



**Republic v County Executive Member for Finance, County Government of Kisumu; Otieno Ragot & Co. Advocates (Exparte Applicant) (Judicial Review E041 of 2023) [2024] KEHC 3406 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3406 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
JUDICIAL REVIEW E041 OF 2023  
RE ABURILI, J  
APRIL 3, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY EXECUTIVE MEMBER FOR FINANCE, COUNTY GOVERNMENT OF KISUMU ..... RESPONDENT**

**AND**

**OTIENO RAGOT & CO. ADVOCATES ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The ex parte Applicant herein, Otieno, Ragot & Co. Advocates filed an application by way of a Notice of Motion dated 5<sup>th</sup> October 2023, wherein he is seeking for Judicial Review Orders of mandamus directed at the Respondent, the County Executive Member for Finance, County Government of Kisumu, to pay to the ex parte Applicant the sum of Kshs 342,490.30 being the certified costs in Kisumu High Court Miscellaneous Civil Case No. E107 of 2021 with interest thereon at 14% per annum from 27<sup>th</sup> February 2017 to date. The ex parte Applicant also sought an order that the costs of the application be borne by the respondent.
2. The said application is supported by a statement of facts dated 6<sup>th</sup> April 2023, and a verifying affidavit sworn on the same date by one David Otieno Advocate on behalf of the ex parte Applicant. The main ground for the application is that judgement was entered on the 21<sup>st</sup> September 2022 and decree issued for the ex parte applicant against the respondent in the sum of Kshs. 342,490.30 with interest at court rates of 14%, a Certificate of Costs issued in favour of the ex parte Applicants against the Respondent on 9<sup>th</sup> February 2023, and that despite a reminder by way of demand, the Respondent has completely failed to settle the said decree.



3. The ex parte Applicant annexed the Certificate of Costs in Kisumu High Court Miscellaneous Civil Case No. E107 of 2021 and the decree issued pursuant thereto. The ex-parte applicant's advocates on record, also filed submissions dated 14<sup>th</sup> December 2023, wherein it was reiterated that the ex parte Applicant is apprehensive that unless this court intervenes and compels the Respondent to obey the court orders by settling the amounts owed, the Respondent will continue with the disobedience of the said order to pay costs and thus corrode and erode the dignity of this court and the confidence of the ex parte Applicant and the general public in the efficiency of the judicial process of resolving disputes in Kenya. Reliance was placed on section 21(4) and (5) of the *Government Proceedings Act*.
4. The respondent did not file any response despite service.

### **Analysis & Determination**

5. I have considered the ex parte Applicant's pleadings and submissions, and I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in *Republic v Kenya National Examinations Council exparte Gatbenji and 9 Others*, [1997] eKLR where it was held that:

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to *Halsbury's Law of England*, 4<sup>th</sup> Edition Volume 1 at page 111 from Paragraph 89. That learned treatise says:

“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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”



6. The requirements for an order of mandamus to issue were further explained by Mativo J. in *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:

“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. v Canada* (Attorney General), and, was also discussed in *Dragan v Canada* (Minister of Citizenship and Immigration). 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

7. It is not disputed in the present application that judgment for costs was entered in favour of the ex parte Applicant in Kisumu High Court Miscellaneous Civil Case No. E107 of 2021, and the decree issued pursuant thereto. The issues therefore that require to be determined are firstly, whether the Respondent is under a public duty and obligation to satisfy the decree issued in favour of the ex parte Applicant in the said judgment, and secondly, if so, whether the ex parte Applicant is entitled to the relief sought.

8. Section 21 of the *Government Proceedings Act* in this regard provides as follows regarding the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(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.”

9. The County Government of Kisumu is one of the Counties established by Article 6 of *Constitution* and the First Schedule to *Constitution*, and is constitutionally recognized as a distinct government level of government by the said Article. In addition, the definition of “Government” in the *Government Proceedings Act* refers to the “Government of Kenya”. In this respect, I adopt the holding by Odunga J. in *Republic v Attorney General & another ex-parte Stephen Wanyee Roki* [2016] eKLR on the application of the *Government Proceedings Act* to County Governments that:

“20 Although the provisions of the *Government Proceedings Act* do not expressly refer to County Governments, section 7 of the Sixth Schedule to *Constitution* (Transitional And Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.



21. It follows that the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the *Constitution*. One such construction would be the realihat Government is now at two levels and Article 189(1)(a) of *Constitution* requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”
10. As to whether the Respondent herein is under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Execution proceedings against a government or public authority under the *Government Proceedings Act* can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body.
11. This was also the holding in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* [2012] eKLR where Githua J. held as follows:
- “In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. 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*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”
12. I Must emphasize that there is good reason for the law to provide for this procedure for settlement of decrees by government entities. If Government entities were to be subjected to the same execution proceedings as private entities or individuals, then all government properties would be attached and sold in execution of decrees. Government properties include Government buildings, motor vehicles, The National treasury and even Central Bank. The situation in my view would be chaotic and against the public good as government and its entities would cease to function.



13. In this case, the decretal sum due from the Kisumu County government is not disputed by the Respondent, and the ex parte Applicant annexed copies of the judgment and decree for costs against the said County Government awarded in his favour in Kisumu High Court Miscellaneous Civil Case No. E107 of 2021.
14. Section 103 of the *Public Finance Management Act* No 18 of 2012 establishes the County Treasury comprising the County Executive Member of Finance, the Chief Officer and the Departments of the County Treasury responsible for Finance and Fiscal Matters. Under section 103(3) of the *Act*, the County Executive Committee Member for Finance is the head of Treasury, and is thus the one responsible for finance matters in the County.
15. This Court therefore finds that arising from these provisions, the Respondent is responsible for the satisfaction of Court orders and decrees on payment of money owed by the Kisumu County Government by virtue of their roles and functions. I adopt the holding in *Republic v Town Clerk of Webuye County Council & Another* HCCC 448 of 2006 where Majanja J. addressed the importance of the Court in ensuring the right of a successful litigant to enjoy the fruits of his judgement is not curtailed as follows:

“...a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of *Constitution* particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of *Constitution*.”
16. The ex parte Applicant has adduced evidence to demonstrate how it made a demand and request for payment which has not been heeded by the Respondent. There is thus an implied refusal on the part of the Respondent to settle the demanded decretal sums.
17. In the premises, I find and hold that the ex parte Applicant’s Notice of Motion dated 5<sup>th</sup> October 2023 is merited. I issue the Judicial Review Order of Mandamus to compel the County Executive Committee Member for Finance, County Government of Kisumu to pay to the ex parte Applicant the sum of Kshs 342,490.30 being the certified and decreed costs awarded to the ex parte Applicant in Kisumu High Court Miscellaneous Civil Case No. E107 of 2021 together with interest thereon at 14% per annum from 27<sup>th</sup> February 2017 until payment in full.
18. The ex Parte Applicant shall also have the costs of the instant application capped at Kshs 30,000.
19. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF APRIL, 2024**

**R.E. ABURILI**

**JUDGE**

