



Republic v County Secretary, Bungoma County & another; Barasa & another (Exparte Applicants) (Suing as Legal Representatives of the Estate of the Late Beatrice Nanjala Kombi) (Judicial Review E011 of 2022) [2024] KEHC 7146 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
JUDICIAL REVIEW E011 OF 2022**

REA OUGO, J

JUNE 11, 2024

IN THE MATTER OF ARTICLES 1 (1) (2), 2(1) (2), 10(1) (B), 20(1), 21(1), 23(1), 27 (1), 28, 73, 156 AND 165 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY SECRETARY, BUNGOMA COUNTY 1ST RESPONDENT

CHIEF OFFICER FINANCE, BUNGOMA COUNTY 2ND RESPONDENT

AND

JACKLINE NELIMA BARASA EXPARTE APPLICANT

JULIANA NASIMIYU KOMBI EXPARTE APPLICANT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
BEATRICE NANJALA KOMBI**

JUDGMENT

1. The ex-parte applicants herein filed a Notice of Motion dated 13th December 2022 which was brought under Order 53 Rule 1 of the Civil Procedure Rules 2010, section 1A and 3A of the Civil Procedure Act, Articles 1 (1) (2), 10(1) (B), 20(1), 21(1), 23(1), 27(1), 28, 73, 156 and 165 of the Constitution . The ex-parte applicants in their application is seeking the following orders:
 - a. An order of Mandamus to be issued against the Respondents herein namely the County Secretary of Bungoma and the Chief Finance Bungoma County, to compel them to proceed and pay out the decretal sum of Kshs 1,132,300/- being general damages, costs and interest in



Bungoma CMC No. 217 of 2019, whose judgment was delivered on 9/7/2021 and it continues to attract interest at court rates.

- b. That the court be pleased to set aside a timeline and/or duration within which the respondents will settle the decretal sum with interest until the date of payment.
 - c. That the applicant be at liberty to apply to this court for all necessary and/or consequent orders that this Honourable Court made be deemed as fit and just grant in the circumstances.
 - d. Costs of this application.
2. A brief background is as follows; the Ex-parte applicant herein successfully prosecuted a matter in Bungoma CMC No. 217 of 2019 against the County Government of Bungoma and obtained a judgment in their favour for Kshs 1,132,300/- (attached is a copy of the decree marked JNB-2). A certificate against the government was issued, the same is marked as JNB-3. The ex-parte applicants wrote to the county government to settle the same but they have ignored it. The applicants averred that it is in the interest of justice that the court should grant the orders sought.
3. The respondents in response, filed their grounds of opposition dated 30/6/2023 on the following grounds:
- a. That the Notice of Motion is still borne, incompetent, bad in law and otherwise an abuse of the due process of the court.
 - b. That the respondents are improperly joined as parties to this proceedings not being constitutional and statutory legal entities and cannot by dint of section 133 of the County Government Act 2012, be sued in their personal capacity in discharge of their public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the Notice of Motion ought to be struck off as against them.
 - c. That the purported respondents are legal phantoms for they are neither human beings nor an incorporated or statutory legal entity capable of suing or being sued and this honourable court is obliged to strike them off from the judicial review as it is an abuse of the court process to purport to sue non-existent entities.
 - d. That the said application is misconceived, mischievous, unmeritorious, frivolous and vexatious and hence an abuse of the due process of the court.
 - e. That the application has been brought in bad faith and the same does not comply with mandatory provisions of section 13 A of the [Government Proceedings Act](#).
 - f. That no leave was sought by the Ex-parte Applicants before filing the Notice of Motion contrary to Order 53 of the [Civil Procedure Rules](#).
 - g. That the proceedings are time-barred contrary to the provisions of the [Law Reform Act](#).

Submissions by Parties

4. The applicant in their submissions argue that the main issue before the court for its determination is whether the respondent was under a public duty and obligation to satisfy the orders issued in favour of the ex-parte applicant. They submit that judgment was entered against the respondent on 9/7/2021 and since 2021, they have been denied the fruits of the judgment which violates the right to access to justice under Article 48 of the [Constitution](#) .



5. They submit that an order of mandamus is normally issued when an officer or an authority by compulsion of law is required to perform a duty, and that duty, despite demand in writing has not been performed. They relied on the decision by Mativo J. (as he then was) in Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR:

“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. v Canada (Attorney General), [23] and, was also discussed in Dragan v 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.”

6. The respondent submits that for purposes of institution of civil proceedings, the attorney general is deemed as the department of government concerned. Any judgment obtained against the Attorney General is considered to be against the said department. They relied on the case of Peter Anyang' Nyong'o & 10 Others v Solicitor General [2011] eKLR:

“...It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client.

Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf.”

7. The Attorney General who was supposed to advise the chief officer finance whether or not to meet the decretal amount was not served with the decree or the certificate for costs. They relied on the case of Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR where the court held:



8. The respondent submits that the application itself is fatally defective for misjoinder, an ambush to the county employees who are non-existent entities with no established offices and work under instructions. They argue that the parties in CC NO 217 OF 2019 are the ones to make the payments. It was also argued that prayers sought by the ex-parte applicant were meant to intimidate a member of the executive government and if issued would be contrary to the procedural safeguards for fair hearing.

Analysis and Determination

9. It is settled law that before a Mandamus Order is issued, the applicant must satisfy the procedure set out in Section 21 of the *Government Proceedings Act* which provides as follows:

“

“(1) (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 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 21 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 latter, 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 such direction to be inserted therein.”

10. In this case, although the ex-parte applicant in his own submissions acknowledged that there is need to have made a prior demand for performance there was no proof of the same. The applicants in their application mentioned that they wrote to the county government of Bungoma asking them to settle the decretal amount, however, they failed to tender said evidence proving that prior demand was made to the county government. In *Republic v County Government of Kiambu Ex Parte Laban J Macharia Muiruri* [2021] eKLR the court held that:

“While still on the duty of the Respondent to pay the decretal sum, the ex parte Applicant has brought evidence to show that it has made several demands and requests for payment which have not been heeded to by the Respondent, and in this respect annexed copies of letters dated 18th September 2019, 28th October 2019, and 24th November 2019 wherein



the Certificate of Taxation was also enclosed. There is thus an implied refusal on the part of the Respondent to pay the demanded sums.”

11. Similarly in *Republic v County Secretary - Nairobi City County & another Ex Parte Tom Ojienda & Associates* [2019] eKLR the court observed that:

“For Mandamus to issue, there must be a public legal duty to act and the duty must be owed to the Applicant. These two tests are not in dispute. There must be a clear right to the performance of that duty, meaning that the Applicant has satisfied all conditions precedent. There must have been a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay. The applicant did not exhibit evidence showing that there was a prior demand for performance. One would have expected a written prior demand for payment. This has not been annexed to the application. One cannot talk of a refusal to pay if there is no evidence of prior demand for the payment. There is no evidence that the Ruling and Reasons for Taxation, Certificate of Taxation and Decree annexed to the application were served upon the Respondents prior to filing this application. It was a serious omission for the applicant to fail to avail evidence of prior demand to the Respondents to comply with the decree.”

12. The evidence on record reveals that the ex-parte applicant failed to comply with section 21(2) of the *Government Proceedings Act*. Consequently, the application must fail. The Notice of Motion dated 13th December 2022 is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered at BUNGOMA this 11th day of June 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Ommani -For the Applicant

Mr. Wanjala -For the Respondent

Wilkister/Diana -C/A

