at the date of writing this Judgment, the Respondents' Submissions had not been filed.

Determination

11. I have considered the Application, the annexures thereto, the Ex-parte Applicant's submissions and the Respondents grounds of opposition.
12. 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
13. 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.
14. 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.
15. 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
16. That said, what is the procedure for execution against the Government?
17. 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.

18. 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.

19. The reason for this strict procedure was pronounced 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 paralyzed 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."

20. The next issue that needs to be addressed is whether the Ex Parte Applicant followed the laid down procedure before filing the instant proceedings.
21. Looking at the application, I am satisfied that there indeed exists a judgment against the Kisii County Government rendered in Kisii CMCC No.247 of 2018 Exteta Equipment Co. Ltd. v Kisii County Government. However, there is no Certificate of Order Against Government or Certificate of Costs. There is no evidence of service of the same.
22. What is attached is an order Annexure "IL5", not a decree which should ideally be the case. The order was issued on 5.8.2022. Counsel for the Ex Parte Applicant wrote to Kennedy Chweya Onsembe Advocates, County Attorney's Offices vide a letter dated 5.8.2022. I am unable to decipher whether and when the letter was received by the said recipient as the stamp thereon is very faint.



23. Nonetheless, the demand for payment must be accompanied by the Certificate of Order, which was not done.
24. As discussed elsewhere in this Judgment, it is not in vain that the process for executing against the Government was designed to be that elaborate and it has been held that the procedure must be followed to the letter. Indeed, I am persuaded by the decision in Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwadhihi (2014) 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.
25. I am further fortified by the decision in *Republic v Trans Nzoia County Public Service Board & 2 Others; Sifuna & Sifuna Advocates (Exparte)* (Judicial Review E011 of 2022) [2022] KEHC 17120 (KLR) (8 December 2022) (Judgment) where the Court held thus:
13. This Court need not re-emphasize the need for strict compliance with Section 21 of the Act which in any event is the law of the land.
14. In this matter, the Court gathers from the record that a Decree and a Certificate of Costs in the civil suit were drawn and issued. The Court did not set its legal eyes on any Certificate of Order.
15. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof, the application is made to the Deputy Registrar in the High Court or to the Court in the subordinate Court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.
16. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.
26. 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.
27. I am also persuaded by the decision in *Maggy Agulo Construction Co. Ltd. v Ministry of Public Health & 4 others* [2020] eKLR. In that case, the Court held thus:
19. An execution process against the government or its officials which sidesteps section 21 of the *Government Proceedings Act* and Order 53 of the Civil Procedure Rules is deficient, irregular and illegal, and cannot stand.
28. In view of the fact that the Ex Parte Applicant herein did not fully comply with the relevant law, I am inclined to strike out the Application dated 28.4.2023- with no order on costs.

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

TERESA ODERA

JUDGE

In the presence of:

Mr. Ondabu for the Applicant

N/A for the Respondents.

Oigo- Court Assistant

