



**Republic v Kajiado County Government & another; Mulekyo
& Compnay Advocates (Exparte) (Application E075 of 2023)
[2024] KEHC 662 (KLR) (Judicial Review) (2 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW
APPLICATION E075 OF 2023**

**J NGAAH, J
FEBRUARY 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**KAJIADO COUNTY GOVERNMENT 1ST RESPONDENT
COUNTY SECRETARY, KAJIADO COUNTY GOVERNMENT 2ND
RESPONDENT**

AND

MULEKYO & COMPNAY ADVOCATES EXPARTE

JUDGMENT

1. The application before court is the applicant’s motion dated 13 July 2023. It is expressed to be brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21 and Order 51(1) of the *Civil Procedure Rules*. It seeks for the order of mandamus whose prayer is expressed as follows:

“1. That this Honourable Court be pleased to issue orders of *mandamus* compelling the respondents to obey the order given by this Honourable Court on 28th April 2023 by paying the ex parte applicant the decretal sum of Kshs. 1,387,508.68 together with costs and interest on the decretal sum at 14% with effect from 14% p/a with effect from 7th April 2022 until payment in full”.

2. The applicant also asked for costs of the application.



3. The application is based on a statutory statement dated 11 July 2023 and an affidavit sworn on even date by Anthony M. Mulekyo verifying the facts relied upon.
4. According to Mr. Mulekyo, his advocate-client bill of costs was taxed at Kshs. 1,387,508.68 in Miscellaneous Petition No. E026 of 2022. A certificate of taxation for this amount was issued on 23 August 2022.
5. On 27 April 2023, judgment was entered against the 1st respondent for the sum of Kshs. 1,387,508.68 plus interest at 14 % with effect from 7 April 2022 till payment in full. The applicant subsequently extracted the decree.
6. The applicant swears that despite several reminders, the 1st respondent has declined to settle the amount due to the applicant.

No response was filed by the respondents.

7. The applicant filed written submissions in support of his application.
8. 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.
9. Under subsection (5), the County Government of Kajiado is protected from execution based on the protection given by section 21(4) of the Act. In the face of this protection from execution or attachment, the only available route open to the applicant would be to compel the 2nd respondent to perform his 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.
10. 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.”
11. 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.”
12. 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.)”
13. Everything else being equal, the applicant would be entitled to the order of *mandamus* because there is no evidence that he has been paid the sum due to his firm of advocates.



14. However, it has not been demonstrated that the applicant ever extracted a certificate of order against government and served upon the respondents. As a matter of fact, neither the decree nor the certificate of costs was served upon 1st respondent's accounting officer. The applicant's depositions with respect to service of these documents is captured in the affidavit verifying the facts relied upon as follows:
 - “ 5. That despite numerous reminders, the respondents has (sic) refused to pay the amount ordered. (Annexed AMM-4 are copies of the reminders)”
15. This is obviously not sufficient because according to section 21 (1) and (2) of the Act, the applicant ought to have extracted a certificate of order against the Government and served it upon the 1st respondent's equivalent of the Attorney General who, depending to his role at the County Government may as well be the 2nd respondent. It is only after service of this document and after the accounting officer fails to pay that the applicant may move the court for the order of mandamus to compel him to pay.
16. According to section 21(3), it is only after service of the certificate of order against Government that the accounting of the County Government of Kajiado can make payment stated in the certificate.
17. In the absence of the certificate of order against government, and in the absence of any evidence that it has been served, the application is premature and for this reason, the application is dismissed. However, considering that the judgment debt has not been settled, I make no order as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI VIA VIDEOLINK ON 2 FEBRUARY 2024

NGAAH JAIRUS

JUDGE

