



Republic v County Government of Mombasa & 2 others; Kiunga, the administrator of the Estate of Stephen Kiunga t/a Kanjalu Building Contractors (Exparte Applicant) (Judicial Review Application E027 of 2022) [2024] KEHC 930 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E027 OF 2022**

OA SEWE, J

FEBRUARY 7, 2024

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS
AND
AND IN THE MATTER OF MOMBASA CHIEF
MAGISTRATE’S CIVIL CASE NO. 3768 OF 2033**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**CHIEF OFFICER, FINANCE COUNTY GOVERNMENT OF
MOMBASA 2ND RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE, COUNTY
GOVERNMENT OF MOMBASA 3RD RESPONDENT**

AND

**THERESA STEPHEN KIUNGA, THE ADMINISTRATOR OF THE
ESTATE OF STEPHEN KIUNGA T/A KANJALU BUILDING
CONTRACTORS EXPARTE APPLICANT**

JUDGMENT

1. Before the Court for determination is the Notice of Motion dated 8th December 2022. It was filed herein by the ex parte applicant, Theresa Stephen Kiunga, the administrator of the Estate of Stephen Kiunga, (hereinafter the applicant), pursuant to Sections 8(2) and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya; and Order 53 Rules 1 and 2 of the Civil Procedure Rules, 2010, for orders that:



- (a) the Court be pleased to issue an Order of Mandamus to compel the County Government of Mombasa, the Chief Finance Officer and the County Executive Committee Member for Finance, to pay the ex parte applicant Kshs. 1,889,333.40 with interest at court rates (14% p.a.) from 16th September 2003 (translating to a total current sum of Kshs. 6,959,044.69) until payment in full;
- (b) That the costs of the application be provided for.
2. The application was premised on the grounds that, in the year 2003, the deceased, Stephen Kiunga, filed a suit against the 1st respondent, being Mombasa Chief Magistrates Civil Case No. 3768 of 2003: Stephen Kiunga T/A Kanjalu Building Contractors v Municipal Council of Mombasa in which he obtained judgment for Kshs. 1,758,833.40 plus costs of Kshs. 130,500/= as well as interest from the date of judgment. The applicant further stated that, on or about the 21st November 2003, the Municipal Council of Mombasa filed an appeal, being Mombasa HCCA No. 199 of 2003: Municipal Council of Mombasa v Stephen Kiunga t/a Kanjalu Building Contractor; which appeal was dismissed on 24th February 2017. The applicant contends that the outstanding sum, as at 15th November 2022 when this suit was filed, was Kshs. 6,959,044.69 and continues to grow. She accordingly prayed for an order of Mandamus to compel the respondent, as the successor of the Municipal Council of Mombasa, to pay the debt.
3. The application was supported by the applicant's own affidavit, sworn on 8th December 2022 to which she annexed copies of the Grant of Letters of Administration in her favour, the Plaintiff and Judgment of the lower court as well as the Memorandum of Appeal to the High Court. The applicant also exhibited a copy of the order of the High by which the appeal was dismissed on 24th February 2017 as well as the Certificates of Order against the Government, both for the decree as well as costs. She prayed that the application be allowed and the orders sought granted as prayed.
4. On behalf of the respondents, a Replying Affidavit was filed herein on 20th January 2023, sworn by Ms. Elizabeth Kisingo, the Legal Counsel at the Office of the County Attorney. She conceded that the debt is indeed unpaid, and explained that the respondents could not settle it because the 1st respondent does not have a budget or vote for the same; and therefore that to pay the debt would be in total contravention of the Public Finance Management Act, No. 18 of 2012. She then went to explain that following the establishment of the County Government and the dissolution of the local authorities established under the repealed Local Government Act, Chapter 265 of the Laws of Kenya, the Intergovernmental Relations Technical Committee under the Intergovernmental Relations Act, 2012, established institutional structures to facilitate the verification and transfer of assets and liabilities belonging to defunct local authorities vide Gazette Notices No. 858, 2701 and 4370 of 27th January 2017, 24th March 2017 and 11th May 2018, respectively.
5. Thus, Ms. Kisingo averred that to date, the modalities of settlement of liabilities of the defunct local authorities have not been settled; and that until this is done, the Controller of Budget will not approve the County's budget with an element of debt owed by the defunct Mombasa Municipal Council. She relied on County Government of Busia & Another v Julius Orina Manwari & 12 Others [2015] eKLR in urging the Court to find that the applicant has not exhausted the other available avenues for redress. She therefore submitted that an order of Mandamus ought not to issue in the circumstances. I hasten to note, however, that in the County Government of Busia & Another v Orina & Others (supra), the petition was in respect of a pending suit; while in the present instance, the debt had crystalized and compliance had with Section 21 of the Government Proceedings Act.



