



**Takaful Insurance of Africa Ltd v County Government of Garissa & 2 others (Civil Miscellaneous Application 5 of 2021) [2024] KEHC 4477 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4477 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL MISCELLANEOUS APPLICATION 5 OF 2021**

**JN ONYIEGO, J**

**MAY 3, 2024**

**BETWEEN**

**TAKAFUL INSURANCE OF AFRICA LTD ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF GARISSA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY GARISSA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER FINANCE & ECONOMIC PLANNING GARISSA**

**COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me is an application dated 13.09.2023 filed by the firm of Macharia, Burugu & Co. Advocates wherein the applicant seeks the following orders that; -
  - i. Spent
  - ii. Spent.
  - iii. The Honourable Court be pleased to review the ruling and orders of Honourable Lady Justice Ali Aroni given on 16.12.2021, set them aside, reconsider and then allow the applicant's notice of motion dated 09.06.2021.
  - iv. The Court be pleased to grant any other further orders as it deem fit.
  - v. Costs be provided for.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn on 13.09.2023 by Dolphine Moindi. The applicant's case is that it is a holder of a decree of this Honourable Court in Garissa HCC No. 8 of 2019 against the judgment debtors the respondents herein. That at the time of filing the Judicial Review application, the applicant had not extracted a



Certificate of Order against the government and as such, the court reached a determination that the application was premature for lack of the said certificate.

3. It was urged that the said Certificate Order has since been obtained and further served upon the judgment debtors thus rectifying the defect previously occasioned in the Judicial Review case number E001 of 2022. That it is only fair that the applicant be not shut out from enforcing a decree of this court arising from curable defects that have already been rectified. It was contended that the grounds for review herein are sufficient grounds pursuant to Order 45 of the Civil Procedure Rules.
4. That the applicant upon delivery of the Ruling in this cause had through the outgoing advocates filed a fresh Judicial Review cause being Garissa Judicial Review No. E001 of 2022 seeking mandamus to compel the judgment debtors to settle the decretal amount. However, that Judicial Review suit was on 19.05.2023 dismissed when the judgment debtors raised a preliminary objection on the ground that the court in accommodating the same, was akin to sitting on an appeal of the decision of 16.12.2021.
5. That noting the developments that have taken place in the suit so far including the ruling in Garissa HCCJR Misc Application E001 of 2022 and noting that execution has a limitation period of twelve years from the date of the decree, the application has been filed timeously. It was averred that the applicant is gravely prejudiced by the state of affairs for it is holding on to a decree of the court but cannot execute yet all the defects preventing the process of execution have since been rectified. It was therefore urged that this court be pleased to allow the orders as prayed.
6. Via a replying affidavit sworn on 16.11.2023 by Khadija Ahmed Mohamed, 1<sup>st</sup> respondents' County Attorney on behalf of all the respondents, it was stated that on 09.06.2021, the applicant filed a substantive notice of motion in this Judicial Review Application being Misc Application No. 5 of 2021 wherein Aroni J on 16.12.2021 dismissed the same by stating that the same was filed prematurely. It was urged that the determination by Aroni J. (as she was then) was not only well thought but also conclusive and therefore, the application herein is not only incompetent but also an abuse of the court process.
7. It was urged that review on grounds of 'sufficient reason' refers to grounds analogous to the first two grounds of review under Order 45 Rule 1 of the *Civil Procedure Rules* namely; discovery of new and important matter or evidence which was not within the applicant's knowledge or could not be produced at the time when the order to be reviewed was made and a mistake or error apparent on the face of record; That the applicant's present application does not find support on these grounds for review.
8. It was averred that the applicants did not demonstrate that the orders sought herein were deserving for the reason that the application herein was made almost two years later. The respondents urged that no good reason was explained by the applicant for the inordinate delay in making the application herein. In the same breadth, it was urged that the order of mandamus is a discretionary remedy which a court may refuse to grant even when the requisite grounds exists and therefore, as already demonstrated by the previous determination of this court, it was outright that this court is not obliged to issue the same. Additionally, the respondents argued that they had previously filed an appeal against the decision of Kariuki J. in Civil Application No. 170 of 2020 in the Court of Appeal at Nairobi and on 20.11.2020, the Court of Appeal directed that the matter be placed before a single judge for the application to be heard. That the respondents are actively pursuing the prosecution of the said application before the Court of Appeal and the procedure in the Court of Appeal is that, it is the Court that sets hearing dates for matters filed before it.
9. It was therefore urged that should this court proceed to determine the matter herein, the same may render the appeal nugatory and not to mention the fact that there is a possibility of the courts



delivering contradicting determinations over the same matter. Further, that they were aware of ongoing investigations by Ethics and Anti- Corruption Commission on the said contract alleged by the applicant as it is open that there were no services rendered after all. That it is only mete and just that the application herein be dismissed for the same is destitute of merit.

10. The applicant swore a supplementary affidavit on 24.11.2023 by Dolphine Moindi wherein it was deposed that pursuant to sections 44 and 57 of the County Government Act, the County Public Service Board is the hands and feet of a County Government. That the said County Public Service Board acts through the County Secretary and the County Chief Officer, Finance and Economic Planning in regard to payment, as the accounting officers. Further, section 103 of the *Public Finance Management Act* 2022 also makes the County Executive Member for Finance as the head of the Treasury and therefore, the Garissa County Secretary Board is not a stranger to the proceedings herein.
11. The applicant urged the court to note that the proceedings herein are not proceedings to determine substantive rights but are proceedings to compel payment by the County Government of Garissa for a sum pursuant to a decree of court that has not been stayed, set aside and where no appeal has been filed. That given that the applicant/decreed holder has no other means of enforcing payment of the decree in Garissa HCC No. 8 of 2019 other than an order of mandamus from this court, the applicant stands a chance to be left to hold a barren decree. It was urged that noting all conditions precedent have been fulfilled, to require the applicant to file an appeal would not be good use of court's time since this matter only deals with execution only.
12. The applicant continued that the respondents did not deny being served with a Certificate of Order and it is also noteworthy that the respondents did not obtain conditional stay and therefore, the process of execution remains open. That it is not in the interest of justice that the 1<sup>st</sup> respondent enjoyed services to the tune of Kes. 200,00 million shillings, failed to defend a suit for recovery thereof and now seeks to hide behind pure technicalities to avoid payment.
13. The application was canvassed by way of written submissions wherein the applicant via submissions dated 24.11.2023, urged that the main prayer before the court is to reconsider the Judicial Review Application dated 09.06.2021 and allow the same. That the application sought for an order of mandamus directed at the respondents accounting officer to pay the decretal amount awarded in Garissa HCC No. 8 of 2019.
14. That judgment was previously entered and decree issued and therefore, there is no substantive rights pending determination. There is no appeal filed by the judgment debtors and therefore, the only impediment to the application being allowed is that the decree is against a government entity, and a Certificate of Order against the said entity is required. That the said Certificate of Order was extracted and thereafter served while the judicial proceedings were ongoing. Reliance was placed on the cases of *Republic v Town Clerk of Webuye County Council & Another* [2014] eKLR where it was held that a decreed holder's right to enjoy fruits of his judgment must not be hampered. That in a case where a court is faced with such a scenario, then the court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. The court was further referred to the case of *F.W.Njoroge t/a Njoroge & Co. Advocates v County Secretary, Olkejuado County Government (sued as successor of Olkejuado County Council)* [2016] eKLR where the court held that:

“...we are dealing with a duty to pay a debt already decreed by a competent court of law to be due and payable by the defunct local authority ...”
15. In light of the foregoing, this court was urged to allow the application herein.



