



**Republic v County Executive Committee Member Finance & Economic Affairs,
Nairobi City County & 2 others; Tom Ojienda & Associates (Exparte) (Application
108 of 2021) [2024] KEHC 783 (KLR) (Judicial Review) (2 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 108 OF 2021
J NGAAH, J
FEBRUARY 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE & ECONOMIC
AFFAIRS, NAIROBI CITY COUNTY 1ST RESPONDENT**

COUNTY SECRETARY, NAIROBI CITY COUNTY 2ND RESPONDENT

**CHIEF OFFICER, FINANCE COUNTY TREASURER NAIROBI CITY
COUNTY 3RD RESPONDENT**

AND

TOM OJIENDA & ASSOCIATES EXPARTE

JUDGMENT

1. The application before court is the applicant’s motion dated 21 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 the respondents to pay the applicant forthwith and without delay, the decretal sum delineated hereunder together with accrued interest until payment in full, that is to say;

Particulars

Taxed costs: Kshs. 1,056,684.60/=

Interest at 14% p.a. from 9th November 2022



To 6th June 2023 Kshs. 84,708.46/=

Total Kshs. 1,141,393.07/=

2. That the costs of this application be borne by the respondents.
2. The application is based on a statutory statement dated 18 September 2023 and an affidavit verifying the facts relied upon sworn on even date by Prof. Tom Ojienda.

According to Professor Ojienda, he filed an advocate client-bill of costs dated 16 June 2021. By a ruling rendered by the taxing officer on 24 October 2022, the bill was taxed at Kshs. 1,056,684.60.

On 9 November 2022, the taxing officer issued a certificate of taxation for the taxed amount. It was served on 14 November 2022 but no response was received from the respondents.

3. The applicant then sought to have judgment entered against the respondents for the taxed amount. Judgment was duly entered on 9 May 2023 together with interest from the date of taxation.

On 22 May 2023 the applicant extracted a decree and on 6 June 2023, he extracted a certificate of order against Government. Both the decree and the certificate of order against the Government were served upon the respondents.

At the time of filing the application, the respondents had not paid the amount as per the certificate of order against Government or at all.

It is for this reason that the applicant has moved this Honourable court for the order of mandamus to compel the respondents pay the applicant the amount due to him.

4. Despite having been served with the application, the respondents did not file any response to the application. In the absence of a response, a mandatory order would ensue, subject, of course, to the applicant complying with the provisions of section 21 of the *Government Proceedings Act*, cap. 40.

Execution or attachment of property is one of the ways through which decrees or orders are enforced. But 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.

5. 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.

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.”

6. 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.”



7. 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.)”

8. 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. The respondents, as noted, did not respond to the application; it is presumed that they do not dispute the amount claimed is due and owing.

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.

9. 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 6 June 2023. It is so ordered.

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

NGAAH JAIRUS

JUDGE