6. On my part, I am persuaded by the decision of Hon. Okong’o, J. in *J.A.S. Kumenda & Another v Clerk Municipal Council of Kisii & 6 Others* [2013] eKLR in which the learned judge held:

“...the County Governments are in my view the successors of the local authorities that were constituted under the repealed Local Government Act and should be the ones to proceed with pending legal actions by the defunct local authorities and against whom the pending legal proceedings against the said local authorities should be sustained. I find support in this proposition in the Sixth Schedule to *the Constitution* of Kenya. Section 33 of the Sixth Schedule to *the Constitution* of Kenya, 2010 provides that, an office or institution established under *the constitution* of Kenya, 2010 is a legal successor of the corresponding office or institution under the former Constitution or under a former Act of parliament in force immediately before the effective date of *the Constitution* of Kenya, 2010 whether known by the same name or a new name. County Governments under the new constitution took over the powers and functions of the local authorities as they were recognized and defined under the old constitution and the Local Government Act. Pursuant to the provisions of the said Section 33 of the Sixth Schedule to *the Constitution* of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities. It follows therefore that until the body referred to in Section 59 of *Urban Areas and Cities Act* is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated. To hold as argued by the Respondents herein that such legal proceedings should remain suspended until such a time that the said body is set up would result in an absurd and a manifestly unjust situation for the hundreds of litigants who have pending suits against the defunct local authorities. Such holding would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities which are pending rulings and judgments before them.”

7. Similarly, in *Republic v Town Clerk of Webuye County Council and Another* [2014] eKLR Hon. Majanja, J. was of the following view:

“Despite the statutory lacuna’s in the County Government Act and the *Urban Areas and Cities Act*, the rights accrued as a result of the litigation are preserved upon repeal of the Local Government Act by *the Constitution*. Section 33 of the Sixth Schedule to *the Constitution* provides for succession of institutions upon promulgation. It states that,

“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of parliament in force immediately before the effective date, whether known by the same or a new name.”

In my view and taking into account the legal provisions I have cited, the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment.”



8. The same position was taken in Bungoma High Court Misc Application No. 10 of 2014: Abdi Ali Sheikh v The County Secretary County Government of Kakamega (unreported), thus:

“The Respondents contended that the liability of the Lugari County Council did not as a matter of course fall on the Respondent. That the Transition Authority is yet to specify which of the assets and liabilities of the Lugari County Council is to be taken by the Central government and which one will remain with the Respondent. In my view, Articles 48 and 159(2)(b) behoves this court to ensure that justice is attained without undue delay. It was not in contemplation of the drafters of our Constitution as well as the Transition into Devolved Government Act, that settlement of claims, more so, decrees against the defunct local authorities would be suspended indefinitely. If that was the intention, nothing would have been easier than to expressly provide so. To my mind, Section 35 of the [Transition to Devolved Government act](#) which the Respondent relied on, do not amount to a suspension of settlement of claims by the devolved units, it only bars such units from transferring assets and liabilities to 3rd parties so that no devolved units short changes the Central Government on the shared assets or liabilities which the decree in Bungoma CMCC No. 366 of 2005 is not.”

9. From the material presented before the Court, it is plain that the respondents were, at all material times, aware of the judgment but made no attempt to challenge it by way of review or appeal. Thus, the assertion by the applicant that the respondents have deliberately failed to pay the sums due to it in spite of several promises, remains unrefuted. In the premises, the applicant is entitled to an Order of Mandamus to assert its right to the fruits of its judgment, granted the provisions of Section 21(4) of the [Government Proceedings Act](#), which shield county governments such as the 1st respondent from execution by way of attachment and sale of its property.
10. 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...”

11. In the premises, I entertain no doubt at all that the remedy sought is warranted; as otherwise, the applicant would be left at the mercy and whims of the respondents as to when and whether his decree would come to fruition. Hence, I entirely agree with the sentiments expressed by Hon. Odunga, J. in Republic vs. the Attorney General & Another, Ex parte James Alfred Keroso [2013] eKLR that:

“...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of [the Constitution](#) which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot



enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya..."

12. In the light of the foregoing, I find merit in the application dated 8th December 2022. The same is hereby allowed and orders granted as hereunder:

- (a) An Order of Mandamus be and is hereby issued to compel the County Executive Committee Member for Finance, on behalf of the County Government of Mombasa, to pay the ex parte applicant Kshs. 1,889,333.40 with interest at court rates (14% p.a.) from 16th September 2003 until payment in full;
- (b) That the costs of the application be borne by the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE

