



**Republic v County Secretary, County Government of Mombasa & another;
Njenga t/a Mwangi Njenga & Company Advocates (Exparte Applicant) (Judicial
Review E026 of 2023) [2024] KEHC 1617 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW E026 OF 2023**

OA SEWE, J

FEBRUARY 8, 2024

**IN THE MATTER OF MOMBASA HCMA NO. 26 OF 2022 (MWANGI NJENGA
& COMPANY ADVOCATES VERSUS COUNTY GOVERNMENT OF MOMBASA)**

AND

**IN THE MATTER OF MOMBASA HCMA NO. 77 OF 2022 (MWANGI NJENGA &
COMPANY ADVOCATES –VERSUS- COUNTY GOVERNMENT OF MOMBASA)**

AND

**IN THE MATTER OF MOMBASA HCMA NO. 35 OF 2022 (MWANGI NJENGA
& COMPANY ADVOCATES VERSUS COUNTY GOVERNMENT OF MOMBASA)**

AND

**IN THE MATTER OF MOMBASA HCJRM NO. E016 OF 2022 (MWANGI NJENGA
& COMPANY ADVOCATES VERSUS COUNTY GOVERNMENT OF MOMBASA)**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA 1ST
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE AND ECONOMIC
PLANNING, COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT**

AND

**MWANGI NJENGA T/A MWANGI NJENGA & COMPANY
ADVOCATES EXPARTE APPLICANT**



JUDGMENT

- [1] The Notice of Motion dated 11th October 2023 was filed herein by the ex parte applicant, M/s Mwangi Njenga & Company Advocates (hereinafter, “the applicant”) against the two respondents. It is expressed to have been filed under Sections 7, 8, 9, 10 and 11 of the Fair Administrative Action Act, 2015, and Order 53 rule 3(1) of the Civil Procedure Rules for:
- (a) An order of Mandamus directed at the Mombasa County Secretary and the Mombasa County Executive Committee Member for Finance and Economic Planning to compel the said County Officials to satisfy the decrees in Mombasa HCMA No. 26 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa; Mombasa HCMA No. 77 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa; Mombasa ELCMA No. 35 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa and Mombasa HCJRMA No. E016 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa by paying the ex parte applicant Kshs. 14,195,499.70 being the total decretal amounts and costs owing, plus interest thereon at court rates until payment in full.
- (b) The costs of the application.
- [2] The application was premised on the grounds set out in the Statutory Statement dated 1st September 2023 wherein the applicant averred that he has obtained various Certificates of Costs against the County Government of Mombasa and applied to convert those Certificates of Costs into decrees in the four matters aforementioned, to enable him initiate execution processes following failure by the County Government of Mombasa to satisfy the said Certificates of Costs. He further averred that he has successfully obtained decrees against the County Government of Mombasa in the primary suits; and that there has been no appeal preferred against, or an order of stay of execution made in respect of any of the decrees in the primary suits.
- [3] Thus, it was the applicant’s averment that the decretal amounts are due and payable, but no execution can issue against the County Government of Mombasa by dint of the Government Proceedings Act, Chapter 40 of the Laws of Kenya. He added that the only avenue available is an order of Mandamus against the Mombasa County Secretary, head of the County Public Service and the County Executive Committee Member for Finance and Economic Affairs as head of the County Treasury, compelling them to satisfy the decrees issued in the primary suit.
- [4] The foregoing averments were reiterated in the Verifying Affidavit, sworn by the applicant on 1st September 2023. The annexures thereto comprise the subject decrees as well as correspondence exchanged between the applicant and the County Government of Mombasa in connection with the pertinent Certificates of Costs and the ensuing decrees. On the basis thereof, the applicant prayed that his application be allowed and the orders sought granted to him.
- [5] The respondents opposed the application; to which end they filed their Ground of Opposition dated 23rd October 2023, contending that the application offends section 45(4) of the County Government Act, 2012. According to them, the applicant has sued the wrong party.
- [6] Directions were thereafter given herein on 18th October 2023 that the application be canvassed by way of written submissions; and while the respondents complied, the applicant did not. Thus, the respondents filed written submissions dated 24th November 2023, proposing a single issue for



determination, namely, whether the application offends section 45(4) of the County Government Act. Accordingly, counsel for the applicant, Ms. Kuria, submitted that in so far as the applicant has sued the County Secretary as the accounting officer, the suit is incompetent. In addition to section 45(4) of the County Government Act, the respondents relied on Miscellaneous Civil Application No. 141 of 2014: Soloh Worldwide Inter-enterprises v County Secretary Nairobi County & another [2016] eKLR and Council of Governors & others v The Senate [2015] eKLR and urged for the dismissal of the application.

