



Republic v County Government of Mombasa & another; Kooba Kenya Limited (Exparte Applicant) (Judicial Review Application E031 of 2023) [2024] KEHC 7068 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E031 OF 2023**

OA SEWE, J

JUNE 14, 2024

**IN THE MATTER OF AN APPLICATION TO APPLY FOR
ORDERS OF JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF SECTIONS 8 & 9 OF THE
LAW REFORM ACT, CAP 26, LAWS OF KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

**IN THE MATTER OF THE DECISION AND/OR JUDGMENT IN
CONSTITUTIONAL & HUMAN RIGHTS DIVISION PETITION NO. 12 OF 2017**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR
FINANCE 2ND RESPONDENT**

AND

KOوبا KENYA LIMITED EXPARTE APPLICANT



JUDGMENT

1. The Notice of Motion dated 17th October 2023 was filed by the ex parte applicant pursuant to the leave granted herein on 4th October 2023. It was filed pursuant to Order 53 Rule 3 of the Civil Procedure Rules for the following orders:
 - (a) That the Court be pleased to issue an Order of Mandamus against the respondents compelling them to forthwith pay to the ex parte applicant, Kooba Kenya Limited, the decretal sum of Kshs. 151,000,000/= together with interest thereon and costs awarded at Kshs. 3,397,240.65 as per the Decree and Certificate of Taxation issued by the Court in Mombasa High Court Petition No. 12 of 2017.
 - (b) That the costs of the application be borne by the respondents.
2. The application was premised on the Statutory Statement dated 29th September 2023 and the Verifying Affidavit of Mr. Richard Bell also sworn on 29th September 2023, annexed to the application for leave. The foundational facts are that the applicant filed Constitutional & Human Rights Petition No. 12 of 2017 seeking the following reliefs:
 - (a) A declaration that the respondent had violated the petitioner's rights under Article 47 of *the Constitution*.
 - (b) An order compelling the respondent to stamp and return the petitioner's building plans.
 - (c) An order compelling the respondent to issue a Certificate of Approval.
 - (d) An order for compensation for the amount of USD 1,338,105 with respect to damages incurred.
 - (e) Such other and/or further relief as the Court may deem fit and just to grant; and
 - (f) The costs of and occasioned by the Petition.
3. The applicant further averred that, by a judgment delivered on 13th April 2017 the Court found and held inter alia that the 1st respondent had violated the applicant's rights under Article 47 of the Constitution and awarded the applicant a sum of Kshs. 151,000,000 as compensation, together with interest thereon and costs of the suit. The costs were thereafter taxed in the sum of Kshs. 3,397,240.65. The applicant deposed that thereafter a Decree, Certificate of Taxation, Certificate of Order against the County Government and a Certificate of Order of Costs against the County Government were issued and served upon the respondents.
4. The applicants cause of action was therefore that, although its Advocates on record have made several demands for payment of the sums aforementioned, the respondents have failed, neglected and/or ignored the same, thereby denying it of the fruits of its judgment. It further deposed that there is no other way of compelling the respondents to pay other than through an order of Mandamus. The applicant accordingly prayed that the reliefs sought herein be granted as otherwise the Judgment, Decree and Certificate of Taxation issued in Petition No.12 of 2017 will be of no value.
5. The respondents opposed the application on the basis of the Grounds of Opposition dated 6th March 2024. They contended, in the main, that:



- (a) The application offends Section 21 of the [Government Proceedings Act](#), Chapter 40 of the Laws of Kenya.
 - (b) The application is inconsistent with Order 29 of the Civil Procedure Rules.
 - (c) The respondents have not been served with the judgment, the decree, the Certificate of Order against the Government or the Certificate of Costs as the matter was being dealt with by an external advocate and the external advocate has not communicated the same.
 - (d) The application is premature and ought to be struck out.
6. Upon directions being given that the application be canvassed by way of written submissions, the applicant duly filed its written submissions dated 2nd April 2024. The applicant reiterated the factual background of the application and reiterated its stance that all the requisite documents were served on the respondents in compliance with the requirements of Section 21 of the [Government Proceedings Act](#). The applicant also relied on Section 103 of the [Public Finance Management Act](#) No 18 of 2012 and submitted that it has enjoined the County Executive Committee Member for Finance for purposes of compliance with Section 21 of the [Government Proceedings Act](#).
 7. To buttress its submissions, the applicant made reference to several authorities, including Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012] eKLR, Republic v Town Clerk of Webuye County Council & Another, HCCC No. 448 of 2006, Republic v County Secretary, Narok County Government & Another, Ex Parte SEC & M Company Limited [2022] eKLR and Republic v The Attorney General & Another, Ex Parte James Alfred Koroso [2013] eKLR.
 8. The respondent did not file any submissions. Hence, from the foregoing summary, there is no dispute that the applicant obtained judgment in its favour in the sum of Kshs. 151,000,000 together with interest thereon in Mombasa Constitutional & Human Rights Petition No. 12 of 2017. There is also no dispute that the costs awarded in that Petition were thereafter taxed in the sum of Kshs. 3,397,240.65 and a Certificate of Taxation issued in that regard. Copies of the Judgment, Decree and Certificate of Taxation were annexed to the applicant's Verifying Affidavit as Annexures RB-1A, RB-1B and RB-2.
 9. There being no indication that the said Judgment or the Certificate of Taxation was set aside on appeal or review, I find as a fact that the sums aforementioned are indeed owing from the 1st respondent to the applicant. Hence, the only issue for determination is whether the applicant has fulfilled the requirements of Section 21 of the [Government Proceedings Act](#).
 10. Section 21 of the [Government Proceedings Act](#), sets out the procedure preceding payment of a debt owed by either the Government. It stipulates thus in Sub-Sections (1) and (2):
 - (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.”
11. Further to the foregoing, Subsections (3) and (4) of Section 21 of the *Government Proceedings Act* state:
- (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.”
12. That the aforesaid provisions apply to County Governments such as the 1st respondent is not in doubt; for Subsection (5) of Section 21 is explicit that:
- 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.”
13. The rationale for this stringent procedure was well captured in *Kisya Investments Ltd v Attorney General & Another* [2005] 1 KLR 74 thus:

History and rationale of Government’s immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. See Halsbury’s Laws Of England 4th Edn Vol. 11 Para 970, 971 AND 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the



Government expenditure. See *Auckland Harbour Board VS.R (1924) AC 318, 326*. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.” (also see *Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandihhi, supra*)

14. Accordingly, I have perused the documents annexed to the applicant’s Verifying Affidavit and noted that, other than the Judgment, the Decree and Certificate of Costs, the applicant annexed a Certificate of Order against the Government dated 9th June 2023. The said Certificate clearly indicates the judgment sum, interest thereon and costs due from the judgment debtor for purposes of Order 29 Rule 3 of the Civil Procedure Rules, which requires that:

Any application for a certificate under section 21 of the *Government Proceedings Act* (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.”

15. Likewise, the applicant exhibited a copy of the Certificate of Order for Costs against the Government dated 9th June 2023, confirming that costs were indeed awarded in the applicant’s favour in the sum aforementioned. The applicant also presented copies of demand letters written to the respondent’s advocates dating back to 30th March 2022. The documents demonstrate that the respondent was all along aware of the judgment. I am therefore satisfied as to compliance with Section 21 of the *Government Proceedings Act* and Order 29 Rule 3 of the Civil Procedure Rules.
16. Apart from the judgment debtor, the 1st respondent, the applicant brought this suit against the County Executive Member for Finance. That is significant because it is the law that the duty bearer, for purposes of Section 21 of the *Government Proceedings Act*, is the Accounting Officer.



17. In *Council of Governors & Others v The Senate* [2015] eKLR, at paragraphs 134 to 137, a three judge bench of the High Court grappled with the question as to who is an accounting officer for purposes of the County Government entities. Here is what the Court had to say:

134 "The Petitioners have also sought the interpretation of the term "Accounting Officer". In that regard, Article 226 of *the Constitution* provides;

- (1) Act of Parliament shall provide for –
 - (a)
 - (b) The designation of an accounting officer in every public entity at the national and county level of government
- (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

135. It therefore follows that "an accounting officer" for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the *Public Finance Management Act*. Indeed, Section 148(3) of the *Public Finance Management Act* mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of *the Constitution*.

136. As regards the accounting officer for the County Assembly, Section 148(4) of the *Public Finance Management Act* provides that;

The Clerk of the County Assembly shall be the accounting officer of the County Assembly".

137. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why."

18. It is plain therefore that, in the absence of proof of appointment by the County Executive Committee member for Finance of the accounting officer for the County Government of Mombasa, as is the case herein, the proper person to look to for the settlement of debts owing from the County Government



of Mombasa is the County Executive Committee member for Finance. Indeed, in *Republic v Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 others* [2018] eKLR, the position taken was:

25. "It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see *Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute* [2003] KLR 582 and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* NBI HC Misc. App. 222 of 2016 [2018] eKLR)."
19. The same position was taken in *Soloh Worldwide Inter-Enterprises v County Secretary Nairobi County & another* [2016] eKLR thus:
 17. "It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose..."
20. Needless to say that Mandamus is a relief available to litigants under Article 23(3)(f) of *the Constitution* as well as Order 53 of the Civil Procedure Rules. Its scope was well explicated in *Halsbury's Laws of England*, 4th Edition, Volume 1 thus:

"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..."
21. As was pointed out in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza* [2012] eKLR, the applicant has no other way of realizing the decree passed in its favour. In that case, Hon. Githua, J, aptly pointed out that:

"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.”

22. Similarly, in *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] eKLR, Hon. Mativo, J. (as he then was) held: -

29. 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.

23. All these conditions have been satisfied herein. In particular, the applicant has demonstrated that a prior demand for payment was made; that a reasonable time to comply with the demand was given, and that no payment has been made in respect of the judgment dated 13th April 2017. Moreover, the respondents offered no explanation at all as to why the decree and certificate of costs have not been settled.

24. In the premises, I entertain no doubt at all that the remedy sought is indeed warranted; as otherwise, the applicant would be left at the mercy of the respondents as to when and whether its decree would be satisfied. In this regard, I entirely agree with the sentiments expressed by Hon. Odunga, J. (as he then was) in *Republic v the Attorney General & Another, Ex parte James Alfred Keroso* [2013] eKLR that:

...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to



justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya..."

25. In the light of the foregoing, I find merit in the application dated 17th October 2023. The same is hereby allowed and orders granted as hereunder:

- (a) That an order of Judicial Review by way of Mandamus be and is hereby issued directed to the County Executive Member for Finance, County Government of Mombasa, the 2nd respondent herein, compelling him to forthwith pay to the ex parte applicant, Kooba Kenya Limited, the decretal sum of Kshs. 151,000,000/= together with interest thereon and costs awarded at Kshs. 3,397,240.65 as per the Decree and Certificate of Taxation issued by the Court in Mombasa High Court Petition No. 12 of 2017.
- (b) That the costs of the application be borne by the 1st respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF JUNE 2024

OLGA SEWE

JUDGE