16. The respondents via their written submissions dated 28.11.2023 urged that no sufficient grounds were demonstrated by the applicant to have the court's favour. That the application herein is not only incompetent but also a gross abuse of the court process for the reason that no grounds have been shown to demonstrate a warrant of review of the orders issued on 16.12.2021 by Aroni J. It was urged that vide the impugned ruling, the court fully considered the issue of failure by the applicant to adhere to the conditions precedent as set out in the [Government Proceedings Act](#) in reference to filing for an order of mandamus.
17. It was urged that the applicant had failed to establish the grounds set out under order 45 of the [civil procedure rules](#) including proof any other sufficient cause. Reliance to that end was placed on the case of [Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya](#) (2019) eKLR where circumstances under which a court could review its order were dealt with and that the grounds advanced by the applicant in this case did not fall on the said principles.
18. It was argued that the Certificate of Order sought to be relied on is not a new document as demonstrated. The respondents relied on the case of [Freda Stores Limited v National Oil corporation of Kenya Limited](#) [2017] eKLR where it was held that if the trial court were to revisit its own decision and then remedy the wrong conclusion previously made, that would be tantamount to the court sitting on an appeal over its own decision. That the only remedy available for the applicant is to challenge the decision of Aroni J. by way of an appeal hence not via review.
19. Additionally, it was urged that the said application was made after a rather an unexplained delay and therefore, the same ought not be allowed. Reliance was placed on the case of [Rufus Ng'ang'a Njibia v Board of governors Loreto High School & Another](#) [2015] eKLR where the court held that an order for mandamus is a discretionary remedy which the court may refuse to grant even when the requisite grounds for its grant exists.
20. The respondents revisited the issue that having been dissatisfied with the findings of Kariuki J read in court on 12.02.2020 in Civil Application No. 170 of 2020, they preferred an appeal at the Court of Appeal where the Court placed the said matter under a single judge and that they are still desirous of pursuing the same. That should this court proceeds to make any further finding, then the same would impede on the rights of the respondents to exhaustively apply their rights to appeal. The respondents further argued that no prejudice will be suffered in allowing the respondents' appeal to be heard and determined before commencing proceedings seeking orders of mandamus and in a balance of prejudice, should the court decide otherwise, the respondents stand to suffer greater prejudice because their appeal shall have been overtaken by events should the respondents' application succeed. In the end, the respondents urged this court to dismiss the application herein for the orders sought seeks to affect a party, namely Garissa County Service Board, who is not a party to the proceedings in Miscellaneous Application No. 5 of 2021.

### **Determination**

21. I have considered the application herein, response thereof and parties' submissions. The only issue for determination is whether the applicant has met the threshold for review.
22. The subject regarding review of court orders can be discerned from Section 80 of the [Civil Procedure Act](#) Cap 21 which provides as follows: -

“ Any person who considers himself aggrieved—



- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
23. The remedy of review which is a discretionary relief is further provided for under Order 45 Rule 1 of the *Civil Procedure Rules* which states;

“ Any person considering himself aggrieved;

  - a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order, without reasonable delay” .
24. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR the court had this to say regarding grant of review orders;

“ Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
25. From the above, it is trite therefore that the provisions of Order 45 of the *Civil Procedure Rules* gives three circumstances under which an order for review can be made. In such instances, an applicant must demonstrate to the court that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.
26. Secondly, a party will succeed in an application for review where he can demonstrate to the court that there has been some mistake or error apparent on the face of the record and that the application has been made timeously. The third ground for review is that an applicant must demonstrate that he has any other sufficient reason for seeking such review. [ See *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court 596 at Page 608].
27. It should not be lost that the underlying object of this provision is neither to enable the court to write a second judgment nor to give a second opportunity to the party who has lost the case because of his/



her negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his/her part in adducing all possible evidence at the trial.

28. In the instant case, the applicant urged that there are sufficient reasons for review of the orders in that, the applicant has since obtained the necessary Certificate of Order against the 1<sup>st</sup> respondent the lack of which was the reason for the application dated 09.06.2021 being disallowed. In the same breadth, that the application herein is not a substantive application but one that seeks to execute a decree entered by this court. Additionally, that the decision of 16.12.2021 makes the applicant totally unable to execute a lawful decree of this court which cannot have been the intention of the law, thus rendering a successful decree holder to hold onto a barren decree indefinitely.
29. It is trite that a court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed v Charan Singh and Another* [1963] EA 557, it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter). Mulla in the *Code of Civil Procedure*, Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18<sup>th</sup> Edition, Reprint 2012, at Page 1147, paragraph 10 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (CAK) (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.
30. In the same breadth, in the case of *Tokesi Mambili and others v Simion Litsanga* [2004] eKLR it was held as follows: -
  - i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. (Emphasis added)
  - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
31. Having noted the circumstances of the case herein, it is not controverted that the applicant is the holder of a decree of this Honourable Court in Garissa HCC No. 8 of 2019 against the respondents. That the respondents purportedly appealed against the said determination and the same is pending determination. As already noted by this court, though differently constituted, Aroni J in her ruling delivered on 16.12.2021 stated that the Court of Appeal in its ruling dated 20.11.2020, did not issue stay orders and further, the respondents did not address the court on the steps taken since the Court of Appeal issued the said directions. Of importance to note is the fact that the respondents argue that they are actively pursuing the prosecution of the said application in the Court of Appeal and that the procedure in the Court of Appeal is that, it is the Court that sets hearing dates for matters filed before it.
32. I am in agreement with the respondents that the Court of Appeal sets its manner of doing its affairs but what remains unanswered is whether the respondents have ever made a follow up on the same. I say so for the reason that the respondents were obligated to demonstrate by presenting whatever evidence that since the appeal was filed, no other direction/s has ever been made by the Court of appeal in regard to the appeal.
33. And as already noted, the Court of Appeal did not issue any stay orders and therefore, it follows that this court's hands are not tied to further deal in the matter. As already noted, the applicant herein is a decree holder and that it previously filed for orders of mandamus to enable it execute against the 1<sup>st</sup>



respondent. It therefore follows that the matter herein had been substantively dealt with and the only portion remaining is the execution of a lawful decree duly issued by this court.

34. Section 21(5) of the [Government Proceedings Act](#) Cap. 40 Laws of Kenya recognises the application of Section 21 to 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.
35. It is trite that where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, and the same remains unsatisfied, the same can only be enforced by way of an order of mandamus. [ See [Republic v Principal Secretary, Ministry of Internal Security & Another ex parte Schon Noorani & Another](#) [2018] eKLR].
36. The only requirement which serves as a condition precedent to the satisfaction or enforcement of such decrees for money issued against the Government is found in Section 21(1) and (2) of the [Government Proceedings Act](#). Under the said provisions, the applicant ought to obtain a certificate of order from the court which issued the decree. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment or where 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. [ See [Republic v County Government of Kiambu & 2 others ex parte Simon Ndung'u Mungai & Another](#) [2022] eKLR].
37. From the above, it is trite that for the applicant to realize the fruits of its litigation, it must seek for orders of mandamus. A look at the ruling delivered on 16.12.2021, which is the subject of the ruling herein, the same had noted that the application dated 09.06.2021 had been prematurely filed as the certificate order had not been annexed.
38. The applicant has approached this court urging that it has since annexed the Certificate of Order previously missing in his application for orders for mandamus. It has urged that having in mind that the decision delivered on 16.12.2021 makes it unable to execute a lawful decree of this court which cannot have been the intention of the law, that is, for a successful decree holder to hold onto a barren decree indefinitely, that this court exercises its discretion in allowing the application herein. [ See [Evan Bwire v Andrew Nginda](#) Civil Appeal No. 103 of 2000].
39. It is however worth noting that the ruling of judge Aroni dated 16-12-2021 is substantive in nature in that it dismissed the application dated 9-06-2021. Had the application been struck out, it would have been easier for the applicant to file a similar application to facilitate the execution process.
40. Unfortunately, the orders sought to be reviewed could only be challenged on appeal to a higher court. Otherwise, I will be accused of sitting as an appellate court in respect of orders made by a court of concurrent jurisdiction. I have carefully considered arguments made by the applicant's counsel under order 45 of the civil procedure rules and section 80 of the [civil procedure Act](#). I do not find any of the grounds set out there fitting the situation at hand including the ground 'for any other sufficient reason'.
41. In as much as I sympathize with the predicament faced by the applicant in not realizing the fruits of their judgment, I am incapacitated lest I be accused of reopening closed litigation. For those reasons, I am inclined to dismiss the application with no order as to costs.

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

**J. N. ONYIEGO**

**JUDGE**