[7] I have given careful consideration to the substantive Judicial Review application dated 11th October 2023 together with the averments set out in the Statutory Statement dated 1st September 2023 and the affidavit of Mr. Mwangi Njenga. I have, likewise, taken into account the written submissions filed by counsel for the respondent. There is no dispute that the applicant is owed some Kshs. 14,195,499.70 by the County Government of Mombasa. The amount is in respect of legal services rendered in respect of which costs have been taxed and Certificate of Costs issued by the taxing officer in the following cases:

- (a) Mombasa HCMA No. 26 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa;
- (b) Mombasa HCMA No. 77 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa;
- (c) Mombasa ELCMA No. 35 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa and
- (d) Mombasa HCJRMA No. E016 of 2022: Mwangi Njenga & Company Advocates v County Government of Mombasa.

[8] Moreover, the applicant proceeded to obtain judgment and decrees on the basis of the Certificate of Costs pursuant to section 51(2) of the Advocates Act, Chapter 16 of the Laws of Kenya. Copies thereof were annexed to the applicant's affidavit as Annexures MN 1a to MN1c. The applicant also annexed correspondence exchanged between the parties in connection with its demand for payment, to underscore the fact that the aforesaid sum has remained unpaid to date, and is therefore due and payable by the respondent.

[9] The single issue raised by the respondent in opposition to the application is that it offends section 45(4) of the County Government Act, No. 17 of 2012, and is therefore incompetent. That provision states:

The county chief officer shall be the authorized officer in respect of the exercise of delegated power.”

[10] Accordingly, it was the submission of the respondents that the County Chief Officer is, for all intents and purposes, the Accounting Officer and therefore this suit has been brought against the wrong parties. For this proposition the respondents relied on Council of Governors & others v The Senate [2015] eKLR, at paragraphs 134 to 137 in which a three judge bench of the High Court held:

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.”

[11] In the premises, the two issues for determination are whether the respondents are the proper persons for the applicant to look to for payment, having regard to the provisions of section 21(3) of the *Government Proceedings Act*; and if so, whether the prayers sought by the applicant ought to issue. In this regard, Section 21(3) 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...”

[12] As was pointed out in the *Council of Governors v The Senate* (*supra*), the responsibility of appointing the Accounting Officer of a County Government is that of the County Executive Committee Member for Finance. Indeed, section 103 of the *Public Finance Management Act* provides that:

The County Executive Committee Member for finance shall be the head of the County Treasury.”



[13] Accordingly, other than merely positing that the applicant has gone after the wrong parties, it was the duty of the respondents to demonstrate that the County Executive Committee Member for Finance appointed an accounting officer for the County of Mombasa; and that that accounting officer is neither of the respondents. I say so because this is a matter within the special knowledge of the respondents for purposes of section 112 of the Evidence Act. The provision states:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

[14] There being no such proof, I am persuaded by the position taken in Republic v Kisi County Government Ex-Parte Peter Kaunda Nyamosi & 2 others [2018] eKLR that:

25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see Consolata Kibara & 21 others v Director of Kenya Trypanosomiasis Research Institute [2003] KLR 582 and Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) NBI HC Misc. App. 222 of 2016 [2018] eKLR).”

[15] It is notable that in this instance, other than the County Secretary, the applicant impleaded the County Executive Committee Member for Finance and Economic Planning. Accordingly, it is my finding that the respondent’s objection lacks merit and is for dismissal.

[16] That said, the next issue to consider is whether the applicant’s prayer for an order of Mandamus is warranted. Needless to say that Mandamus is a relief available to litigants under 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...”

[17] 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.



[18] Moreover, an elaborate procedure has been set out, not only under Section 21 of the [Government Proceedings Act](#), but also under Order 29 rule 3 of the [Civil Procedure Rules](#) for compliance before an order of Mandamus can issue. For instance, Section 21 of the [Government Proceedings Act](#), 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.”

[19] Further to the foregoing, Subsection (4) of Section 21 of the [Government Proceedings Act](#) state:

(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.”

[20] That the aforesaid provisions apply to County Governments such as the 4th 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.”

[21] 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 v 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 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." (also see *Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandibi*, supra)

- [22] No Certificate of Order Against the Government for purposes of Section 21(2) of the *Government Proceedings Act* was exhibited by the applicant. There is likewise no indication that the Attorney General was served with any such notice. Consequently, I am in total agreement with the position taken by Hon. Mativo, J. (as he then was) in *Republic v Principal Secretary, Ministry of Internal Security & Another, Ex Parte Shon Noorani & Another* [2018] eKLR that:

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)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] 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.”

[23] Having found that the applicant has not complied with all the conditions precedent to the grant of the order of Mandamus in this instance, it would follow that the duty to pay on the part of the respondent is yet to arise; and therefore the application is premature.

[24] In the result, it is hereby ordered that the Notice of Motion dated 11th October 2023, having been prematurely filed, be and is hereby struck out with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE

