



**Zedka Services Limited v County Secretary, Uasin Gishu County & another  
(Judicial Review 7 of 2023) [2024] KEHC 5908 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5908 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
JUDICIAL REVIEW 7 OF 2023  
JRA WANANDA, J  
MAY 24, 2024**

**BETWEEN**

**ZEDKA SERVICES LIMITED ..... APPLICANT**

**AND**

**THE COUNTY SECRETARY, UASIN GISHU COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF FINANCE OFFICER FINANCE, UASIN GISHU COUNTY  
GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application before Court is the Chamber Summons dated 8/08/2023 and filed through Messrs Kiprop Luseria & Co. Advocates. It seeks prayers as follows:
  - a. Spent [.....]
  - b. An order of *mandamus* to issue against the Respondents herein namely the County Secretary Uasin Gishu and the Chief Officer, Finance Uasin Gishu, to compel them to proceed and pay the Applicant Kshs 29,437,700/- as per the Certificate of Order against Government issued on 15<sup>th</sup> June 2023 in the High Court Civil Case No. 9 of 2016.
  - c. The Court be pleased to set a timeline and/or duration within which the Respondents will settle the ordered sum with interest accruing until the date of payment.
  - d. That the Applicant be at liberty to apply to this Court for necessary and/or consequent orders that the Honourable Court may deem fit and just to grant in the circumstances.
  - e. Costs of this Application be borne by the Respondents.



2. In response, the Respondents filed the Notice of Preliminary Objection dated 18/10/2023 as well as the Replying Affidavit sworn on the same date, and both filed on 24/10/2023 through the County Solicitor, County Government of Uasin Gishu.
3. In the Preliminary Objection, quoted verbatim, the Respondents averred as follows:
  - i. That the Application is time-barred, contra statute and a nullity.
  - ii. That the Application offends the provisions of Order 53 Rule 1 & 2 of the Civil Procedure Rules and Section 9(2) and (3) of the Law Reform Act, Cap. 26 Laws of Kenya.
  - iii. That a Judicial Review must be filed within 6 months from the date of the Judgment or decision.
  - iv. That the Ruling herein subject to the Judicial Review Application was issued on 2<sup>nd</sup> October 2018.
  - v. That the Application is bad in law and an abuse of the Court process and the same should be struck out with costs to the Respondents.
4. In the Replying Affidavit sworn by Eliud Kipkorir Chemaget, the Chief Finance Officer of the County Government of Uasin Gishu, the matters stated in the Preliminary Objection were reiterated. It was then deponed that satisfaction of decrees of judgment is deemed to be an expenditure by Parliament/ County Assembly and as a result, must be notified in law and provided for in the Government expenditure, and that it is for the above reason that Section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government shall be used out of the monies provided by Parliament.
5. He deponed that Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority, in this case, the County Assembly by dint of County Government Act and the Public Finance Management Act, no payment out of public funds is legal unless it is authorized by statute in this case by fiscal plan and a budget process, only through an appropriation can the Respondents pay a debtor and as such immediate payment upon issuing of decree and judgment is not tenable. In conclusion, he deponed that in the event that the instant Application is allowed then the Court do set a timeline for payment that will not put the Respondent in clash with any statute.

### **Hearing of the Application**

6. It was agreed, and I directed, that the Preliminary Objection be canvassed by way of written Submissions. Pursuant thereto, the Respondents filed their Submissions on 9/11/2023 while the Applicant filed on 8/12/2023.

### **Applicant's Submissions**

7. Counsel for the Applicant submitted that a reading of Order 53 Rule 2 of the Civil Procedure Rules indicates that the 6 months' timeline only applies to orders of Certiorari and not *Mandamus*. She also submitted that Section 9(1) of the Law Reform Act which was to give effect to Section 9(2) is not framed in mandatory terms as it uses the word "may" and also that the Section remains a recommendation as no rules requiring the filing of a *Mandamus* application within 6 months exist. She then cited the case of Joseph Mureithi Nyaga vs Embu County Government [2021] eKLR and also the case of Patrick Mbayu Lumbasi vs Principal Secretary of Ministry of Interior & Co-Ordination of National Government [2021] eKLR.



## Respondent's Submissions

8. On his part, Counsel for the Respondent reiterated the matters already set out and cited the case of Judicial Review Application No. 1 of 2021: *Peter Orengo Migiro vs Samuel Omagwa James & 2 Others* as authority that an Application for leave to file an application for an order of *mandamus* must be made within 6 months of the subject decision or judgment. He submitted further that the Court has no discretion to enlarge time within which to file an Application for leave. It was also Counsel's contention that the Preliminary Objection meets the threshold stipulated in the case of *Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Ltd* (1969) E.A. 696(*supra*) and
9. Counsel reiterated the argument that only through an appropriation can the Respondents pay a debtor and submitted that in the event that the instant Application is allowed then the Respondents should be given time so that it can factor in the debt in the next financial cycle of 2024/2025 financial year and that the Court do set a timeline for payment that will not put the Respondent in clash with any statute.

## Determination

10. The issues for determination in this matter are the following:
  - i. Whether the Application for leave to apply for an order of *mandamus* is statute barred on the ground that the same was filed outside 6 months.
  - ii. Whether therefore the order for *mandamus* should be granted.
11. The Preliminary Objection is premised under Order 53 Rules 1 & 2 of the *Civil Procedure Rules* and Section 9(2) and (3) of the *Law Reform Act*, Cap. 26.
12. Order 53(1) and (2) provide as follows:

“53(1). No application for an order of *Mandamus*, Prohibition or Certiorari shall be made unless leave therefor has been granted in accordance with this rule.”

53(2). Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
13. Section 9(2) and (3) of the *Law Reform Act* then provides as follows:

“9(2). Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of *mandamus*, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.”

9(3). In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of



the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

14. It has been the case that in Kenya, execution of money decrees against the Government or Governmental bodies or County Governments in the ordinary manner of instructing Auctioneers to proclaim and attach assets is prohibited. I am however aware of recent High Court decisions which are now advancing the view that this prohibition on execution is unconstitutional. Decree-holders have therefore had to always proceed under the provisions the *Government Proceedings Act*. Cap. 40 which was enacted, among other, to provide the “the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government”. The *Act* is the one that regulates conduct of civil proceedings against the Government, including County Governments.
15. Section 21 of the *Government Proceedings Act*. Cap. 40 provides for the procedure which a decree holder is required to invoke and follow as a means of executing a decree against the Government or County Governments. The Judicial Review proceedings herein has therefore been instituted pursuant to that provision of the law.
16. The Preliminary Objection raised herein is not new. Government bodies and County Governments and before them, Local Authorities, when faced with applications of the nature herein, seeking payment of Court decrees, have regularly brought up the same Objection. For instance, in the case of *Joseph Muriithi Nyaga v Embu County Government* [2021] eKLR, faced with a similar Preliminary Objection and in dismissing the same, Hon. Lady Justice L. Njuguna held as follows:

“ 11. As I have already noted, the respondent’s bone of contention is that the application was brought after the expiry of the 6 months as provided under Section 9 of the *Law Reforms Act*.

12. Section 9(1) extends the power to make rules of the court to provide for any matters relating to the procedure of civil courts to making rules of the court (a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of *mandamus*, prohibition or certiorari is sought; (b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order; (c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

13. Section 9(2) proceeds to provide that subject to the provisions of subsection (3), *rules* made under subsection (1) may prescribe that applications for an order of *mandamus*, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates. It is this section which the respondent relies on in support of the preliminary objection.

14. Section 9(3) which I consider important to this case provides that;-

.....

15. What is clear from Section 9(2) is that the rules made under subsection (1) may prescribe that applications for an order of *mandamus*, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates. My understanding of this section is that it is the rules which are



made to govern court proceedings which can (discretionally) provide for the time limit within which an application for *mandamus* (as the case herein) can be made. The only instance when section 9 limits such time is where an applicant seeks for orders of certiorari.

16. The power to make rules as contemplated under section 9(1) is actually actualized by the provisions of Order 53 of the [Civil Procedure Rules](#) 2010. Indeed, there are no other rules besides Order 53 of the [Civil Procedure Rules](#) 2010.

17. I have clearly looked at the said Order 53 of the [CPA](#) and there is nowhere in that Rule is it stated that an application for the order of *mandamus* must be made within six months of the date of the act complained of. It is only in Order 53 Rule 2 that a specific timeline is given for the application for the order of certiorari. That particular Rule reads as follows:

.....

18. Further, from the reading of the said section 9(2), the prescription as to the time within which applications for an order of *mandamus*, prohibition or certiorari ought to be made is in regards to specified proceedings. There are no other rules which have been made in regards to execution against the government taking the same as specific proceedings as contemplated by the said section.

19. It is my view therefore, that the respondent herein misconstrued the law in raising the preliminary objection. It is clear that section 9(2) does not limit the time for filing an application for *mandamus* to six months but provides that rules made to provide for the procedure of the courts may limit such time. The procedural rules ([CPR](#) 2010) which are the only applicable rules do not provide for such a limitation on time in relation to an application for orders of *mandamus* but only when seeking for orders of certiorari.”

17. I agree and associate fully with the above logic, reasoning and holding as eschewing the correct position of the law. I do not believe that the 6 months statutory limit could have been intended place a bar on a decree-holder’s entitlement to pursue a lawful Court Judgment passed in his favour. to frustrate or bar a decree-holder from pursuing payment of a lawful decree. Such argument, if accepted, will only lead to an absurdity and an unacceptable state of affairs where decree-holders are automatically shut out from pursuing payment of their judgments upon lapse of 6 months unless they have commenced *mandamus* proceedings. This could not have been the intention of the drafters

18. Counsel for the Respondent relied on the case of [Peter Orengo Migiro \(suing on behalf of the Late Christopher Orange Makori\) v Samwel Omagwa James & 2 others](#) [2022] eKLR as authority that an Application for leave to file an application for an order of *mandamus* must be made within 6 months of the subject decision or judgment. However, that authority may not be applicable in this case as it relates to a Judicial Review Application seeking to quash the decision of a Land Disputes Tribunal, and not execution of a Court Judgment or decree as herein. The authority is therefore distinguishable.

19. I therefore reject the Preliminary Objection and now proceed to determine the Application on its merits.

20. As aforesaid, the basis of the instant Application is Section 21 of the [Government Proceedings Act](#) already referred to. As regards the steps to be taken in enforcing orders as against Government organs in civil proceedings, the Section provides as follows:

“

“(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:

.....  
(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:

.....  
(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.”

21. The logic for shielding the Government from the ordinary manner of execution was also well explained by D. Kemei J in the case of Republic v Maiyu & 2 others; Lumbasi (Exparte Applicant); Principal Secretary Ministry of Interior & Coordination of the National Government (Interested Party) (Judicial Review E003 of 2022) [2022] KEHC 13484 (KLR) (19 July 2022) (Ruling) as follows:

“ 16. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the court. The rationale for the immunity against normal execution proceedings and by extension the said elaborate procedure was explained by Visram and Ibrahim, JJ (as they were) in Kisya Investments Ltd v Attorney General & Another [2005] 1 KLR 74, as follows

.....  
17. It is therefore clear that apart from the fact of the existence of a judgement against the Government, the law recognizes that due to the special role played and the central position held by the Government in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented.

22. Uasin Gishu County is one of the Counties established by Article 6 of the Constitution and the First Schedule thereto, and is constitutionally recognized as a distinct government level of government by the said Article. An order of Mandamus is normally issued when an officer is by law required to perform a duty and as was held by Nyamweya J (as she then was) in the case of Republic v County Government of Kiambu Ex Parte Laban J Macharia Muiruri [2021] eKLR, execution proceedings



against the government under the [Government Proceedings Act](#) can only be as against the Accounting officer or Chief Officer of the governmental body in issue, who is the one under a statutory duty to satisfy a judgment made by the Court against that body.

23. In regard thereto, Githua J in the case of [Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security](#) (2012) stated 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.”

24. In this case, the Respondents, as the County Secretary and the Chief Officer, respectively, of the Uasin Gishu County Government have not denied that indeed, they are the Officers within that County Government with the statutory obligation to pay the Applicant the sum of Kshs 29,437,700/- as per the Certificate of Order in issue herein in satisfaction of the Decree issued therein. The Applicant has indeed supplied copies of the relevant supporting documents, including the said Certificate, duly signed by the Deputy Registrar of the High Court, and the authenticity thereof have not been challenged or denied.
25. As aforesaid, the Respondents argue that by dint of County Government Act and the [Public Finance Management Act](#), no payment out of public funds is legal unless it is authorized by statute, in this case by fiscal plan and a budget process, and that only through an appropriation can the Respondents pay a debtor. They have then stated that in the event that the Application is allowed then the Respondents should be given time so that they can factor in the debt in the next financial cycle of 2024/2025 financial year and that the Court do set a timeline for payment that will not put the Respondents in clash with any statute.
26. I must disabuse the Respondents from the myth that compliance with a Court order can be subject to any other extra judicial processes outside Court or that it can be subject to the whims or discretion of any third party or process. I must remind the Respondents that once a Court order of any nature is given, compliance therewith becomes immediately mandatory. Disregard or non-compliance may



as well amount to contempt of Court. In regard to a money decree, whether there is a budget or contingency fund for payment is not and cannot be a ground for failure to comply.

27. In any event, the Court order in issue herein was given on 2/10/2018 vide the Ruling delivered by Hon. Justice D. O. Ogembo. That is almost 6 years ago. The Respondents cannot therefore be heard to still plead for more time. The Court has to balance the interests of both parties in making decisions and in this case, considering the delay and length of time that the Applicant has been waiting for payment, the interest of the Applicant must prevail. I will therefore only grant the Respondents a period of two months to pay the amount due.
28. In reaching my findings as above, I again cite with approval the holding of D. Kemei J made in the case of *Republic v Maiyu & 2 others; Lumbasi (Ex parte Applicant)* (supra) as follows:

18. Where a party has complied with all the procedures leading to the grant of an order of *mandamus* to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice yet article 159(2)(b) of *the constitution* mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd. It is only proper and appropriate that the applicant who has exhausted all the remedies available should be granted the judicial remedy of *mandamus* so as to enjoy the fruits of his judgement.”
29. The upshot of my findings above is that the Application succeeds.
30. On the Respondent’s prayer that I also grant interest on the amount due, I find that at this stage, the Court is simply dealing with execution of an already passed decree. The proper forum for the Applicant to have asked for interest was the Court that passed the decree. I therefore find that it will be wrong for this Court, at this stage, to delve into awarding award interest
31. Before I pen off, I observe that, as was also noted by the Court of Appeal in the case of *Republic v Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licencing and Regulating Officers* [2006] eKLR, despite clear guidelines given in the case of *Mohammed Adhmed v. Republic (1957) EA 523* and also in the case of *Farmers Bus Service & others v. The Transport Licencing Appeal Tribunal (1959) EA 779* on the proper form of heading an application for judicial review, the problem of the form of title continues to persist.
32. I may remind the Applicant’s Counsel that as was established on the authority of the case of *Farmers Bus Service (supra)*, prerogative orders, like the old prerogative writs, are issued in the name of the Crown at the instance of the applicant and are directed to the person(s) who are to comply therewith. For this reason, the form of the application ought to have reflected the “Republic” as the Applicant instead of “Zedka Services Limited”. However, since that irregularity, is in my view, a question failure in form and not substance, I do not believe that it is fatal to the entire application. On the authority of the case of *Farmers Bus (supra)*, and also under Article 159 of *the Constitution*, I find that the omission, though not encouraged, to be one that is merely on form and not substance. However, Counsel should take caution as he may in future come before a Juge who may not share a similar view.

### **Final Orders**

33. In the end, the Applicant’s Notice of Motion dated 8/08/2023 is hereby allowed in the following terms:
  - i. An order of *mandamus* do and is hereby issued against the Respondents herein, namely the County Secretary, and the Chief Officer Finance, respectively, County Government of Uasin Gishu, compelling them to, **within a period of sixty (60) days**, pay the Applicant the sum of



Kshs 29,437,700/- as per the Certificate of Order against Government issued on 15/06/2023 in **Eldoret High Court Civil Case No. 9 of 2016.**

- ii. Costs of the Application herein are awarded to the Applicant.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 24<sup>TH</sup> DAY OF MAY 2024**

**WANANDA J. R. ANURO**

**JUDGE**

**Delivered in the Presence of:**

<b>Ms. Luseria for Applicant</b>
<b>N/A for Respondent</b>

**Eldoret High Court Judicial Review Case No. E007 of 2023**

