



**Maomond (Suing as the Administrator of the Estate of the Late Linda Apiyo Maomond - Deceased) v Chief Officer Finance/County Treasurer Machakos County Government & another (Miscellaneous Civil Application E010 of 2021) [2024] KEHC 6769 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6769 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CIVIL APPLICATION E010 OF 2021**

**FROO OLEL, J**

**JUNE 7, 2024**

**BETWEEN**

**GEORGE SOGUTU MAOMOND (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE LINDA APIYO MAOMOND - DECEASED) ..... APPLICANT**

**AND**

**THE CHIEF OFFICER FINANCE/COUNTY TREASURER MACHAKOS COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

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

**RULING**

**A. Introduction**

1. The application before this court is the Notice of Motion application dated 30<sup>th</sup> November 2021 brought pursuant to Section 8 and 9 of the *law reform Act*, Order 53 Rule 1(1) and(2) of the Civil procedure Rules, 2010 and all other enabling and all other enabling provision of law. the main prayer sought is that;
  - a. That this honourable court be pleased to issue an order mandamus directed to the respondents compelling them to satisfy the decree and certificate of costs in Milimani CMCC 2288 of 2018 together with interest thereto from 13<sup>th</sup> August 2018 until payment till full
  - b. That cost of the application be awarded to the applicant.



2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the applicant George Sogutu Maomond dated 30<sup>th</sup> November 2021. The respondent's asked for time severally before court, to respond to the said application but did not file any response.

## **B. The Application**

3. The applicant averred that as the legal representative of the estate of the late Linda Apiyo Maomond, he lodged civil proceedings in Nairobi CMCC No 2833 of 2016; George Sogutu Maomond Vs Kennedy Mulandi Malinda, Shadrack Mwonga Simon & The county Government of Machakos, and that after hearing judgement was entered and delivered in their favour against Shadrack Mwonga Simon and the county government of Machakos being the driver and registered owner respectively of Toyota double cabin pick up registration number KAN 939U for the sum of Kshs.11,203,750/- plus cost and interest thereon compounded at 12%, until payment in full.
4. The applicant averred that several years had passed since the issuance of the decree and the respondents had failed, refused and intentionally declined to settle the same, hence the need for this application and that the continued failure and refusal by the respondent to pay the money was unconstitutional as it violated the rights of the estate of deceased to access justice as protected under Article 48 of *the Constitution* of the Kenya 2010.
5. That the respondents had also failed to settle/satisfy the decree and certificate of cost despite a notice being issued to them and that it was in the interest of justice that orders sought be granted as prayed.
6. As noted above, the respondents did not file any pleading to oppose this Application.

## **C. Applicant's submissions**

7. The applicant filed their submissions dated 18<sup>th</sup> September 2023 and submitted that section 21 of the *Government Proceedings Act* and order 29 of the Civil procedure Rules which elaborated the procedure to be followed in enforcing a decree as against the Government had been adhered to and they had served the respondent with the decree and certificate of costs on 15<sup>th</sup> January 2019, but the respondent had not made any effort to settle the decretal amount. Reliance was placed to the case of Republic v County Government of Bomet Ex parte DKN(suing as the father and next friend of the minor DK) [2021] eKLR and the case of Kisya Investments Ltd vs AG (2005)1 KLR, Republic v Independent Electoral and Boundaries Commission Ex parte Nyabaro Onditi[2021] where it had been held that once the Ex parte Applicant had complied with all legal provisions for enforcement of Judgment as against the County Government of Machakos, the orders sought ought to issue.
8. It was submitted that the applicant demonstrated that they have a valid judgment/decree which the respondents were well aware off and they had never made any payments towards settling the decretal sum. The application under consideration was therefore merited and should be allowed to enable them have closure on the emotional pains caused by his daughter's death caused as a result of this tragic accident.
9. The applicant also prayed that they be awarded the costs of this suit.

## **C. Analysis & Determination**

10. I have carefully considered the Application, Supporting Affidavit, and discern that the issue which arise for determination is whether
  - a. Whether the order of Mandamus as against the respondents should be granted



11. In Republic vs Kenya National Examinations Council ex parte Gathenji and 9 others, [1997] e KLR. The said Court held as follows in this regard:

“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....”

12. The requirements for an order of mandamus to issue were further explained by Mativo J. in Republic vs 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. vs. Canada (Attorney General), [23] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[24] 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

13. The applicant averred that as the legal representative of the estate of Linda Apiyo Maomond, he lodged civil proceedings in Nairobi CMCC No 2833 of 2016 and that after hearing judgement was entered and delivered in their favour against Shadrack Mwangi Simon and the county government of Machakos, being the driver and registered owner respectively of Toyota double cabin pick up registration number KAN 939U for the sum of kshs.11,203,750/= plus cost and interest thereon.
14. The applicant averred that it has now been several years since issuance of the decree in the matter and the respondents had deliberately failed, refused and/or intentionally declined to settle the same hence the need for this application and that the continued failure and refusal by the respondent to pay the money was unconstitutional as it violates the rights of the estate of deceased to access justice as protected under article 48 of *the Constitution* of the Kenya 2010. These averments have not been controverted and are deemed factual.
15. The issues therefore that require to be determined are firstly, whether the Respondent is under a public duty and obligation to satisfy the orders issued in favour of the Applicant in the said judgment, and secondly, if so, whether the Applicant is entitled to the reliefs sought.
16. Section 21 of the *Government Proceedings Act* in this regard provides as follows as regards 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.”

17. Machakos County is one of the Counties established by Article 6 of *the Constitution* and the First Schedule to *the 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 as regard the application of the *Government Proceedings Act* to County Governments:

“Although the provisions of the *Government Proceedings Act* do not expressly refer to County Governments, section 7 of the Sixth Schedule to *the 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 reality that Government is now at two levels and Article 189(1)(a) of *the 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.”

18. 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.



19. This was also the holding in *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012)* 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.”

20. The decretal sum due from the Machakos County government has in this respect not been disputed by the Respondents, and the Applicant in this respect annexed copies of the judgment and decree for costs against the said County awarded in his favour in in Nairobi CMCC No 2833 of 2016; *George Sogutu Maomond Vs Kennedy Mulandi Malinda, Shadrack Mwonga Simon & The county Government of Machakos*.
21. Section 103 of the *Public Finance Management Act* No 18 of 2012 in this respect also establishes the County Treasury comprising of 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 said Act, the County Executive Committee Member for Finance is the head of Treasury, and is thus the responsible for finance matters in the County.
22. This Court therefore finds that arising from these provisions, the 1<sup>st</sup> Respondent is jointly responsible for the satisfaction of Court Orders and decrees on payment of money owed by the Machakos County by virtue of his roles and functions. In this regard, I adopt the holding in *Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006* wherein Majanja J. addressed the importance of the Court in ensuring that the right of a successful litigant to enjoy the fruits of his judgment 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 *the 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 *the Constitution*

### **Disposition**

23. Taking all relevant factors into consideration, I accordingly grant the following orders:
- (a) An order of mandamus to compel the County Government of Machakos, and the County Chief Officer Finance to pay to the Applicant the sum of Kshs.11,203,750/= plus cost and interest thereon, arising from the decree issued in Nairobi CMCC No 2833 of 2016; ; George Sogutu Maomond Vs Kennedy Mulandi Malinda, Shadrack Mwonga Simon & The county Government of Machakos. The said decree will attract interest at 12 % from the date of Judgment until date of payment in full.
  - (b) The Applicant shall have the costs of this suit and the same is assessed at Ksh.150,000/= all inclusive
24. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF JUNE, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 7<sup>th</sup> day of June, 2024.

Mr. Nyagena for Applicant

Mr E. Mutua for Respondent

Sam Court Assistant

