



**Republic v County Executive Committee Member, Finance and Economic Affairs, Narok
County Government & 2 others; Tom Ojienda & Associates (Exparte) (Application
100 of 2023) [2024] KEHC 782 (KLR) (Judicial Review) (2 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 100 OF 2023
J NGAAH, J
FEBRUARY 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE AND ECONOMIC
AFFAIRS, NAROK COUNTY GOVERNMENT 1ST RESPONDENT**

**COUNTY SECRETARY NAROK COUNTY GOVERNMENT ... 2ND
RESPONDENT**

**CHIEF OFFICER FINANCE COUNTY TREASURER NAROK COUNTY
GOVERNMENT 3RD RESPONDENT**

AND

TOM OJIENDA & ASSOCIATES EXPARTE

JUDGMENT

1. The application before court is the applicant’s motion dated 20 September 2023. It is expressed to be brought under Order 53 rule 3 of the Civil Procedure Rules. The application seeks the following orders:
 1. That an order of mandamus be issued compelling county executive committee member finance and economic affairs, County Government of Narok, the chief officer, finance/ county treasury, County Government of Narok, the County Secretary County Government of Narok directing them to pay the applicant forthwith and without delay the decretal sum as



per the certificate of order issued on (sic) delineated hereunder together with accrued interest until payment in full, that is;

Particulars

Taxed costs Kshs. 45,758,170.20/=

Interest at 14% p.a. from 30th April 2020

to 9th August 2023 Kshs. 20,991,090.46/=

Costs Kshs. 30,000.00/=

Court collection Kshs. 1,500/=

Total Kshs. 66,780,760.66/=

3. That the costs of this application be borne by the respondents.
2. The application is based on a statutory statement dated 15 September 2023 and an affidavit verifying the facts relied upon sworn on even date by Prof. Tom Ojienda.
3. According to Professor Ojienda, he filed an advocate client-bill of costs dated 28 October 2019. The bill of costs arose out of a judgment in **Supreme Court Petition No. 3 of 2015, County Council of Narok versus Livingstone Kunini Ntutu Olkiombo Limited & Attorney General** in which he represented the County Government of Narok.
4. By a ruling delivered on 30 April 2020, the bill of costs was taxed at Kshs. 64,168,722/=. A certificate of taxation to this end was issued on 30 June 2020.
5. A reference against the taxation was filed in this Honourable Court and in a ruling delivered on 15 June 2021, Kshs. 18,410,552/= was taxed off from the initial sum leaving a total sum of Kshs. 45,758,170.20/= as the amount due to the applicant.
6. The applicant extracted a fresh certificate of taxation of the amount. Although the applicant demanded payment, the respondents did not pay as a result of which the applicant sought for judgment against them. Judgment for the amount of Kshs. 45,758,170.20/= together with interest from the date of ruling on the taxation was eventually entered on 21 July 2023.
7. Subsequently, the applicant extracted a decree and a certificate of order against government and served them upon the respondents. The respondents have not made the payment hence this application.
8. John Mayiani Tuya swore a replying affidavit opposing the application. He states that he is the 2nd respondent and has sworn the affidavit on his own behalf and on behalf of the rest of the respondents.
9. Tuya has sworn that the County Government of Narok has pending bills of One Billion Four Hundred Million Kenya Shillings. The bills date back to 2013 and the new government, apparently elected after the August, 2022 General elections, is trying its best to settle them.
10. The respondents, according to Tuya, have not refused or neglected to satisfy the amount due to the applicant but that Parliament has not provided any monies or adequate funds for the respondents to settle any claims, including the applicant's claim. Tuya wants the respondents to be given enough time to come up with what he has referred to as strategies in settlement of the decretal sum and, if necessary conduct audits.



11. He has admitted that the certificate of order of against government was served upon him on 9 August 2023 and since service, the governor of the County of Narok, commenced negotiations with the respondents to determine the best strategies for settlement of the decretal sum owed to the applicant.
12. It is apparent from the respondents' replying affidavit that the respondents acknowledge that the County Government of Narok owes the applicant and the extent of the debt is as contained in the certificate of order against the Government.
13. Their only bone of contention is that they need time to undertake an audit and come with strategies to settle the claim.
14. Considering that the judgment or decree or the certificate of order against the Government have neither been challenged nor stayed, the applicant is entitled to enforce payment of the decretal sum.
15. When one considers the amount that has now accrued as interest, the liability of the County Government of Narok is likely to grow even further at the expense of the tax-payer if the total amount due is not settled at the earliest opportunity possible.
16. It is inevitable, in these circumstances, that a mandatory or mandamus order should ensue, if not for anything else, to mitigate the loss that the tax payer has been subjected to.

Why a mandatory order?

17. One of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the Government is protected from such process of execution or other similar process in enforcement of decrees or orders by section 21 of the [Government Proceedings Act](#), in particular, section 21(3) thereof. That section reads 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 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.
- (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. In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the respondents to perform their statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant. In other words, only the order of mandamus would be the appropriate order under the circumstances.
- 19. According to Halsbury's Laws of England/Judicial Review (volume 61 (2010) 5TH Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

"A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles."*

- 20. This is reiterated in paragraph 703 which states:

"A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy."

- 21. And with particular reference to public officers who, like in the instant case, fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)"



22. The applicant has demonstrated that he extracted a certificate of order against government and that the same was duly served upon the respondents. It has not been suggested that applicant defaulted in any step prescribed under section 21 of the Act as to disentitle him to the order of mandamus. In any event, the respondents have acknowledged that they are aware that the decree or the amount specified in the certificate of order against Government has not been settled.
23. A demand for payment having been made and the respondents having failed to pay, no other evidence is required to demonstrate that the respondents have failed to perform a public duty with which they are charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.
24. Accordingly, I allow the applicant's application to the extent that the order of mandamus is hereby granted compelling the respondents, jointly or severally, to pay the applicant in terms of the certificate of order against the government issued on 9 August 2023. The applicant will also have costs of the application. It is so ordered.

SIGNED, DATED AND DELIVERED VIA VIDEO LINK ON 2 FEBRUARY 2024

NGAAH JAIRUS

JUDGE

